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THE
ATLANTIC REPORTER,
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CONTAINING ALL THE DECISIONS OF THE

Supreme Courts of MAINE, NEW HAMPSHIRE, VERMONT, RHODE ISLAND,
CONNECTICUT, and PENNSYLVANIA; Court of Errors and Appeals,
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ADOPTED OCTOBER 12, 1896.

In all cases of appeal directly to this court from any court of first instance in which the amount of money or value of the property in controversy, for purposes of jurisdiction, does not affirmatively appear in one of the modes prescribed in section 7 of clause c of the act of June 24, 1895 (the Superior Court Act), the appellant shall be required to file with his appeal a certificate of the judge hearing the case that the value of the property, right or matter really in controversy is greater than one thou-

sand dollars, which certificate shall be printed in the appellant's paper book immediately after the docket entries.

For want of such certificate the writ may be quashed.

If the facts on which to base the certificate do not appear in the course of the trial or hearing, the judge shall require the parties to produce evidence thereof for his information in order to make such certificate.

PER CURIAM.

v.35 A.

(v)*

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THE
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STATE *ex rel.* LA MONTE *v.* BOARD OF
CHOSEN FREEHOLDERS OF
SOMERSET COUNTY.

(Supreme Court of New Jersey. June 29,
1896.)

HIGHWAYS—IMPROVEMENTS—SUFFICIENCY OF PETITION—DUTY OF COUNTY BOARD.

1. Under Laws 1895, p. 424, providing for the permanent improvement of public roads, the petition was sufficient, though not actually signed by the requisite number of landowners, if the names of those not actually signing were placed there by previous authority, or with the subsequent ratification of the owners.

2. Under Laws 1895, p. 424, relating to the permanent improvement of public roads, and providing that one-third of the cost thereof shall be defrayed by the state, it is the duty of the board of freeholders to perform the duty required of them therein, irrespective of the condition of the state fund for the improvement of roads; it being in the province of the state road commissioner to reject the improvements in default of funds to pay the state's proportion of the cost.

Application by George La Monte for a writ of mandamus against the board of chosen freeholders of the county of Somerset. Writ granted.

Argued February term, 1896, before VAN SYCKEL, GUMMERE, and DEPUE, JJ.

Nelson Y. Dungan, for relator. John A. Frech and R. V. Lindabury, for respondent.

PER CURIAM. The relator and others, claiming to be the owners of more than two-thirds in lineal feet of the lands fronting on a certain public road in the county of Somerset, petitioned to the defendants, on the 11th day of June, 1895, to improve said road in accordance with the provisions of "An act for the permanent improvement of public roads in this state" (P. L. 1895, p. 424). Instead, however, of proceeding to improve said road, the defendants, on July 9, 1895, passed a resolution rejecting the petition, and ever since that time have constantly refused to take action in the matter. In this condition of affairs, the relator applies for a mandamus to compel the defendants to improve said road, as required by the statute. The defendants resist this application upon two grounds:

First, that the evidence taken on the rule to show cause, heretofore allowed, fails to show that the relator and those who joined with him in signing the petition which was presented to the board were in fact the owners of two-thirds in lineal feet of the lands along said road; and, second, that the act of 1895 requires one-third of the cost of the improvement to be paid by the state, and that, at the time the petition was presented to the board, there were no state funds available for the improvement asked for.

As to the first ground upon which defendants resist this application: It appears sufficiently from the evidence that the names of the requisite number of property owners were attached to the petition, and that they were placed there either by the owners themselves, or by their authority, or, in cases where the signatures of owners were placed upon the petition without their authority, that they subsequently ratified the act of the persons placing them there.

As to the second ground upon which the application is resisted: The act of 1895 required the defendants to take the preliminary steps designated therein, without regard to the condition of the state fund appropriated to the improvement of public roads, and to submit its specifications of the proposed improvement, asked for by the relator and his fellow petitioners, to the state road commissioner. If, when those specifications were submitted to him, there were no moneys in the state treasury which could be used for that purpose, it would then have been the duty of the state road commissioner, under the statute, to have rejected the proposed improvement. The fact that there were no state funds available for the payment of the state's share of the cost of the improvement at the time the petition was presented to the board was not known to them when they passed the resolution rejecting the petition, and in no way influenced their action in the matter, and, even if it had been known to them, would not have justified them in refusing to discharge the duty imposed upon them by the act of 1895. The rule to show cause should be made absolute, and an alternative mandamus ordered.

(39 N. J. L. 28)

LINN v. JOSEPH DIXON CRUCIBLE CO.

(Supreme Court of New Jersey. June 22, 1896.)

INSOLVENT CORPORATIONS—POWERS AND LIABILITIES—REORGANIZATION.

1. After a corporation is declared insolvent under the provisions of the corporation act, and an injunction has been issued, and a receiver appointed, the corporate existence continues for four months with unimpaired corporate powers except as such powers are impliedly curtailed by the powers conferred upon the receiver. After the lapse of four months the corporation retains power to collect its property and assets, and to sell the same, and to distribute the proceeds among its creditors and stockholders.

2. Pending the injunction and receiver, such corporation has power to take steps looking towards a reorganization and resumption of its property and business.

3. In exercising such powers such corporation may employ agents and incur a liability to compensate them for their services.

4. Whether the compensation of such agents is a liability which can be charged upon the assets of the insolvent corporation in case it fails to resume its property and business, *quære*. But for such compensation the corporation will be liable if the injunction is dissolved and the receiver removed.

(Syllabus by the Court.)

Action by John Linn against the Joseph Dixon Crucible Company. On demurrer to replications. Judgment for plaintiff.

Argued February term, 1896, before the CHIEF JUSTICE, and DIXON, GARRISON, and MAGIE, JJ.

Linn & Speer, for plaintiff. Flavel McGee, for defendant.

MAGIE, J. Plaintiff's declaration has been treated in the pleadings and argument as if it contained a special count for professional services rendered to defendant by plaintiff as an attorney and counselor at law and solicitor in chancery, and the common counts. Defendant pleaded to the supposed special count and to the common counts separately. To each it interposed a similar plea, setting out that on January 4, 1881, the chancellor had decreed that it was an insolvent corporation, and at the same time had appointed a receiver of its property, and enjoined it from exercising any of its franchises; that the receiver was duly qualified; that the injunction was afterwards modified so as to permit the corporation to hold an election of directors; that the injunction, as modified, continued in force until it was dissolved on July 29, 1890, and that the supposed undertakings declared on were made, if at all, while the injunction remained in force. It was thereupon averred that defendant was then incapable in law to exercise any of its franchises except that of electing directors, and that the supposed undertakings then made were *ultra vires*, in contempt of the court of chancery, and void. To each of these pleas plaintiff has filed two replications, and defendant has demurred thereto. Upon such a demurrer the sufficiency of the former

pleadings is brought into question, and in this case plaintiff contends that the pleas to which these replications were filed are insufficient to bar his claims set out in the declaration. An examination of the pleas suggests the idea that the pleader assumed that an order or decree of the court of chancery enjoining a corporation from exercising its franchises *ipso facto* deprived it of the capacity to contract. Such a contention is open to serious question. An injunction of that sort might operate upon the corporation and its officers, and render them liable to punishment for the exercise of its capacity to contract. But, if the corporate existence remain unimpaired, the corporate powers would continue to exist, and it would seem to be no answer to a suit at law upon a corporate contract to set up that it was made in violation of an injunction against the exercise of corporate powers. If such a contract ought not to be enforced, relief would seem to be properly sought, not in denying the contract, but by enjoining its enforcement. But the argument here has not supported the pleas upon the ground above suggested, but has been directed to the proposition that when the court of chancery has exercised the powers conferred by the provisions of the corporation act respecting insolvent corporations (Revision, p. 188, §§ 69-86), and has decreed a corporation to be insolvent, appointed a receiver of its property, and enjoined the exercise of its franchises, such corporation has become totally incapacitated to make such contracts as those declared on, viz. for the professional services of a lawyer and for work and labor. This contention requires an examination of these provisions and a determination of their effect upon the status of the corporation. Upon the insolvency of a corporation being made to appear, the chancellor is thereby authorized to declare it insolvent, and to enjoin it from exercising its franchises, and from paying, selling, or assigning any of its estate, moneys, lands, etc. He may also appoint a receiver, who is empowered, among other things, to sell and convey all the real estate and personal property of the corporation. By section 83, as originally adopted in the corporation act of April 7, 1875, *ubi supra*, it was provided that, if such an injunction has been allowed, and a receiver has also been appointed, and the injunction and appointment have continued for four months, it should not be lawful for the officers of the corporation to use or exercise its franchises, or to transact any business in its name or by color of its charter, except such as might be necessary to collect its property and assets, and to sell the same and to distribute the proceeds among its creditors and stockholders; and that, for all other purposes, the charter of such corporation, by such injunction, appointment, and continuance, should be forfeited and void, without any further proceedings or judgment. By these provisions it is plain

that the legislative intent was that the corporate powers of such corporation were to continue unimpaired for the space of four months after injunction and the appointment of a receiver, except so far as their exercise may have been curtailed by the powers conferred on the receiver. This was doubtless for the purpose of enabling those interested to procure the dissolution of the injunction and the removal of the receiver. After the lapse of four months the declared purpose was that certain of the corporate powers should ipso facto be forfeited, but the corporate life was to continue, for corporate powers were to continue for certain purposes, viz. for settling its affairs. By the supplement to the corporation act which was approved March 8, 1877 (Supp. Revision, 167) the eighty-third section, above considered, was amended by striking out its last clause, which provided for the forfeiture of certain corporate powers after the period of four months, and substituting in its place a provision that for all other purposes—that is, other than those set forth in the preceding exception—the chancellor might at any time declare the charter to be forfeited and void. As thus amended, the plain intent of this legislation is to continue the corporate powers of a corporation declared insolvent unimpaired, except as their exercise may be impliedly curtailed by the powers conferred on the receiver for the period of four months, and thereafter corporate powers were to continue, but only for the purpose of settling its affairs. The general rule is that a corporation is not dissolved by becoming insolvent. 2 Mor. Priv. Corp. § 1010. The "act to prevent frauds by incorporated companies," approved April 15, 1846 (Rev. St. 129), contained the provisions of most of the sections of the present corporation act respecting insolvent corporations, including the provisions for injunction and receiver. The appointment of receivers under that act was held not to put an end to the corporation. *Willink v. Banking Co.*, 4 N. J. Eq. 377. The provisions now contained in section 83 were first enacted in 1852. Laws 1852, p. 397. After the amendment of 1877 it was held in the United States circuit court for this district that a corporation declared insolvent, and enjoined by the chancellor, and for which a receiver had been appointed, could enter an appearance to an attachment in a state court, and remove the proceeding to a federal court. *Second Nat. Bank v. New York Silk Manuf'g Co.*, 11 Fed. 532. A like view has been taken elsewhere under similar statutes. *Kincaid v. Dwinelle*, 50 N. Y. 548; *Pringle v. Woolworth*, 90 N. Y. 502; *Coburn v. Manufacturing Co.*, 10 Gray, 243; *Johnson v. Bleaching Co.*, 15 Gray, 216; *Taylor v. Insurance Co.*, 14 Allen, 353.

Looking at the whole scope of the provisions of our statutes respecting insolvent corporations, it does not seem open to question that they design to leave the corporate

powers, or some of them, in continued existence for the purpose of settling their affairs, and enabling them to resume business. This is particularly indicated by a supplement to the corporation act approved February 26, 1878 (Supp. Revision, 160), giving any such corporation power to mortgage its property and franchises with the consent of the chancellor, when it is reorganizing its property and debts to resume its property and business. Many such corporations have in fact reorganized and resumed business. As, therefore, certain powers remained in the defendant corporation, notwithstanding the proceedings in insolvency, it follows that, because such powers must necessarily be exercised by agents, power to employ and compensate such agents must be implied. This conclusion is not inconsistent with *Bissell v. Besson*, 47 N. J. Eq. 580, 22 Atl. 1077. In that case Vice Chancellor Van Fleet had declared a mortgage given by an insolvent corporation to those creditors who had initiated the proceedings against it to be a nullity, both because it was made during the pendency of the insolvency proceeding and because it was in violation of the injunction. The decree was affirmed in the court of errors, but the opinion of the majority of the court voting for affirmance is not reported. I think I am correct in saying that the prevailing view was that the mortgage was in contravention of the policy of the statute which designed the equal distribution of the assets of an insolvent corporation among its creditors, whose debts, after injunction issued and receiver appointed, are charged upon those assets. *Graham Button Co. v. Spielmann*, 50 N. J. Eq. 120, 24 Atl. 571; *Id.*, 50 N. J. Eq. 796, 27 Atl. 1033. The mortgage in question in that case pledged such assets for the payment of the petitioning creditor in preference to others, and was not within such powers as, upon our construction, an insolvent corporation retains. Nor need it be determined whether plaintiff could have made effectual his claim for compensation for his services, if defendant had remained insolvent, and in the hands of the receiver. Whether such compensation could be paid out of the assets may be questioned. But there can be no doubt that, if the injunction is discharged, and the receiver relieved, the corporation and its property will be answerable for such compensation.

Having concluded, then, that an insolvent corporation remains possessed of some corporate powers, and may employ agents to exercise such powers, the question is as to the effect of these pleas. The declaration does not fix the date of the rendition of the services of plaintiff. The pleas aver that the services were rendered during the continuance of the injunction and receiver, which was for many years, but do not indicate whether they were rendered during the four months next succeeding the issuing of the injunction and the appointment of the re-

ceiver. If within the four months, the pleas upon the construction given the statute are no bar to plaintiff's action. But if it is to be inferred, and as is probably the case, that the services were rendered long after the lapse of the four months, the pleas are yet no answer to plaintiff's action. Their purpose is to evince the incapacity of the defendant to make the contracts sued on by appealing to the act which deprives an insolvent corporation of some of its corporate powers. But the act appealed to contains in its very enacting clause and sentence an exception whereby such a corporation retains corporate powers which are sufficient to enable it to make such contracts. Under such circumstances the pleas should have averred that the contracts sued on were not within the exception. This is the established rule of pleading when the plaintiff finds his action on a statute. 1 Chit. Pl. 206. No reason can be perceived why a like rule should not be applied when a defendant bases his defense upon a statute. For these reasons I think the pleas are defective. This result renders it unnecessary to examine the replications. Plaintiff is entitled to judgment on the demurrer.

(59 N. J. L. 18)

TERHUNE v. PARROTT et al.

(Supreme Court of New Jersey. June 10, 1896.)

INDORSEMENT OF NOTE — INDIVIDUAL OR CORPORATE — PARTIES — PRESUMPTIONS.

1. An indorsement of a note in the following form: "J. W. Parrott, President of Long Branch Hotel and Cottage Co." imports prima facie the personal liability of J. W. Parrott.

2. A summons and declaration naming "John W. Parrott, President of the Long Branch Hotel and Cottage Company," as the defendant, indicate John W. Parrott individually as the defendant, in the absence of evidence that the company is suable in the name of its president.

(Syllabus by the Court.)

Action by Henry S. Terhune against John W. Parrott and others, in which there was a judgment for plaintiff. On motion to set aside the judgment. Rule to show cause discharged.

Argued June term, 1896, before LUDLOW and DIXON, JJ.

John W. Parrott, pro se.

DIXON, J. A summons was issued against "John W. Parrott, President of the Long Branch Hotel and Cottage Co.," and in the declaration the defendant was similarly named and described. The schedule annexed to the declaration showed that "J. W. Parrott, President of Long Branch Hotel and Cottage Co.," had become second indorser of a promissory note held by the plaintiff. No plea having been filed, the plaintiff took judgment by default, and in the rule for judgment the title of the cause designates

John W. Parrott, without any addition, as the defendant. John W. Parrott now seeks to set aside the judgment upon the ground that the indorsement created no personal liability on his part, and therefore the judgment against him as an individual is wrong. No evidence as to the circumstances under which the indorsement was made is produced, and the motion is based solely on the matters appearing in the record. The question whether such a signature as is indorsed on the note in this suit imports a personal or a corporate liability, has been settled in this state, and the rule is that prima facie a personal liability is implied; but evidence may be adduced, even by parol, to show that only corporate liability was intended. *Kean v. Davis*, 21 N. J. Law, 683; *Reeve v. Bank*, 54 N. J. Law, 208, 23 Atl. 853. In the present case, there being nothing before us but the signature, a judgment against the individual signer was warranted by the indorsement. The summons and declaration should also be interpreted upon the same principle. Had it been shown that the Long Branch Hotel & Cottage Company was suable in the name of its president, these proceedings would be regarded as being directed against that company; but, that not appearing, the individual, John W. Parrott, must be deemed the defendant, and the addition of his title must be considered as mere description or rejected as surplusage, otherwise the proceedings quoad hoc would be nugatory. There is no incongruity in the record, and the rule to show cause is discharged.

(59 N. J. L. 73)

STATE (ELIZABETHTOWN WATER CO. et al., Prosecutors) v. WADE, Township Collector.

(Supreme Court of New Jersey. June 4, 1896.)

CONSTITUTIONAL LAW — TAXATION — CLASS LEGISLATION.

Acts May 25, 1894 (Laws 1894, p. 517), and March 22, 1895 (Laws 1895, p. 472), provide that, where a number of school districts are consolidated, an assessment equal to one-fifth of the value of the school property in each of the old districts shall be levied upon all the taxpayers of the consolidated district, and there shall be remitted to the taxpayers of each school district as it existed on the 30th day of June, 1894, one-fifth of the appraised value of the school property belonging to said district, and yearly thereafter one-fifth shall be so assessed and remitted, until the whole appraised value is remitted. *Held*, that this legislation is unconstitutional. It provides for no public necessity or exigency; the tax is not to be appropriated to the expenses of government; its sole end and design is to benefit one class of citizens at the expense of another.

(Syllabus by the Court.)

Certiorari at the prosecution of the Elizabethtown Water Company and others against Lewis H. Wade, collector of Union township, to review assessments. Assessments set aside.

Argued February term, 1896, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Frank Bergen and Cross & Noe, for prosecutors. U. C. J. English, for defendant.

VAN SYCKEL, J. This case involves the question of the constitutionality of section 27 of the act of May 25, 1894 (P. L. 1894, p. 517), entitled "An act to amend an act entitled 'An act to establish a system of public instruction,'" as amended by a supplement thereto approved March 22, 1895 (P. L. 1895, p. 472). Section 13 of the act of 1894 is as follows: "That the several school districts in each township shall be consolidated into one school district, and that the property, real and personal, of said several school districts, shall become and be the property of the consolidated district in its corporate capacity, and shall be held in its corporate name, and the several obligations, and debts of said districts, whether secured by bonds or otherwise, shall be assumed by and shall become the obligations and debts of said consolidated district." Section 27 provides: "That the school houses, lands, apparatus and other property owned by the school districts, hereby abolished, shall immediately after the passage of this act, be appraised, by the assessors of the several townships; in making said appraisement, the amount of debt incurred by any district for the purchase of lands, apparatus and other property, or for the erection of a school house or school houses, which debt is unpaid at the time of making such appraisement shall be deducted from the appraised value of such property; one copy of said appraisement shall be filed with the county superintendent, one copy with the district clerk of the consolidated district, and one copy with the township collector, and at each assessment for special school tax thereafter (until the whole amount is remitted) there shall be remitted to the taxpayers of each of said districts one tenth of the said appraised value of the property of the school district in which such taxpayers reside or own property; provided, that in case any such district is situated in two or more townships, the assessors of said township shall jointly make said appraisement, and shall determine the part thereof belonging to each of said townships, and each township shall remit to the taxpayers on its part of such district the part so determined, in the same manner as in case of districts wholly within a single township; and provided further, that in case any such district is situated in two or more boroughs, or partly in a borough and partly in a township, said appraisement shall be made by the several borough assessors, or by the borough and township assessors (as the case may be) in the manner aforesaid." The first section of the act of 1895 provides: "That each assessor shall include in the next assessment made by him one fifth of the total value of all the school property situate within his taxing district, as appraised as now provided by law, and there shall be remitted to the taxpayers of each school district, as said dis-

trict existed on the thirtieth day of June last, one fifth of the appraised value of the school property belonging to said school district, and yearly thereafter one fifth of the value of said property so appraised as aforesaid, shall be assessed and remitted until the total appraised value of said property has been remitted; provided that in case a district lay in two or more townships or boroughs or in a township and borough, the amount ascertained as due that portion of the district lying in the township or borough which does not contain the school house shall be paid over by the collector of the township or borough in which said property is situated to the collector of the township or borough in which is situated that portion of the district which does not contain the school house, and the monies thus paid over shall be used for the repair or improvement of the school property of said township or borough." In this section, and also in section 3 of the act of 1895, as printed in the Pamphlet Laws, the word "thirteenth" is by mistake erroneously substituted for the word "thirtieth," as appears by the act filed in the office of the secretary of state.

"The theory of taxation is that it is levied for public purposes; that it is an attribute essential to the exercise of government, without which it would be powerless to discharge its functions, and for that reason it is held to be inherent. It is the public use for it which marks it as a tax. Where no public end is subserved, the power cannot be called into action." *Baldwin v. Fuller*, 39 N. J. Law, 576. The provision made by this legislation is that an assessment equal to one-fifth of the value of the school property in each of the old districts shall be levied upon all the taxpayers of the consolidated district, and there shall be remitted to the taxpayers of each school district as it existed on the 30th day of June, 1894, one-fifth of the appraised value of the school property belonging to said district, and yearly thereafter one-fifth shall be so assessed and remitted, until the whole appraised value is remitted. Those who were taxpayers in the old district on the 30th of June, 1894, can alone participate in the remittance from year to year. Persons who were taxpayers in such district on the 30th day of June, 1894, would be entitled to the remittance in each of the five years, although they had become such taxpayers after all the school property had been paid for by taxation of the district, and they had never contributed to the purchase of the school property. The effect of this legislation is to assess upon all the taxpayers of the consolidated district a tax equal to the value of all the school property in the several districts composing it at the time of the consolidation, and to give back to the taxpayers in each of the old districts a sum equal to the value of the school property in their district. So far as this tax is remitted, it is imposed for private use, not for any public use. No part of it goes to discharge

a public debt, or to promote a public purpose, and no part of it finds its way into the public treasury. In the most favorable view that can be taken of the law, it is levied expressly for the benefit of a selected class of persons, to reimburse them for moneys heretofore paid by them in satisfaction of taxes legally laid upon them, and appropriated to public uses. If taxes are illegally imposed, the taxing district may unquestionably be authorized to make an assessment for the purpose of restoring to the individual taxpayer the amount illegally exacted from him; but when taxes have been in all respects legally levied and collected, and appropriated to the public purposes for which they were assessed, there is no right on the part of the taxpayer to have them refunded at the expense of those who had no voice in their imposition or expenditure, nor is there any duty on the part of the government to make restitution. No right can be based upon the payment of taxes except those rights which the taxpayer enjoys in common with all persons residing in the political district in which the burden is laid. The effect of this legislation is to take by taxation the property of one part of the taxpayers, in ease of another part, for purposes to which both are alike legally liable to contribute. It cannot be justified on the theory that the taxpayers who receive the remittance are only receiving compensation for property in which they have a personal interest. Such taxpayers have no right of property whatever in the school lands and buildings to the purchase of which taxes paid by them have been applied. The school property is public property, the property of the incorporated district, and not of the taxpayers residing within it. While such persons live within the district, they enjoy, in common with others, its superior advantages; but they have no greater right in such property than a person who moves into the district after all liabilities incurred for the purchase of school property have been paid. If this legislative scheme can be upheld, there is no limitation upon the power to provide for an equalization of the public burdens, taking into account previous assessments without regard to lapse of time. By this device of assessment and remittance the inhabitants of a district annexed to a city might, at the will of the legislature, be burdened in excess of other taxpayers, until a supposed equality was established between the old and new citizens, taking into computation the amount of taxes previously paid by the former, and expended for public improvements. Such an exaction has none of the characteristics of legal taxation; it provides for no public necessity or exigency; it is not to be appropriated to the expenses of government; its sole end and design is to benefit one class of citizens at the expense of another. "Taxes must be apportioned among those who are to bear the burden upon the rule of uniform-

ity. A tax upon the persons or property of A., B., and C., individually, whether designated by name or in any other way, which is in excess of an equal apportionment among the persons or property of the class of persons or kind of property subject to the taxation, is, to the extent of such excess, the taking of private property for a public use without compensation." *State v. Township Committee*, 36 N. J. Law, 66. In the case sub judice it is the taking of private property for private use. A present inequality cannot be established because in times past some taxpayers have contributed by way of taxation more than others to the purchase of school buildings or to other public improvements. "It is the essential character of the direct object of the tax, which must determine its solidity." *Lowell v. Boston*, 111 Mass. 461. In the case before us there can be no question that its primary and principal object is for private, and not for the public, benefit. In this respect it violates not only the spirit of our constitutional provision, but also general fundamental principles. The effect of the remittance is to cast the tax upon a part only of the political district without regard to the special benefits which may accrue to those upon whom it is made to fall. It must, therefore, be denounced as an illegal exercise of the taxing power. *Baldwin v. Fuller*, supra. In my judgment, the legislature has transcended its authority in resorting to the power of taxation for the purposes expressed in the enactments under review. This radical vice existing in the law, it is not necessary to consider whether the act of 1895 is void, because it does not set out section 27 of the act of 1894 as altered or amended by the act of 1895. The assessments should be set aside, with costs.

(59 N. J. L. 6)

CASEY v. LESLIE.

(Supreme Court of New Jersey. June 5, 1896.)

ACTION ON CONTRACT — PLEADING — CONDITIONS PRECEDENT.

Where concurrent acts are to be done, the party who sues the other for nonperformance must aver that he had performed or was ready to perform his part of the contract.

(Syllabus by the Court.)

Action by one Leslie, receiver, against Jeremiah Casey. On demurrer to the declaration. Judgment for defendant.

Argued February term, 1896, before MAGIE, GARRISON, and DIXON, JJ.

Flavel McGee, for plaintiff. Collins & Corbin, for defendant.

BEASLEY, C. J. The declaration in this case has more the semblance of a bill in chancery than of a pleading in a court of law, and it is plain that a motion to strike out its redundancies and irrelevancies could

not have been successfully resisted; but on this demurrer the only question is whether, in this complex mass of facts, a cause of action can be discovered. In its general nature the suit is for breach of contract by the defendant in refusing to take and pay for certain personal property bid in by him at a public sale made by the plaintiff as receiver. The imputed insufficiencies of the count will sufficiently appear from the exceptions to it that are stated in the brief of counsel.

The first alleged defect is that it is not shown that the agreement to purchase the goods in question was in writing, and therefore it is void by force of the statute of frauds. There are two answers to this objection, each of which is unquestionable: First, the statute of frauds is a defense, and must be pleaded to make it available in any case. It is not necessary for the plaintiff to show that the contract sued on has been executed in the manner prescribed by the act. This is and always has been the rule, as will appear by a reference to Chitty or any of the other text-books. And in the second place, the declaration shows that 10 per cent. of the purchase money was paid at the time of the sale, so that the transaction was excepted from the statutory requirement. This objection is destitute of all force. Another objection of the counsel of the defendant is that certain other persons were purchasers with the defendant, and that they should have been joined as parties in the action. This position relates to the statement in the count to the effect that, when the defendant made his final bid at the auction in question, "he alleged himself to be bidding for himself" and several other persons whom he named. If the allegations of the pleading had stopped at this point, the position of the defense would have been, even then, palpably untenable, as a case of nonjoinder would have been exhibited, and such an imperfection could not have been objected to on demurrer, but only by plea in abatement, in conformity with the method appointed in the practice act. But this question is not presented in this simple form. There are other allegations in the declaration that control the inquiry. After the statement that the defendant alleged, at the time of the sale, that he made his bid for himself and certain other persons, named by him, there is an averment that, with respect to the persons so named, the defendant had no right to bind them. The legal situation thus exhibited is this: The defendant purchased the goods in question for himself and for certain other persons for whom he was not authorized to act. The result of such a transaction was that no one was bound by the contract but the defendant, and under such conditions it seems to be the better view that he can be sued for a breach of the agreement, inasmuch as by the form of the transaction he has charged himself. *Woodes v. Dennett*, 9 N. H. 55; *Savage v. Rix*, Id. 263. With respect to the third and

last exception to the count, that it does not show that the conditions of sale, which are set out in extenso, were in any manner promulgated or made known to the defendant, it is sufficient to remark that, in respect to the present cause of action, so far as appears, these conditions of sale are of no account. If there were no express conditions, the defendant as purchaser was bound to pay the stipulated price, and upon failure to do so the chattels could be resold by the vendor, and these are the facts constituting the gravamen of the action as it is shown upon the record. In the opinion of the court, none of these objections can prevail.

Nevertheless, two imperfections have been perceived in the statements of the plaintiff's grounds of suit which appear to have escaped notice, and which must be pronounced to be fatal to the plaintiff's case. One of these defects is that, while the plaintiff presents himself in court demanding of the defendant the residue of the price of the goods sold, he altogether fails to show that on his part he has done, or has been ready to do, the act that alone entitles him to make such demand. The declaration touching this subject thus states the reciprocal duty of the vendee and vendor: It avers: "The ninety per cent. above referred to, to be paid at the office of * * * No. 1. Exchange Place, Jersey City, New Jersey, on the 19th day of December next at twelve o'clock noon, when the goods will be delivered," etc. From this it is manifest that the payment of the money by the defendant and the delivery of the goods by the plaintiff were to be simultaneous acts, and, when such is the situation, the familiar rule, as stated by Lord Kenyon, in *Morton v. Lamb*, 7 Term R. 125, is: "The party who sues the other for nonperformance must aver that he had performed or was ready to perform his part of the contract." In the present pleading there is no allegation even tending to indicate that the plaintiff attended at the time and place appointed, or that he was ready or willing to have delivered the things sold if their price had been tendered to him. Consequently no right of action is here shown. The other defect alluded to is that, from the statements of this declaration, it appears that the plaintiff made a resale of the goods sold before the day fixed for their payment by the defendant had arrived. The time set for the payment of the 90 per cent. is the 19th of December, 1891. The property was resold on the 30th day of November, 1891. This imperfection is, of course, fatal to the suit.

It may be well to remark that, in the opinion of the court, the orders of the chancellor regulating the course to be taken by his receiver, and which proceedings are so uselessly interpolated into the case, cannot in any degree affect or impair the legal rights of the defendant. On the two grounds just indicated, the defendant is entitled to judgment on his demurrer.

(84 Md. 173)

TRUSTEES OF METHODIST EPISCOPAL CHURCH IN EAST BALTIMORE STATION v. TRUSTEES OF JACKSON SQUARE EVANGELICAL LUTHERAN CHURCH.

(Court of Appeals of Maryland. June 19, 1896.)

TRUSTS—BENEFICIARIES—DESIGNATION—EFFECT OF INVALIDITY—RELIGIOUS SOCIETIES—CONVEYANCES TO—LEGISLATIVE SANCTION.

1. A conveyance of land in trust to be used, etc., as a place of worship for the use of the white ministry and white membership of the Methodist Episcopal Church in the United States of America, subject to the usages and ministerial appointments of said church from time to time authorized and declared by the annual conference in whose bounds the premises are situated, is invalid as a trust, for failure to sufficiently designate the cestuis que trustent.

2. A conveyance for a valuable consideration, namely, the payment of an annual rent, to trustees, in trust for a religious denomination, which is invalid as a trust, for failure to sufficiently designate the cestuis que trustent, is yet valid as a conveyance of the beneficial interest to the trustees.

3. Legislative sanction of a conveyance of land by one religious society to another is an implied sanction of the prior conveyance to the grantor, so as to validate such prior conveyance.

Appeal from circuit court of Baltimore city.

Bill by the trustees of the Methodist Episcopal Church in the East Baltimore Station against the trustees of the Jackson Square Evangelical Lutheran Church. From a decree dismissing the bill, complainants appeal. Reversed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, FOWLER, and PAGE, JJ.

Robert H. Smith and Arthur D. Foster, for appellants. Rufus W. Applegarth, for appellees.

BRISCOE, J. The bill in this case is filed for the specific performance of a contract of sale of church property situate in Baltimore city. The case was submitted to the circuit court of Baltimore city, upon an agreed statement of facts, and from the pro forma decree dismissing the bill this appeal has been taken.

By a lease of the 5th day of December, 1866, Thomas F. Johnson and others, for the consideration of the yearly rent of \$280, conveyed for 99 years, to William F. Pentz and seven others, and to their successors, lessees in trust, certain property situate in Baltimore city, upon the following trust: "In trust that the said premises shall be used, kept, maintained, and disposed of as a place of divine worship for the use of the white ministry and white membership of the Methodist Episcopal Church in the United States of America, subject to the usages and ministerial appointments of said church as from time to time authorized and declared

by the general conference of said church and the annual conference in whose bounds the said premises are situate." On the 20th day of the same month and year, the Jackson Square Centenary Methodist Episcopal Church was duly incorporated, under article 23 of the Code; and, by the act of incorporation, William F. Pentz and the other lessees in trust, named in the lease of the 5th of December, 1866, were constituted trustees of the church. Subsequently, on the 31st of July, 1876, Alexander Ray and four others, the survivors of the trustees named in the lease of the 5th of December, 1866, conveyed absolutely this property to the Jackson Square Centenary Methodist Episcopal Church, a body corporate, "unto and to the use of the church [by its corporate name] and its assigns, for all the residue of the term yet to come, and unexpired therein, with the benefit of renewal forever." And on the 9th day of February, 1889, the Jackson Square Methodist Church granted and assigned the same property to the appellants, the trustees of the Methodist Episcopal Church in the East Baltimore Station, a body corporate. Afterwards, on the 5th day of April, 1892, the appellants agreed in writing to sell the property to the appellees.

The only question here presented is whether the appellants have a good and marketable title to the property which the appellee has agreed to buy upon the terms set forth in the contract of sale. Now, it is very clear that the trust expressed and contained in the lease from Johnson et al. to Pentz et al. is void, and must fail. In *Isaac v. Emory*, 64 Md. 337, 1 Atl. 713, it was held, in construing a similar trust, that "this designation of beneficiaries is too vague and indefinite to be sustained by the courts. According to the uniform course of decisions in this state, a trust cannot be upheld unless it be of such a nature that the cestuis que trustent are defined, and capable of enforcing its execution by proceedings in a court of chancery. *Church Extension of M. E. Church v. Smith*, 56 Md. 397." But, while the trust is void, it does not follow that the lessees failed to acquire any title, or that there was a resulting trust in favor of the lessors. The case was not a voluntary conveyance, but was made upon a valuable consideration,—the payment of the annual rent of \$280. When there is a consideration for the conveyance, and it is made upon a trust which is void for uncertainty, or otherwise fails, then the grantee takes the beneficial interest. 2 Pom. Eq. 1033; *Perry, Trusts*, § 151. A resulting trust will not be raised in opposition to the obvious design of the transaction. *Perry, Trusts*, § 159; *Walsh v. McBride*, 72 Md. 45, 19 Atl. 4.

In the case now under consideration, the trust appears to have been set forth in the lease only to show the purpose for which the property was bought, and not to limit the right of alienation. *Newbold v. Glenn*, 87 Md. 491, 10 Atl. 242. The lease, consequent-

ly, is valid, and the lessees took the same free from the trust therein set forth. When, therefore, they assigned this property, on the 1st of July, 1876, to the Jackson Square Church, by which it had already been improved and used, they conveyed the legal title to the party for whose benefit the lease had been made. This assignment operated to vest both the legal and equitable ownership in the Jackson Square Church, provided the assignment is otherwise free from objection. Now, both the assignment from the original lessees to the Jackson Square Church, and the assignment of that church to the appellants, are conveyances of land to "religious societies or denominations." Declaration of Rights, art. 38. While it appears that legislative assent was given to the assignment of the property from the Jackson Square Centenary Methodist Episcopal Church to the appellants, no such assent appears to have been given to the deed from Alexander Ray et al., trustees, to the Jackson Square Centenary Methodist Episcopal Church. Even if this be so, we think the legislative sanction on the 7th of April, 1892 (Laws 1892, c. 430), to the purchase by the appellants from the Jackson Square Centenary Methodist Episcopal Church, was necessarily a legislative assent to the validity of the grant by Alexander Ray et al., trustees, to the Jackson Square Methodist Episcopal Church, and a legislative ratification thereof; and this is so because the subsequent sanction would be nugatory and of no avail without a ratification of the former grant.

For these reasons, we think the appellants can give a good and valid title to this property. So the pro forma decree in this case will be reversed, and the cause remanded, to the end that proceedings may be had in accordance with this opinion. Decree reversed, and cause remanded, with costs.

(34 Md. 170)

TRUSTEES OF ZION CHURCH OF CITY OF BALTIMORE v. HILKEN.

(Court of Appeals of Maryland. June 18, 1896.)

RELIGIOUS SOCIETIES—CONVEYANCES TO—ADVERSE POSSESSION—ENTRY UNDER VOID DEED.

1. Under Declaration of Rights 1776, art. 34, prohibiting conveyances to religious societies except for certain purposes, a conveyance without designating the purposes for which it is made is void.

2. Though such a deed is void, an entry under it would constitute adverse possession to the extent of the boundaries contained in it, so as to perfect title in the religious society by continued possession for 20 years as against the grantor and his heirs.

Appeal from circuit court of Baltimore city.

Suit by the Trustees of the Zion Church of the City of Baltimore against Henry G. Hilken. There was a decree for defendant, and complainants appeal. Reversed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, PAGE, and RUSSUM, JJ.

Niles & Wolff, for appellants. Clarence A. Tucker, for appellee.

PAGE, J. This case involves the title of the appellants to certain property situated in Baltimore city. It appears that in 1793, Engelhard Yeiser, one of the trustees of the Lutheran Congregation in Baltimore town, in consideration of £775 current money conveyed the lot in question to "John Shriver and others, trustees of the said Lutheran Congregation, in trust for the use and uses of the High German Lutheran inhabitants in Baltimore town, forever, who do or shall hold to the said confession of faith," etc. Upon a part of the lot a parsonage was erected, and so occupied up to 1870. The residue was used as a garden surrounding the church hard by. Under the provisions of the act of 1802 (chapter 111) the trustees of Zion Church, in 1830, became a body corporate. No succession conveyance of the lot, however, was made to the corporation. The succession of trustees, not having been kept up, in 1882 Zion Church filed a bill in the circuit court for Baltimore city for the appointment of new trustees to hold the legal title of its real estate (which included this lot), and on the 28th December of that year that court decreed that certain persons therein named, and their successors, should be trustees, invested with the legal title in said property, "to the same effect and intent as if they had been the original trustees," etc. In March, 1896, Henry G. Hilken agreed in writing under seal to lend to the appellants (the survivors of the trustees appointed by said decree) \$25,000, upon the understanding that the latter were seised of a good and merchantable title, to be secured by mortgage on the lot, executed by the appellants as trustees. Hilken refused to accept the mortgage and to make the loan, claiming the appellants' title was not good and merchantable; wherefore this proceeding for a specific performance was begun.

The ground of the appellee's objection is alleged in his answer to be that the appellants claim title under the deed from Yeiser, already mentioned, and under its provisions, if the property once ceased to be used for church purposes, the title would revert to the heirs of said Yeiser. The deed from Engelhard Yeiser was in contravention of article 34 of the declaration of rights of 1776, and was therefore void. *Grove v. Trustees of the Disciples*, 33 Md. 451; *Trustees v. Manning*, 72 Md. 116, 19 Atl. 599. The grantor in that deed, and those who would obtain under him, therefore never lost their right of entry, and consequently the statute of limitations commenced running against him and them at once, and has been running up to the present time. "The deed, even if void,

could not be less than color of title, and the entry under it would constitute adverse possession to the extent of the boundaries contained in it, and a continuance of this possession for twenty years would perfect the title against all persons, not under legal disabilities." *Gump v. Sibley*, 79 Md. 169, 28 Atl. 977. The appellants, and those under whom they claim, having had open, public, notorious, and adverse possession for more than 100 years, their title is complete. The counsel for the appellee insisted at the argument that the possession could not be adverse as against the heirs to the reversion, because, claiming under the deed from Yeiser, they could not at the same time repudiate it. The cases cited to sustain this position, however, are those in which a party claiming under a deed undertakes to set up rights inconsistent with its provisions, as in *Campbell v. Shipley*, 41 Md. 96, where an assignee of a lease undertook to set up a title by possession as against the landlord; or where a party attempts to repudiate the contract by which he enters, in order to set up an adverse holding, as in *Dean v. Brown*, 23 Md. 16; *Kelso v. Stigar*, 75 Md. 402, 24 Atl. 18. In this case the claim of the appellants is not inconsistent with the deed. An entry under a claim of title is generally sufficient to constitute adverse possession, whether the title be valid or not. *Casey's Lessee v. Inloes*, 1 Gill, 501; *Gump v. Sibley*, *supra*. Decree reversed, and cause remanded.

(34 Md. 19)

BAKER v. MARYLAND COAL CO.

(Court of Appeals of Maryland. June 17, 1896.)

MASTER AND SERVANT—INJURIES TO SERVANT—
NEGLECT—CONTRIBUTORY NEGLIGENCE
—PROVINCE OF JURY.

1. In an action by an employé for injuries resulting from being crushed between a car running on a tramway in a mine and the wall of the tunnel through which it passed, it appeared that the brakes were on the sides of the car, and had to be operated by a person moving alongside; that the tramway (between which, as originally located, and the walls of the tunnel, there was sufficient room at all places for brakemen to move along without danger in operating the brakes) had been recently straightened, to adapt it to a new motive power, so that in places there was not sufficient room for the safe performance of brakemen's duties. The evidence for plaintiff, which was contradicted, showed that plaintiff was at the time acting within the line of his duty as brakeman, and that other employés as well as himself did not know that the place was dangerous; that men had been, and were at the time of the accident, engaged in widening other places of a similar dangerous character; and that the place of the casualty was widened after the accident; and there was no evidence that, by reasonable diligence, it could not have been widened before. *Held*, that the question of negligence was for the jury.

2. The question of contributory negligence was also for the jury.

Appeal from circuit court, Allegany county.

Action by Thomas F. Baker against the Maryland Coal Company. From a judgment for defendant, plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and PAGE, BRYAN, ROBERTS, and FOWLER, JJ.

D. Jas. Blackiston, for appellant. Benj. A. Richmond and W. E. Welsh, for appellee.

FOWLER, J. This is an action to recover damages for injuries alleged by the plaintiff to have been sustained by him by reason of the wrongful and negligent act of the defendant. The defense is contributory negligence. The controlling question is whether the court below was right in instructing the jury—First, that there was no evidence in the case of negligence on the part of the defendant; and, second, that the alleged injury was the direct result of negligence on the part of the plaintiff himself, and that, therefore, their verdict must be for the defendant.

The principles of law applicable to cases like this have been frequently so fully settled in this state by the decisions of this court that they require no further discussion at this time. The only difficulty is to ascertain and fix definitely the significance and effect of the admitted facts in each particular case. As has been said (*Maugan's Case*, 61 Md. 60), "accidents occur and injuries are inflicted under an almost infinite variety of circumstances, and it is quite impossible for the court to fix the standard of duty and conduct by a general and inflexible rule applicable to all cases, so that a departure from it can be pronounced negligence in law." In the same case it is also said that the evidence of contributory negligence must be very clear to justify a court in taking the case from the jury. "It must present some prominent and decisive act in regard to the effect and character of which no room is left for ordinary minds to differ." And in the case of *Cooke v. Traction Co.*, 80 Md. 558, 31 Atl. 327, there is a clear exposition of the rule, which will be found, we think, particularly applicable to the case before us. In the case just cited, the present chief justice, McSherry, delivering the opinion of the court, said: "Where the nature and attributes of the act relied on to show negligence contributing to the injury can only be correctly determined by considering all the attending circumstances of the transaction, it falls within the province of the jury to pass upon and characterize it, and it is not for the court to determine its quality as matter of law."

Having thus briefly alluded to the general principles, we will ascertain what is the act of the plaintiff relied on by the defendant to show contributory negligence. To do this will require a brief recital of the evidence. The defendant company is the own-

er of a coal mine in Allegany county, which is operated by means of a tramroad running through a tunnel which is constructed in the mine. Just before the happening of the accident by which the plaintiff was injured, a change was made in the mode of moving the cars over the tramway. For a long time the cars were drawn by horses, but at the time of the injury complained of, the motive power was and now is derived from a stationary steam engine placed outside the mine, to which was attached a wire rope, which, in turn, was attached to the cars. In order to use the new motive power with advantage, it was found necessary to straighten the tramway, and the result was that in many places the cars were brought so near to the sides or ribs of the tunnel that there was not room enough for a man to stand safely in the remaining space while the cars were moving. It appears that the change from horse to steam power was made in a very few days, between the 7th and 12th of December, and that shipments of coal by means of the new system were begun on the 13th of December, and before the tunnel through which the cars were drawn had been made sufficiently wide at all places so that a man could safely work the brakes attached to the cars, and operate the signal wire communicating with the engine at the mouth of the mine. It also appears from the testimony of the plaintiff that, at the time of the accident, he was acting as front brakeman, and that it was a very important part of his duty to put down the brakes when there was danger that the cars would run upon and cut the wire. When injured, the plaintiff was at his post on the front platform, watching the wire rope; and, discovering that it "was not rolling on the track right," he jumped off the car, as it was necessary for him to do, for the purpose of checking the train, by means of brakes which were attached to the sides of the car, and which could be worked only by one who was walking or running with the train, between it and the side of the tunnel. While in this position, where it is clear, from his testimony, his duty called him, he was suddenly caught between the side of the moving cars and the side of the tunnel, and severely injured. The evidence shows that men had been, and were at the time of the accident, engaged in widening those dangerous places, similar to the place where the plaintiff was injured. The plaintiff did not know of this place being dangerous, but, on the contrary, he had always found it safe before the straightening or relocating of the tracks. The witness Recker, who was mine boss, testified he did not know of the danger there, and another witness said that, immediately after the accident, the tunnel was sufficiently widened there to insure safety. Of course, all this testimony of the plaintiff and his witnesses was more or less

contradicted by the defense, but mere contradiction can never justify the court in finding a legal insufficiency of evidence.

We have not been able to find in the testimony of the plaintiff, nor in that of the defendant, evidence of any prominent and decisive act on the part of the former which should convict him of negligence under all the "attending and surrounding circumstances" of the case. Admitting the danger to which the plaintiff was exposed by the act of the defendant, it urged that the plaintiff should have known it, and protected himself from it, or that he undertook the work with his eyes open, and, with a knowledge of the necessary dangers connected with the employment, he assumed the risk, and must himself suffer the consequences. But it appears to us that the danger to which the accident is ascribed was not one of those ordinary dangers which the employes should be required to look out for and avoid, but rather one of those dangers which they may reasonably expect that proper precaution had been adopted by the employer to remove. It is not reasonable to suppose that the employes of the defendant would be subjected to such a danger in the performance of the ordinary work of taking the coal from the mine, nor was it unreasonable for the plaintiff to assume that the dangerous places in the tunnel had been made safe. *Abbott's Case* (Baltimore & P. R. Co. v. State), 75 Md. 160, 23 Atl. 310; *Stricker's Case*, 51 Md. 69; *Moran's Case* (Cumberland & P. R. Co. v. State), 44 Md. 292. All danger was removed immediately after the accident, and there is nothing to show that the same could not have been accomplished before the damage was done, if the defendant had acted with prudence and caution. We do not think it at all clear that the plaintiff could have been expected to know of the danger. On the contrary, there were many others, who had equal opportunities, who did not know of it. Having seen men engaged in widening the tunnel at the narrow places, it was reasonable to suppose, or one might be led to expect, that all liability to danger from that source had been obviated. Without prolonging this opinion by further detailed examination of the evidence, we think the case should have been allowed to go to the jury.

We see no objection to the prayers of the plaintiff. They appear to put the whole case fairly and fully to the jury. Judgment reversed, and new trial.

(34 Md. 84)

HOPKINS et al. v. HOLLAND et al.
(Court of Appeals of Maryland. June 17,
1896.)

LANDLORD AND TENANT—JUDGMENT OF RESTITUTION—WAIVER OF RIGHTS BY LANDLORD.

Code, art. 53, gives a tenant against whom judgment of restitution has been render-

ed the right to appeal therefrom, and pending appeal to keep possession of the premises, on condition that he secures by a sufficient bond payment of rent in arrears and that accruing pending appeal. *Held*, that a landlord, by accepting payment of rent thus secured after the appeal has been determined against the tenant, does not waive his right to regain possession under the judgment of restitution.

Appeal from circuit court, Harford county, Bill by Oliver S. Holland and W. G. Rouse, trustee, against Mary J. Hopkins and others, to enjoin defendants from enforcing a warrant for restitution of premises of which plaintiffs were in possession. An injunction was granted, and from an order continuing it defendants appeal. *Reversed*.

Argued before McSHERRY, C. J. and BRYAN, FOWLER, PAGE, and BRISCOE, JJ.

John L. G. Lee, for appellants. E. M. Allen, John S. Young, J. J. Archer, and W. G. Rouse, for appellees.

BRYAN, J. This is an appeal from an order of the circuit court for Harford county continuing an injunction. The facts of the case are as follows: Mrs. Mary J. Hopkins leased to Oliver S. Holland, Jr., a farm in Harford county for "the term of one year, with the privilege of three years." At the expiration of one year from the beginning of the lease, she instituted before a justice of the peace proceedings, under article 53 of the Code, to obtain possession of the premises. The justice having rendered judgment in her favor, the tenant appealed to the circuit court. In that court a verdict was given for her, and judgment was rendered in her favor for costs, and for restitution of possession. After this judgment she caused a warrant of distress for rent alleged to have become due for the half year which had elapsed since the expiration of the lease. On the 5th day of September, 1895, the day after the distraint was levied, Holland conveyed all his property to William G. Rouse, in trust for the benefit of his creditors. On the 10th day of September, Holland filed a petition in the circuit court, praying that the trustee might be directed to pay the rent and costs of distraint. The trustee consented to the passage of an order for the payment, and the court passed it, and the money was paid on the same day to Mrs. Hopkins. On the 13th day of September the warrant of restitution was issued from the circuit court, and on the same day Holland and Rouse, the trustee, filed a bill in equity, alleging that Mrs. Hopkins had, by reason of the facts above stated, waived any right which she had to regain possession of her farm by virtue of the judgment of restitution, and praying for an injunction to restrain her from proceeding with the execution of the warrant of restitution. The court granted the injunction, and, on motion to dissolve, continued it. An appeal was taken by Mrs. Hopkins.

At the time when the distraint was issued,

Holland was occupying the premises wrongfully, and against the will of the owner. His right of occupation had expired, and judgment of ouster had been pronounced against him after litigation, in which he had exhausted his means of resistance. When he took his appeal to the circuit court, he exercised a right given him by the fourth section of article 53 of the Code. After authorizing an appeal, the section proceeds as follows: "And if said defendant shall file with said justice, to be by him transmitted with the papers in said case to said court, a good and sufficient bond, with one or more securities, conditioned that he will prosecute said appeal and well and truly pay all rent in arrears, and all rent which shall accrue pending the determination of said appeal, then the tenant or person in possession of said premises may retain possession thereof until the determination of said appeal." The defendant was not in any manner absolved from his obligation to pay rent, but the condition on which he was permitted to remain in possession of the premises was that he should secure the payment of rent until the determination of the appeal. The statute undoubtedly means that he ought to pay rent as long as he remains in possession of the premises. The appeal kept him in possession, and the bond was required to indemnify the landlord for the damage which the appeal caused. When a tenant, by reason of an unsuccessful appeal, has been enabled to occupy his landlord's land, it is just and reasonable that he should pay for the whole period of his occupation. It would be very imperfect redress for the landlord to hold that, although he had been entitled to possession during this whole time, yet, nevertheless, we must deny him compensation for that of which he had been deprived through the forms of law. We do not think that any such result was intended by the statute. It gave the tenant the means of having his claim decided by the court, but it also provided that this decision should be made without inflicting on the landlord the loss of what might be adjudged to be his right. The case, then, is simply this: The landlord was entitled to his rent, and the tenant was bound to pay it, and thereupon the landlord attempted to collect it, and the tenant procured it to be paid to her. In all this we see no waiver of any right, nor anything except the receipt of what was legally due. When rent is paid by the occupier of land, and is received by the owner, and there is nothing else apparent, the necessary inference is that both parties intended to create a tenancy. It would not be reasonable to suppose that they had any other purpose. But no such purpose could be inferred in the present case. The usual course to recover the rent under the circumstances which we have detailed is to bring suit on the appeal bond. We do not find it necessary to discuss the propriety of the distress warrant, inasmuch as by the

consent of the tenant and his trustee (the complainants in the injunction suit) the money was paid to the landlord. That settled the question finally as between these parties. Decree reversed, with costs, and bill dismissed.

(83 Md. 524)

CALEDONIAN INS. CO. OF SCOTLAND v. TRAUB et al.

(Court of Appeals of Maryland. June 18, 1896.)

INSURANCE—AWARD OF APPRAISERS—VALIDITY—ACTION ON POLICY—WHEN WILL LIE—EVIDENCE.

1. A fire policy provided that the loss should be determined by two appraisers, the company and the insured each selecting one, and that the two should select one umpire, to whom they should submit their differences if they failed to agree. *Held* that, where one of the appraisers ceased to act, and the appraisement was completed by the other appraiser and the umpire, the award was not in accordance with the policy.

2. The mere fact that the umpire was chosen after the appraisement was begun did not invalidate the award.

3. Where a policy provides that the loss shall be determined by appraisers, the company and the insured each selecting one, and the insured causes a failure of appraisement, he cannot maintain an action on the policy.

4. Where a policy provides for ascertaining the loss by appraisers, in an action on the policy the appraisement cannot be proved by oral evidence unless the absence of the paper is accounted for.

5. It is proper to exclude evidence as to a matter not shown to be important.

6. In an action on a fire policy it appeared the loss occurred July 23, 1893, and one of the plaintiffs testified the value of the goods insured at that time was about the same as on February 23d. *Held*, that it was not error to permit plaintiffs to ask a witness to state the value of the goods in February or March, 1893.

7. In an action on a fire policy which provided that the loss should be ascertained by appraisers, one of the appraisers testified that one of plaintiffs asked him to attend to the arbitration for him, and he agreed to do so. *Held*, that it was error not to allow defendant to ask the witness what he did in pursuance of the request or the power delegated to him towards procuring an appraisal.

8. Plaintiffs' witness had given evidence tending to show that the goods were worth \$6,000 to \$7,000, thereby corroborating one of plaintiffs. On cross-examination he testified that he supposed he had a conversation with one R.; that he did not say to R. that he had told one of plaintiffs that his books were wrong, and he had no such stock as he claimed to have. *Held*, that it was error not to permit defendant to ask R. as a witness if plaintiffs' witness said to him at a particular place and time that plaintiffs' books were wrong, that he had no such stock as he claimed, and that his charges were erroneous, or something to that effect.

Appeal from circuit court, Carroll county. Action by Julius Traub & Bro. against the Caledonian Insurance Company of Scotland on a fire insurance policy. From a judgment for plaintiffs, defendant appeals. Reversed.

For prior report, see 30 Atl. 904.

The plaintiffs offered the three following prayers: "(1) If the jury believes from the

evidence that the plaintiffs were insured by the defendant company in the policy of insurance offered in evidence; and shall further find that the plaintiffs suffered a loss by fire on the goods mentioned in said policy, if they shall so find; and shall further find that the defendant company was notified of the said loss, as admitted by the defendant company; and shall further find that the adjuster of the said defendant company, in response to the said notice, visited the place of fire; and shall further find the said adjuster thereupon examined into the circumstances of said loss; and shall further find that he thereupon offered to pay to said plaintiffs the sum of money mentioned in evidence, if they shall so find; and shall further find that the defendant company or its agent took the property of the plaintiffs into its possession and retained the same, if they shall so find, for a period of nineteen days; and shall further find that said defendant company and the plaintiffs entered into an agreement for appraisal of the loss of said fire, and denied its liability on other grounds than the absence of proof of loss,—then the jury are at liberty to find from the evidence that the defendant company waived the necessity for all preliminary proofs of loss; and if they shall find such waiver, then their verdict must be for the plaintiffs. (2) The court instructs the jury that if they shall find from the evidence in this case that Joseph Rosenfeld and George J. Biernbacher were appointed appraisers by virtue of the agreement for submission to appraisers offered in evidence; and if they shall further find that said appraisers did not choose any person to decide any specific items of difference that might arise between them until said Joseph Rosenfeld and George J. Biernbacher had begun to appraise said stock; if the jury shall further find that said appraisers did begin said appraisement, and enter upon the discharge of their duties,—that then the jury must not consider the award offered in evidence in determining the amount of damages, if the jury shall find for the plaintiffs in this case. (3) The court instructs the jury that, if they shall find for the plaintiffs, then their verdict must be only such proportion of the loss that the policy sued on bears to the whole amount of insurance on the property in the declaration mentioned,—that is, one-fourth of said entire loss,—and that the jury, in their discretion, may allow interest upon the amount of such loss, as they may so find, from the expiration of sixty days after such time as the jury may find said defendant company waived the furnishing of preliminary proof of loss, under the facts and circumstances set forth in plaintiffs' first prayer, if the jury shall find the facts and circumstances set forth in said first prayer of the plaintiffs."

And the defendant offered the nine following prayers: "(1) The defendant prays the

court to instruct the jury that from the pleadings and evidence in this cause their verdict must be for the defendant, because the policy sued on contains a condition precedent, to wit, that proof of loss must be furnished by the insured to the insurer before suit can be maintained; and there is no evidence that such proof of loss was furnished, nor is there sufficient evidence to show waiver by the defendant to its right in this respect under the conditions of the policy. (2) If the jury shall find from the evidence that there was an award under the conditions of the policy sued on, and shall further find that the plaintiffs are entitled to a verdict in this case, then the liability of the defendant is that proportion of the said award that the amount of this policy bears to the total amount of insurance. (3) If the jury shall find from the evidence in this case that the plaintiffs are entitled to recover in this action, then their verdict must be only for such proportion of the loss as shown by the award that the policy sued on bears to the whole amount of insurance on the property in the declaration mentioned, that is, the one-fourth. (4) If the jury shall find that the plaintiffs did not, within sixty days after the day of fire testified to, to wit, on the 23d day of July, 1893, render a statement in writing to the defendant, signed and sworn to by the plaintiffs, stating their knowledge and belief as to the time and origin of the fire, the interest of the plaintiffs and all others in the property, the cash value of each item thereof, and the amount of loss thereon, all incumbrances thereon, all other insurances, whether valid or not, covering any of said property, and a copy of all descriptions and schedules in all said policies, any change in the title, use, occupation, location, possession, or exposures of said property since the issuing of the policy sued on in this action, then their verdict must be for the defendant. (5) If the jury shall find that J. George Baetjer was selected by Joseph Rosenfeld and George Biernbacher, appraisers, as umpire, and that he acted as umpire with the knowledge of the plaintiffs, and that plaintiffs took part in or assisted in the appraisal of the stock of merchandise sued for in this action, and did not object to the said Baetjer acting in the capacity of umpire, then, in that event, said knowledge, taking part in said appraisal, and failure to object to the said Baetjer acting as umpire, is a waiver on their part of any informality or irregularity in the proceedings under the agreement to submit to an appraisal. (6) If the jury find from the evidence in this cause that the defendant, by its agent, investigated the loss occasioned by the said fire, and offered to pay a certain sum of money in settlement of the claim of the plaintiffs, if they shall so find; and if they shall further find that the defendant has not denied its liability on other grounds than the failure of the plaintiffs to conform to the conditions in

the said policy, which are therein made conditions precedent to maintaining a suit at law for any claim growing out of the writing of said policy, then the jury are instructed that such investigation and offer to pay a sum certain in settlement of said claim are not evidence of waiver of the conditions of the said policy, and their verdict must be for the defendant unless they shall find waiver on other grounds. (7) The jury are instructed that the entering into an appraisal with a view to an award by the assured and the insurer, is not a waiver of the conditions of the policy of insurance, but simply is an ascertainment of the liability of the insurer. (8) If the jury shall find that no entry in writing was made in the book offered in evidence as the appraisal of any of the merchandise or property appraised by Biernbacher and Rosenfeld until J. George Baetjer was by them selected as umpire, then they must find that said Baetjer was selected as umpire in conformity with the agreement to submit to an appraisal, and the plaintiffs are concluded by the award made thereunder, and their verdict must be only for such proportion of the loss that the policy sued on in this case bears to the whole amount of insurance on the property in the declaration mentioned; that is, the one-fourth of the amount of the award under the appraisal. (9) If the jury shall find from the evidence that the plaintiffs refused to abide by the award made under the agreement of submission for an appraisal, or to accept the amount decided upon as the amount of loss in this cause, then their verdict must be for the defendant."

The plaintiffs filed special exceptions to the granting of the defendant's fourth, fifth, and sixth prayers; and the defendant filed special exceptions to the granting of the plaintiffs' first prayer. The court overruled defendant's special exception and granted all the plaintiffs' prayers, and rejected all the defendant's prayers. To the granting of the plaintiffs' and rejection of the defendant's eight prayers the defendant excepted.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BOYD, and RUSSUM, JJ.

James Hewes, C. T. Reifsnelder, and C. T. Reifsnelder, Jr., for appellant. B. Rosenheim and Clabaugh & Roberts, for appellees.

BRYAN, J. A former appeal in this case is reported in 80 Md. 214, 30 Atl. 904. The suit was brought by the appellees on a policy of insurance to recover a loss by fire to the goods insured. The policy provides for determining the amount of loss as follows: "Said ascertainment or estimate shall be made by the insured and this company, and, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall

be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company. * * * In the event of disagreement as to amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire. The appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree shall submit their differences to the umpire, and the award in writing of any two shall determine the amount of such loss." One of the cardinal questions in the case depends on the effect and legal consequences of these clauses. The fire occurred July 23, 1893. An agreement for the appraisal of the loss was signed by Traub & Bro. on one hand and the insurance company on the other on the 4th day of August of the same year, and Rosenfeld and Biernbacher were appointed appraisers. They proceeded to appraise the loss, and appointed Baetjer umpire. There is testimony that the appraisal was begun before the umpire was appointed, and there is testimony on the other hand that the umpire was appointed before any entry had been made in a book by the appraisers. There is evidence that Rosenfeld withdrew after some progress had been made in the appraisal, and refused to have anything more to do with it, and that the work was then completed and an award made by the other appraiser and the umpire without his concurrence. This award is not in accordance with the stipulations of the policy. It was required that the appraisers, acting together, should estimate the loss, and, when they failed to agree, their differences were to be submitted to the umpire. It was necessary that there should be joint action by both of the appraisers, conference together, and a result reached, if possible, by their combined action. The umpire had no authority to act, except when they differed in their estimates. As it occurred, Rosenfeld's judgment was not exercised on a good many questions involved in the appraisal; and the other appraiser and the umpire assumed that they had the authority to make the decision without him, and they together made up the award. Independently of the distinct requirement of the policy, the law would require combined action by the appraisers who were selected by the parties. They occupied the position of arbitrators, and with respect to the duties of arbitrators the law is fully settled. In the first volume of American and English Encyclopædia of Law (page 683) a great number of authorities are collected, and the accepted doctrine is stated as follows: "All must be present throughout each and every meeting, equally whether the meeting be for hearing the evidence or arguments of the parties or for consultation or determination upon the award. The disputants are entitled to the exercise of the judgment and discretion, and

to the benefits of the views, arguments, and influence, of each one of the persons whom they have chosen to judge between them; and they are entitled to these not only in the award, but at every stage of the arbitration, even where a majority are empowered to decide." The fact that the umpire was not chosen until after the appraisal had been begun would not have invalidated the award. The substantial requirement was that he should decide the differences of judgment between the appraisers. The time at which he was appointed could not injure any one's rights, provided he was on hand to decide the differences between the other two. Although the direction as to his appointment was not strictly followed in this particular, the variation did not interfere with any of the duties which he was appointed to perform, and was not of essential importance. There is something unexplained about Rosenfeld's desertion of the arbitration after he had commenced it. Evidence was given by Reinhardt as follows: "The witness testified on cross-examination that he told Traub that he would have to go into arbitration. He was acting for the plaintiffs. It was after the offer of \$816 had been made and refused that arbitration was spoken of. I understood from Mr. Hewes that he was acting for all four companies. I told Mr. Traub that they would have to enter into an agreement of arbitration, and he said, 'All right.' He asked me to attend to it. I told him I would." Baetjer, the umpire, testified that on the second day of the appraisal he received from Rosenfeld the following telegram: "Baltimore, Md., Aug. 10th, 1893. To J. G. Baetjer, c/o J. Traub & Bro., Union Bridge, Md.: Reinhardt is dissatisfied as matters stand. Best make no appraisal until you see him. Jos. Rosenfeld." The ascertainment of the amount of the loss by appraisal was a condition precedent to the payment of the sum of money for which the insurance company was liable. And it was the duty of each of the parties to the contract of insurance to select an appraiser. If the insured should refuse to perform this duty, he would be disabled to recover in a suit on the policy; and, of course, it is necessarily implied that the appointment of an appraiser should be made in good faith, with the purpose and intention, so far as it depended on the parties, that the appraisal should be duly made. If the insured should interfere to prevent it, or should in any way cause it to be defeated, the consequences would be the same as if he had refused to make an appointment. The withdrawal of the appraiser appointed by the insured without any apparent good reason, and with no explanation except such as is given by the telegram above mentioned, ought to have been the subject of an inquiry by the jury. It ought to have been left to them to determine whether the failure of the appraisal was in any way caused by the agency or procurement of the insured; that is, supposing that they found as a fact

the sending of the telegram, and that it was caused or authorized by Reinhardt, and that Reinhardt was attending to this business in behalf of the insured by their request, as he testified, on the hypothesis that Reinhardt was their agent, they would be responsible for his action; and if it caused the failure of the appraisal there can be no recovery in this suit. Because this inquiry was not submitted to the jury in any of the plaintiffs' prayers the judgment must be reversed. If the appraisal failed without the fault of the insured, the failure would not be any impediment to their right of recovery, if they could maintain their suit on other grounds.

The question of waiver was decided on the former appeal, and on this point the plaintiffs' first prayer was correct; but there was error in stating that a verdict ought to be rendered for the plaintiffs on the facts stated. The award was void for the reasons which we have stated. It would not have been invalidated, however, by the finding of the facts set forth in the plaintiffs' second prayer. The defendant's second prayer was granted. All of its other prayers were properly refused, for reasons which will appear from what has been stated. There were seven exceptions by the defendant to the admission of evidence. If the question by defendant in the first exception was intended to put the appraisal in evidence, it was properly overruled. It could not be proved in that way. The paper itself ought to have been produced, or its absence accounted for, according to the rules of evidence. We do not perceive that it would have been relevant in any other aspect of the case. In the second exception one of the plaintiffs, who had been examined in behalf of himself and partner, was asked "if he ever refused to accept any amount of money that was agreed upon for their loss after the refusal to accept eight hundred and odd dollars." As the case had been presented by the evidence, it did not appear in what way the refusal of the plaintiffs to accept a sum of money was a matter of importance. The question in the third exception was an attempt to prove by parol the contents of a written instrument; that is to say, the award of the appraisers. In the fourth exception the witness was asked by the plaintiff to state the value of the stock of goods in the store of the insured in February or March, 1893. The fire took place on the 23d of July of the same year. But one of the plaintiffs had already testified that the value of the goods in the store at that time was about the same that it was on the 23d of February. We may notice that the answer of the witness is not stated in this exception. There was no error in permitting the question to be asked. In the fifth exception, af-

ter the witness Reinhardt had testified that one of the Traubs had asked him to attend to an agreement for arbitration for him, and that he had agreed to do so, he was asked by the defendant, "What did you do in pursuance of the power that was delegated to you, or the request that was made to Mr. Traub & Bro. towards procuring an appraisal to be made in this matter?" The court refused to allow the question. The question is different from the one in the first exception. It inquired into the personal action of the witness, and tended to throw light on his connection with the appraisal. It might have been more pointed and specific, but it covered in a general way everything that he had done in the matter; and if he had in any way interposed to defeat the appraisal the question applied to his conduct in that particular. It was germane to the matter about which he was testifying. There was error in refusing to permit the question to be asked. In the sixth exception the witness Russell was asked, "Did Mr. Samuel Reinhardt say to you, somewhere in the rear of the store, on the occasion you met him there, that Traub's books were wrong, that he had no such stock as he claimed, and that his charges were erroneous, or something to that effect?" and the court refused to permit the question to be answered. Reinhardt had already testified on cross-examination that he supposed that he had a conversation with Russell, though it was mostly with Hewes, and that he did not "remember having any conversation especially with Mr. Russell; did not say to Mr. Russell that he had told Traub that his books were wrong, and that he had no such stock as he claimed to have. Never said anything to him or Mr. Hewes about stock being overestimated by Mr. Traub." He was speaking in reference to a meeting that he and one of the Traubs had with Hewes and Russell on the 28th of July in reference to this business. He had given evidence on his direct examination tending to prove that the stock of goods in the store of the plaintiffs at the time of the fire was worth from six to seven thousand dollars, thereby corroborating the evidence of Julius Traub. We think that a sufficient foundation had been laid in the cross-examination of this witness to permit the introduction of this evidence to contradict him. This testimony ought to have been admitted if the question had not been leading in its form. 1 Greenl. Ev. § 435. In the seventh exception the defendant made a motion to strike from the evidence the inventory of the plaintiffs. The court, in effect, decided that the inventory was not in evidence. For the errors mentioned, the judgment must be reversed. Reversed, and new trial.

(34 Md. 1)

MAYOR, ETC., OF BALTIMORE v. BALTIMORE, C. & E. M. PASS. R. CO.

(Court of Appeals of Maryland. June 19, 1896.)

STREET RAILROADS — MUNICIPAL FRANCHISE TAX.

The "park tax" provided for by Acts 1882, c. 229, and Acts 1894, c. 550, is a tax on the gross receipts of "street-railway companies" in the city of Baltimore, imposed in consideration of the franchise accorded such companies to locate and operate their tracks on the public streets, and has no reference to an electric railroad originally constructed outside the city, on a private right of way, purchased, by legislative authority, from a turnpike company, though a portion of such line is subsequently brought within the city by an extension of the territorial limits.

Appeal from Baltimore city court.

Action by the mayor and city council of Baltimore against the Baltimore, Catonsville & Ellicott's Mills Passenger Railroad Company to recover a tax. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before BRYAN, RUSSUM, PAGE, FOWLER, McSHERRY, and BRISCOE, JJ.

Thomas I. Elliott, for appellants. John K. Cowen, E. J. D. Cross, Hugh L. Bond, I. N. Steele, J. E. Semmes, and Francis K. Carey, for appellees.

McSHERRY, C. J. The question involved in this case is clearly stated in the following terms by the learned judge whose rulings are now before us for review: "The defendant company operates a local passenger railway, running for a part of its length (about two miles) through the annexed district, or within the present territorial limits of the city as extended, and for the rest of its length (about three and one-half miles) westwardly beyond those limits, and for the whole of its length on its own right of way, acquired and maintained at its own expense. This right of way it has purchased from the turnpike company upon whose roadbed its tracks are laid, under legislative authority. No street franchise or concession of any kind whatever has been conferred upon it by the city. Its tracks are not laid upon, nor does it use, nor has it received any municipal privilege upon, any city street or streets acquired from the city by grant, dedication, or condemnation, or in any other way, and maintained at public expense. The question is whether such an enterprise properly answers to the description of a 'street railway,' within the intentment of the laws imposing the park tax of 9 per cent. upon gross receipts from all street-railway lines within the present city limits."

The appellee company is the successor of the Baltimore, Catonsville & Ellicott's Mills Passenger Railway Company. This latter company was incorporated by the general assembly of Maryland under an act passed at the January session of 1890 (chapter 34).

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By authority of this act, the corporation thereby created constructed a single-track horse railway upon the bed of a turnpike road owned by the president, managers, and company of the Baltimore & Fredericktown Turnpike Road, after first, by agreement, procuring, for a money consideration, the right of way from the turnpike company. The railway thus constructed was located wholly in Baltimore county, with one terminus just at the city limits. Some 30 years afterwards, this railway company became embarrassed financially, and was sold under foreclosure proceedings; and the present appellee was the purchaser, and assumed the same name, with the single exception that the word "Railroad" was substituted for "Railway." The reorganized company (the appellee), having determined to change the motive power for the propulsion of its cars from horses to electricity, was empowered, under Act 1894, c. 162, to contract with the turnpike company for the amount of compensation to be paid to the latter for the use of its roadbed by this different and more rapid method of transit. Conformably to this act, the right to use the turnpike roadbed for an electric railroad was acquired by agreement, for the sum of \$28,000 in money, and the further consideration of the performance of certain stipulations, which need not be stated or considered, as they are not material in respect to the pending controversy. By chapter 98 of the Acts of 1888, the limits of Baltimore were extended, and part of the railway now owned by the appellee, and theretofore built by its predecessor, was brought within the enlarged outlines of the city. When permission was first given by the mayor and city council, in 1858, by ordinance, to certain individuals, to construct a passenger railway upon some of the city streets, and to run thereon cars drawn by horses, a tax of one-fifth portion of the whole passenger receipts was exacted; and when, in 1862, these same individuals secured from the general assembly an act incorporating the Baltimore City Passenger Railway Company, the exaction of one-fifth of the gross receipts was embodied in the fourth section of the charter. As succeeding street-railway companies were formed, a like tax was imposed upon them by the city. In 1874, by ordinance, the rate of this tax was reduced to 12 per cent.; and in 1882 the legislature, by chapter 229, provided "that each of the several passenger horse railway companies in the city of Baltimore shall charge five cents, and no more," for conveying each passenger, etc.; and, by the second section, "that, in lieu and substitution of the twelve per cent. now imposed upon and payable by the said several passenger horse-railway companies mentioned in the first section of this act, the said several passenger horse-railway companies shall pay * * * a tax upon their gross receipts of nine per cent.," etc.

This tax is what is known as the "park tax," and, up to the time of the annexation to the city of the outlying belt in 1888, was imposed upon and collected only from street-railway companies upon the basis of their receipts within the city limit.

Since the decision by this court of the case of Baltimore U. P. Ry. Co. v. Mayor, etc., of Baltimore, 71 Md. 405, 18 Atl. 917, there can be no question that the tax thus imposed was laid and collected in consideration of the privilege or franchise granted by the city to the several street-railway companies to lay their tracks and to run their cars upon the public thoroughfares of the city. "The nine per cent. tax * * * has been imposed for the privilege accorded by the city to the appellant of using its streets for railway purposes." 71 Md. 413, 18 Atl. 917. There is no pretense that the tax was ever imposed or collected either in respect of gross earnings received from suburban travel, or in respect of such earnings accrued to any other railway than one located and operated upon a public street of the city. The history of the legislation relating to this subject would, apart altogether from the explicit language used in 71 Md. 405, 18 Atl. 917, be sufficient to demonstrate, we think, that the tax was a franchise tax exacted in exchange for the privilege accorded these several companies to lay their rails and run their cars upon city streets,—streets subject to the control of the mayor and city council of Baltimore, and subject to no other dominion whatever. This is emphasized by the ordinance which reduced the rate of the tax to 12 per cent., for it provided that the several railway companies named in it (and the appellee is not included) should be required to pay to the city register 12 per cent. of their gross receipts "in lieu of the one-fifth, as now required under their respective grants." Clearly, this language indicates, if it does not expressly declare, that the tax was the equivalent for the grant; and consequently, if there were no grant, there was to be, and in reality was, no tax. When subsequent legislation spoke of streets in connection with this class of railways, it manifestly meant streets, and not private rights of way. It would do violence to the words employed in the act of 1894 (chapter 550), relating to this subject, and would ignore the distinctive character of the tax itself, if the term "street railway" were stretched so far from its natural and primary meaning as to force it to include railways that, though operated like street railways, are in fact not built upon, and do not occupy, streets at all.

As the act of 1888 has brought part of the appellee's tracks within the new limits, it is insisted by the city that the appellee became liable to pay this tax upon the earnings received from that part of the road, solely because of the extension of the city outlines, even though the turnpike road still continues

a turnpike road, and has not become a street at all. But the obvious answer, it seems to us, is that appellee's road was not constructed upon a street of the city, is not now located on such a street, but was built upon, and still occupies, its own purchased right of way, over which the city has not now, and never has had, control, and as to the occupancy of which the city could not confer, and never undertook to confer, on the appellee, any right or privilege whatever. A permission given by the city to the appellee to locate its tracks upon their present site along the bed of the turnpike would have conferred no right or authority to construct the road where it is now located. That right and authority were derived from the legislature and from the turnpike company. If, then, no right was conferred by the city,—and confessedly there was not, for the tracks were laid long before the city's limits embraced any part of the territory through which the appellee's railway runs,—the city gave nothing to the appellee in exchange for which it could lawfully exact the franchise tax; and in this vital particular the appellee differs widely from the old lines constructed within the city and upon the beds of the city's streets. The extension of the city limits gave to the appellee no rights or privileges which it did not have before. It granted to the company no authority it did not already fully possess and enjoy. If the appellee held before the act of 1888 none of its rights as to the occupancy of the turnpike by grant, license, or permission from the city, and if it acquired from the city since the extension no other rights than it had before, there can be no ground upon which the claim to collect the tax can be placed, unless it be that the act of 1882 and a subsequent act of 1894 (chapter 550) have authorized the city to impose a gross receipt tax for the benefit of the city, without regard to whether the railway be located on a city street, on a turnpike road, or wholly on private property, acquired by the company through purchase or condemnation. There is no such intention manifested in either of the statutes referred to, and we are not, in our judgment, authorized to expand by sheer implication a tax burden of this kind so as to make it include an object, or, speaking more accurately, a person, natural or artificial, obviously not within the scope of the original scheme devised to raise revenue for the maintenance of the parks. Without going into any of the other questions discussed at the bar and in the elaborate briefs filed, it seems to me no valid reason can be assigned for holding that the appellee is now liable to pay this gross receipt or park tax. The road does not answer the description of the class of railways heretofore subjected to the tax; and this is so because it never was, and is not now, located on a street of the city. In our judgment, the rulings below were right, and the

judgment appealed from should be affirmed. Judgment affirmed, with costs above and below.

(33 Md. 512)

CHAPPELL et al. v. EDMONDSON AVE.,
C. & E. C. ELECTRIC RY. CO.

(Court of Appeals of Maryland. June 17,
1896.)

COURTS—SPECIAL JURISDICTION—INQUISITION OF
CONDEMNATION—APPEAL—REMOVAL.

1. The statutory provisions investing the circuit court with the powers of reviewing, and of confirming or setting aside, an inquisition of condemnation, conferred a special and limited jurisdiction, entirely distinct and independent of its common-law powers; and since no appeal was expressly given from its decision in such a case, none lies to any other tribunal.

2. The statute requires the inquisition to be returned to the circuit court of the county in which the land lies; and since no removal of the record of proceedings to an adjoining circuit is provided for, an appeal will not lie from an order overruling a suggestion for removal.

Appeal from circuit court, Baltimore county.

Proceedings by the Edmondson Avenue, Catonsville & Ellicott City Electric Railway Company to condemn certain lands of Alcinda M. Chappell, Thomas C. Chappell, and Thomas C. Chappell, trustee, for railroad purposes. From orders entered therein, defendants appeal. Dismissed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Thomas C. Chappell and R. R. Boarman, for appellants. D. G. McIntosh and J. F. C. Talbott, for appellee.

BRISCOE, J. The motion to dismiss the appeal in this case must prevail. There are two grounds upon which the motion is based: First, because an appeal does not lie from the order of the circuit court in a proceeding of this kind; and, second, because the record in the case has not been printed in accordance with the rules of this court. It appears from the record that the appellee, the Edmondson Avenue, Catonsville & Ellicott City Electric Railway Company proceeded, according to the provisions of Acts 1892, c. 335, to condemn certain lands of the appellants for railroad purposes, as by such act it was authorized to do. A warrant was duly issued by a justice of the peace of Baltimore county, upon application of the company, to condemn the land and assess the damages. An inquisition was had and returned by the sheriff to the court. Thereupon the following proceedings were had, as appears from the "docket entries" in the case: "November 19, 1895: Exceptions filed. Same day: Motion to quash filed. November 20, 1895: Notice to plaintiff to produce copies filed. Same day: Sheriff's return of service of order of court on William L. Layfield, secretary of plaintiff. Same day: Peti-

tion for a writ of certiorari refused. Exceptions noted. Same day: Application for removal refused. Exceptions noted. November 21, 1895: Additional exceptions filed. November 22, 1895: Sheriff's return of service of notice on counsel for plaintiff filed. November 23, 1895: Additional exceptions of defendants and exhibit plat filed. November 25, 1895: Motion to quash filed. Same day: Motion of plaintiff that the court shall not receive papers filed by appellant after testimony closed filed. November 28, 1895: Exceptions of Alcinda M. Chappell, etc., filed." And on the 3d of December, 1895, an order for appeal to this court was filed, in these words: "Mr. Clerk: Enter an appeal in this case from the order of the court, passed November 18th, refusing to order the removal of this case, and from the order of the court, passed November 20, 1895, refusing to issue a writ of certiorari herein, and the refusal of the court to remove said case to the United States circuit court. Thomas C. Chappell, Atty. for Alcinda M. Chappell, Thomas C. Chappell, and Thomas C. Chappell, Trustee."

Now, as far as the record discloses, there has been no order by the circuit court of Baltimore county confirming the inquisition, nor an appeal from a final order, though the appellees, in their brief, state "that exceptions were made to the proceedings upon a great variety of grounds before the circuit court, the exceptions were overruled, and the inquisition confirmed by the court." But, assuming that there had been such an order, and the appellants had appealed therefrom, it would clearly not be an order from which an appeal would lie to this court; and this is so because the jurisdiction of the circuit court for Baltimore county is a limited one, in proceedings of this kind, specially conferred by statute, which does not authorize an appeal,—its jurisdiction here being entirely distinct and independent of its common-law powers. In the case of *Railroad Co. v. Condon*, 8 Gill & J. 443, it was distinctly said by this court that there is no appeal expressly given to the court of appeals, under the act of assembly investing the county court with the powers of reviewing and confirming or setting aside inquisitions like the present. From the nature and course of their proceedings this power of review is a fit subject for litigation in a county court, but is wholly inappropriate to the jurisdiction of this court. It is a special, limited jurisdiction, given to the county court, from the decision of which no appeal lies to any other tribunal. With as much propriety might it be contended that appeals would lie to this court from the judgments of the county court on warrant appeals relating to the recovery of small debts. And to the same effect will be found the more recent cases of *Cumberland & P. R. Co. v. Pennsylvania R. Co.*, 57 Md. 275, and *Brown v. Railroad Co.*, 58 Md. 539.

So far as concerns the appeals from the action of the court in overruling the motion to re-

move the record of proceedings to an adjoining circuit, it is sufficient to say that the statute required the inquisition to be returned to the circuit court of the county wherein the land lies, and exceptions thereto are to be heard by that court. No removal is provided by the statute, and there can be no appeal from an order, in cases like this, overruling the suggestion for removal. And, as to the alleged refusal by the circuit court of Baltimore county to remove the case to the United States circuit court, we need only say that it does not appear from the record that any such order was passed. On the contrary, the clerk certifies that no such petition was filed, and that he is unable to find "copies of the petitions in his office." For these reasons, this appeal will be dismissed. Appeal dismissed, with costs.

(83 Md. 375)

MELOY v. SCOTT, Officer of Registration,
et al.

(Court of Appeals of Maryland. June 16,
1896.)

**ELECTIONS—QUALIFICATIONS OF VOTERS—CHANGE
IN LAW.**

On appeal from an order dismissing a petition to review the action of a registration officer in striking the name of petitioner from the list of voters on the ground that he was disqualified under the provisions of Act 1890, c. 573, it appeared that the act referred to had been wholly repealed by Act 1896, c. 202, providing for the registration of voters. *Held* that, the determination of the appeal being governed by existing law, in view of which the petitioner had suffered no injury, the appeal will be dismissed.

Appeal from circuit court, Prince George county.

Petition by William A. Meloy to review the act of Bennett C. Scott, officer of registration of the Thirteenth election district of Prince George county, Md., and John W. Belt, clerk, in striking name of petitioner from the list of voters. From an order sustaining the ruling of the registration officer, petitioner appeals. Dismissed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

William A. Meloy, in pro. per. Richard E. Brandt, for appellees.

FOWLER, J. The appellant claims to be a resident of Prince George county, in this state, and that he was a registered voter of the Thirteenth election district thereof on the 10th day of October last, when his name was stricken from the registry of qualified voters by the appellee Bennett C. Scott, registration officer for said district. From this action of the appellee the appellant appealed to the circuit court for said county, but that court affirmed the ruling of the appellee, and hence this appeal. Subsequent to the trial of this cause below, and before it was heard on appeal in this court, the law under which

the appellant claimed the right to be registered was repealed, and a new law has been enacted by the legislature, by the terms of which a new registration is required to be made by new officers. Hence, by the well-settled law applicable to such a condition, the rights of the parties must be determined by the law existing when the case is heard and finally determined in this court, and the law existing at the time the cause was decided by the lower court must be treated as though it had never existed, except in so far as the former law is saved by express provision of the repealing law. And especially is this so when, as here, the repealing law makes sweeping changes and introduces a new system before unknown in this state. *Wade v. Industrial School*, 43 Md. 179; *Dashiell v. Mayor, etc.*, 45 Md. 615; *Keller v. State*, 12 Md. 322; *Day v. Day*, 22 Md. 530; *Price v. Nesbitt*, 29 Md. 263; *Montague v. State*, 54 Md. 481. Assuming, without deciding, that the order appealed from is erroneous, where is the injury to the appellant? His right to vote at the next election will be determined by the new, and not by the old, test. Under the new law, "only persons constitutionally qualified to vote in the precinct at the next general election, and who have personally applied for registration, shall be registered as qualified voters. Act 1896, c. 202, § 16, subsec. 4. It is true that it is provided by subsection 5 of the section just cited that "the board of registry shall be entitled to receive from the officers having custody thereof the last preceding registration books for the purpose of comparison and assistance in identification; and if any one shall apply for registration who appears on such former registry as disqualified, his name shall be entered in the new registers, but he shall be marked disqualified, unless such grounds of disqualification shall have been removed." If it should be contended that the old lists now in the hands of the clerk of the circuit court, and prepared under the old law, are included within the provisions of subsection 5,—about which we express no opinion,—and that, therefore, they will be used by the registers under the new law for the purpose of comparison and identification, and that, inasmuch as the name of the appellant will appear on the old lists as a disqualified voter, he will, therefore, as required by the act of 1896, be marked on the new lists also as a disqualified voter, it must be remembered that the act of 1896 also provides that such mark of disqualification is to be attached to the name of the voter on the new lists only in case such grounds of disqualification have not been removed. But the ground of the alleged disqualification of the appellant, namely, a failure to comply with section 14 of the act of 1890 (chapter 573) has been effectually removed by the repeal of that act, and the failure to re-enact the provisions of the section in question. It would seem, therefore, wholly immaterial

whether the name of the appellant be placed upon the old registration lists or not. It did him no injury that can be redressed on this appeal to have his name stricken from those lists, nor can he derive any benefit by having it replaced. No injury having resulted from the action of the court below, the appeal must be dismissed. Appeal dismissed, costs to be paid by Prince George county.

(82 Md. 373)

TURNER v. BRYAN, Officer of Registration, et al.

(Court of Appeals of Maryland. June 16, 1896.)

ELECTIONS—QUALIFICATIONS OF VOTERS—CHANGE IN LAW.

On appeal from an order dismissing a petition to review the action of a registration officer in striking the name of petitioner from the list of voters on the ground that he was disqualified under the provisions of Act 1890, c. 573, it appeared that the act referred to, which was in force when the decision was made, had been wholly repealed by Act 1896, c. 202, providing for the registration of voters. *Held* that, the determination of the appeal being governed by existing law, in view of which the petitioner had suffered no injury, the appeal will be dismissed.

Appeal from circuit court, Anne Arundel county.

Petition by David H. Turner to review the act of John T. Bryan, officer of registration of the Fourth election district of Anne Arundel county, and John C. Brannon, clerk, in striking the name of petitioner from the list of voters. From an order sustaining the ruling of the registration officer, petitioner appeals. Dismissed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Elihu S. Riley, for appellant. Edward C. Gantt, for appellees.

BRISCOE, J. The name of David H. Turner, the appellant, was stricken from the list of qualified voters of the Fourth election district of Anne Arundel county during the October sitting by the officer of registration for that district, and on the 24th day of October, 1896, he appealed by petition to the circuit court for that county. The case was heard, and the court, on the 31st of October, 1896, passed an order dismissing the petition, and from that order this appeal has been taken. We find, however, that the law relating to elections (article 33 of the Code of Public General Laws), and the several acts amendatory thereof, which were in force at the time of the decision of this case, have been wholly repealed by the act of 1896 (chapter 202), and that this latter act has made a radical change, and adopted an entirely different system of registration of voters for this state from that required by the law in existence at the time of the appellant's appeal. The ruling of the court be-

low was under the law as it then stood, whereas the present appeal must be decided by the existing law. *Strauss v. Heiss*, 48 Md. 293. It is a settled doctrine, says this court in *Wade v. Industrial School*, 43 Md. 181, that courts, in deciding questions arising before them, will look to the law as it is at the time, and are not to be governed by what it may have been, unless proceedings under a prior existing law had been complete, or rights had become vested. This principle has been held to apply as well to cases before an appellate court as to those that are pending in courts of original jurisdiction. *U. S. v. The Peggy*, 1 Cranch, 110; *Price v. Nesbitt*, 29 Md. 204; *Atwell v. Grant*, 11 Md. 104; *State v. Norwood*, 12 Md. 206; *Keller v. State*, Id. 328. But, even if it be conceded there was error in the rulings of the court below, inasmuch as the law in existence at the time has been abrogated and repealed, the appellant has not been injured thereby. It therefore becomes unnecessary for us to pass upon the questions presented by this appeal, and it will be dismissed, the costs to be paid by Anne Arundel county. Appeal dismissed, with costs to the appellant in both courts to be paid by Anne Arundel county.

(84 Md. 67)

LYNN v. STATE.

(Court of Appeals of Maryland. June 17, 1896.)

BASTARDY—CONSTITUTIONAL LAW—EX POST FACTO LAW.

1. In bastardy proceedings, a dilatory plea, setting up the failure to file a recognizance, merely alleging that "no proper recognizance" was filed, without setting it out, is insufficient.

2. A judgment in bastardy proceedings in favor of defendant, on the ground that the court was without jurisdiction, is not a bar to a subsequent prosecution.

3. Code, art. 12, § 2, authorized in bastardy proceedings the justice to require accused to give security in the sum of \$80 to indemnify the county from all charges which might arise from the maintenance of the bastard; and section 7 required the payment by accused of \$30 a year until the child was 7 years old, and authorized the discharge of accused at any time the security was given, and did not fix any limit to the time during which accused should be confined for failure to enter into such security. Laws 1894, c. 108, repealing the former sections, requires the justice, on failure of accused to give the security, to commit him to custody for 12 months, and provides for a trial by jury; accused being required to enter into a personal recognizance alone to entitle him thereto. *Held*, that the later act did not deprive accused of his right to discharge on giving security after commitment, or impose additional punishment, so as to render it unconstitutional as an ex post facto law as applied to the begetting of bastard children prior to the act.

Appeal from circuit court, Carroll county.

Bastardy proceedings against Daniel H. Lynn. From a judgment of conviction, he appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, RUSSUM, and BOYD, JJ.

Jas. A. C. Bond and John M. Roberts, for appellant. Atty. Gen. Clabaugh and C. E. Fink, for the State.

BOYD, J. An indictment was found in the circuit court for Carroll county against the appellant, which charged that on the 27th day of January, 1894, he did beget, in and upon the body of Rosa B. Haines, a male illegitimate child, which was born on the 27th day of October, 1894. A demurrer was entered to the indictment, which was overruled, and the traverser then filed four pleas, the second of which was withdrawn, and the others demurred to, and the demurrer sustained.

Before considering the demurrer to the indictment and the first bill of exceptions, which practically presents the same question, we will briefly pass upon the action of the court in reference to the pleas. That the first plea was insufficient is clear. It simply states a conclusion of law, without stating the facts out of which the defense arises. The third plea was also defective for the same reason. It is not sufficient to state in a plea of this character that there is "no proper recognizance," etc., without setting it out, or stating sufficient facts to enable the court to determine wherein it was not proper. "Every dilatory plea must be pleaded with strictness, and be certain to every intent. * * * And it is consequently essential that the facts should be stated out of which the defense arises, or a negation of the facts, which are presumed from the existence of a record." *State v. Scarborough*, 55 Md. 349. The fourth plea was not pressed in this court. It shows on its face that there is no issue raised as to the merits of the case under the prior indictment referred to in the plea, but only questions affecting the jurisdiction of the court. The latter having been determined in his favor, and the court, therefore, being without jurisdiction to pass judgment on the merits of the case, it was not a good plea of former acquittal, which it was intended to be.

This brings us to the consideration of the principal and important question in the case, which was very thoroughly and ably argued by the attorneys on both sides. The indictment charges—and the evidence objected to by the traverser, but admitted by the court, tends to sustain it—that the child was begotten in January, 1894, and was born on the 27th day of October of that year. The legislature passed an act which went into effect March 21, 1894 (being chapter 108 of the Laws of 1894), which repealed and re-enacted sections 2 and 5 of article 12 of the Code, without any saving clause for pending cases or past offenses. It was contended on the part of the traverser that the act of 1894 inflicted a greater punishment than did the law in force when the crime was committed, and was therefore an *ex post facto*

law, unconstitutional, and void when attempted to be applied to this case. It must be conceded on the part of the state that, if the premises of the traverser be correct, his conclusions must be admitted to be so; for, without deeming it necessary to discuss at length what is meant by an *ex post facto* law, it was held in *Calder v. Bull*, 3 Dall. 386, that "every law that changes a punishment and inflicts a greater punishment than the law annexed to the crime when committed" was within the meaning of that term; and in *Fletcher v. Peck*, 6 Cranch, 138, Chief Judge Marshall said that "an *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when committed." See, also, *Anderson v. Baker*, 23 Md. 531, and *Beard v. State*, 74 Md. 132, 21 Atl. 700.

It is contended on the part of the traverser's counsel that although, under the terms of this statute, a proceeding of this character cannot be instituted before the birth of the child; yet, as the act done by him is when the child is begotten, therefore it must be said that the crime for which he is indicted was committed at that time, and not at the birth of the child. There is certainly great force in their argument in a case involving the question as to whether a law passed after the commission of an act can apply if it increases the punishment. A party is presumed to know what the law is, but not what it will or may be in the future. He is ordinarily liable to punishment according to the law as it is when he does a forbidden act, not "in a manner in which it was not punishable" at the time. But, under our view of this case, it is unnecessary to discuss that question. For the purposes of this case, it may be conceded that the crime was committed when the child was begotten, and we will therefore consider the case with that assumption.

After providing for the arrest of the mother of an illegitimate child, and requiring her to enter into a recognizance on her refusal to disclose the name of the father, article 12 of the Code of Public General Laws, by section 2, provides: "But, if the said person shall on oath discover the father of such child, the justice shall discharge her, and shall cause to be arrested, and brought before him, such father, if a resident of the county, and shall cause him to give security in the sum of eighty dollars to indemnify the county from all charges which may arise from the maintenance of such child." The act of 1894 re-enacted that much of section 2, and then added: "And upon failure of such putative father to enter into security the justice shall commit him to the custody of the sheriff of the county for the period of twelve months." It is contended that the act of 1894 thus materially altered and added to the punishment, and that the father, on his failure to enter into security, must be imprisoned for 12 months, although he might

be able to furnish bail the next day, week, or month after he was taken before the justice of the peace. If that construction of the law be correct, the penalty has undoubtedly been increased. Prior to the act of 1894, he was committed to the jail in default of security, but, upon it being given, he was discharged. The form of the commitment adopted in this state in such cases directed the sheriff to "him thus safely keep until he shall give such security or be otherwise lawfully delivered from thence." The original statute did not provide for any definite time for which he might be committed in default of giving security before a justice of the peace; but as section 7, art. 12, made the recognizance liable for \$30 per annum until the child should reach seven years of age, it was the accepted, and undoubtedly correct, interpretation of the law that there was no lawful way of securing the release of the father who continued thus in default until after the expiration of the seven years. Therefore, if he was unable or failed to give security, he was, as the law then stood, liable to be confined in the county jail for the period of seven years. It is perfectly apparent, then, that the object of the legislature was to lessen the penalty, and avoid such a severe and harsh punishment, as well as to relieve the county of the burden of supporting persons so charged for such length of time. Although the language of section 2, as amended by the act of 1894, may, by a strict construction, be read to mean that the justice of the peace shall, upon the failure of the father to give security, then and there commit him for the period of 12 months, without any authority to afterwards take the security, it is manifest, when we remember the evident object of the passage of the law, that such a construction is not in accordance with the legislative intent. It must be construed to mean that he is to be committed for the period of 12 months unless he sooner give the security. There must be a continuous failure to enter into security to authorize his confinement during the whole period. While it is intended to punish the guilty party for fornication, another great object of the law is to indemnify the county, which would be wholly defeated by saying a justice of the peace could not afterwards take the security for that purpose, but must keep him in jail, at the expense of the county. Section 5, art. 12, as it stood in the Code, and as amended by the act of 1894, shows conclusively the meaning of the legislature. That section provides that if any putative father, feeling aggrieved by the judgment of the justice, takes his case to the court, and be there found guilty, upon his neglect or refusal to give security "he shall be committed to the custody of the sheriff until he comply; provided that such custody shall not continue longer than twelve months nor less than six months, in the discretion of the court." The legislature cannot be said

to have intended to refuse the father the privilege of giving security before the justice after the day of the judgment by him, although he can do so in court at any time during the term for which he was committed.

We see no difficulty about the provisions of section 5 of the act of 1894. Prior to that act, the putative father could only have his case reviewed by entering into a recognizance with security; while now, if he feels aggrieved by the judgment of the justice, he can enter into a personal recognizance for his appearance at court, and, upon his doing so, the court is required to "take cognizance thereof," and he can then, on being indicted, have a trial by jury. But as in many cases, if that was all he was required to do, he would never appear, but escape punishment, he is further required, to "entitle him to be discharged from the custody of the sheriff," to enter into additional recognizance, with good and sufficient securities "to indemnify the court," as the act says, which, of course, means the county, as shown by the context and the provisions of sections 1 and 2. There is certainly nothing in this section of the act of 1894 which can be interpreted to mean that any additional penalty has been imposed, but, on the contrary, it has been for the benefit of the party accused. If there ever was any question about the constitutionality of the bastardy law on the ground that it authorized the commitment of the accused by the justice without providing for a trial by jury, this act has now removed the objection, and he can now have his case reviewed without furnishing security, but must, of course, remain in confinement or give the required security until his case is heard and disposed of. But, under the former laws, that question was settled in this state. *State v. Glenn*, 54 Md. 604.

Nor do we see any constitutional objection to this act, as contended by the appellant, on the ground that it provides two different punishments for the same offense; that is to say, the father must be committed for 12 months for the failure to give security before a justice of the peace, while, if his case is reviewed by the court, and he is convicted, he can be committed for not less than 6 nor more than 12 months. It is very probable that one reason for making the distinction is the one suggested in argument on the part of the state, that the parties in some counties may have to remain in jail for months awaiting trial, and hence the court can take that fact into consideration, and commit them for less than 12 months, but not less than 6; but, whether that be the correct reason or not, they certainly cannot complain because the court may reduce the time of their confinement from what the justice must give in case of their conviction.

As what we have said disposes of the question raised by the exception to the testimony in the bill of exceptions, the only remaining

point urged by the appellant is that the sentence was erroneous because it required him to stand committed to the custody of the sheriff for the period of six months, or until he should enter into the recognizance to indemnify the county, "and the additional recognizance required by section 5, c. 108, of the Acts of 1894, provided he shall not remain in said custody longer than six months." Without meaning to decide that this question is properly before us on an appeal, it is apparent that the appellant is not prejudiced thereby, as there is no "additional recognizance" required by that section, except the personal one he must have entered into before he was entitled to have his case heard in court. That was probably inadvertently added, but it imposes no additional burden on the appellant, for, if he enter into the recognizance to indemnify the county, no other is required by that section; and the order of court expressly provides that, on his failure to enter into recognizance, he shall not remain in custody longer than six months. We might add that if this were not so, and the sentence exceeded that authorized by law, it would not entitle the appellant to be released. After the case of *McDonald v. State*, 45 Md. 80, cited by the appellant, was decided, the legislature passed a law to meet the result of that decision; and it is now provided by section 78 of article 5 of the Code that in case this court reverses a judgment for error in the sentence, etc., it shall remand the record to the court below, in order that such court may pronounce a proper judgment. But, as we have already said, we do not think there was any reversible error in that addition to the judgment, as the appellant was not prejudiced thereby. Judgment affirmed, with costs to the appellee.

(68 Conn. 131)

STATE ex rel. BULKELEY v. WILLIAMS.¹
(Supreme Court of Errors of Connecticut.
June 25, 1896.)

BRIDGES—IMPOSING COST ON TOWNS—VALIDITY OF
STATUTE—POWER OF LEGISLATURE—CONSTITUTIONAL
LAW—MANDAMUS—PARTIES.

1. The legislature may require towns specially benefited by a bridge across a river to contribute to its construction and maintenance, though it is wholly without their territory.

2. There is nothing in the right of local self-government which prevents the legislature from declaring that a bridge shall be constructed and maintained at the expense of towns specially benefited.

3. Act June 28, 1895 (Sp. Acts 1895, p. 485, c. 343), constituting certain towns a bridge and highway district for the construction and maintenance of a bridge across a river, and appointing certain citizens from the towns commissioners for the district, with authority to construct and maintain the bridge at the expense of the towns composing the district, does not contravene the principle that there cannot be taxation without representation; the towns having been represented in the legislature which enacted it.

4. If, in colonial times, it was the right of the inhabitants of every town themselves to or-

der the municipal duties assigned to them, and to choose the officers by whom only it could be placed under a pecuniary obligation, this is not one of those rights and privileges "derived from our ancestors," to "define, secure, and perpetuate" which the state constitution was adopted, as recited in the preamble thereto; the reference being to rights personal to the individual as a citizen of a free commonwealth, civil as distinguished from political, and belonging alike to each man and woman and child, and it being asserted in Declaration of Rights, art. 1, § 2, that "all political power is inherent in the people and all free governments are founded on their authority," and subject to such alterations in form, from time to time, "as they may think expedient."

5. Act June 28, 1895, constituting certain towns a bridge and highway district for the construction of a public bridge across a river; appointing certain citizens thereof commissioners for the district, with authority to construct and repair the bridge; authorizing the board to issue the bonds of the district for a certain amount, to provide means for building the bridge; directing that each town pay annually to the treasurer of the commission, on his order, 25 cents on each \$1,000 of its grand list, to meet the principal and interest of the bonds, till its specified proportion is fully satisfied; and directing that for the ordinary support and maintenance of the bridge each town pay, on the orders of the commission, from time to time, such further proportional sums as the commission may determine, and that it shall provide for such payments in voting its annual tax levy,—is not void, on the ground that it requires payments from town treasuries without providing the necessary means, because not requiring submission of estimates of the amount needed for the ensuing year before the time for laying the tax, the amount to meet principal and interest of bonds being fixed, and it being presumed that timely report as to amount needed for ordinary expenses will be made.

6. What towns shall pay for the construction and maintenance of a public bridge across a river, as being specially benefited thereby, and in what proportion they shall pay therefor, may be declared by the legislature, or left by it for determination in a judicial proceeding; and though this has been intrusted to and determined by a court, a readjustment of the proportion may thereafter be made by the legislature.

7. The passage of an act declaring that the state shall maintain a bridge at its expense, having no element of a contract, does not prevent the legislature from thereafter putting the duty on towns specially benefited by it.

8. Towns on which an act puts the duty of constructing and maintaining a bridge cannot claim a release from the duty on the ground that the act impairs the obligation of a contract made by the state with a bridge company under a previous act declaring that the state should maintain the bridge, especially where the bridge company discharged the state from all demands.

9. In mandamus proceedings, matters occurring after institution thereof may be considered in determining whether the writ be made peremptory.

10. Const. U. S. Amend. 14, secures no right to municipal corporations of a state, as against the state, to the equal protection of the laws, which can limit legislation to charge them with public obligations; and their inhabitants, as members of such corporations, have no greater immunity with reference thereto.

11. Act June 28, 1895, having imposed on the treasurer of each of several towns the duty of paying orders drawn on him in behalf of a bridge district, and one of them having refused to pay such an order, he is the only defendant necessary in mandamus proceedings to compel such payment.

Andrews, C. J., and Hamersley, J., dissenting.

¹ For dissenting opinion, see 35 Atl. 421.

Appeal from superior court, Hartford county; Robinson, Judge.

Mandamus, on the relation of one Bulkeley, to compel payment by Williams, treasurer of the town of Glastonbury, of an order drawn on him by the board of commissioners for the Connecticut River bridge and highway district (established under Sp. Acts 1895, p. 485, c. 343), for part of certain expenses incurred by the board in the maintenance of the bridge and causeway leading from Hartford to East Hartford. An alternative writ was granted, and a return made, on which issues were raised both of fact and law. Judgment on all the issues was rendered pro forma against defendant, a special finding of fact made, and a peremptory writ issued. Defendant appeals, mainly on the ground that the act of 1895 is unconstitutional. Affirmed.

Lewis E. Stanton and John R. Buck, for appellant. Lewis Sperry and George P. McLean, for appellee.

BALDWIN, J. The provision of suitable means of communication between the opposite banks of the Connecticut river has been, from early colonial days, a frequent subject of legislation by the general assembly. Numerous ferries have been set up, from time to time, at different points, by virtue of franchises, conferred in some cases upon towns, and in others upon individuals; and several toll bridges have been erected during the present century, under charters granted to private corporations. One of these bridges took the place of an ancient ferry between the towns of Hartford and East Hartford, in which each town had a proprietary interest. The bridge company, by a voluntary settlement, paid to Hartford a satisfactory compensation for the revocation of its ferry franchise, but declined to recognize any claim of East Hartford, the original grant to which, by its express terms, was only during the pleasure of the general assembly, and had been repealed without qualification. Litigation resulted, and this court held (*Town of East Hartford v. Hartford Bridge Co.*, 17 Conn. 78) that no rights of East Hartford had been violated,—a decision afterwards affirmed, upon proceedings in error, by the supreme court of the United States. In the opinion there delivered, it was held that the state, on the one hand, and the town of East Hartford, on the other, did not stand, with reference to the grant and repeal of the ferry franchise, in the attitude of parties to a contract. "The legislature," it was declared, "was acting here on the one part, and public municipal and political corporations on the other. They were acting, too, in relation to a public object, being virtually a highway across the river, over another highway up and down the river. From this standing and relation of these parties, and from the subject-matter of their action, we think that the doings of the legislature as to this ferry must be considered rather

as public laws than as contracts. They related to public interests. They changed as those interests demanded. The grantees likewise, the towns being mere organizations for public purposes, were liable to have their public powers, rights, and duties modified or abolished at any moment by the legislature. They are incorporated for public, and not private, objects. They are allowed to hold privileges or property only for public purposes. The members are not shareholders nor joint partners in any corporate estate, which they can sell or devise to others, or which can be attached or levied on for their debts. Hence, generally, the doings between them and the legislature are in the nature of legislation rather than compact, and subject to all the legislative conditions just named, and therefore to be considered as not violated by subsequent legislative changes. It is hardly possible to conceive the grounds on which a different result could be vindicated without destroying all legislative sovereignty, and checking most legislative improvements and amendments, as well as supervision over its subordinate public bodies. Thus, to go a little into details, one of the highest attributes and duties of a legislature is to regulate public matters with all public bodies, no less than the community, from time to time, in the manner which the public welfare may appear to demand. It can neither devolve these duties permanently on other public bodies, nor permanently suspend or abandon them itself, without being usually regarded as unfaithful, and, indeed, attempting what is wholly beyond its constitutional competency. It is bound, also, to continue to regulate such public matters and bodies, as much as to organize them at first. Where not restrained by some constitutional provision, this power is inherent in its nature, design, and attitude; and the community possess as deep and permanent an interest in such power remaining in and being exercised by the legislature, when the public progress and welfare demand it, as individuals or corporations can, in any instance, possess in restraining it." *Town of East Hartford v. Hartford Bridge Co.*, 10 How. 511, 533.

In view of these principles of constitutional law, an act was passed by the general assembly in 1887, for the purpose of making this same bridge a free public highway, and throwing the burden of its support on the towns which would be especially benefited by such a change. At that time there were three toll bridges across the Connecticut river in Hartford county. By this act, which was entitled "An act to establish free public highways across the Connecticut river in Hartford county" (Pub. Acts 1887, p. 746, c. 128), the state's attorney was directed to bring a complaint, in the name of the state, to the superior court for that county against the corporations owning these bridges, for the purpose of making each of them a free public highway. Notice of the pendency of

the proceedings was to be given to all towns interested, and any town might appear and become a party. Commissioners were to be appointed by the court, who should "lay out and establish highways across the Connecticut river where the toll bridges in said county now are, and across said bridges and across and along the causeways and approaches appurtenant to and connected therewith." Section 2. The commissioners, after such notice as the court should prescribe as to those towns which they should deem interested, were to "estimate and assess the damages caused by the layout and establishment of such free highways, and shall estimate and assess said damages upon the several towns which they shall find will be specially benefited by the layout and establishment of said highways, as benefits accruing to said several towns, in such proportion as said commissioners shall find to be equitable." Section 3. Their report, if accepted by the court, was to be "final and conclusive as to all matters therein contained, and said court shall render judgment thereon against said several towns for the amount assessed against them respectively; and the clerk of said court shall forthwith notify each of said towns of the judgment against it by mailing to the clerk thereof a notice specifying the date and amount of such judgment." Section 4. The act also contained the following provisions: Section 5: "Said towns so assessed shall, within three months from the rendition of said judgment, deposit with the treasurer of this state the sums so severally assessed against them, and at the expiration of said three months the comptroller shall draw his order on the treasurer in favor of the several persons or corporations in whose favor damages have been assessed for the amount of damages so assessed respectively, and said treasurer shall hold the amount thereof for the benefit and subject to the order of the several parties in whose favor said orders were drawn, and shall notify said several parties that he so holds said amounts, and thereupon said highways so laid out as aforesaid shall become and remain public highways. In case any town shall fail to pay the judgment rendered against it as aforesaid, within the time aforesaid, said court shall order execution upon said judgment to be issued against said town in favor of the state." Each town so assessed was given, by section 6, power to issue bonds to raise the money to pay its assessment. Section 7: "When said highways, so established as aforesaid, shall have become free public highways as aforesaid, the same shall thereafter be maintained by said towns so assessed in proportion to the assessment upon said towns as hereinbefore provided. The first selectmen of said several towns shall meet on the second Monday after said highways shall have become free highways as aforesaid, at the office of the selectmen in Hartford, and an-

nually thereafter and at such other times as they shall deem necessary, and said several first selectmen shall constitute a board for the care, maintenance, and control of said highways. Said board shall appoint a chairman, secretary and treasurer; and said board shall apportion the expense of repairing and maintaining said highways upon the several towns in proportion to the assessment against said towns as aforesaid, and said chairman shall draw his order on the respective treasurers of said towns to the order of the treasurer of said board for the proportional amount payable by said towns as aforesaid for such repairs and maintenance. Any damages resulting from the defective condition of said highways or the bridges upon the same, shall be paid by said towns in proportion to the said assessment. For the purpose embraced in this section said board shall be a body politic and corporate by the name of the 'Board for the Care of Highways and Bridges across the Connecticut River in Hartford County,' and actions may be brought against said board by service upon its secretary, and any judgment recovered therein shall be paid by said towns in said proportions and in the same manner as herein provided for the payment of the expenses of repairs and maintenance as aforesaid. Said board shall annually report to said several towns the expenses incurred and paid by them during the preceding year." By a joint resolution, approved on the same day, it was provided that this act should not affect the bridge between Windsor Locks and Warehouse Point, nor that between Suffield and Enfield.

Due proceedings were had under the act, resulting in a final judgment, in 1889, establishing a free public highway across the river between Hartford and East Hartford, including the bridge and causeway of the Hartford Bridge Company, and awarding it \$210,000 damages. The court also "found that the towns of Hartford, East Hartford, Glastonbury, South Windsor, and Manchester will be specially benefited by the layout and establishment of such free highway, and estimated and assessed said damages upon said several towns as benefits accruing to said several towns in such proportion as said commissioners found to be equitable; that is to say, as follows: To the town of Hartford, ninety-five thousand (\$95,000) dollars; to the town of East Hartford, sixty-six thousand (\$66,000) dollars; to the town of Glastonbury, twenty-five thousand (\$25,000) dollars; to the town of South Windsor, twelve thousand (\$12,000) dollars; to the town of Manchester, twelve thousand (\$12,000) dollars." Pending the action, the general assembly in 1889 appropriated \$84,000 from the treasury of the state, for the purpose of paying 40 per cent. of these damages. Sp. Laws, vol. 10, p. 1321. In view of this, the judgment of the superior court concluded with an order that "the town

of Glastonbury shall, within three months from the date of rendition of this judgment, deposit with the treasurer of this state the sum of fifteen thousand (\$15,000) dollars, the same being 60 per cent. of the sum so assessed against it," and a like provision with respect to the assessment against each of the other four towns, and a further order that, "at the expiration of said three months from the date of the rendition of this judgment, the comptroller of the state shall draw his order on the treasurer in favor of the Hartford Bridge Company for the sum of \$210,000, the same being the amount of the damages that have been so assessed in its favor, and that the treasurer shall hold the amount thereof, viz. said two hundred and ten thousand (\$210,000) dollars, for the benefit and subject to the order of said Hartford Bridge Company, and shall forthwith notify said Hartford Bridge Company that he so holds said amount, and thereupon, as soon as the treasurer shall give said notice, said highway so laid out as aforesaid shall become and remain a public highway. The treasurer of the state shall at the same time give notice to the first selectman of each of said towns, viz. Hartford, East Hartford, Glastonbury, South Windsor and Manchester, that said highway has become a free public highway to be thereafter maintained by said towns." After this judgment had been fully executed the general assembly, in 1893, passed an act (Pub. Acts 1893, p. 395, c. 239) declaring that the highway, which included the bridge, and its approaches, should thereafter be maintained by the state at its expense, and providing for the appointment, on the nomination of the governor, of a board of three commissioners, for the care, maintenance, and control of the highway; such expenses as they might incur for repairing and maintaining it to be paid from the state treasury on the order of the comptroller. All acts inconsistent therewith were repealed. Commissioners were duly appointed under this act, who soon afterwards, the bridge having become unsafe, executed a contract in behalf of the state with the Berlin Iron Bridge Company for the erection of a new one at a cost of over \$300,000. After the company had begun the work of construction, the old bridge was accidentally destroyed by fire, and the commissioners thereupon ordered, under one of the provisions of the contract, the erection of a temporary bridge by the same company.

While it was fulfilling this order an act was passed, which was approved and took effect May 24, 1895 (Pub. Acts 1895, p. 530, c. 168), repealing the act of 1893, and requiring the towns of Hartford, East Hartford, Glastonbury, South Windsor, and Manchester thereafter to maintain the highway across the Connecticut river where the old bridge formerly was, with the proper approaches, and to erect a new bridge whenever necessary, and maintain the same, con-

tributing to any expenses to which they might be thus subjected "in proportion to the assessment made upon said towns by the superior court in the proceedings in which said highway was laid out and established; that is to say, Hartford, $\frac{25}{310}$; East Hartford, $\frac{25}{310}$; Glastonbury, $\frac{25}{310}$; South Windsor, $\frac{12}{310}$; Manchester, $\frac{12}{310}$." Half the taxes received by the state during the next five years from any street-railway companies using the bridge was to be paid over to the towns in proportion to their assessments, and 10 per cent. of such receipts during each succeeding year. A commission was also appointed to hear and determine all legal claims, not exceeding in all \$40,000, for any contract obligations already incurred by the bridge commissioners,—their decision in favor of such claimants was to be final against the state, and any sums awarded by them, not exceeding \$40,000, to be paid from the state treasury. If any claimant were dissatisfied with their decision, he was at liberty to bring suit against the state in the superior court, and should the Berlin Bridge Company so sue, then whether it proved the existence, of any valid contract with the bridge commissioners under the act of 1893 or not, it was to be entitled to recover for all materials furnished or expenses incurred under or in connection with any contract with the commissioners, including all legal expenses. Any judgment of the court in favor of the claimant in any suit was to be paid from the state treasury. If the contract already described between the Berlin Iron Bridge Company and the bridge commissioners should be adjudged valid, then the comptroller was directed to carry it out and pay the contract price. In such case the towns were not to receive half of the railway taxes for five years, but were to receive 10 per cent. of them annually, and were to remain charged with the perpetual maintenance and repair of the highway over the river, including the new bridge. On June 28, 1895 (Sp. Acts 1895, p. 485, c. 343), a private act was passed, entitled "An act creating the Connecticut River Bridge and Highway District." By this the towns of Hartford, East Hartford, Glastonbury, Manchester, and South Windsor were constituted a corporation under the name of the Connecticut River Bridge & Highway District, "for the construction, reconstruction, care and maintenance of a free public highway across the Connecticut river at Hartford, and the causeway and approaches appertaining thereto, as described in a decree of the superior court of Hartford county, passed on the 10th day of June, 1889, in which decree said highway was laid out and established."

Four citizens of Hartford and one from each of the other towns were appointed "commissioners for said district, with authority to maintain said free public highway, and whenever public safety or convenience may require, to erect new bridges along or

upon said highway, to reconstruct, raise and widen the causeway and approaches appurtenant to or a part of said highway, at the expense of the towns named in section 1 of this act, and composing said bridge district, at a cost not exceeding five hundred thousand dollars." This board was to report annually to the several towns the expenses incurred and paid by it during the year preceding. It was authorized to issue the bonds of the district to an amount not exceeding \$500,000 to provide means for building a new bridge or improving the highway across the river. Each of the five towns, in order to meet the principal and interest due and to become due upon these bonds, was to pay over to the treasurer of the commission, on his written order, annually, 25 cents on each \$1,000 of its grand list, until its share of the whole had been fully satisfied, in the proportion of Hartford $\frac{70}{100}$, East Hartford $\frac{12}{100}$, Glastonbury $\frac{2}{100}$, Manchester, $\frac{2}{100}$, and South Windsor, $\frac{2}{100}$; and for the ordinary support and maintenance of said highway each town was also directed to pay upon the orders of the commission, from time to time, such further sums as the commission might determine as its proper proportion of the total expense under the provisions of the act, and to provide for such payments in voting its annual tax levy. Half of all taxes received by the state during the next five years from the street-railway companies using the bridge, and 10 per cent. annually of all future receipts of the same character, were to be paid to the treasurer of the commission. The commissioners were given full power to construct and reconstruct all necessary bridges and approaches, and their orders were made obligatory upon the towns, and sufficient authority for the town treasurers to pay any sums to the treasurer of the commission which the commission might direct. The courts were empowered to enforce, by mandamus or otherwise, any orders of the commissioners made under authority of the act. The commissioners under the act of 1893 were directed to turn over all property and papers in their hands to the new board. The latter was authorized to assume the cost of constructing the temporary bridge which was in course of erection under the contract made by the commissioner under the act of 1893. So much of the public act of May 24, 1895, as fixed the proportion in which each town was to contribute to the cost of constructing and maintaining the bridge and highway, was repealed.

The judgment brought up for review by this appeal directed the issue of a writ of peremptory mandamus to enforce the payment by the treasurer of the town of Glastonbury of an order drawn upon him by vote of the commissioners for the Connecticut River Bridge & Highway District for $\frac{2}{100}$ of the sum of \$500 required to meet expenses incurred by the board for the ordinary support and maintenance of the highway under their charge. In

behalf of the town it is contended that it cannot thus be compelled to contribute, at the dictation of officials not of its own choosing, to the cost of maintaining a highway which is wholly outside of its territorial bounds. It has undoubtedly been the general policy of the state to leave the expense of public improvements for highway purposes to the determination of the municipal corporations within the limits of which the highways may be situated, and to charge them only with such obligations as may be incurred in their behalf by officers of their own selection. But when the state at large or the general public have an interest in the construction or maintenance of such works, there is nothing in our constitution, or in the principles of natural justice upon which it rests, to prevent the general assembly from assuming the active direction of affairs by such agents as it may see fit to appoint, and apportioning whatever expenses may be incurred among such municipalities as may be found to be especially benefited, without first stopping to ask their consent. Inhabitants of *Norwich v. County Com'rs of Hampshire*, 13 Pick. 60; *Rochester v. Roberts*, 29 N. H. 300; *City of Philadelphia v. Field*, 58 Pa. St. 320; *Simon v. Northup (Or.)*, 40 Pac. 560. As against legislation of this character, American courts generally hold that no plea can be set up of a right of local self-government, implied in the nature of our institutions. *People v. Draper*, 15 N. Y. 532, 543; *People v. Flagg*, 46 N. Y. 401-404; *Com. v. Plaisted*, 148 Mass. 375, 19 N. E. 224. The constitution of Connecticut was ordained, as its preamble declares, by the people of Connecticut. It contemplates the existence of towns and counties, and without these the scheme of government which it established could not exist. It secured to these territorial subdivisions of the state certain political privileges in perpetuity, and among others the election by each county of its own sheriff, and by each town of its own representatives in the general assembly, and its own selectmen, and such officers of local police as the laws might prescribe. It secured them, because it granted them, not because they previously existed. Towns have no inherent rights. They have always been the mere creatures of the colony or the state, with such functions, and such only, as were conceded or recognized by law. *Webster v. Town of Harwinton*, 32 Conn. 131. The state possesses all the powers of sovereignty, except so far as limited by the constitution of the United States. Its executive and judicial powers are each distributed among different magistrates, elected some for counties, and some for the state at large; but its whole legislative power is vested in the general assembly. Our constitution imposes a few, and only a few, restrictions upon its exercise, and except for these the general assembly, in all matters pertaining to the domain of legislation, is as free and untrammelled as the people would themselves have been, had they retained the law-making power in their own hands, or as they

are in adopting such constitutional amendments from time to time as they think fit. *Pratt v. Allen*, 13 Conn. 119, 125; *Booth v. Woodbury*, 32 Conn. 118, 126. It has not infrequently, from early colonial days, made special provision for particular highways or bridges, and in several instances, by the appointment of agencies of its own to construct or alter them at the expense of those upon whom it thought fit to cast the burden. 1 Col. Rec. p. 417; 5 Col. Rec. p. 80; 13 Col. Rec. p. 601; 14 Col. Rec. pp. 605, 630; 1 Priv. Laws, 282, 285. By legislation of this nature the city of Hartford was recently compelled to contribute a large sum for a separation of grades at the Asylum street railroad crossing, and we held the act to be not unconstitutional. *Woodruff v. Catlin*, 54 Conn. 277, 6 Atl. 849; *Woodruff v. Railroad Co.*, 59 Conn. 63, 83, 20 Atl. 17. That so many laws of this general description have been enacted by the general assembly, both before and since the adoption of our constitution, is, of itself, entitled to no small weight in determining whether they fall within the legitimate bounds of what that instrument describes as "legislative power." *Maynard v. Hill*, 125 U. S. 190, 204, 8 Sup. Ct. 723; *Wheeler's Appeal*, 45 Conn. 306. One of those, to which reference has been made (1 Priv. Laws, p. 285), required the town of Granby to build and maintain a bridge across the Farmington river, half of which was in the town of Windsor, and was adjudged to be valid by this court, notwithstanding then, as now, the General Statutes provided that bridges over rivers dividing towns should be built and maintained at their joint cost. *Granby v. Thurston*, 23 Conn. 416. There is no principle of free government or rule of natural justice which demands that the support of highways and bridges shall be imposed only on those territorial subdivisions of the state in which they are situated. If it be required of them, it is only by virtue of a statute law, which the legislature can vary or repeal at pleasure. *Childsey v. Canton*, 17 Conn. 475, 478. The burden is one that the legislature can put on such public agencies as it may deem equitable, and transfer from one to another, from time to time, as it may judge best for the public interest. *Dow v. Wakefield*, 103 Mass. 287; *Inhabitants of Agawam v. Hampden Co.*, 130 Mass. 523; *Mobile Co. v. Kimball*, 102 U. S. 691, 708; *Washer v. Bullitt Co.*, 110 U. S. 558, 4 Sup. Ct. 249.

The defendant urges that taxation and representation are indissolubly connected by the underlying principles of free government, and that this, the commission which directs the affairs of the bridge district and makes regulations on the towns for such funds as it deems necessary not having been selected by them, is a sufficient defense against the payment of the order which has been drawn upon him, since it can be paid only out of moneys raised by town taxation. Taxes can, indeed, under our system of government, only be imposed by the free consent of those who

pay them, or their representatives, and for purposes which they approve. But the inhabitants of these towns were represented in the general assembly, by which the laws now brought in question were enacted. The legislative power, after defining the general purposes of taxation, to confer upon local public corporations the right to determine the amount of the levy within the territory under their jurisdiction, is unquestionable; and in its exercise it is immaterial whether the corporations, to which that function is intrusted or between which it is shared, be called "counties" or "towns," "school districts" or "bridge districts." When a levy is voted, the action is corporate action, deriving its obligatory force wholly from the authority of the state. Towns cannot tax their inhabitants for any purpose except by virtue of statute law. That law for many years required them annually to tax for moneys to be paid over to the state treasurer for state expenditures. It now requires them to tax, as occasion may require, for moneys to be paid over to the county treasurer for county expenditures. It can equally require any town or towns to tax for moneys to be paid over to the treasurer of a bridge or highway district, in which they are included, for district expenditures. *Kingman v. Commissioners*, 153 Mass. 566, 27 N. E. 778.

It has been suggested that in colonial times it was the right of the inhabitants of every town themselves to order the municipal duties assigned to them, and choose the officers by whom only it could be placed under a pecuniary obligation, and that this is one of those rights and privileges "derived from our ancestors," to "define, secure, and perpetuate" which our constitution was adopted, and to which its preamble refers. If it can be said that such a right ever existed, it was not one of the nature of those which were described by the framers of the constitution. They were speaking of rights personal to the individual, as a citizen of a free commonwealth, civil as distinguished from political, and belonging alike to each man, woman, and child among the people of Connecticut. Such of them as they deemed most essential they proceeded to specify in the declaration of rights, and here we find asserted (article 1, § 2) that "all political power is inherent in the people and all free governments are founded on their authority," and subject to such alterations in form, from time to time, "as they may think expedient." If there were any absolute right in the inhabitants of our towns to regulate their town finances and affairs which was superior to all legislative control, it would be a great "political power." It would create an imperium in imperio, and invest a certain class of our people—those qualified to vote in town meetings—with the prerogative of defeating local improvements which the general assembly deemed it necessary to construct at the expense of those most benefited by them, un-

der the direction of agents of the state, unless the work were done and its cost determined under town control. No set of men can lay claim to such a privilege under the constitution of Connecticut.

The defendant further insists that the act of June 28th is void because, in section 4, it requires payments from the town treasuries without providing the necessary means; the authority given to raise the necessary funds in the annual tax levy being of no avail, because the bridge district is not required to submit any estimate of the amount needed for the ensuing year before the time for laying the tax. There is no substance to this objection. So far as concerns the principal and interest of any bonds that may be issued, each town is expressly directed to pay to the district annually 25 cents for each \$1,000 of its grand list, until enough has been thus received to satisfy its proportionate share. As to the ordinary expenses of maintenance, the commission is to draw orders on each town from time to time for such sums as it may determine as the proportion of such town under the provisions of the act. The rule for ascertaining this proportion is that previously laid down in the same section, and it is to be presumed that the commission will make such reports to each town before its annual town meeting as will enable it to lay all taxes necessary to meet its probable expenses for the succeeding year. As to those of the first year, there is nothing on the record to indicate that the share of any town could have been large enough to cause it the slightest embarrassment. No valid exception can be taken to this rule of apportionment, according to which the expenses of the bridge district are to be distributed among the several towns. The acts of 1895, under which the present action has arisen, both refer to, and in some sense rest upon, the act of 1887. That was designed to secure the perpetual maintenance of the Hartford bridge as a free highway, at the expense of those towns to which it might be found to be of especial benefit. The duty of ascertaining which towns would be thus benefited was intrusted to the superior court. It might have been undertaken by the legislature itself, but it was entirely proper to make it the subject of proceedings of a judicial character, to be instituted by the state. *Salem Turnpike & Chelsea Bridge Corp. v. Essex Co.*, 100 Mass. 282. This duty was fulfilled, and since the date of the final decree in that cause there has been, and there could be, no material change in any of the conditions by which it was determined. Whatever towns were most benefited in 1889 by the perpetual maintenance of a free bridge must be most benefited by it in 1895. This was purely a question of proximity. Hartford is the natural market of all the neighboring towns lying within easy driving distance. From several of these she is separated by

a navigable river, which is outside of her boundaries as well as of theirs. Ferries had been tried as a means of communication, and found inadequate. A toll bridge had then been established, and with the same result. The next step, naturally, was to provide for a free bridge. Four towns east of the river have been judicially found to derive a special benefit from this, and, while the proportionate benefits accruing to each, as well as those to Hartford, may vary from time to time, with changes in population and industrial or social conditions, some benefit, and some especial benefit, to each of the group, must, in the nature of things, always be felt. On this point they were fully heard before a competent tribunal, which, after due notice to every town in the state, and long consideration, selected them out of all the rest.

Complaint is made because, while, by the decree of the superior court, Glastonbury was charged with $\frac{25}{110}$ of the cost of erecting and maintaining a bridge at this point, and this proportion was reaffirmed by the general assembly in the act of May 24, 1895, by that of June 28, 1895, it was cut down to $\frac{2}{100}$, and other changes made, with the result of reducing the assessment of every town except Hartford, the burden thrown upon which was largely increased. There is no reason why the relative amount of benefits, which each of the five towns, as compared with the rest, derives from the bridge, may not vary from one period of time to another, and any such variation might present an equitable ground for making a corresponding change in its proportionate assessment for the expenses of construction or maintenance. That what was the proper share of each was determined in 1889 by a judicial proceeding did not preclude a readjustment for due cause, in 1895, by a legislative proceeding; nor did the act of May 24, 1895, put it out of the power of the general assembly to reconsider its action, as was, in effect, done by the act of June 28. *Inhabitants of Scituate v. Inhabitants of Weymouth*, 108 Mass. 128. We are bound to presume that there was due cause for making the apportionment finally determined on, for it is certain that there might have been. A comparison of the census of the United States for 1880 and 1890, between which dates the proceedings under the act of 1887 were brought to a conclusion, shows that while, during the intervening decade, the population of Hartford, East Hartford, and Manchester had been largely increased, that of Glastonbury and South Windsor had suffered a substantial loss. The organization of modern society is such as to foster the growth of cities and their suburbs, at the expense of country towns dependent for their prosperity on agricultural pursuits. The street railways, from the taxes paid by which the treasury of the bridge district was to be in part supplied, run from Hartford to the

towns across the river, and from their inhabitants a large part of the fares collected may be derived. In view of all these matters the general assembly may well have concluded, when by the act of June 28th they were about to supply the necessary machinery for carrying into effect the main object of the act of May 24th, that Hartford, with its rapidly increasing business and population, ought in fairness to relieve the lesser towns in the bridge district of part of the burden to which they were subject under previous legislation. Nor is it of any importance that in 1893 the state had taken the maintenance of the bridge upon itself. This was merely a gratuitous act, with no element of a contract, and gave rise to no vested rights, except such as might accrue from obligations on the part of the state subsequently assumed by virtue of its provisions.

It is contended that such an obligation was contracted in favor of the Berlin Iron Bridge Company and was impaired by the legislation of 1895. If so, this legislation would be so far forth invalid, as against that company, under article 1, § 10, of the constitution of the United States. The result would be that the contract made between it and the bridge commissioners, acting under the act of 1893, would remain in force, but not that the state could not compel the towns especially benefited by its execution to pay for the benefits received. In fact, however, the pleadings show that the bridge company, availing itself of the remedy tendered by the act of May 24, 1895, presented its claim for breach of contract to the commission appointed to examine it, and pending this action has accepted their award, and discharged the state from all demands. This, at all events, left the towns or their representatives in no position to raise this objection on constitutional grounds. In mandamus proceedings matters occurring after the suit is brought can be properly considered in determining whether the writ shall be made peremptory.

The defendant also urges that the act of June 28th violates the fourteenth amendment of the constitution of the United States, in that it deprives the town of Glastonbury of property without due process of law, and denies to it the equal protection of the laws. No right, as against a state, to the equal protection of the laws is secured to its municipal corporations by this amendment which can limit in any way legislation to charge them with public obligations. Nor have their inhabitants, in their capacity of members of such corporations, any greater rights or immunities. *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 93, 12 Sup. Ct. 142. No property of the town of Glastonbury has been or is to be taken. *Booth v. Town of Woodbury*, 32 Conn. 118, 130; *Railroad Co. v. Otoe Co.*, 18 Wall. 667, 676. A duty to lay taxes for public pur-

poses has been imposed, and for reasons already stated it was competent to the general assembly to create that duty, as it was created. Their proceedings were due proceedings. The process by which it is now sought to compel the defendant to pay the sum in controversy is due process. The town can found no claim, under the constitution of the United States, any more than under that of Connecticut, to such right of local self-government as precludes the general assembly from exacting this payment, notwithstanding the demand comes from another municipal corporation, the bridge district, in choosing whose members or directing whose affairs it has had no share. *Giozza v. Tiernan*, 148 U. S. 657, 662, 13 Sup. Ct. 721.

We have spoken of the bridge district as a municipal corporation, although it may not answer the common-law definition of that term, since not composed of the inhabitants of any territory as such. In modern times corporations, both public and private, have often been constituted by a union of other corporations. Such were the United States of America after the Declaration of Independence, and until the adoption of their present constitution. Such are the various counties of this state, once quasi corporations and now full corporations, the constituents of which have always been the several towns within their boundaries. The power of the bridge district over the towns composing it is no less than it would have been had their inhabitants individually been made its members. The district and the towns are alike agencies of the state for governmental purposes, and, whether they be styled public or municipal corporations, their relation to it and to each other are the same, and equally subject to modification at its pleasure.

The defendant having refused to pay an order lawfully drawn upon him in behalf of the bridge district, the writ was properly issued against him. There was no necessity for making the several towns or the bridge district parties defendant. The bridge district was, in effect, the relator, no town other than Glastonbury had any local interest in this controversy, and Glastonbury itself had none in this suit, by which it was charged with no wrong, and in which the only remedy sought was one to compel the performance of a statutory duty incumbent on its treasurer as such. The writ of mandamus must run singly to the party who is bound to do the particular act commanded. *Farrell v. King*, 41 Conn. 453. While not necessary parties, the superior court might and, no doubt, would, have summoned in any or all of the five towns, or the bridge district, or admitted any of them as interveners, had application to that effect been made; for each had a vital interest in the questions of law on which the case must turn. Gen. St. pp. 584, 587, 590.

No order of this nature, however, having been sought from any quarter, their absence can furnish no ground of appeal. There is no error in the judgment appealed from.

TORRANCE and FENN, JJ., concur. ANDREWS, C. J., and HAMERSLEY, J., dissent.

(67 Conn. 197)

Appeal of CENTRAL RAILWAY & ELECTRIC CO.

(Supreme Court of Errors of Connecticut. Jan. 6, 1896.)

STREET RAILWAYS—PLANS FOR ADDITIONAL TRACKS—CONDITIONAL APPROVAL—APPEAL.

1. Act 1893 (Pub. Acts 1893, p. 308) provides that when a street-railway company is given the right to construct a railway or lay additional tracks in a city it shall, before proceeding to do so, present to the mayor and common council a plan showing the streets in which it proposes to lay its tracks, the location of the same as to grade and the center of the streets, etc.; that thereupon the mayor and common council shall hear persons interested, and may then accept and adopt such plan or make such modifications therein as to them shall seem proper, and that no company shall construct such railway or lay additional tracks except in accordance with a plan so approved. Act 1895 (Pub. Acts 1895, p. 630) gives the company a right of appeal "to the superior court or any judge thereof" from an order or decision of a mayor and common council under Act 1893, and provides that "said court or judge shall make such orders in reference to said matters appealed from, as may by it or him be deemed equitable in the premises, and the decision of said court or judge shall be final and conclusive upon the parties." *Held*, that an order of a judge of the superior court, on such an appeal to him, was, so far as he exceeded his jurisdiction, appealable, under Gen. St. § 1137, providing that, when jurisdiction of any matters or proceeding is vested in a judge of the superior court, any party to such matter or proceeding feeling aggrieved on any questions of law arising therein may appeal from his final judgment to the supreme court of errors. Torrance and Hamersley, JJ., dissenting.

2. Act 1893 (Pub. Acts 1893, p. 308) provides that when a street-railroad company is given the right to construct a railway or lay additional tracks in a city it shall, before proceeding to do so, present to the mayor and common council a plan, showing the streets in which it proposes to lay its tracks, the location of the same as to grade and to the center of the street, such changes as are proposed to be made in any street, the kind and quality of the track to be used and the method of laying the same, and the motive power to be used in propelling its cars and the method and manner of applying the same; that thereupon the mayor and common council shall hear all persons interested, and may then "accept and adopt such plan, or make such modifications therein as to them shall seem proper"; and that no company shall construct or lay additional tracks except in accordance with a plan so approved. Act 1895 (Pub. Acts 1895, p. 630) gives the company a right of appeal from the order or decision of the mayor and common council under Act 1893 to a judge of the superior court, who shall make such orders in reference to said matter as may by him be deemed equitable in the premises; the judge thereby being put in the place of the mayor and common council, with their powers in reference to the matters. Act 1893 requires

all such orders to be executed at the expense of the company, except changes of grade after location of tracks, and requires the company to keep the street in repair between its tracks and two feet on each side of them. *Held*, in case of a street-railway company which had tracks in certain streets of a city, and which, on being granted power by the legislature to lay additional tracks in other streets thereof, presented a plan showing the particulars required by Act 1893, that, as cities have all powers necessary to the attainment and maintenance of their declared objects and purposes, and as one of the objects and purposes of the city in question, declared by its charter, was the maintenance of highways within its limits in safe and proper condition, and the provision of means for payment of expenses thus occasioned, the city could make its approval, subject to the condition that the company annually pay the city a sum which should be just compensation for the new expenses to which the city would be annually subjected in the maintenance and reparation of the streets on which the additional tracks were to be laid, though it could not require compensation for such expenses as were occasioned by tracks already in use. Torrance, J., dissenting.

3. A revised city charter (Sp. Acts 1895, p. 359, § 23) gave the common council power to make such orders as it deemed fit to provide for the placing and maintenance of fenders on electric cars. After such act went into effect, a public act, which went into effect immediately, was passed, giving the railroad commissioners exclusive jurisdiction with respect to ordering such fenders on street cars, and repealing all inconsistent acts, resolutions, and by-laws. *Held*, that the city could not thereafter make it a condition for approval of a plan for a street railway that the company keep its cars at all times equipped with such fenders as should be satisfactory to its street committee.

4. The city could make its approval of the plan of the street-car company for additional tracks conditional on there being no abandonment of the tracks already laid, and on there being trips thereon as often as every 20 minutes; especially as Act 1893 gave the mayor and common council exclusive direction over the relocation or removal of tracks permanently located on a street, and authorized them to order resumption of operation of any line which the company should cease to operate. Torrance, J., dissenting.

5. For a city to condition its approval of the plan of a street-railway company for additional tracks on the company's annually paying a certain amount towards the new expenses in maintaining the streets occasioned by the presence of tracks, is neither the laying of a tax nor the charging of a license fee. Torrance, J., dissenting.

6. It being provided by Act 1893 that the wrought part of a street made suitable for travel on each side of street-railway tracks shall not be less than a certain width, unless permission is obtained from the superior court or a judge thereof, the judge, on appeal to him from an order of the mayor and common council approving conditionally the plan for additional street-railway tracks, should not approve it, it appearing that the wrought part would be less than the required width. His permission therefore can be given only on an original proceeding brought before him for that purpose.

Appeal from district court of Bridgeport.

The Central Railway & Electric Company presented to the mayor and common council of the city of New Britain a plan for extension of its tracks. From an order of conditional approval the company appealed to Fenn, J., a judge of the superior court. He confirmed the order, and the company again appeals. The city moves to erase the

appeal. Motion denied. Judgment reversed in part.

George E. Terry, Frank L. Hungerford, John W. Alling, and George D. Watrous, for appellant. William F. Henney and Henry C. Gussman, for appellee.

BALDWIN, J. The petitioner's appeal to this court is founded upon section 1137 of the General Statutes. This provides that: "When jurisdiction of any matter or proceeding is or shall be vested in a judge of the superior court, or in a judge of any court of common pleas, or of the district court, any party to such matter or proceeding who feels aggrieved by any of the decisions or rulings of such judge upon any questions of law arising therein may appeal from the final judgment of said judge in such matter or proceeding in the manner hereinbefore provided for an appeal from the judgments of said courts respectively, to the supreme court of errors next to be held in the judicial district or county where the parties or any of them reside; but in cases of appeal from the appraisal of damages in laying out any street or in making any improvement or public work in any city, village, or borough, upon paying to the person or persons entitled thereto damages appraised therefor, or upon depositing the same in the manner provided by law; and in cases where no damages shall be appraised, such city, village, or borough, may immediately proceed to lay out and open such street, or make and complete such improvement or public work, in the same manner as if no appeal had been taken; and in proceedings on writs of habeas corpus, the judge may, at his discretion, decline to order a stay of execution." The act of 1893 (Pub. Acts 1893, p. 308); under which the proceedings which came before Judge Fenn were commenced, provides that whenever any street-railway company has or shall be given the right to construct a railway or to lay additional tracks in any city, before it shall proceed to do so it shall present to the mayor and court of common council a plan showing the highways or streets "in and through which it proposes to lay its tracks, the location of the same as to grade and to the center line of said streets or highways, such change or changes, if any, as are proposed to be made in any street or highway, the kind and quality of track to be used and the method of laying the same, the motive power to be used in propelling its cars, and the method and manner of applying the same." Thereupon the mayor and court of common council, after giving public notice, shall hear all persons interested, and may then "accept and adopt such plan, or make such modifications therein, as to them shall seem proper," and no such company shall construct such railway or lay any additional tracks except in accordance with a plan so

approved. From any order or decision of a mayor and common council made under the act of 1893, an act passed in 1895 (Pub. Acts 1895, p. 630) gives the company a right of appeal "to the superior court, or any judge thereof"; and it is further provided that "said court or judge shall make such orders in reference to said matters appealed from as may by it or him be deemed equitable in the premises, and the decision of said court or judge shall be final and conclusive upon the parties," and that such appeals "shall have precedence of all other civil actions in respect to the order of trial, except" those brought by or on behalf of the state, respecting matters of a public nature. The city of New Britain has filed in this court a motion to erase the appeal from the docket, mainly on the ground that the act of 1895 expressly made the order of Judge Fenn "final and conclusive upon the parties."

The final judgment of every legal tribunal is conclusive upon the parties, so far as it is within its jurisdiction, and so long as it remains in force and unreversed. No judgment, order, or decision pronounced by one assuming to act under authority of law, but who is in truth acting outside of the jurisdiction which the law has given him, can possess any validity. The government of this state is one of laws, and not of men. This principle is enforced throughout our system of remedial justice by the perpetual establishment by the people, when they framed the constitution, of a supreme court of errors, and by the statutes which give to it appellate jurisdiction as to errors of law over every other court, without regard to the character or amount of the matter in controversy, and extending even to criminal prosecutions where the law has been misapplied in favor of the accused. A judge of the superior court is not a court, and statutes granting appeals from final judgments of courts have no application to his decisions in matters committed to his determination as such judge. However erroneous such decisions might be, there was no direct mode of review prior to 1864, and, to remedy this defect of justice, Gen. St. § 1137, was then enacted. *Trinity College v. Hartford*, 32 Conn. 452, 466, note; *Clapp v. Hartford*, 35 Conn. 66, 220. Its terms plainly embrace a proceeding like the present, and they must govern it, unless it be regarded as excepted from their operation by the provision in the act of 1895 as to the "final and conclusive" effect of the order of the court or judge. In our opinion, these statutes are not inconsistent with each other. The order of Judge Fenn was final and conclusive upon the parties as respects all matters which the law confided to his determination, and upon which they were duly heard. No injunction, for instance, would lie to forbid, as inequitable, what he, within those limits, had decided to be "equitable in the premises." But if he exceeded his jurisdiction in any par-

ticular, whatever he thus did beyond the authority given him by law was *coram non iudice*, and the proper subject of review by appeal. *Beard's Appeal*, 64 Conn. 526, 534, 30 Atl. 775; *Hopson's Appeal*, 65 Conn. 140, 31 Atl. 531; *Lawton v. Commissioners*, 2 Caines, 179, 181; *People v. Wilson*, 119 N. Y. 515, 23 N. E. 1064; *Ex parte Bradlaugh*, 3 Q. B. Div. 509. Any other construction of the act of 1895 would render possible unseemly conflicts between the different tribunals of the commonwealth. For a defect of jurisdiction in an order made by the superior court or a judge of that court in a proceeding under its provisions, it is clear that there must be some judicial remedy, and that, if any other than by way of appeal exists, the proper place in which to seek it would be the superior court itself. Could an injunction be sought there from one judge against the enforcement of the order of another? Could he be asked as a chancellor to enjoin the execution of an order made by himself, when sitting as an appellate tribunal to revise the proceedings of the authorities of a municipality? We cannot impute to the general assembly an intention to compel or permit a resort to remedies of this description, in the face of a statute giving in plain terms a right of direct appeal to this court, as to which the only claim made by the appellees is that, so far as it affects the case in hand, it has been repealed by implication.

A remedy equivalent to such an appeal is afforded under the practice existing in many of our sister states by the common-law writ of *certiorari*. It issues to revise the proceedings of municipal corporations, and, when issued, the controversy between the parties in interest becomes one of a judicial nature. 2 Dill. Mun. Corp. §§ 925-928. The fact that this writ has never been used in this state is an additional reason why statutes granting an appeal from such proceedings should not be too narrowly construed. *Williams v. Railroad Co.*, 13 Conn. 110, 118; *Grelle v. Pinney*, 62 Conn. 478, 488, 26 Atl. 1106. The right of appeal given by Gen. St. § 1137, cannot be treated as repealed by implication, as respects such a proceeding as that now before us, unless the right of appeal for error in law from all judgments of the superior court, given by Gen. St. § 1129, has been similarly restricted. To hold this would be to reverse the rule that repeals by implication are not favored, and will never be presumed, where both the new and the old statute may well stand together.

The appellee also contends that it was not necessary for Judge Fenn to decide any questions of law in coming to the conclusion stated in his order; as that, under the statute, must have been determined by his opinion that the conditions imposed by the mayor and common council were "equitable in the premises." Nothing can be deemed equitable, within the meaning of a statute confer-

ring jurisdiction to grant equitable relief, which does not come within the limits of the jurisdiction granted; and what those limits are is a question of law inherent in the judgment rendered. The motion to erase is therefore denied.

The finding shows that the railway company, prior to June 5, 1895, had constructed, under legislative authority, and agreeably to conditions imposed by the mayor and common council of New Britain (to certain of which, affecting one of its lines, it had agreed in writing, under its corporate seal), a railway in the principal streets of that city, and extending in one direction to Plainville and in another to Berlin, all of which was in operation. On that day, having been given by the general assembly power to lay additional tracks in some 30 other streets, including three known as Chestnut, East, and Jubilee streets, it presented to the mayor and common council a plan showing the particulars required by section 2, c. 169, Pub. Acts 1893. After due hearing, the mayor and common council approved the plan, subject to and as modified by certain conditions. From this order of conditional approval the company took the appeal to Judge Fenn which is now before us for review, and he has found that the conditions imposed were "just, reasonable, legal, and equitable," confirmed the order, and made it in all parts his own.

The first reason of appeal is that there was error in holding that the company's right to lay tracks on the streets in question, and to use such tracks for the purpose of an electric railway, was dependent upon the consent of the city authorities. No such ruling was made by the judge of the superior court. That franchise the company received by the express terms of its charter. The state, acting through its legislative department, can grant such a right, without consulting the municipality; and in the present instance the grant was so made. *New York, N. H. & H. R. Co. v. Bridgeport Traction Co.*, 65 Conn. 410, 430, 432, 32 Atl. 953. The finding states that a large portion of these streets was conveyed to the city for public use, and that the fee in each belongs to the adjoining proprietors. Whether the general assembly could confer this franchise without providing adequate compensation to the municipality and to the owners of the fee in the soil is a question not raised by this appeal, and upon which we express no opinion. Before the company could proceed to lay tracks in any of these streets, it was bound to present a plan of location and construction to the city authorities for their approval, and they were authorized by the street-railway act of 1893 to "accept and adopt such plan, or make such modifications therein as to them shall seem proper." Pub. Acts 1893, p. 308, § 2. They were also given, by section 3 of this act, exclusive direction over the placing, material, quality, and finish of any street-rail-

way tracks, wires, fixtures, or structures, including their relocation or removal, and of changes in grade for the purpose of any public improvement. All such orders are to be executed at the expense of the company, except changes of grade made after the location of its tracks, in which case the municipality is to pay the expenses of regrading, and the company that of readjusting the tracks to the new grade. Section 6 of the act requires every company to keep the street in repair between its tracks and for a space of two feet on each side of them, to the satisfaction of the municipal authorities; but the latter cannot order it to make use of any better material for such parts of the street, except for the space of one foot outside of each rail, than is used for the rest of the street, unless this "was required in the order permitting the original location and layout of such railway on such street." By section 11 any orders made under section 2 or section 3 may be revised and changed by the municipal authorities, subject to a right of appeal, in favor of the company, to the superior court or a judge thereof, in case the execution of the original order had been already begun. In view of these various provisions, the "modifications" of a plan of location and construction authorized by section 2 must be deemed to be limited to those legitimately affecting one or more of the particulars which the statute requires to be specified in the plan. To modify is ordinarily to change the mode in which a subject is dealt with, rather than to change the subject itself. No change can properly be deemed a modal one which deprives that which is changed of any of its essential qualities, or adds anything which is wholly foreign. The plan which the law required the company to submit for the approval of the city was to specify the streets over which the tracks were to be laid, the particular location and grade of the tracks, their kind and quality, and how they were to be laid, the changes, if any, to be made in the street, the motive power to be used, and the method and manner of applying it. The location of a railway upon a highway is a different thing from the right to make such a location, and presupposes a prior grant of that right. The location definitely appropriates a particular portion of the highway for railroad use, establishes the grade at which the tracks are to be laid upon it, and may make extensive changes in the course, character, or use of the remaining portions. As to any of these matters the city had a power of modification. It had like power as to the kind and quality of tracks, the method of laying them, the motive power to be used, and the method and manner of its application. It would be, for instance, merely a modal change to vary a plan for applying electric power by means of an overhead trolley by requiring the substitution of an underground circuit, or of a storage battery upon the car. The essential

feature of the plan would be the use of electric power. The method and manner of its application, whether by rows of high poles, with a network of connecting wires, or in ways that affect the ordinary uses of the highway less directly, are left to the regulation of the local authorities. So far as the conditions imposed in the order of the mayor and common council were within their authority as thus defined, they were valid, and no further, except as they may be justified by sections 3, 6, and 11 of the statute in question, or other provisions of law or charter. These latter sections may be the basis of separate orders after the approval of a plan of location and construction; but they may also support the introduction of appropriate conditions to limit such an approval.

The rule by which the legislature intended that the exercise of the authority thus granted should be governed is indicated by the terms of section 1 of the act of 1895, under which the appeal to Judge Fenn was taken. It is the rule of equity. If a plan submitted under the act of 1893 should not be acted upon within 60 days, and so, under the second section of that act, may be deemed in law to be wholly rejected, this first section of the act of 1895 gives the company a right of appeal, and provides that the court or judge, upon such an appeal, "shall have the same powers with reference to said plan and the acceptance or modification thereof that said municipal authorities would have had" under the provisions of the act of 1893, "and may make all such orders with reference thereto as may be deemed equitable." An appeal from an acceptance of the plan, with modifications, is evidently meant to place the appellate tribunal in the same position. It fulfills, as respects the plan in question, the functions of the mayor and common council of the city. It has the discretion with which they were originally invested. *Fairfield's Appeal*, 57 Conn. 167, 17 Atl. 764. The provision that it may make such orders in reference to the matters appealed from as may "be deemed equitable in the premises" necessarily implies that, if it appears that the original order of the municipal authorities was equitable in the premises, it should be affirmed. The basis of the judgment appealed from was not that the existence of a right to lay tracks on the streets in question could be regarded as dependent on the consent of the municipal authorities, but that the exercise of the right in a particular way was so dependent.

Of the eight conditions imposed by the city, the validity of only four is directly challenged by the reasons of appeal. These are those relating to the annual payment of a percentage of the entire gross receipts of the company, the use of fenders satisfactory to the street committee, and the continued operation of cars on the tracks already laid through South Stanley and Pleasant streets.

The first of these conditions was expressed as follows: "Before this approval shall take effect, and before any work shall be begun under this permit, the said Central Railway & Electric Company shall execute and deliver to the mayor an agreement with the city of New Britain to pay into the treasury of said city the sum of one per cent. (1%) of its gross receipts for the third year after the completion of said lines to the points before mentioned, and two per cent. (2%) for the fourth and each following year, so long as the company or its successors shall use the public streets of this city, or any of them, for street-railway purposes. The payments above provided for shall be made annually on or before the first day of March in each year. The said agreement shall also contain an undertaking on the part of the railway company to save the city harmless from all loss and damage by reason of the use of electrical currents for the purposes of its railway, and also a clause relating to fenders, as herein set forth." It is found by Judge Fenn that the first payment thus required would amount to \$285, and the subsequent annual payments to \$570 each; and that the laying of the additional tracks, "and the operation of an electric road throughout the city, will occasion continuously large expenses on the part of the city for repairs to the roadbed, and for the maintenance of the streets through which the railway company operates in a reasonably safe and proper condition; and that the percentage of its receipts required from the railroad company by the city is only a just and equitable compensation for the expenses thus to be incurred." The extension of the company's railway over new streets necessarily involved changes in the mode of their use by the public, provision for which might fairly be deemed germane to that part of the plan presented which the statute required to state "such change or changes, if any, as are proposed to be made in any street or highway." A change of use may be as important a subject of consideration as a change of grade or of line. In deciding whether to approve a railway location, all the natural consequences of the construction and operation of the road upon it must be taken into account. An electric railway in a city street must throw the main course of ordinary travel upon those parts of the highway which are not covered by its tracks. Such parts, being thus subjected to greater wear, and exposed to danger from ruts or broken pavements, must often be improved or reconstructed, in order to be adequate to support the increase of burden; and this increase will be largely determined by the amount of business for which the tracks are used, and so, to a great degree, proportioned to the gross receipts which such business yields. The finding shows that the company is now running passenger trains, consisting of a motor car with one or two trail cars attach-

ed, upon those streets in which its tracks are laid, and that the proposed extension, if operated in the same manner, would be a serious inconvenience to public travel. It shows also that the plan calls for an excavation to a depth of not less than six feet, for a considerable distance on that part of Chestnut street upon which the new tracks were to be laid; and that this would compel the city to build a retaining wall, and put up a guard rail to protect travel.

The city, as has been stated, held title, by conveyance, to an easement in a large portion of these three streets, in trust for the public use. The common council had power by charter (section 23) to regulate the location of any public work upon highways, and was charged with the duty of constructing, grading, and repairing all the city streets. It was thus made, in respect to them, the general guardian of the public interests, and was protecting these in protecting itself. *Borough of Stamford v. Railroad Co.*, 58 Conn. 381, 395, 15 Atl. 749. As to the repair and maintenance of so much of any highway as is embraced within their rails, and a further space of two feet on each side of them, the liability of street-railway companies is definitely regulated by section 6 of the act of 1893; but this does not affect the power of the municipal authorities to make suitable provision, under the other sections of the statute, and by virtue of the general control over the city streets with which they are invested by charter, against loss to themselves, or inconvenience to the public, from changes affecting other parts of the highway, which are incident to the location and use of the tracks. Municipal corporations possess not only the powers expressly granted, and those which may be necessarily implied in or incident to these, but also all which are indispensable to the attainment and maintenance of their declared objects and purposes. One of the main objects and purposes of our towns and cities generally, and of the city of New Britain in particular (charter, section 23), is the maintenance of all highways within their territorial limits in safe and proper condition, and the provision of means for the payment of the expenses thus occasioned. It is indispensable to the attainment of this object that all unlawful encroachments or erections upon highways should be restrained, and all lawful changes in them carefully regulated in the public interest. In the case of steam railroads, the legislature has committed this regulative power over their location to the railroad commissioners. In the case of street railways, the act of 1893, coupled with their ordinary powers over highways, gives it, though in somewhat different terms, to the municipalities whose interests are directly affected, and gives it in order that they may protect those interests fully, promptly, and effectually. In the case before us, however,

the terms of the city order; read in connection with the finding, leave it, to say the least, very questionable whether the annual payments were not required as a compensation for annual expenses that would be chargeable to the city in consequence of the operation of the entire railway system of the company, the greater part of which was already in use, and had been constructed in compliance with previous orders of the city, imposing conditions which the company had accepted by a formal covenant. The imposition of any such condition in this proceeding would be beyond the authority vested in the mayor and common council. They could guard against an increase of municipal burdens from the changes in three more of the city streets which it was proposed to make; but an increase already occasioned by the location in other streets was a matter entirely foreign to the plan presented for their consideration, and which they had no right to make the subject of any new condition or agreement. It is not impossible that the city authorities acted upon the view that the mileage of the tracks that it was planned to lay in Chestnut, East, and Jubilee streets would bear such a proportion to the total mileage of the company's railway system that the specified percentages of the entire gross receipts from the operation of that system (measuring, as they must, to a large extent, the business done upon it, from time to time) would be only a fair equivalent for the new expenses to which the city would be annually subjected, in the maintenance and reparation of these three streets, when the railway should be in use upon them. If it were clear that the order meant this, or if a fixed sum had been assessed as such an equivalent, we should think there was no error. The most natural construction of the finding, however, would seem to be that which makes it uphold the imposition of this condition, on the ground that it would provide a just compensation for such expenses as the city might thereafter incur for the maintenance of all the streets through which cars are run. On such a basis it cannot be vindicated; and, if the finding means anything else, it is not expressed with sufficient certainty to support the judgment. Upon this point, therefore, there is error.

The question whether the city might hereafter, by some other appropriate proceeding, compel the company to pay all damages to the city that may arise in the future from the continued operation of its road in all or any of the city streets, is not before us upon this appeal, and as to that we express no opinion.

Another undertaking demanded of the company was to keep its cars at all times equipped with such fenders as the street committee might approve, under a prescribed penalty. The revised city charter (Sp. Acts 1895, p. 859, § 23), which went into effect June 5, 1895, gave the mayor, aldermen, and

councilmen, constituting a body known as the "common council of the city," power to make such orders as it might see fit, to provide for the placing and maintenance of fenders on electric cars. On June 26, 1895, a public act was passed, and went into immediate effect, authorizing the railroad commissioners, whenever they should deem it necessary for public safety that fenders should be placed upon the cars operated upon any street railway, to order them, after due notice to the company operating the cars, and hearing, and, on like notice and hearing, to "modify or revoke any orders made in reference thereto"; giving them "sole and exclusive jurisdiction with respect to ordering such fenders upon any street-railway car or cars," and repealing all inconsistent acts, resolutions, and by-laws. The express provision for the instant repeal of all resolutions and by-laws inconsistent with this grant of jurisdiction to the railroad commissioners was manifestly intended to rescind all inconsistent provisions in any municipal charters or by-laws which were then in force. The field was to be swept clear for the selection by a board of state officers of the style of fender best adapted to secure public safety in the case of each particular road on which that board might deem their use to be necessary. *Cullen v. Railroad Co.*, 66 Conn. 211, 223, 33 Atl. 910.

The condition in question was imposed in July, 1895, and required the appellant to stipulate to keep its cars at all times equipped with such fenders as should be satisfactory to the street committee. Had it done so, and, after its cars were so equipped, had the railroad commissioners ordered the substitution of fenders of a different style, the company would have been bound, in obedience to the law, to violate its contract. Should the street committee of the common council require one style of fender, and the selectmen of Plainville or of Berlin, into each of which towns the company's railways extend, require another, it would be necessary either to change cars, or to stop and shift the fenders on every trip, upon crossing the city line. It was to prevent the possibility of such conflicts of obligation that the jurisdiction of the railroad commissioners over this subject was made sole and exclusive. Any existing provisions of charters or by-laws to the contrary were repealed. Any future municipal legislation to the contrary was forbidden. The city authorities might properly have qualified their approval of the plan by making it a condition precedent that the company should not commence the operation of its road in the streets in question until the railroad commissioners, upon its application or otherwise, had designated a suitable fender to be placed upon its cars, and their order had been complied with. This would have merely guarded against danger to the public during such interval as might else chance to elapse before the attention of the railroad

commissioners was called to the new condition of things by which it was occasioned. The course adopted, however, was substantially an attempt to substitute the discretion of the street committee for that of the railroad commissioners; and there was error in affirming that part of the order of the mayor and common council. *In re Kings Co. Elevated R. Co.*, 105 N. Y. 97, 13 N. E. 18.

The fifth condition, which required an annual report of the company's entire gross receipts, could only be supported in connection with the third condition, already considered; and, upon the state of facts presented by the finding, both must fall together, although each might have been sustained had it appeared from the finding to have been adopted as a means of providing a suitable compensation for any increase of municipal burdens resulting from the execution of the company's plan.

The seventh condition calls on the company for a written acceptance of the "permit," and all its provisions. In respect to this, as well as to the requirement of a written agreement to perform the various conditions, there was error in upholding the action of the city authorities; not because there was any objection to exacting written proof of the assent of the company to any proper modifications of the plan, but because some of the modifications which were made in this instance were not proper ones, and compliance with this condition would have waived or prejudiced its right to object to these thereafter.

Whether the eighth condition was a proper modification of the plan is a question not free from difficulty. The plan contemplated a location of new tracks on Chestnut street. This condition provided that such a location should not be the occasion of the abandonment of tracks already laid from Chestnut street to Fairview street, but that those residing in that part of the city should be given a fair and suitable service, according to an established time card, with trips as often as once in every 20 minutes. The general street-railway act of 1893 (*Pub. Acts 1893*, p. 307) began by repealing provisions regulating the location of horse-railway tracks, which had been upon the statute book since 1865. These had given the proper authorities in any city power to permit and regulate the use, within its limits, of any motive power, except steam, for drawing passenger cars on such railroads, and forbade the laying of any horse-railway tracks upon a city highway except in such manner as they might prescribe, subject only to an appeal by the company to the superior court. The mode of procedure which has been substituted for this is described in terms the true meaning and effect of which are open to serious question; but as between these two corporations, one claiming that the powers granted by the act of 1893 should be liberally interpreted, and the other contending for a stricter construction we think the doubt as to how far they may extend, in cases such as

that now before us, should be resolved in favor of the city. Municipal corporations are created solely for the public good, and are appropriate agencies to protect the public interests. Railway companies also serve the public, but they serve them with a view to the profit of their shareholders. *Bradley v. Railroad Co.*, 21 Conn. 294, 306; *Appeal of New York & N. E. R. Co.*, 58 Conn. 532, 540, 20 Atl. 670.

It is certainly possible that to discontinue or diminish the use of the tracks already laid from Chestnut street, through South Stanley street, to Pleasant street, and thence, through Pleasant street, to Fairview street, might throw more travel upon the new tracks which it was proposed to lay on Chestnut street, between Stanley and East streets, and thus impose an additional burden upon that highway. A street may suffice to accommodate ordinary public travel, notwithstanding a street railway may run over it, if the cars pass at such intervals that the space between the rails can generally be used for the passage of other vehicles. If, however, one car or train follows another in rapid succession, that part of the road over which they run may be practically monopolized, while the rest of it may be inadequate to satisfy the public wants. It has been the general policy of the state, throughout its history, to accord to its various municipal corporations a large authority in the regulation of their local affairs. The amount of travel for which any particular highway can be safely or conveniently used can ordinarily be best determined by those to whom its establishment and maintenance have been intrusted. *New Haven & Fairfield Counties v. Town of Milford*, '64 Conn. 568, 574, 30 Atl. 768. All this is entitled to considerable weight in determining the true scope and meaning of the act of 1893, and we think that, under its provisions, the condition in question can fairly be regarded as germane to the new mode in which Chestnut street was to be used. The company had previously made a location through Chestnut street, as far as Stanley street, for the purpose, in part at least, as it must be presumed, of reaching Fairview street, through South Stanley and Pleasant streets. Its franchise to lay tracks upon Chestnut street conferred no absolute right to occupy the whole of it for that purpose. What particular part it was to use was to be determined ultimately by the city authorities, in passing upon such plans of location and construction as it might submit. It submitted a plan which located the railway through Chestnut street as far as Stanley street, and no further. From that point the tracks diverged, to give a means of access to Fairview street. The approval of this plan by the city authorities must have been somewhat influenced by this fact. The principle that a power once exercised is exhausted forbids a railway company which has once made a location of its road to

change it, unless statutory provision is made to the contrary. The street-railway act of 1893, by section 3, gave the mayor and common council of every city exclusive direction over the relocating or removal of any tracks or railway fixtures permanently located on any of the city streets, and provided, in section 5, that if any street railway company, after the location and construction of its railway in any such street, should cease to operate it, the mayor and common council might order its operation to be resumed, under pain of a forfeiture of all rights under such location. In view of these provisions of the statute, we think that the city authorities of New Britain had the right, in deciding whether or not to approve the extension of the appellant's line through a particular part of Chestnut street, to consider what effect such a location might have upon the use of its tracks already laid in another part of this street. The action which they took may have been essential for the protection of interests dependent upon the maintenance of reasonable service through Pleasant street, over tracks for which those on Chestnut street served as a line of approach, and on account of the connection with which the location of those on Chestnut street had been originally approved. It is enough to support the validity of this condition that it came within the class of those which might be imposed on the company if the circumstances of the case made it equitable. Whether it was in fact equitable was a matter as to which the action of Judge Fenn was "final and conclusive" upon the parties.

The case does not call for a decision as to any of the points of constitutional law which the appeal seeks to raise. Such compensation as the city might exact as a condition of its approval of the location it could properly claim to enable it to meet the new expenses to which it was found that it would be subjected by the construction and use of the additional tracks,—expenses which it would be obliged to meet, not as owner of the streets, nor as a representative of individuals having a proprietary interest, but as the party bound by law to maintain them in safe and proper condition. The provision for the payment of such compensation was not an exercise of a power to tax, nor of a power to license and to charge a license fee. The state had licensed the company to place its tracks in the streets in question, and the city had no function to discharge in that respect, except as to the mode in which the license should be executed. The state had also laid such taxes upon the company as it deemed proper, and had provided that these should "be in lieu of all other taxes on its franchises, funded and floating debt, and railroad property." Gen. St. § 3920; Pub. Acts 1893, p. 362, c. 209. But the state, in granting to the company the right to make a definite location, under specified conditions, upon the streets of New Britain, had required it to obtain from the mayor and common

council what section 6 of the act of 1893 designates as an "order permitting" the particular location selected, and which might, with reference to certain points, permit it only on equitable terms. To ask for equitable compensation for injuries occasioned by the location is something very different from laying a tax or charging a license fee. There can be no obligation to pay unless the tracks are laid; and it will then be merely a contractual obligation, voluntarily assumed, to make good a loss that would otherwise ensue to the municipality from their location. *City of New Haven v. New Haven & D. R. Co.*, 62 Conn. 252, 255, 25 Atl. 316. The city gains nothing. It simply seeks to protect itself from loss.

One of the provisions of the street railway act (section 3) is that, except in case of bridges, terminals, curves, turnouts, and switches, "the wrought part of any street or highway made suitable for travel shall nowhere be of a width less than eight feet on each side of the street railway tracks, measuring from the outer rails where the said tracks are located in the center of the street or highway, and not less than twelve feet in width, measuring from the rail nearest the wrought part of the highway, where said street railway track or tracks are located on the side of the street or highway, unless permission is obtained from the superior court or a judge thereof." The finding of Judge Fenn as to the proposed location in Chestnut, Jubilee, and East streets is that "the space between the tracks, as projected by the plan, and the outer edge of the traveled part of the highway over the greater part of these streets, would be less than the width prescribed by statute." Error has not been assigned because of the affirmance by Judge Fenn of an order which approved, in these respects, a plan that transgressed the limitations of the statute, but we feel bound to notice it, as it is apparent on the record, and concerns a matter of great importance to the public interests. No permission by municipal authorities, nor any order obtained from a judge of the superior court in the exercise of functions similar to theirs, upon an appeal, could make such a location anything but an unlawful incumbrance on the highway. The general powers over its streets which the city of New Britain possessed by its charter were controlled, in this respect, by the express provisions of the act of 1893; and no judge of the superior court could permit the width of the traveled parts of the streets to be curtailed, as the plan proposed, except upon an original proceeding brought before him for that purpose.

There is error in so much of the judgment appealed from as relates to the requirement of annual payments by the appellant of a percentage of its entire gross receipts, and of annual returns of the amount of such receipts; and to the use of fenders; and to the execution, within a certain period, of a written acceptance of those indiscriminately with other provisions, and of a written agreement to ful-

fill them; and to the approval of a location on any part of any street which leaves the wrought part of the highway of less than the width required by section 3 of the street railway act of 1893. And the residue of said judgment is affirmed, and the cause remanded to Judge Fenn for further proceedings in conformity with this opinion, including the limitation of a reasonable time, should he deem it proper, within which, in case the tracks are laid on Chestnut, Jubilee, and East streets, such conditions as he may impose shall be performed.

ANDREWS, C. J., and WHEELER, J., concur.

TORRANCE, J. With respect to that branch of the case relating to the motion to erase, I dissent from the majority opinion, and agree with Judge HAMERSLEY, substantially for the reasons stated by him in his dissenting opinion. With respect to the other branch of the case, while agreeing with the majority of the court that there was error, I dissent from some of the conclusions reached, and will here indicate the points of dissent, and, very briefly, the reasons therefor.

Upon this part of the case the question is not what powers, with respect to the location, construction, and operation of street railways, the local authorities ought to possess, but it is, simply, what powers of this kind do they possess? With the former question this court has nothing to do. From a careful review of all the legislation on this subject up to date, it seems to me that whatever powers of this kind the local authorities now possess are to be found, substantially, in chapter 169 of the Public Acts of 1893. The first section of that act repeals the then-existing provisions of law in relation to this matter, as embodied in sections 3595, 3596, and 3597 of the General Statutes. The act then goes on with great minuteness of detail to confer certain limited and defined powers upon the local authorities with respect to the location, construction, and operation of street railways. These powers are quite extensive. They cover a wide variety of matters, and they are conferred expressly and specifically. The provisions of the act, by section 17, operate as an amendment to the charters of all then-existing street railways, and of all then-existing municipal corporations. All such railway companies and all municipal corporations thereafter chartered are expressly made subject to its provisions, and all acts or parts of acts inconsistent with its provisions are repealed. The legislature, in 1893, thus in effect wiped out all prior legislation upon this matter, and began anew to expressly and specifically confer certain powers upon the local authorities with respect to street railways. Under such circumstances, I think the maxim, "*Expressio unius est exclusio alterius*," is peculiarly applicable; and that the local authorities possess no powers over the location, construction, and operation

of street railways other than those conferred upon them expressly or by necessary implication by the act of 1893.

Under this view of the law, I think that neither the common council nor the special appellate tribunal had any power to impose upon the railway company the burden of paying anything whatever for the exercise of its right to lay additional tracks in the streets. Such a power is nowhere expressly conferred, nor does it exist by any necessary implication from the powers so conferred. On the contrary, I think that, by a fair implication, the existence of any such power is negated.

In the first place, the legislature has expressly and specifically prescribed the share of the burden of maintaining the streets and highways which the railway company shall bear as a condition to the exercise of its chartered powers; and this, I think, fairly excludes the existence of a power in the local authorities to increase that burden. Surely, if the legislature had intended to give the local authorities power to impose a greater burden, it would have said so in plain words somewhere, and would not have left the matter to doubtful construction. It would have said so in such a way that the local authorities would have known their duty in the premises, without the aid of this court, and would thus have been able to perform that duty long before the year 1896.

In the second place, the power in question is essentially a power to tax the railway company for highway purposes; and as the state reserves to itself the power to tax the company, and has said that the taxes so paid shall be in lieu of all other taxes, this fairly negatives the existence of any such power in the common council. Nor do I agree that, if such a power to tax existed in the local authorities, they could impose it in the way and manner in which the majority opinion says they may impose it. I dissent in toto from the conclusion of the majority of the court upon this point in the case.

I further think that neither the common council nor the appellate tribunal had any power to make it a condition precedent to the approval of the "plan" presented by the railway company that it should not abandon any part of its tracks already laid, or should run its cars according to any time-table the council might see fit to impose; for this, I think, is the effect of the decision. Such a power is not expressly conferred. It does not exist by any fair implication from those conferred; and the fact that so many powers were expressly conferred by one and the same act, without mentioning the one in question, affords a just ground for concluding that the legislature did not intend to confer that power. Furthermore, this act was intended to apply to inter-town street railways, and it is not reasonable to suppose that the legislature intended to leave this matter to the conflicting decisions of the different local authorities, without oth-

er limitation than what they might deem to be equitable.

Lastly, I think the matters which the majority opinion treats as "modifications" of the "plan" were not modifications of the plan at all, within the meaning of section 2 of the act in question. They were by the common council correctly called "conditions and limitations" precedent to the approval of the plan, and such they unquestionably are. The requirements that the company should pay the city a certain sum annually, or should agree not to abandon certain parts of its existing lines, or to run its cars upon other parts of its lines at least once every 20 minutes, or enter into a written contract with the city to do some or all of these things, are clearly not modifications of the plan presented to the common council under section 2. The fact is, the plan presented was acceptable to the common council, and they approved of it; but this was done conditionally, and the conditions related to matters foreign to the plan, and foreign to any modification of the plan. If the powers already given to the local authorities in this matter are not sufficiently ample, the remedy is with the legislature, and it can be easily applied. The courts can only administer the law as they find it.

Upon the points indicated, and for the reasons thus briefly stated, I dissent from the majority opinion.

HAMERSLEY, J. (dissenting). The Central Railway & Electric Company petitioned the common council of the city of New Britain for its acceptance and adoption of a plan submitted for the location of its tracks in three of the city streets, and for the construction of the tracks so located. The common council passed a series of votes by which the plan, substantially as submitted, was accepted and adopted, provided the company should first agree to perform certain conditions relating to compensation to the city for damages that would be occasioned by the layout and operation of the road, to the protection of the traveling public by the use of fenders, and to furnishing a fair service on other portions of the company's road, and should deliver to the mayor within 60 days "an acceptance of this permit under the conditions herein set forth." The form of these votes is irregular. They contain some slight modifications of the plan submitted, immaterial to the questions before the court, and apparently treat the conditions set forth as modifications of the plan. But the inaccuracy of form does not change the legal effect of the votes. They were not modifications of the plan, but were an offer to accept and adopt the plan as submitted, if the company, within the time fixed, would accept the permission for such location and plan of construction, under the conditions mentioned. The company appealed from this action of the common council to

"Augustus H. Fenn, one of the judges of the superior court," pursuant to chapter 288 of the Public Acts of 1895. The appellate tribunal found that an approval of the action appealed from "is by me deemed equitable in the premises," and therefore ordered that said action be approved. The railroad company appealed to this court, and the city of New Britain has filed a motion that the case may be erased from the docket. The questions arising on the motion and on the appeal were argued at the same time.

I think the motion to erase should be granted. The question involves many difficulties, owing to the complex nature of the act of 1893, "Concerning Street Railways" (Pub. Acts, p. 307), pursuant to which the application to the common council for the adoption of the lay-out was made, as well as to the singular character of the act of 1895, under which the appeal to Judge Fenn was taken. The language of the latter act is very broad, and there is a serious complication, in that the act purports to authorize any appeal under it to be taken to the superior court, as well as to any judge thereof. We have held that any duty of a quasi judicial character performed by a judge of the superior court, not in the exercise of the power of that court, but by virtue of a special statutory authority for that purpose, is the act of a special statutory tribunal, which is not a court, and does not possess the general attributes of a court. *Trinity College v. Hartford*, 32 Conn. 452, 466, note; *Olapp v. Hartford*, 35 Conn. 66, 73, 220, 222; *La Croix v. Commissioners*, 50 Conn. 321, 325. It is evident that there are duties that may be performed by such a special tribunal which cannot be imposed on the superior court, and that there are judicial functions exclusively pertaining to a court that cannot be given to such tribunal. The act says that, whenever the local authorities shall make, pass, or render any decision, denial, order, or direction with respect to any matters relating to street railways (which may be within the respective jurisdictions of such officers), any street-railway company affected thereby may appeal. This may include an order in respect to the location of a pole in the highway, the painting of such pole, or the color of the paint used. It may include any order in the exercise or performance of municipal power or duty within a large portion of the field of municipal administration, and the exercise of these administrative functions is transferred, at the request of any street-railway company affected thereby, from the officers of the municipality to the superior court or any judge thereof. If the legislature should enact that, whenever any public corporation, board, or officer shall make any decision, denial, order, or direction relative to the official powers or duties belonging to them respectively, any person affected thereby may appeal to the superior court, and, upon such

appeal, said court shall execute the powers of said officers in such manner as it shall deem equitable, such law would differ in degree, but possibly not in kind, from the act of 1895, and would seem to be in contravention of the express command of the constitution: "The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another, and those which are judicial, to another." Before exercising any jurisdiction in an appeal taken under the act of 1895, I should feel bound to carefully consider its construction and legal effect. But, in the views I take, the exercise of such jurisdiction is not required in this case, and it is therefore sufficient to note the nature of the questions involved, without an expression of any opinion.

Assuming, then, for present purposes, that the railroad company could appeal to a judge of the superior court, is there an appeal from his decision to this court? It must be remembered that this special tribunal is not a court, and has none of the attributes of a court, except such as are conferred by statute. It is no more a court than if it consisted of the governor or the speaker of the house of representatives. The ordinary way of correcting errors committed by such a tribunal is through the action of a superior court, from whose judgment appeal might be taken to this court. The statute authorizing the direct intervention of this court was intended to save circuitry of procedure, and was doubtless largely induced by the consideration that the tribunal is in fact held by a judge of the superior court. But such procedure is unusual, is open to the objection that an appeal direct to this court from a tribunal that is not a court is in the nature of an original rather than an appellate proceeding, and should not be extended by implication. The powers of this special tribunal upon an appeal from the action of the common council of New Britain are to be found only in the language of the statute creating it a tribunal for that purpose. They are to try such appeal, and to "make such orders in reference to said matters appealed from as may by * * * him be deemed equitable in the premises, and the decision of said * * * judge shall be final and conclusive upon the parties," and in case of an appeal like the present one, from the action of the common council, under the provisions of section 2 of the act of 1893, to exercise "the same powers with reference to said plan and the acceptance or modification thereof that said municipal authorities would have had under the provisions of said act, and to make all such orders with reference thereto as may be deemed equitable." When we consider that the action of the common council appealed from is clearly administrative action

for the protection of the public and municipal interests; that such action cannot become binding without the assent of the railway company; that the appeal is not for the purpose of obtaining a final judgment on any judicial or quasi judicial controversy between parties, but simply for the purpose of asking the special tribunal to exercise the same administrative powers which the council has exercised or refused to exercise, and to make such orders in respect thereto as it may deem equitable; that the statute expressly declares that the decision as to what orders are equitable in the premises shall be final and conclusive on the parties,—we can entertain no doubt but that the action of the special tribunal in the exercise of the powers conferred by the statute is the same in nature, and as final in effect, as similar action taken by the common council before the act of 1895 was passed.

The act of 1893 gave the common council administrative power. The act of 1895 transferred, upon the application of the railroad company, the exercise of this power to a special tribunal. The nature and extent of the power are not changed by such transfer, and it was the clear intent of the legislature that the decision of the special tribunal, in the exercise of the power transferred to it as an appellate common council, should be final and conclusive between the parties. When the legislature (in Gen. St. § 58) provided that the decision of a superior court judge on a contested election case should be "conclusive," it expressly provided that the natural meaning of the word should not affect the right of appeal on questions of law. But the very nature of the power conferred in this case is such that questions of law which may be the subject of appeal cannot arise. The action of the special tribunal, as well as of the common council within the jurisdiction conferred, is governed by a discretion which is not the subject of appeal. The appellant feels the force of this consideration, and contends that, if the orders of the judge "are made pursuant to the authority conferred by those acts, there may be an exercise of judicial discretion, but, if they are wholly unauthorized, they are not only illegal, but are inequitable also, within the meaning of the law." If they are wholly unauthorized, they are void; but it does not necessarily follow that an appeal lies to this court direct from such unauthorized action. While the judgment of a court which is void as *coram non jure* may be the subject of appeal to this court, yet the void action or order of an administrative or quasi judicial body like the common council or special tribunal cannot be the subject of appeal to this court, unless made appealable by statute. The only statutory provision is to be found in section 1137 of the General Statutes, which provides that, when jurisdiction of any matter or proceeding is vested in a judge of the superior court, any party to

such matter or proceeding who feels aggrieved by any of the decisions or rulings of such judge upon any question of law arising therein may appeal from the final judgment of such judge in such matter or proceeding, in the manner provided for an appeal from the judgment of the superior court. This statute was enacted with special reference to the jurisdiction vested in such a special tribunal in respect to the condemnation of land, under a statute giving such tribunal for that purpose all the powers of the superior court, with power to render final judgment and issue execution. Its broad language covers the exercise of an analogous jurisdiction by such special tribunal authorized by statute, but it does not extend to the void acts of a person claiming to exercise the powers of a special tribunal which has not been created for that purpose. It does not extend to the action of such special tribunal, void or valid, which is not a final judgment, in the exercise of jurisdiction of a proceeding in which a final judgment analogous to that of the superior court may be rendered. Whether or not it is competent for the legislature to vest in this court a general authority to directly intervene for the regulation of the action of administrative boards and officers, either by way of certiorari or appeal, the novelty and impropriety of such intervention is evident, and it is not authorized by section 1137.

The action from which this appeal is taken is not, in the legal sense, a final judgment. The "order" cannot be enforced. The tribunal is not authorized to tax costs or to issue execution. It settles nothing. The common council passed votes that a particular location would be accepted and adopted if the company, within a certain time, would enter into an agreement to compensate the city for the losses involved in such a location. The special tribunal passed the same votes. It had the same powers as the common council, and no more. This action does not fix the location, and is not binding on the appellant. We are asked to settle the law on a moot case, for the sole purpose of aiding the parties in future negotiations. No order that the council or the special tribunal exercising the power of the council can make under the provisions of section 2 of the act of 1893 is, in any legal sense, a "final judgment." If the tribunal had made an order fixing the location of the road, so that the road, when built, must be built on that location, there might be some ground for claiming such an order to be analogous to a "final judgment." But the tribunal did not make such an order, and had no power to make such an order. Whether we confirm or set aside the action of the special tribunal, the company may in either case present a new plan to the council, and may appeal from the action of the council thereon, as before. The statute is not mandatory on the common council, or the special tribunal exercising the power of the council,

in that it expressly refrains from any attempt to control their discretion in the exercise of the granted power; and it does not subject the company to the power of either, in fixing a location. By its express terms, no location determined only by the council or by the company is binding; and the question of location cannot be finally closed "until the street-railway company and local authorities shall agree upon the same." It may be claimed that the language of section 2 is defective, and does not fully carry out the intent of the statute; or it may be claimed that such language was used for the express purpose of enlarging the power of the city to protect, by proper conditions, the interests damaged or endangered by the construction and operation of the railroad; but whatever view may be taken of the purpose of the draftsman in framing this section, or of its legal effect in relation thereto, it is clear that the action authorized, whether exercised by the common council itself or vicariously by the special tribunal, is not a "final judgment," from which an appeal can be taken to this court, under section 1137.

This conclusion excludes from consideration, not only the unsettled questions argued in respect to the powers of the legislature to authorize an appropriation of highways for this railroad without compensation, but also the question of the legality of the action of the common council, and of the special tribunal acting as a common council. In my judgment, any expression of opinion on these questions in this case is obiter. But as a majority of the court has entertained jurisdiction of the appeal for the purpose of declaring the legality of the action of the common council in some particulars, and of denying it in others, I feel bound to distinctly dissent from so much of the opinion of the majority as finds any error in the action of the common council specified in the reasons of appeal, and also from the main reason given for sustaining such portion of that action as is sustained.

It seems to me demonstrable that the vote of the common council requiring the company to enter into an agreement for making compensation for the increased expenses of the city to be caused by the operation of the railroad on the lay-out submitted, and for a continued and prescribed service on other parts of the road, is not a "modification" of the plan submitted, in respect to the particulars required by section 2 of the act of 1893 to be specified in the plan, and can only be justified as legal by the ratio decidendi indicated in the opinion,—that the conditions imposed by the council were justified by "other provisions of law or charter"; that the right to lay tracks on the streets in a particular way was "dependent on the consent of the municipal authorities"; that, in deciding whether to approve a location, "the natural consequences of the construction and operation of the road upon it [the highway] must

be taken into account"; and that the municipality, by virtue of the control vested in it by charter over all the city streets, was "made, in respect to them, the general guardian of the public interests, and was protecting them in protecting itself."

The charter of New Britain invested the people of the place therein described with the local government thereof (Salk. 193), constituting them "one and the same body politic and corporate, * * * to have perpetual succession," and "to hold and exercise such powers and privileges hitherto exercised by said city as are perpetuated herein, together with all the additional powers and privileges herein and hereby conferred." Among the powers and privileges specially granted in the charter, to be exercised by the city through its court of common council, are the following: The "powers, under the restrictions otherwise provided in this act, to make such orders or ordinances as it shall see fit" in relation to nuisances of all kinds in the said city; the licensing and regulating of public trucks and carriages; the regulation of the speed of animals, vehicles, and electric cars within the city limits; the maintenance of fenders on electric cars; the sole and exclusive authority and control over all streets and highways, and all parts of streets and highways; the excavation of streets and highways for public and private purposes, and the location of any work thereon, whether temporary or permanent, upon or under the surface thereof; the power of providing for taking land for public use not otherwise prescribed in this act; the finances and property, real and personal, of the city; providing revenue for the payment of expenses of any kind and of all public works and improvements; and the doing of all things convenient for providing funds for all its lawful expenditures.

The legislation of 1893, in respect to street railways, in so far as it affects the rights and powers of the city of New Britain, must be read and construed in connection with the charter, establishing their rights and powers, which were reaffirmed in a public act enacted at the same session of the legislature. That legislation must also be read and construed in connection with the following vital principles: (1) Cities and towns possess not only the powers specifically granted, and are subject not only to the liabilities specifically imposed, but they also possess the powers, and are subject to the liabilities, which are necessary to the full operation of those expressly mentioned, or to the attainment and maintenance of their declared objects and purposes. There are certain implied powers inherent in a municipality, from the very fact of its creation, with the specific powers and liabilities ordinarily belonging to a municipal corporation. This principle has been developed and established in a long line of cases, extending from 1750 to the present time. In *Farrel v. Town of Derby*, 58 Conn. 234, 245, 20 Atl. 460, it was invoked to sustain the powers of a

town to use its power of taxation, specifically given for other purposes, to raise funds for protecting the integrity of its territory from attack in the legislature. In the very recent case of *New Haven v. New Haven & D. R. Co.*, 62 Conn. 252, 255, 25 Atl. 316, it was invoked to sustain the right of a city to use its power of opposing, before the railroad commissioners, an application by a railroad company for leave to make changes in its location, so as to obtain from the company an agreement to make compensation for municipal interests endangered by such location, as a condition of the withdrawal of its opposition to the application. (2) While the legislature represents the sovereignty of the state in legislating, in respect to all governmental powers, yet this power of legislation must be exercised subject to limitations expressed in the specific provisions and fundamental principles contained in the constitution, and should be exercised in harmony with those settled methods of free government whose essential importance has been recognized as self-evident by the people of our own state. The principle of local self-government—i. e. the control by each municipality of those local matters relating wholly or mainly to their own affairs, as distinguished from those matters affecting the state at large—is recognized as an underlying principle so essential to free government under an American and especially the New England system as to constitute a rule of legislative conduct, even if it can never be treated as strictly a limitation on legislative powers. *Caldwell v. Justices of Burke*, 4 Jones, Eq. 323; *People v. Hurlbut*, 24 Mich. 44, 66, 96; *People v. Detroit*, 28 Mich. 223. In our own state the initial steps in the whole operation of government depend on the action of towns, whose existence as territorial and municipal corporations is, by express provision of the constitution, protected from extinction unless by their own consent. *O'Flaherty v. City of Bridgeport*, 64 Conn. 159, 165, 29 Atl. 466. And it seems to me that in this state, certainly, the principle of local self-government may fairly be regarded as, at least, effective to direct the action of the legislature, and potent to prevent this court, in a case of reasonable doubt, from preferring a construction that would give effect to legislation plainly obnoxious to the principle.

So read and construed, the legislation of 1893 must be held to grant to the railroad company the franchise for the occupation of the streets of the city of New Britain only after an agreement between the company and the city in respect to a location, and cannot be held to abridge the right of the city to insist upon a reasonable agreement for the protection of its municipal interests before consenting to such occupation of its streets. The opinion of the court contains the suggestion of such construction, as one ground for sustaining in part the action of the city council. It seems to me that it is the only tenable ground for sustaining such

action, and that its logical application must sustain the whole of that action.

While I deem it necessary to state this ground of dissent, it does not seem appropriate to detail the line of argument and the authorities that have led me, after the most careful consideration, to such result. As I am satisfied that this appeal is not properly before the court, I think the decision should have rested wholly on that ground, and that the case should have been erased from the docket.

(19 R. I. 527)

SWIFT et al. v. ROUNDS.

(Supreme Court of Rhode Island. July 6, 1896.)

DECEIT—PURCHASE ON CREDIT.

An action of deceit may be based on fraudulent express or implied representations of intentions to pay for goods purchased on credit.

Action by G. F. & E. C. Swift against Arthur Rounds. Heard on demurrer to the complaint. Demurrer overruled.

Willard B. Tanner, for plaintiffs. Robert W. Burbank, for defendant.

TILLINGHAST, J. This is trespass on the case for deceit. The first count in the declaration alleges that the defendant, intending to deceive and defraud the plaintiffs, did buy of them on credit certain goods and chattels, of the value of \$400; the said defendant not then and there intending to pay for the same, but intending wickedly and fraudulently to cheat the plaintiffs out of the value of said goods and chattels, which said sum of \$400 the defendant refuses to pay, to the plaintiffs' damage, etc. The second count, after setting out the fraudulent conduct aforesaid, alleges that the defendant thereby then and there represented that he intended to pay for said goods, but that he did not then and there intend to pay for the same, but wickedly and fraudulently intended to cheat the plaintiffs out of the value of said goods and chattels, etc. To this declaration the defendant has demurred, and for grounds of demurrer to the first count thereof, he says: (1) That the plaintiffs do not allege any false representation by the defendant; (2) that the plaintiffs do not allege that they have acted upon any false representation of the defendant; and (3) that the plaintiffs do not allege any damage suffered by them in acting upon any false representation of the defendant. The grounds of demurrer to the second count are: (1) That the plaintiffs do not allege any false representation by the defendant as to any fact present or past, but only as to something that would happen in the future, which, if in the future it proved not to be true, would not be the subject-matter of a false representation, but simply a promise broken, and therefore not a ground of an action of de-

ceit; (2) that the plaintiffs do not allege that they acted upon any false representation made by the defendant; and (3) that the plaintiffs do not allege that they suffered any damage by acting upon any false representation made by the defendant to the plaintiffs.

We are inclined to the opinion, after some hesitation, that the declaration states a case of deceit. Any fraudulent misrepresentation or device, whereby one person deceives another who has no means of detecting the fraud, to his injury and damage, is a sufficient ground for an action of deceit. Deceit is a species of fraud, and consists of any false representation or contrivance whereby one person overreaches and misleads another, to his hurt. And, while the fraudulent misrepresentation relied upon usually consists of statements made as to material facts, either verbally or in writing, yet it may be made by conduct as well. Grinnell, Deceit, p. 35. A man may not only deceive another to his hurt by deliberately asserting a falsehood, as, for instance, by stating that A. is an honest man when he knows him to be a rogue, or that a horse is sound and kind when he knows him to be unsound and vicious, but also by any act or demeanor which would naturally impress the mind of a careful man with a mistaken belief, and form the basis of some change of position by him. 1 Story, Eq. Jur. § 192. In *Ex parte Whittaker*, 10 Oh. App. 449, Mellish, L. J., says: "It is true, indeed, that a party must not make any misrepresentation, express or implied; and, as at present advised, I think Shackleton, when he went for the goods, must be taken to have made an implied representation that he intended to pay for them, and if it were clearly made out that at that time he did not intend to pay for them, I should consider that a case of fraudulent misrepresentation was shown." See, also, *Lobdell v. Baker*, 1 Metc. (Mass.) 201; 1 Benj. Sales (Ed. 1888) § 524. In the case at bar, the declaration alleges that the defendant bought the goods in question upon credit, fraudulently intending not to pay for them, but to cheat the plaintiffs out of the value thereof. By the act of buying the goods of the plaintiffs, the defendant impliedly promised to pay for the same, which promise was equally as strong and binding as though it had been made in words or even in writing. The plaintiffs had the right to rely on this promise, and to presume that it was made in good faith. It turns out, however, according to the allegations aforesaid, that it was not made in good faith, but, on the contrary, was made for the purpose of deceiving the plaintiffs into the act of parting with their goods, the defendant intending by the transaction to cheat them out of the value thereof. The fraud, then, consisted in the making of the promise, in the manner aforesaid, with the intent not to perform it. By the act of purchasing the goods on

credit the defendant impliedly represented that he intended to pay for them. The plaintiff relied on this representation, which was material and fraudulent, and was damaged thereby. All the necessary elements of fraud or deceit, therefore, were present in the transaction. See *Upton v. Vall*, 6 Johns. 181; *Bartholomew v. Bentley*, 15 Ohio, 666; *Bish. Noncont. Law*, §§ 314-318; *Burrill v. Stevens*, 73 Me. 400; *Barney v. Dewey*, 13 Johns. 226; *Hubbell v. Meigs*, 50 N. Y. 491. The general doctrine which controls this action is fully reviewed by Mr. Wallace in a note to *Pasley v. Freeman*, 2 Smith, Lead. Cas. 101. As said by Bigelow (*Frauds*, p. 484): "To profess an intent to do or not to do, when a party intends the contrary, is as clear a case of misrepresentation and of fraud as could be made." See, also, page 466, as to what constitutes a representation. In *Goodwin v. Horne*, 60 N. H. 486, the court say: "Ordinarily false promises are not fraudulent, nor evidence of fraud, and only false representations of past or existing facts are actionable, or can be made the ground of defense. * * * But when a promise is made with no intention of performance, and for the very purpose of accomplishing a fraud, it is a most apt and effectual means to that end, and the victim has a remedy by action or defense. Such are cases of concealed insolvency and purchases of goods with no intention to pay for them." In *Ryrd v. Hall*, 1 Abb. Dec. 286, it was held that, although a purchase of goods on credit by one who knows himself to be insolvent is not fraudulent, yet, where it is made with a preconceived design not to pay, it is fraudulent. See, also, *Mulliken v. Millar*, 12 R. I. 296; *Thompson v. Rose*, 16 Conn. 81; *Hennequin v. Naylor*, 24 N. Y. 129; *Devoe v. Brandt*, 53 N. Y. 465; *Story, Sales* (2d. Ed.) § 176, and cases in note 2; *Douthitt v. Applegate*, 33 Kan. 396, 6 Pac. 575; *Morrill v. Blackman*, 42 Conn. 324; *Skinner v. Flint*, 105 Mass. 528; *Earl of Bristol v. Willsmore*, 2 Dowl. & R. 760; *Lobdell v. Baker*, 1 Metc. (Mass.) 193; *Cooley, Torts* (2d. Ed.) 559; *Load v. Green*, 15 Mees. & W. 215. In short, the making of one state of things to appear to those with whom you deal to be the true state of things, while you are acting on the knowledge of a different state of things,—among the oldest definitions of fraud in contracts,—is exemplified in this case. See *Lee v. Jones*, 17 C. B. (N. S.) 494. The defendant made it to appear, by the act of buying on credit, that he intended to pay for the goods in question, while in fact he intended to cheat the plaintiffs out of them; and to hold that such a transaction does not amount to fraud would be to make it easy for cheats and swindlers to escape the just consequence of their unrighteous acts.

We have hesitated somewhat in arriving at the conclusion that an action of deceit will lie upon the facts set out in the declara-

tion for the reason that, among the numerous cases of fraud and deceit to be found in the books, we have not been referred to any, nor have we been able to find any, where the action of deceit was based simply on the act of buying goods on credit, intending not to pay for them. In *Lyons v. Briggs*, 14 R. I. 224, which was an action of deceit, *Durfee, O. J.*, intimates, however, that deceit would lie, in a case like the one before us, by the use of the following language: "It is not alleged that the buyer did not intend to pay when he bought, but only that he falsely and fraudulently asserted that he could be safely trusted." But the authorities are overwhelming to the effect that it is a fraud to purchase goods intending not to pay for them, and that the vendor, upon discovering the fraud, may repudiate the sale and reclaim the property, or may sue in trover or in some other action of tort for the damages sustained by the fraud. And, this being so, we fail to see why an action of deceit, which is an action of tort based on fraud, may not lie as well; for to obtain goods on credit, intending not to pay for them, is as much a trick or device as it would be to falsely represent in words any material fact whereby the vendor should be induced to part therewith. But defendant's counsel contends that the alleged representation was not as to any fact, present or past, but merely as to what the defendant would do in the future with reference to paying for the goods, and that to say what one intends to do is identical to saying what one will do in the future, which amounts simply to a promise; and, furthermore, that a representation of what will happen in the future, even if not realized, is not such a representation as will support this action. We do not assent to this method of reasoning. The state of a man's mind at a given time is as much a fact as is the state of his digestion. Intention is a fact. *Cliff v. White*, 12 N. Y. 538. Hence a witness may be asked with what intent he did a given act. *Seymour v. Wilson*, 14 N. Y. 567. A man who buys and obtains possession of goods on credit, intending not to pay for them, is then and there guilty of fraud. The wrong is fully completed, and no longer exists in intention merely, and a cause of action instantly accrues thereon in favor of the vendor to recover for the wrong and injury sustained. It is true the purchaser may afterwards repent of the wrong and pay for the goods, and the vendor may never know of the wrongful intent. But this does not alter the case at all as to the original wrong, and the liability incurred thereby. Of course, a mere intention to commit a crime or to do a wrong is no offense; but, when the intention is coupled with the doing or accomplishment of the act intended, that moment the wrong is perpetrated, and the corresponding liability incurred. See

Starch Factory v. Lendrum, 57 Iowa, 582, 10 N. W. 900. In *Stewart v. Emerson*, 52 N. H. 301, where it was alleged, in reply to the defendant's plea of discharge in bankruptcy, that the debt in question was created by the fraud of the defendant, Doe, J., in the course of a long and vigorous opinion, used the following language, which is so apt and pertinent that we quote it. He said: "When the intent not to pay is concealed, the intent to defraud is acted out. The mere omission of A. to disclose his insolvency might not be satisfactory proof of a fraudulent intent in all cases. He might expect to become solvent. He might intend to pay all his creditors. He might intend to pay B., though unable to pay others. His fixed purpose never to pay B. is a very different thing from his present inability to pay all or any of his creditors. A man may buy goods, with time for trying to pay for them, on the strength of his known or inferred disposition to pay his debts, his habits, character, business capacity, and financial prospects, without his present solvency being thought of, and even when his present insolvency is known to the vendor. But who could obtain goods on credit with an unconcealed determination that they should never be paid for? The concealment of such a determination is conduct which reasonably involves a false representation of an existing fact, is not less material than a misrepresentation of ability to pay (*Bradley v. Obear*, 10 N. H. 477), and is an actual artifice, intended and fitted to deceive. * * * An application for or acceptance of credit by a purchaser is a representation of the existence of an intent to pay at a future time, and a representation of the nonexistence of an intent not to pay. What principle of law requires a false and fraudulent representation to be express, or forbids it to be fairly inferred from the act of purchase? A representation of a material fact, implied from the act of purchase, and inducing the owner of goods to sell them, is as effective for the vendee's purpose as if it had been previously and expressly made. If it is false, and known to the pretended purchaser to be false, and is intended and used by him as a means of converting another's goods to his own use without compensation, under the false pretense of a purchase, why does it not render such a purchase fraudulent? When the intent is to pay, it is necessarily understood by both parties, and need not be expressly represented as existing. When the intent is not to pay, it is of course concealed. Whether the deceit is called a false and fraudulent representation of the existence of an intent to pay, or a fraudulent concealment of the existence of an intent not to pay, the fraud described is, in fact, one and the same fraud."

Demurrer overruled, and case remitted to the common pleas division for further proceedings.

CHAFFEE v. OLD COLONY R. CO.

(Supreme Court of Rhode Island. June 29, 1896.)

NEGLECT—DELAY IN STOPPING TRAIN—EVIDENCE.

A finding that a train which killed a person guilty of contributory negligence was not stopped as soon as it was reasonably possible after the engineer and fireman had notice that deceased was in danger, is not supported by the evidence, it appearing that the train, which consisted of a very large engine and four cars, was going five or six miles an hour, and that when the fireman discovered deceased's danger the end of the engine was about 50 feet from him, and the fireman having testified that he immediately warned the engineer of the danger, and the engineer having testified that he immediately did everything possible to stop the train as quickly as possible; the only evidence to the contrary being the testimony of the two engineers who testified that in their opinion the train could have been stopped within a distance of eight to ten feet.

Action by Lavina W. Chaffee against the Old Colony Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

Daniel R. Ballou and Frank H. Jackson, for plaintiff. Henry W. Hayes and Frank S. Arnold, for defendant.

PER CURIAM. It being necessarily conceded by the plaintiff, after the decision in 17 R. I. 658, 24 Atl. 141, that the deceased was guilty of contributory negligence, the issue at the last trial was whether the engineer on the defendant's north-bound train could have stopped the train in season to have prevented the accident. The jury found specially that the train was not stopped as soon as it was reasonably possible after the engineer and fireman had notice that the deceased was in danger. The question presented by the defendant's petition for a new trial is whether this finding is supported by a preponderance of the evidence. We do not think that the finding is supported by a preponderance of the evidence. The fireman testifies that he was on that side of the engine towards the station; that the cab of the engine had already got over the crossing on Broad street when he saw the deceased coming out of the door of the men's waiting room in the station, and cross the concrete walk in front of the station, the walk being, as appears from other testimony, about 12 feet wide; that, as soon as it was apparent to the witness that deceased was about to step on the track in front of the engine, he hollowed "Whoa!" to the engineer. The engineer testifies that he was on the right-hand side of the cab,—or that away from the station,—and was prevented by the boiler and smokestack from observing what was taking place on the walk in front of the station, though he was looking forward on the track; that after the cab of the engine had passed over the crossing on Broad street, the fireman hollowed "Whoa!" to him, which was the signal understood between them that there was

danger, and for him to stop as quickly as possible; that, in obedience to the signal, he immediately shut off the steam from the engine and pulled the air handle which operated the air brake over into the emergency notch, the effect being to apply practically instantaneously the air brakes to the wheels of all the cars and the tender and to the driving-wheels of the engine; that when he had done this he had done everything possible to stop the train. The testimony further shows that the distance from the easterly line of Broad street, on the north-bound track, to a point opposite the middle of the doorway of the men's waiting room in the station, is about 90 feet; that the length of the engine in front of the cab is about 38 feet; that the north-bound train consisted of an engine of nearly the largest size, a tender, a baggage car, and three passenger coaches, and was hauling in to the station at a speed of from five to six miles an hour. The only testimony adduced by the plaintiff to rebut the testimony of the engineer that he did everything that he could to stop the train as quickly as possible was that of two other locomotive engineers, who testified, as experts, that in their opinion the train could have been stopped within a distance of from eight to ten feet. As already stated, the distance on the track from the easterly side of Broad street to a point opposite the middle of the doorway of the men's waiting room, assuming that to have been the point where the deceased was struck by the engine, is only about 90 feet. Deducting from this 90 feet the length of the engine in front of the cab, and there remained but 52 feet as the distance to be passed over by the front of the engine from the time the deceased was first seen to the time he was struck. A train moving at the rate of $5\frac{1}{2}$ miles an hour passes over $8\frac{3}{4}$ feet a second, so that the train in the present instance would have passed over the entire 52 feet in less than seven seconds. Surely this was too brief a period in which to require the fireman to give notice to the engineer of the peril of the deceased and the engineer to stop the heavy train. If it be urged that the mathematical computation as to time is not to be thoroughly relied on because, the data on which it is based being matters of estimate, the witnesses may easily have been mistaken, it is nevertheless apparent from other evidence that the occurrences which immediately preceded and led up to the accident occupied but a brief interval of time. The warning shouts of the bystanders to the deceased as he stepped onto the track are convincing evidence of the imminent peril of the deceased by reason of the proximity of the approaching train. In view of these considerations, if we assume that the two expert witnesses were qualified by their experience to express an opinion as to the stopping of the train in the precise conditions shown by the testimony, we do not think that their evidence is sufficient to overthrow the direct and positive testimony of the fireman and engineer as to what was done to avert the

accident. The case is remitted to the common pleas division, with direction to enter judgment for the defendant for costs.

(176 Pa. St. 170)

WHITESELL et al. v. PECK et al.

(Supreme Court of Pennsylvania. May 25, 1896.)

WRIT OF RESTITUTION—REVERSAL OF JUDGMENT.

Where, pending an appeal from an order striking out a satisfaction of judgment, a purchaser of the property bound pays the judgment, he is entitled, on reversal of the order, to a writ of restitution, which should issue from the trial court.

Appeal from court of common pleas, Alleghany county.

Action by Whitesell & Sons, for the use of Frederick Maul, against H. R. Peck and others, in which there was a judgment for plaintiff, which was afterwards satisfied of record by the legal plaintiffs, who were Maul's attorneys. Maul filed a petition to strike off such satisfaction, giving notice to defendants, and to M. H. Stevenson, terre tenant under defendants of the property bound by the judgment. The petition was granted, and the satisfaction stricken off, but on appeal the order was reversed. Pending the appeal, the use plaintiff issued execution, and compelled Stevenson to pay the judgment, and said Stevenson, being refused a writ of restitution by the trial court after the determination of the appeal, now petitions the supreme court for said writ. Writ awarded.

John D. Shafer, for appellant. James Bredin, for appellees.

PER CURIAM. This is a proper case for restitution. It might properly have been awarded by the court below, as the judgment was collected after the appeal to this court was taken, and did not regularly appear as the record here. Having been brought to our attention, however, by petition and motion, we now have no hesitation in saying that a writ of restitution should issue out of the court below. The writ is awarded.

(53 N. J. E. 244)

In re ROSS.

(Prerogative Court of New Jersey. Feb. Term, 1895.)

GUARDIANS—APPOINTMENT.

The mother of an infant will not be appointed guardian of its person for convenience alone, while another is appointed guardian of its estate.

Samuel P. Savage, for petitioner.

THE ORDINARY. The petition in this case is by the mother of the infant. It alleges that the father lately died without hav-

ing disposed of the guardianship of his child, and that the infant is now under 14 years of age. It prays that the mother may be appointed guardian of the person of the infant. It does not ask that she be appointed guardian of his estate. It does not state a reason why she should not also be appointed guardian of his estate. The design, evidently, is to secure a separation of the guardianship, so that the person will go to one care and the estate to another. In the case of *Tenbrook v. McCole*, 12 N. J. Law, 97, decided in the supreme court in 1830, it was held that the policy of the laws of this state forbade an orphans' court awarding the guardianship of an infant's person to one and the guardianship of his estate to another. The chief justice (Ewing), after stating the statutory policy, added: "The idea of parceling out the guardianship, and dividing its duties among several, I do not find recognized, directly or indirectly, in any act of the legislature. From a separation of these duties, while very little benefit can be anticipated, many inconveniences and considerable increase of expense must necessarily follow. The policy of our laws is wisely designed to prevent such consequences. From a careful review of the acts of the legislature on this subject, and from a reference to the uniform and settled practice of the state, which is entitled to some respect, I am satisfied the orphans' courts are not authorized to divide the guardianship of a minor, and commit his property to one and his person to another." This decision was recognized as the law in 1835, by Chancellor Vroom, in *Re Van Houten*, 3 N. J. Eq. 220. I am not aware of any later decisions upon this subject. These cases have been acquiesced in as the law of this state to this time. My research has not disclosed any change in the statutory policy of the state. While the decisions referred to do not define the powers of the prerogative court, they and the statutory policy of the state, exhibited in the orphans' court act, must have an influence with the prerogative court in the exercise of its jurisdiction, and, I think, should control it, except, possibly, in a case in which the application of the rule would lead to great hardship. Such a case is not presented here. My understanding, from the statements of counsel, is that it will be simply convenient to have the infant's entire estate managed by a trust company, which is ill fitted to also control his person, and hence that the guardianship should be divided. The great evil of two guardianships lies in two sets of accountings and expenses for the accomplishment of that which should be one duty. I think that the court should condemn such a separation, unless the given case shall present strong exceptional features. I will therefore deny the present application, without prejudice, however, to granting guardianship of both the person and estate of the child to the mother, when it shall be asked for in any proper tribunal.

(33 N. J. E. 183)

WEST JERSEY TRACTION CO. v. CAMDEN HORSE-RAILROAD CO.

SCOTT et al. v. SAME (two cases).

(Court of Errors and Appeals of New Jersey. March Term, 1895.)

STREET RAILWAYS—CONSTRUCTION OF FRANCHISE—CONSENT OF TOWNSHIP—VALIDITY—EXCLUSIVE RIGHTS.

1. The special act of March 11, 1872 (P. L. 1872, p. 512), which authorizes the Camden Horse-Railroad Company to build a railroad or railroads on "any public road or highway extending from the city of Camden into the county of Camden," does not empower the company to build a railroad upon a public highway no part of which touches the city of Camden, but does empower it to build more railroads than one upon the highways mentioned in the act.

2. A municipal consent to the laying of "a street railroad" in and along the streets of the municipality is not a consent to the laying of two distinct street railroads.

3. When a statute requires "the consent of the township committee" to legalize the laying of a street railroad in the township, it is necessary that the consent should be given when the members of the committee, or a majority of them, are assembled in corporate meeting.

4. The declarations of individual members of a township committee are not legal evidence to prove prior acts of the corporate body, nor is the public estopped by such declarations.

5. Under the traction companies act of March 14, 1893, a municipal consent to "the location of tracks" is invalid if it does not define the position of the tracks in the street.

6. Under the act of March 9, 1893 (P. L. 1893, p. 144), the consent of the township committee is necessary to legalize the construction of street railroads in any township.

7. If a company has legislative power to build a railroad on a designated street, provided the municipal authorities consent thereto, and it commences to build such railroad without municipal consent, the municipal authorities cannot grant to another company the exclusive right to build a railroad in that street, without giving to the first company notice and an opportunity to be heard.

(Syllabus by the Court.)

Appeal from court of chancery.

Three actions heard together: One by the West Jersey Traction Company against the Camden Horse-Railroad Company; one by the Camden Horse-Railroad Company against Charles W. Scott and others, township committee of Stockton township; one by the same plaintiff against the West Jersey Traction Company. Decree in favor of the Camden Horse-Railroad Company. The traction company and the other parties appeal. Affirmed on traction company's appeal. Reversed on other appeals.

On appeal from decrees advised by Vice Chancellor Pitney, whose opinion is reported in *West Jersey Traction Co. v. Camden Horse-Railroad Co.*, 52 N. J. Eq. 452, 29 Atl. 333.

Thomas E. French and Mark R. Sooy, (Lindley M. Garrison, of counsel), for appellant West Jersey Traction Company. Jonas S. Miller (Thomas E. French, of counsel), for appellants Charles W. Scott and others. Edward A. Armstrong and David J. Pancoast

(Thomas N. McCarter, of counsel), for respondent.

DIXON, J. On June 21, 1893, the West Jersey Traction Company filed a bill of complaint to restrain the Camden Horse-Railroad Company from constructing a street railway, in the township of Stockton, Camden county, from the bridge over Cooper's creek, which divides the township from the city of Camden, along State street, to Fourth street, and, along Fourth street and the River road, to the line between Stockton and Pensauken townships. The traction company based its claim upon the ground that, by certain proceedings stated in the bill, it had become invested with an absolute and exclusive right to lay its tracks along said streets, and that the construction and operation of a railroad thereon by the Camden Company would be an invasion of the complainant's right, and would cause the complainant irreparable injury. On August 14, 1893, the Camden Horse-Railroad Company filed a bill of complaint, and on August 17, 1893, it filed another bill of complaint, the object of which bills was to enjoin the West Jersey Traction Company, the inhabitants of the township of Stockton, in the county of Camden, and the members of the township committee of said township, from interfering with the construction of a street railroad along Fourth street, in said township, by the Camden Company. After answers filed by all the defendants, these causes were heard together, and resulted in decrees dismissing the bill of the traction company, and granting to the Camden Company the relief for which it prayed. The traction company appeals from the decree dismissing its bill, and also from the decree rendered on the bill filed August 17th, in which it was a defendant. The township corporation and the members of the township committee appeal from the decrees rendered on the bills filed August 14th and August 17th, in both of which they were defendants.

In disposing of the questions raised by these appeals, it is convenient to consider first the right of the Camden Company to construct a street railway along Fourth street, as claimed in its bills. The company was chartered by act of March 23, 1866 (P. L. 1866, p. 640), which empowered it to build and operate a railroad on certain streets within the city of Camden only. A supplement to the charter, approved April 2, 1868 (P. L. 1868, p. 638), likewise confined it to the city of Camden. Another supplement, passed March 11, 1872 (P. L. 1872, p. 512), authorized the company "to build, maintain and use a railroad or railroads on any public road or highway in the city of Camden, or on any public road or highway extending from said city into the county of Camden." Upon the last clause of this supplement the company bases a right to build a railroad along Fourth street. We cannot concede this claim. Fourth street is not a "road or highway extending

from the city of Camden into the county." It lies wholly in Stockton township, and no part of it touches the city of Camden. True, it crosses State street, which extends out of the city into the township, and it ends in Federal street, which also extends out of the city into the township; but it is as distinct from either State street or Federal street as any two intersecting streets can be from each other. To support this claim of the company, we must interpret the language of the statute as though it read that the company might build "a railroad or railroads extending from Camden city into the county on any road or highway,"—an interpretation which would require greater latitude of construction than is permissible in public grants. The legislature defined the highways which the company might use, not the railroads, and the company cannot go beyond the terms of the definition. On April 5, 1878, an act was passed (Supp. Revision, p. 368) authorizing certain street-railway companies to extend their tracks in any county, "provided the consent of the township committee * * * of the township, upon the streets or roads of which it is proposed to lay such tracks, shall first have been had and obtained." Under this act, also, the company contends it is entitled to lay its tracks along Fourth street, in pursuance of a consent given by the township committee on May 12, 1892; and it produces a writing of that date, signed by the three persons who then composed the committee, certifying that permission had been, and thereby was, granted to the Camden Horse-Railroad Company "to lay and operate in and along the streets, roads, avenues and highways of the township of Stockton a street railroad." Passing by the questions whether this statute is special, and so unconstitutional, and whether the Camden Company is embraced within its provisions, we think that, according to the terms of the above certificate, only one street railroad was authorized, and that the authority was exhausted by the construction, shortly afterwards, of the Merchantville line. The fact that the language of the certificate is broad enough to embrace all the highways in the township does not counteract the restrictive force of the words "a street railroad," since a single street railroad may traverse any number of streets. The evidence is that, when this certificate was signed, the Camden Company had in contemplation the immediate construction of a railroad through the township from the city of Camden to Merchantville, and that forthwith it built such a railroad, which was completed during the summer of 1892, and has been in operation ever since. The proposed railroad along State and Fourth streets is entirely distinct from this Merchantville line. Under the terms of the certificate, the company had the right of selection among all the highways in the township for the building of a street railroad; but the selection being once made, and the railroad constructed, the right ended. Morris

& E. R. Co. v. Central R. Co., 31 N. J. Law, 205; Allen v. Board, 13 N. J. Eq. 68. A consent that the company might, at all times thereafter, lay as many railroads as it chose, on any highways within the township, would, even if legal, be so unreasonable that it could not be judicially inferred where it was not couched in unquestionable terms.

But, even if the language of this instrument were as broad as the Camden Company contends for, we would still be of opinion that the company's claim must be denied, because it appears that the consent so expressed was not the lawful consent of the township committee. The second section of "An act concerning townships and township officers," approved April 21, 1876 (Revision, p. 1202), provides that the clerk of the township shall act as clerk of the township committee, and keep a record of its proceedings, and record the same in the town book. The town book of the township of Stockton contains no record indicating that the committee ever gave the consent alleged. In view of the public duty of the town clerk, the absence of such a record shows, *prima facie* at least, under the maxim "*Omnia rite acta præsumentur*," that no consent was given by the committee. This presumption of fact was not rebutted by the proofs. According to the evidence, the certificate above mentioned was signed by each of the three subscribers in the absence of his fellows. As the statute requires the consent of the "township committee," it was essential to a valid consent that it should be given when the members, or a majority of them, were assembled in corporate meeting. Schumm v. Seymour, 24 N. J. Eq. 143; 19 Am. & Eng. Enc. Law, 467. Hence this certificate cannot be itself the statutory consent.

It is argued, however, that, since the certificate states that permission had been granted, it is evidence from which the giving of a joint consent at some previous time may be inferred. But this position is untenable, for the reason that the declarations of the several members of the board, whether oral or written, are not, by any statute or by any legal rule, admissible to prove prior acts of the corporate body. The testimony of witnesses at the hearing favors, rather than repels, the belief that no consent was ever voted by the committee when assembled as a body.

But it is further insisted that as the Camden Company acted upon the supposition that this certificate was the requisite consent, or was conclusive evidence of it, the public authorities are estopped from denying such consent. The answer to this is that neither for the purpose of giving consent, nor for the purpose of making evidence that consent had been given, were the members of the committee, when separated, the representatives of the public; their conduct then was that of private individuals. Moreover, the legislature having provided that

the official proceedings of the committee should be recorded in the town book, the Camden Company was not justified in relying on unwarranted assertions as to the acts of the committee, and the public cannot be estopped thereby. Kean v. City of Elizabeth, 55 N. J. Law, 337, 26 Atl. 939.

With respect to the implied consent growing out of the alleged approval by the township committee of a grade map of Fourth street, in July, 1893, it suffices to say that, previously, the traction company had applied to the committee for permission to construct a street railroad along that street, and the committee had granted, or attempted to grant, such permission, and that, under these circumstances, a subsequent consent to build such a railroad on the same street could not lawfully be given to the Camden Company without notice to the traction company. West Jersey Traction Co. v. Board of Public Works of City of Camden, 56 N. J. Law, 431, 29 Atl. 163, affirmed, on error, March term, 1895, 34 Atl. 1134.

Our conclusion is that the Camden Company has never acquired a perfect right to construct a street railway along Fourth street, and, therefore, that the decrees rendered on the bills filed by it on August 14th and August 17th should be reversed, and the bills dismissed.

We come now to the questions raised by the bill of the West Jersey Traction Company, the first of which is whether that company has shown itself to be invested with an absolute and exclusive right to lay tracks from the bridge over Cooper's creek, along State street, to Fourth street, and, along Fourth street and the River road, to the easterly line of Stockton township. The company was formed on May 13, 1893, by the filing with the secretary of state of a certificate of incorporation under the traction companies act of March 14, 1893 (P. L. 1893, p. 302). Simultaneously with the filing of this certificate, there were filed in the same office a description and map of six routes of railway proposed to be built by said company, one of which covered the streets in question; and on June 20, 1893, the company filed with the secretary of state a copy of a resolution which, on the previous day, had been adopted by the Stockton township committee, purporting to give the committee's consent to the "location of tracks" by the traction company along those streets, and also an acceptance by the company of such location. This consent was evidently designed to be the consent to the location of tracks provided for in the seventh section of the statute last mentioned, but, as it utterly fails to indicate the location of the tracks in the streets named, it is invalid as a consent under that section, for the reason stated in *State v. Mayor, etc., of Newark* (N. J. Sup.) 30 Atl. 528. It may be, however, in substance, a consent to the location of the route under section 6, and we will proceed to con-

sider it in that aspect. According to the statute, such a consent, if properly granted, secures to the company an exclusive right for a limited time to build the line of railway indicated,—that is, an exclusive right to the route,—subject, of course, to the obtaining of municipal consent to the location of tracks thereon. The question therefore arises whether this consent to the location of the route was properly granted. The statute does not require notice to be given of an application for consent to the route, and, as such consent does not usually affect private rights, notice to particular persons is not generally necessary. *State v. Mayor, etc., of Jersey City* (N. J. Sup.) 30 Atl. 531. But, in the present instance, we think the relations of the Camden Horse-Railroad Company to the State street portion of the route, at least, were such as to require that notice should be given to that company before this application could lawfully be granted.

As already stated, the supplement to the charter of the Camden Company passed March 11, 1872, authorized the company "to build, maintain and use a railroad or railroads on any public road or highway in the city of Camden, or on any public road or highway extending from said city into the county of Camden." State street is a public highway, extending from the city into the county of Camden, and was therefore within the range of this grant. The traction company contends that, under this supplement, the Camden Company obtained the right to use only one road leading from the city into the county, and that, by building the railroad on Federal street, from the city, through the township of Stockton, to Merchantville, in 1892, it had exhausted the right. But we deem this interpretation of that statute too strict to satisfy its terms. Its language is, "to build a railroad or railroads on any public highway." Now, although the words "any highway" more aptly denote the selection of a single highway than the selection of several, yet it is not incapable of the latter signification; and to accord with the context in this statute, which authorizes the building of railroads, it must have the broader meaning, or else we must suppose that the legislature contemplated the construction of several railroads on the same highway by the same company. That supposition cannot be entertained, and therefore it follows that the power to build a railroad on State street remained. On March 9, 1893, the legislature passed an act to prohibit the laying or construction of any street or horse railroad along the streets of any municipality of this state without the consent of the governing body having the control of the streets in such municipality, which act repealed all acts, general, special, or local, inconsistent with its provisions. P. L. 1893, p. 144. This act embraces townships (*State v. Willey*, 46 N. J. Law, 473); and in view of

the act of March 8, 1893 (P. L. 1893, p. 130), increasing the powers of township committees, there can be no doubt those committees are in townships the governing bodies whose consent is required. At the time this act was passed, the Camden Company had done nothing towards the laying of a railroad along State street, in Stockton township; and as the supplement of 1872, authorizing it to build such a railroad was subject to alteration and repeal, it is clear that after March 9, 1893, the company could not lawfully construct a railroad in that street without the consent of the township committee; it being within the reserved power of the legislature thus to modify the franchise, which depended wholly upon the repealable statute, and under which no property rights had been acquired. *Zabriskie v. Railroad Co.*, 18 N. J. Eq. 178; *Railroad Co. v. Maine*, 96 U. S. 499; *Greenwood v. Freight Co.*, 105 U. S. 13, 21.

It thus appears that on June 19, 1893, when the township committee voted this consent to the traction company, the Camden Company had legislative authority to build a railroad on State street, in the township, provided the committee consented thereto. It also appears that before that time the Camden Company had actually commenced to construct a railroad on that street, and had proceeded so far in the work as to justify inference that the township committee had become aware of its design. Under these circumstances, the committee could not lawfully confer the exclusive right to build such a railroad on the traction company without giving to the Camden Company notice, and an opportunity to be heard. *West Jersey Traction Co. v. Board of Public Works of City of Camden*, supra. No such opportunity was afforded. A certain notice had indeed been published in a local newspaper that the township committee would meet at the time stated, to consider the petition of the traction company for the location of its tracks in the township, conformably to the routes described in the office of the secretary of state; but it does not appear that the Camden Company had actual notice of that publication, and the statute does not make it constructive notice of an application for a consent to the route. Even if the publication had come to the knowledge of the Camden Company, it was too indefinite (the case being one where special notice was necessary) to inform that company of a purpose to consider a route which included State street. It should have been sufficiently explicit to indicate to the company that its interests were involved. *Vantilburgh v. Shann*, 24 N. J. Law, 740; *State v. Mayor, etc., of Jersey City*, 35 N. J. Law, 404; *Bowker v. Wright*, 54 N. J. Law, 130, 23 Atl. 116. Consequently, we think the consent given was invalid as to State street; and, since the route approved was an entirety, the consent must wholly fail. For this reason, the traction

company had not acquired the right upon which it based its claim for relief, and its bill was properly dismissed.

West Jersey Traction Co. v. Camden Horse-Railroad Co.: Unanimously affirmed. Vote on other appeals: Unanimously reversed.

(58 Vt. 219)

RAYCROFT v. TAYNTOR.

(Supreme Court of Vermont. Washington. March 14, 1896.)

PROCURING DISCHARGE OF SERVANT—LIABILITY.

A superintendent of a quarry, who refuses to permit another to take stone therefrom unless the latter discharges a certain employé, is not liable for causing such discharge, even though he act maliciously, where the contract under which the employer took stone from the quarry was for no definite period, and was terminable at the pleasure of the superintendent.

Exceptions from Washington county court; Start, Judge.

Action by Hugh Raycroft against E. M. Tayntor to recover damages for causing his discharge from employment. There was a judgment for plaintiff, and defendant excepts. Reversed.

John W. Gordon and Richard A. Hoar, for plaintiff. J. P. Lamson, for defendant.

ROSS, C. J. At the close of the testimony the defendant requested the court to direct the jury to return a verdict in his favor, and excepted to its failure to comply with this request. He also excepted to that portion of the charge of the court set out in the exceptions. These exceptions raise the same question. He contends that the defendant's relation to the business and property of C. E. Tayntor was such that no liability arose from his acts of which the plaintiff complains. C. E. Tayntor owned and operated a granite quarry, in the fall of 1891, and therein employed from 60 to 90 workmen. He resided in New York, and spent very little time at the quarry. The defendant was the manager and superintendent of his business, employed and discharged the help, paid them, and purchased supplies and anything needed in the business. A man by the name of Libersant obtained from the defendant leave to go upon the quarry and cut some of the poor granite into paving stone on paying an agreed price therefor. This contract was for no definite period, and was terminable at the pleasure of the defendant. Libersant had the right to leave the work at pleasure. He expected, if no difficulty arose, to continue the work through the winter. The plaintiff came to work for Libersant by the hour, with an understanding, if they got along well together, that he could work through the winter. Either party could end this arrangement at his pleasure. While the arrangement was existing between the plaintiff and Libersant, the plaintiff purchased the standing trees on a piece of land adjoining the

quarry, on which was a small spring. C. E. Tayntor, to obtain the spring for the use of the quarry, through the defendant purchased the land on which it was located, and on which the trees which the plaintiff had purchased stood. The plaintiff had cut some of the trees. The defendant, acting for C. E. Tayntor, purchased from the plaintiff what trees there were then standing on this piece of land about the spring. When the defendant was paying the plaintiff for the trees, a difficulty arose over the terms of a receipt which the defendant asked the plaintiff to sign. As the plaintiff's testimony tended to show, the defendant became very angry, ordered the plaintiff to leave the premises, and added that he would go to Libersant and get him discharged; that he did go to Libersant and tell him that, if he did not discharge the plaintiff, he could no longer cut paving blocks on the premises. Libersant informed the defendant of his arrangement with the plaintiff, that the plaintiff was satisfactory to him, and that he did not want to discharge him. The defendant insisted that he must discharge the plaintiff or leave the works. Libersant thereupon, and because the defendant demanded he should do so or leave, discharged the plaintiff. The evidence tended to show that the plaintiff was not able that winter to procure another place where he could obtain as good wages as Libersant was paying him. The court, in substance, charged that, notwithstanding the defendant, as superintendent and manager for C. E. Tayntor, had the right to terminate the contract with Libersant at pleasure, and without having any reason for so doing, and Libersant had the right to dismiss the plaintiff at his pleasure, yet if his dismissal was brought about by the defendant's threat to terminate Libersant's right to remain on the quarry and cut paving stone, and this action of the defendant was malicious, and occasioned damage to the plaintiff, the action could be maintained. The court did not define to the jury what constitutes legal or actionable malice. It is evident that if the defendant, in the capacity which he sustained to the quarry, actuated by hatred and ill will, or for any other cause, had terminated the contract with Libersant, and compelled him to leave the quarry, Libersant could have maintained no action therefor, although it was shown to be to his pecuniary detriment. By so doing the defendant would be exercising a legal right, resting in him as superintendent and manager of the business. When one exercises a legal right only, the motive which actuates him is immaterial. If the defendant had exercised this right, and Libersant had left the quarry, the plaintiff would have had to leave working on the quarry also. He had acquired his right to work on the quarry under the right which the defendant, as superintendent and manager, had conferred on Libersant. Hence the plaintiff's right to remain and work there, for Libersant, being

derived from the right which the defendant, in his capacity of superintendent and manager, had conferred upon Libersant, was not superior to the right of Libersant. If the defendant had done what he threatened to do, discharged Libersant for the express purpose of removing the plaintiff from the quarry, and if he would have incurred no liability, whatever may have been his motive for the act, it is difficult to discover how his threat to do this act if Libersant did not discharge the plaintiff can give a right of action to the plaintiff, who had no right to remain at work on the quarry except what had been conferred by Libersant. The stream cannot rise higher than its source. The charge excepted to treats the defendant as an intermeddler, and without right to determine who should remain and work on the quarry. On the undisputed facts in regard to determining who might remain and work upon the quarry, he was clothed with all the right and power of the owner.

The authorities cited for the plaintiff clearly establish that if the defendant, without having any lawful right, or by an act, or threat, allunde the exercise of a lawful right, had broken up the contract relation existing between the plaintiff and Libersant, maliciously or unlawfully, although such relation could be terminated at the pleasure of either, and damage had thereby been occasioned, the party damaged could have maintained an action against the defendant therefor. But the same authorities clearly establish that if the defendant's act or threatened act was one which, in his relation to the property and parties, he had a lawful right to perform, unless it involved a superior right of the plaintiff, this gave the plaintiff no right of action, though it occasioned a loss to him, and was actuated by a desire to injure. As said in *Walker v. Cronin*, 107 Mass. 554: "Accordingly it is generally held that no action will lie against one for acts done upon his own land in the exercise of his rights of ownership, whatever the motive, if they merely deprive another of advantages, or cause a loss to him without violating any legal right; that is, the motive is immaterial." *Frazier v. Brown*, 12 Ohio St. 294; *Chatfield v. Willson*, 28 Vt. 49; *Mahan v. Brown*, 13 Wend. 261; *Trustees v. Youmans*, 50 Barb. 316. A similar decision is found in *Wheatley v. Baugh*, 25 Pa. St. 528, but the suggestion in *Greenleaf v. Francis*, 18 Pick. 118, was approved so far as this, namely, that malicious acts without the justification of any right—that is, acts of a stranger resulting in the loss or damage—might be actionable. "If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria* unless some superior right by contract or otherwise is interfered with." So, too, in *Chipley v. Atkinson*, 23 Fla. 206, 1 South. 934, it is said: "Where one does an act which is legal in itself, and violates no

right of another person, it is true that the fact that the act is done from malice or other bad motive towards another does not give the latter a right of action against the former. Though there be a loss or damage resulting to the other from the act, and the doer was prompted to it solely by malice, yet if the act be legal, and violates no legal right of the other person, there is no right of action." In support of this doctrine a large number of decisions are cited, and among them *Chatfield v. Willson*, 28 Vt. 49; *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505; *Harwood v. Benton*, 32 Vt. 724. William L. Hodge, in the January and February numbers of the *American Law Review* for 1894, in an article on "Wrongful Interference by Third Parties with the Rights of Employers and Employed," reviews a great number, and on page 54 says: "So, also, it is said that there are, indeed, many authorities which appear to hold that, to constitute an actionable wrong, there must be a violation of some definite legal right of the plaintiff. But these are cases, for the most part, at least, where the defendants were themselves acting in the lawful exercise of some distinct right, which furnished the defense of a justifiable cause for their acts, except so far as they are in violation of a superior right in another. Therefore, if the defendant's act be (1) legal in itself and (2) violates no superior right in another, it is not actionable, although it be done maliciously, and cause damage to that other."

On the doctrine of these authorities, cited by the plaintiff, the threatened act of the defendant was one which, in his relation to the business of the quarry and Libersant, he had the legal right to do, and it would violate no superior right of the plaintiff. The court should have ordered the verdict as requested at the close of the evidence. Judgment reversed, and cause remanded.

(33 Vt. 247)

HATJIE v. HARE.

(Supreme Court of Vermont. Chittenden.

April 25, 1896.)

MALICIOUS PROSECUTION—DIRECTING VERDICT.

In an action for malicious prosecution, plaintiff's evidence not tending to prove malice on the part of defendant in bringing his action against plaintiff, verdict was properly directed for defendant.

Exceptions from Chittenden county court; Taft, Judge.

Action on the case by Adolph Hatjie against William Hare, insane (E. E. Davis, guardian), for malicious prosecution. Verdict was directed for defendant, and plaintiff excepts. Affirmed.

The evidence of the plaintiff tended to show that the defendant had brought suit against him for the conversion of a basket which he claimed that the plaintiff had unlawfully taken from his store; that the de-

defendant testified in that suit that he had seen the plaintiff take the basket, and that he could not be mistaken; that subsequently one Leser was produced as a witness upon that trial, and testified that he had taken the basket, which he brought into the court; that the defendant recognized the basket as his upon seeing it, but still insisted that the plaintiff was guilty of the conversation.

A. V. Spaulding, for plaintiff. Seneca Haselton and Charles T. Barney, for defendant.

THOMPSON, J. This is an action on the case for malicious prosecution. To maintain it, it was incumbent upon the plaintiff to allege and prove, as an independent fact, malice on the part of the defendant in bringing his action against the plaintiff. Dishonesty and bad faith on the part of the defendant must be established. Therefore the question whether there was malice in the mind of the defendant in the institution of his suit was a distinct issue on trial, to be proven by the plaintiff. *Barron v. Mason*, 31 Vt. 189; *Driggs v. Burton*, 44 Vt. 124; *Carleton v. Taylor*, 50 Vt. 220. The plaintiff's evidence did not tend to prove such malice, and the county court, therefore, did not err in directing a verdict for the defendant, at the close of the plaintiff's evidence. Judgment affirmed.

(68 Vt. 243)

In re HARRIS.

(Supreme Court of Vermont. Caledonia.
March 14, 1896.)

CRIMINAL LAW—SENTENCE—VALIDITY—HABEAS CORPUS—UNLAWFUL RESTRAINT—WHAT CONSTITUTES—DISCHARGE OF PETITIONER.

1. V. S. § 5066, provides that one guilty of gross lewdness shall be imprisoned not more than five years, but does not designate the place of imprisonment. Section 5170 provides that when an offense is punishable by imprisonment, and it is not specified that such imprisonment shall be in the state prison, it shall mean imprisonment in the house of correction, if the offender is a man over 16 years old. *Held*, that a court has no jurisdiction to impose on a man over 16 years old, convicted of gross lewdness, a sentence of imprisonment in the state prison.

2. Under V. S. § 1603, relating to habeas corpus, providing that, if no legal cause is shown for the imprisonment or restraint, the court shall discharge the prisoner, where a sentence of imprisonment is void the prisoner is entitled to discharge, and he cannot be detained on the ground that the process on which he was committed was a justification to the officer serving it.

3. On habeas corpus it appeared that petitioner was properly convicted, but the sentence of imprisonment in the state prison was void. *Held*, that while petitioner was unlawfully in the state prison he was not unlawfully restrained, and should be remanded to the sheriff of the county in which he was convicted, to be re-sentenced, under V. S. § 1605, providing that where petitioner is not unlawfully restrained he shall be remanded to the person from whose custody he was taken, or to such other person as is authorized to detain him.

Petition by Charles Harris for a writ of habeas corpus to obtain his discharge from the custody of the superintendent of the state prison to which he was committed on conviction of gross lewdness. Petition dismissed.

Dunnett & Slack, for the relator. W. H. Taylor, State's Atty., for the State.

TAFT, J. This is an original petition for a writ of habeas corpus. The petitioner is in custody of the superintendent of the state prison. The return of the petition shows that he was received by the superintendent December 30, 1895, from the sheriff of Caledonia county, pursuant to a mittimus issued upon a judgment of conviction of the offense of open and gross lewdness in the county court of that county, and a sentence of two years and nine months in the state prison at Windsor. The statute under which he was convicted (section 5066, V. S.) provides that one guilty of the offense therein specified "shall be imprisoned not more than five years, or fined not more than three hundred dollars," but does not designate the place of imprisonment. V. S. § 5170, reads that: "When an offence is declared by law to be punishable by imprisonment, and it is not specified that such imprisonment shall be in the state prison it shall be construed to mean imprisonment in the house of correction, if the offender is over sixteen years of age, if a man," etc. The petitioner claims his liberty upon the ground that the sentence to imprisonment in the state prison was void. The sentence was erroneous, and an erroneous sentence may be void or it may be voidable. If the sentence was void, the petitioner is entitled to be discharged from any imprisonment thereunder; and whether void or not depends upon the question of whether the court had jurisdiction to impose such a sentence. If it had, then, however irregular or erroneous the sentence may have been, the petitioner's remedy was by exception, which, under our statutes, takes the place of a writ of error, and habeas corpus will not lie. The court had no power to sentence the petitioner to imprisonment in the state prison. It had no jurisdiction to impose such a sentence. There is, consequently, no escape from the conclusion that the sentence was in violation of the statute. In imposing the sentence the court exceeded its powers, and its action, therefore, was void. *In re Mills*, 135 U. S. 263, 10 Sup. Ct. 762.

The counsel for the state insists that the petitioner is not entitled to a discharge, because the process upon which he was committed was a justification to the officers serving it; citing *Com. v. Lecky*, 1 Watts, 66. This doctrine is not sustained by recent authorities nor by principle. See note to case cited in 26 Am. Dec. 41. The petitioner is entitled to be discharged from imprisonment under the sentence, for section 1603, V. S.,

relating to habeas corpus, reads: "If no legal cause is shown for the imprisonment or restraint, the court or judge shall discharge the prisoner therefrom." The record before us shows that the petitioner was properly convicted. The error was in the sentence, and there does not seem to be any good reason why jurisdiction of the petitioner should not be reassumed by the court in which he was convicted, that he may be properly sentenced. To prevent the defeat of justice, we may well remand the petitioner to the custody of the sheriff of Caledonia county, that he may be taken before the county court, and sentence properly imposed. In re Bonner, 151 U. S. 242, 14 Sup. Ct. 323. While the petitioner is unlawfully in the state prison, we cannot say that he is unlawfully restrained; and if he is not, the statute (section 1605, V. S.) requires that "he shall be remanded to the person from whose custody he was taken, or to such other person or officer as by law is authorized to detain him." The sheriff of Caledonia county is by law authorized to detain him. The petitioner is released from imprisonment in the state prison, and remanded to the custody of the sheriff of Caledonia county, who is authorized to detain him for sentence by the Caledonia county court. Petition dismissed.

(68 Vt. 239)

**CONNECTICUT RIVER LUMBER CO. v.
BROWN et al.**

(Supreme Court of Vermont. Caledonia.
April 25, 1896.)

**COMPROMISE—CLAIM UNDER COLOR OF RIGHT—
TENDER IN SATISFACTION—ACCEPTANCE.**

1. In an action for balance due on a contract for the sale of lumber, where defendant, alleging defects in the lumber, denied the amount claimed by plaintiff, such denial, since it was in the nature of a claim in good faith under color of right, afforded a ground for compromise, even though in fact it was no defense to plaintiff's demand.

2. In an action to recover a balance alleged to be due under a contract, defendant, denying that the whole amount claimed by plaintiff was due, sent plaintiff a check for a portion of the amount, stating that it was sent "in full settlement of all demands. If this is refused by you, we shall make tender in the legal way." *Held*, that the acceptance and collection of the check by plaintiff operated as a full satisfaction of their claim.

Exceptions from Caledonia county court; Start, Judge.

Action by Connecticut River Lumber Company against F. H. and A. H. Brown. There was judgment for defendants, and plaintiff excepts. Affirmed.

Dunnett & Slack, for plaintiff. L. M. Read, for defendants.

THOMPSON, J. The plaintiff contracted with the defendants to deliver them a certain quantity of lumber, at an agreed price, on board the cars at Bellows Falls, Vt. This suit is brought to recover the balance claim-

ed to be due for lumber delivered under this contract. The defendants claimed that some of the lumber was not such as was required by the contract, in respect to quality and the manner in which it was sawed. They also claimed that they were damaged by reason of the failure of the plaintiff to deliver the lumber within the time agreed. These claims were controverted by the plaintiff. The last car load of lumber was shipped to the defendants June 24, 1880, and there was then due the plaintiff, at the contract price, as it claimed, \$1,265.94. The defendants claimed there was not so much due from them. The parties being unable to settle, the matter drifted along until the 20th of August following, when the plaintiff, by letter, informed defendants that their bill must be settled at once, or the same would be put into the hands of an attorney for collection. On receipt of this letter, August 21st, the defendants sent plaintiff, by mail, a check for \$1,014.35, inclosed in a letter from them of that date, in which, among other things, they wrote: "We send you inclosed our check for ten hundred fourteen dollars and ²⁵/₁₀₀ (\$1,014.35), in full settlement of all demands to date. If this is refused by you, we shall make the tender in a legal way." The plaintiff received this letter and check in due course of mail, and collected the check in due course of business, and gave the defendants credit for the same on the amount it claimed to be due it for the lumber.

The plaintiff contends that the defendants had accepted the lumber, so that they were precluded from setting up defects in it as a defense; and that, as the price was fixed by the terms of the contract, the sum due was certain and liquidated; and that, therefore, there was no legal ground for a compromise; and that the amount paid, under the circumstances disclosed, only extinguished defendants' debt pro tanto. The plaintiff also insists that the terms of the letter inclosing the check were not such as to make the acceptance and collection of the check operate as a satisfaction of its claim.

We think the defendants' claims were such as could be urged in good faith and with color of right. This is all that was requisite as a ground for compromise, even though they in fact had no defense to plaintiff's claim. *Bellows v. Sowles*, 55 Vt. 391; *Wild-er v. Railroad Co.*, 65 Vt. 43, 25 Atl. 896.

Whether the acceptance of the check operated as a satisfaction of plaintiff's claim depends upon the construction which should be given to the letter of the defendants. The doctrine running through the cases is that where a party makes the offer of a certain sum to settle a claim, when the sum in controversy is open and unliquidated, or honestly believed by him to be so, and attaches to his offer the condition that the same, if taken at all, must be received in full or in settlement or in satisfaction of the claim in

dispute, if the other party receives the money he takes it clogged with the condition which the other party attached to it, and it operates as a satisfaction of the claim, notwithstanding the creditor does not intend it to have such effect, and so declares when he receives the money. This rule is distinctly stated in *McDaniels v. Lapham*, 21 Vt. 222, and is recognized in many of the cases cited by both parties. We think the fair construction of the defendants' letter is that the check for \$1,014.35 was offered to the plaintiff upon the condition that it must be received by it, if at all, as a full settlement of its claims against them, and therefore its acceptance operated as a satisfaction of such claims. Judgment affirmed.

(68 Vt. 249)

ENRIGHT v. BEAUMOND.

(Supreme Court of Vermont. Chittenden.
June 29, 1896.)

JUDGMENT IN GARNISHMENT—PROTECTION OF GARNISHEES—NEGOTIABLE INSTRUMENTS—PAYMENT—PRINCIPAL AND AGENT—REVOCATION OF AUTHORITY.

1. Plaintiff acquired, by first indorsement, four notes of a series, but authorized the payee to continue to deal with the maker after the transaction as if it were still the owner and holder of the notes, and the maker sent checks to the payee in payment of all except the last. Before the last note became due, payment of all four was demanded by a bank of Boston, the notes being payable at any bank of that city; and, as a result of correspondence then opened with the bank, the maker arrived at the understanding that the last note had been transferred to some unknown person as collateral security, and was then in said bank for collection. Thereafter the maker was summoned as trustee in a suit against the payee, and disclosed an indebtedness to the payee on the last note, but made no mention of the matters which had come to his knowledge regarding the same, and he was adjudged trustee in a certain sum on account of said note. *Held*, that his disclosure was not sufficient to protect him from a recovery in behalf of an assignee of the note.

2. The maker of the note was entitled to the benefit of all payments made on the series, which were justified by the authority to the payee to continue to deal with the maker after the transfer as if it still were the owner and holder of the notes, although the maker had no knowledge of that authority; but the authority did not justify a diversion of the funds for the benefit of the payee's creditors, and the maker was consequently liable for so much of the indebtedness as was taken on the trustee process.

3. An authority given by the first indorsee of a note to continue to deal with the maker as if the payee were still the owner and holder of the note, and to take payments as they became due thereon, is not shown to have been revoked by evidence that the note was subsequently placed in the bank for collection, since it was not necessary to the exercise of the authority that possession of the note be held.

Exceptions from Chittenden county court; Bowell, Judge.

Assumpsit by John J. Enright against J. W. Beaumont on a note. There was a judgment for plaintiff, and defendant excepts. Reversed and rendered.

W. L. Burnap and J. J. Enright, for plaintiff. D. J. Foster, for defendant.

MUNSON, J. The note for which the court below gave judgment was the last of a series of six made payable to the order of the George G. McLaughlin Manufacturing Company, under which name one George G. McLaughlin carried on business. The plaintiff in interest is one Hezekiah McLaughlin, who is found to have become the owner of the last four notes of the series, by virtue of a sale, indorsement, and delivery thereof made in good faith prior to their maturity. It appears, however, that the George G. McLaughlin Manufacturing Company continued to deal with the defendant after this transfer as if it were still the owner and holder of the notes, and that the defendant sent checks to it in payment of all of them except the last, before he learned that they were in other hands. But, before the last note became due, payment of all four of them was demanded of the defendant by the Third National Bank of Boston, and he thereupon corresponded with the bank in regard to them. The notes were all payable at any bank in Boston. Some months after his correspondence with the banks, the defendant was summoned as trustee in a suit against the George G. McLaughlin Manufacturing Company. He was at this time owing the company an open account, amounting to \$23.60; and he disclosed as an indebtedness to the company this sum due on account and the amount of the last note, but did not disclose the further matters which had come to his knowledge regarding the note. On this disclosure, the defendant was adjudged trustee in the sum of \$31.50. Subsequently, the defendant sent the George G. McLaughlin Manufacturing Company his check for the sum due on the account and the last note, after deducting the amount of the trustee judgment, which check was received and collected by the company.

It is found that, when the trustee process was served on the defendant, he did not know who was the owner of his note, but that he understood it had been transferred to some one as collateral security, and that it was then in the Boston bank for collection. He understood this through his correspondence with the bank, and knowledge so obtained was the same as if communicated by the assignee. This being the case, the defendant's disclosure was not sufficient to protect him from a recovery in behalf of the assignee. The fact that he did not know the name of the assignee did not excuse him from a further showing. He should have stated all the facts material to the inquiry, and taken such steps as were likely to secure to the assignee an opportunity to assert his claim. *Seward v. Heflin*, 20 Vt. 144; *Marsh v. Davis*, 24 Vt. 363. This would affirm the judgment, if it were not for a further finding which we think must limit the plaintiff's recovery.

As before stated, the George G. McLaughlin Manufacturing Company continued to deal with the defendant after the transfer of the notes as if it were still the owner and holder of them, and to take payment of them as they became due; and it is found to have done this in behalf of Hezekiah, and by his authority. The case, as made up by the court below, shows clearly that the authority given covered all the notes transferred, and we are unable to discover any finding that this authority was revoked before the last payment was made. The finding that Hezekiah placed the notes in a bank for collection cannot be considered a finding that the authority was revoked, for the authority as originally given and always exercised was independent of the possession of the notes. The defendant can have the benefit of any payment made that was justified by this authority, although he was not aware of its existence at the time of the payment. But the authority was merely to receive the money on Hezekiah's behalf, and did not justify a diversion of the funds for the benefit of the company's creditors. So, the defendant is liable for so much of the indebtedness as may have been taken by the trustee process, and is protected as to whatever balance there may have been by the existence of this authority and his final payment to the company. The disclosure having covered an account due the company, as well as the note, it is necessary to determine the sums chargeable to each. Of the \$31.50 paid upon the trustee judgment, \$23.60 was properly disclosed as due the company, and properly paid on its debt. Only the balance, \$7.90, is to be treated as paid on account of the indebtedness represented by the note. This \$7.90 is all that the plaintiff is entitled to recover. The remainder of the note was included in the defendant's remittance to the company, and was thus paid to one who was authorized to receive it on Hezekiah's behalf. Judgment reversed, and judgment for plaintiff for \$7.90, with interest from date of judgment below.

(84 Md. 30)

ROGERS v. BAYLY et al.

(Court of Appeals of Maryland. June 17, 1896.)

WILL—CONSTRUCTION—DESCRIPTION OF PROPERTY.

Testatrix bequeathed all her personalty to her brother for life, and upon his death certain stocks and all "other personalty that may go under this paper to" her brother were given to a niece, but it was provided that "it is not my intention to make any devise or bequest of my undivided moiety" in certain land. Testatrix had a life estate in the land mentioned which she afterwards sold, taking a note and mortgage for the purchase price. *Held*, that under its terms the note or its proceeds did not pass by the will.

Appeal from circuit court, Baltimore county, in equity.

Application by Charles B. Rogers, executor of the estate of Maria Butler, deceased, for

an order of distribution of certain funds belonging to the estate. From an order directing the fund to be paid over to N. Rogers Bayly as administrator of the estate of Eunice R. Bayly, deceased, the applicant appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, ROBERTS, and BOYD, JJ.

Charles E. Hill, for appellant. Frederick P. Ross and Jas. W. Bowers, Jr., for appellees.

BRYAN, J. We are required to construe certain clauses in the will of Maria Butler, deceased, and the codicil to it. The clauses in the will are the following: "Item 1. I give, devise, and bequeath unto my brother, Frederick Butler, for and during the term of his natural life, my house and lot on Pennsylvania avenue, in the city of Baltimore, my bank stock, city stock, and all other personalty of which I shall die possessed, for him to use and enjoy the rents, interest, issue, and profits thereof for and during the term of his natural life." "Item 3. And at the death of my said brother, Frederick Butler, I give and bequeath my bank stock and city stock to my niece, Eunice R. Bayly, absolutely; also whatever other personalty that may go under this paper to Frederick Butler from me. It is not my intention in this, my last will, to make any devise or bequest of my undivided moiety in the land mentioned and described in the deed from Aquila P. Giles and wife to Nathan Rogers, Jr., in trust, dated August 17th, 1858, and recorded among the land records of Baltimore county, in Liber G. H. C., No. 23, folio 204, etc., nor do I in any manner make any disposition herein of said undivided moiety, or any interest I may have in said land mentioned and described in said deed to Nathan Rogers, Jr., in trust." This is the clause in the codicil: "And whereas, in item 3 of my said last will, in the sixth and seventh lines from the top of the second page, occur the words, 'Also whatever other personalty that may go under this paper to Frederick Butler from me'; and whereas, I am not sure that the meaning of the words aforesaid is clear: Now, then, I do hereby declare that by said words I intended to give, and do hereby give, to my niece, Eunice R. Bayly, at the death of said Frederick Butler, my household furniture and all chattels not disposed of by said last will." Miss Butler had a life estate in an undivided moiety of the land mentioned in the third item of her will, with power to sell and convey the same, absolutely or otherwise, as she might see fit. About two years after the execution of the codicil she sold her interest in the land, and took a note for a portion of the money, secured by a mortgage on the land sold. After her death the note was paid to her executors, who have in their hands for distribution about \$6,000 of the money received. The question

is whether this sum passed to Eunice R. Bayly under the will and codicil. By a pro forma decree the circuit court for Baltimore county, sitting in equity, determined that it did so pass, and ordered it to be paid to N. Rogers Bayly, her administrator, who is one of the appellees.

It is not at all improbable that the testatrix may have supposed that she had power to dispose by last will and testament of her interest in the land. There can, however, be no mistake about her intention regarding it. She puts on the face of her will a declaration that it is not her purpose to make any devise or bequest of it, nor in any manner to make any disposition of it by the will, or of any interest which she might have in it. She uses words ("devise" and "bequest") which are applicable to both real and personal property, as if she were uncertain whether her interest was real or personal, or as if she considered it possible that it might at some time in the future be converted into money. This circumstance, standing alone, would not be entitled to much weight, but it may be considered in connection with the language of other parts of the will. By the first item the testatrix gave to her brother, Frederick, for life, a house and lot, her "bank stock, city stock, and all other personalty" of which she might die possessed. By the third item she gave, at the death of her brother, her bank stock and city stock to her niece, Eunice R. Bayly, absolutely, and also whatever other personalty may have gone under the will to Frederick. In her codicil she explains that by giving her niece the personalty she meant that she should have the household furniture and all chattels not disposed of by the will. She restricted the ordinary and technical meaning of the word "personalty," and confined it to household furniture and chattels not disposed of by the will. She was well aware that, standing without explanation, it would include "bank stock and city stock," because, after bequeathing such property, the will speaks immediately afterwards of "other personalty." In order to exclude such descriptions of property, she carefully makes the restrictive explanation in her codicil. She confines its application to very different objects. She comprehends them all in one class, showing that she meant things of the same general nature. She calls them "furniture and all chattels not disposed of by her will," already executed; that is to say, furniture and chattels of the same kind. She could not have intended to include promissory notes under such a description, and most certainly (after the statement in the third item of the will) not promissory notes derived from the sale of her landed interest. We hold that the note mentioned in the pro forma decree did not pass under the will, and that it must be distributed as intestate property. The decree will be reversed, and the cause remanded for further proceedings. Decree reversed, and cause remanded; costs to be paid out of the estate.

(33 Md. 650)

BALTIMORE BELT R. CO. v. McCOLGAN.

(Court of Appeals of Maryland. June 16, 1896.)

APPEAL—NECESSITY FOR MOTION FOR NEW TRIAL—OBSTRUCTION TO RIGHT OF WAY—DAMAGES.

1. The objection that the verdict is excessive must be taken by motion for new trial.

2. A lot owner on an ungraded and unimproved street dedicated to the city, but never accepted by it, may recover from a railroad company for so excavating the street as to render it impassable, thereby depriving the lot owner of its use and benefit, and depreciating the value of his property.

3. The measure of damages in such case is the difference between the value of plaintiff's land with the railroad cut, and its value in the original state, and without any power in plaintiff to grade, curb, or pave the street except in front of his own property.

4. If the mere right of way, freed from the railroad cut, would not add to the value of plaintiff's land without the opening of the street and material changes in the grade, only nominal damages can be recovered for the trespass.

Appeal from superior court of Baltimore city.

Action by Charles C. McColgan against the Baltimore Belt Railroad Company to recover damages for the obstruction of a right of way. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

W. Irvine Cross, for appellant. James McColgan, for appellee.

BOYD, J. In 1864 a decree was passed in the case of Parkhurst v. Frisby by the circuit court for Baltimore county, for the sale of the property therein mentioned, which has since been included within the limits of Baltimore city. Before offering it for sale, the trustees laid out streets through it, and divided it into lots, which were sold by numbers, and according to a plat filed in the case. It is admitted that the sale of the lots by this plat worked a dedication of what is called "Barclay Street," which is shown on the plat to be 66 feet in width; but the street was not graded, paved or otherwise improved. In the construction of the appellant's road, it became necessary to make a deep cut at a point where it crossed Barclay street, as laid out on the plat, which was done, the appellant owning the property on both sides of the street. Before the railroad was constructed through that portion of the city, an ordinance was passed by the mayor and city council of Baltimore providing for the route, terms, and conditions under which it should be built, including a provision that "said company shall also construct and maintain iron bridges or viaducts for the purpose of carrying Oak street and Barclay street, when opened, over said railroad." Prior to the excavation being made, a number of buildings had been erected on this street between Huntingdon avenue and

the point where the railroad crossing was made, but none had been built north of that point. The appellee owns some lots which front on this street some distance north of the crossing, which he claims have been greatly depreciated in value by reason of this excavation of the street. There are three counts in the declaration; the first proceeding on the theory that it was the duty of the appellant to build a bridge or viaduct over the excavation; the second alleged it was its duty to restore the surface to its original condition before the road was built; and the third claimed that, by the excavation of the bed of the street, it became impassable, and the plaintiff was deprived of the use, benefit, and advantage of it, and his property fronting thereon was greatly depreciated in consequence thereof. As the evidence established the fact that there had been no acceptance of the street by the public authorities either of the county or city, the first and second counts were practically abandoned, and the case tried on the third count. All of the prayers of the plaintiff were rejected, as were the second, fourth, sixth, seventh, and eighth of the defendant. The court gave an instruction of its own, and modified the defendant's fifth prayer. The verdict having been rendered against the defendant, it appealed, and the rulings of the court on the prayers, so far as adverse to the defendant, present the only questions that are before us.

It being conceded by the appellant that the sale of the lots by the trustees worked a dedication of Barclay street, the prayers proceeded on the theory and admission that the plaintiff had a right of way over the street. It being further conceded—in fact, proven by the appellant—that the city had never in any way accepted the street, it could, of course, give no right to the company to destroy or injure their right of way. The extent of that injury was for the jury to determine under the guidance of the court, and, although the verdict seems large for the character of injury the record discloses, that could only have been remedied, if excessive in point of fact, by the court below, on a motion for a new trial. We can only review the questions of law as presented by the record.

The court's instruction told the jury that, under the uncontradicted documentary evidence, the plaintiff acquired and owns a right of way over Barclay street. That much, as we stated above, was conceded by the appellant. It then instructed them that if they found that the defendant "has obstructed the use by plaintiff of said way by the excavation for the cut, as testified to, then the plaintiff is entitled to recover." It was "testified to" that this excavation was 35 or 40 feet deep, about 25 feet wide at the bottom, and about 100 feet wide at the top or grade of Barclay street. Under such circumstances, the plaintiff was clearly entitled

to recover something, and that instruction was therefore correct.

The court granted the prayer offered by the defendant as to the measure of damages,—that it was "the difference between the value of plaintiff's land with the railroad cut, and its value left in the original state, and without any power in the plaintiff to grade, curb, or pave the street except in front of his own land." The fifth prayer of the defendant, as modified by the court, was: "If the jury believe from the evidence that the simple right of way, freed from the defendant's cut, would not add to the value of plaintiff's land without the opening of the street and material changes in the grade, then the plaintiff cannot recover more than nominal damages." These prayers, when taken together, seem to have fairly presented the question at issue. The addition by the court, of "more than nominal damages," to the fifth prayer, was necessary from the fact that inasmuch as the defendant had broken the right of way of plaintiff, without authority, it was a trespass, and it was, at least, liable for nominal damages.

In this connection we will state that the eighth prayer, which undertook to limit plaintiff's recovery to nominal damages, was necessarily rejected, as there were a number of witnesses who testified to substantial damages; some of them estimating the injury by this excavation at very high figures.

The defendant's second prayer was faulty, if for no other reason, because it asked the court to say there had been no evidence produced legally sufficient to show an actual interference with the physical use of plaintiff's right of way. The size of the cut above stated and other evidence necessarily required the court to reject that prayer. The fourth and fifth were not directed to the real issue in the case, and might only have confused the jury. Neither of them would have enlightened the jury as to their duties in determining whether the right of way as it existed when the excavation was made in the street had been thereby injured, and, if so, to what extent.

Finding no error in the rulings of the court, the judgment must be affirmed. Judgment affirmed, with costs to the appellee.

(84 Md. 143)

MATTHEWS v. ADAMS.

(Court of Appeals of Maryland. June 17, 1896.)

PARTNERSHIP—ADVANCEMENT—INTEREST—LIMITATIONS—EXPENSES OF RECEIVERS.

1. A payment by one partner of money in excess of his share of the capital, not derived from partnership profits, when it was necessary to be paid to preserve the partnership property and carry on the business, constitutes a preferred claim on the partnership property, which must be paid before there can be any surplus found to be divided among partners.

2. An advancement or loan by a partner to a firm bears interest.

3. Limitation does not run against a claim by a partner for an advancement to the firm till an account has been settled between the partners, and a balance ascertained.

4. Receivers of a partnership which for a long time had kept no books, finding it impossible to adjust the account without experienced clerical help, are entitled to an allowance therefor.

On reargument. For former report, see 33 Atl. 645.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

James P. Matthews, Alex. Armstrong, and N. B. Scott, Jr., for appellant. F. F. McComas, for appellee.

BRISCOE, J. The appellant and appellee were owners and partners in the publication of a weekly newspaper, called the "Herald and Torchlight," at Hagerstown, Md. There were no written articles of partnership, but at the time of the purchase of the property and business, for \$7,025, each partner contributed the sum of \$1,512.50 in cash, and raised the residue by a mortgage on the property purchased. The profits and losses in the business they were to share equally. Shortly after the purchase of the paper, in 1885, the appellant being in the employment of the United States government, as special examiner of the pension office, it was agreed that a local editor should be employed to represent him in the management of the paper, and whose salary was to be charged against the appellant's share of the profits. On the ——— day of December, 1889, the appellee was appointed doorkeeper of the United States house of representatives; and, both partners being then absent from the business, it was further agreed that the management and conduct of the paper were to be placed in the hands of a Mr. Biggs, of Hagerstown, and this was accordingly done. The business as thus conducted not being successful,—the expenditures exceeding the receipts,—the plant, good will, and establishment of the paper were sold, by agreement, on the 18th of September, 1891, for the sum of \$6,500, Messrs. Matthews & Adams reserving all accounts and credits that were due to the firm on the day of sale. And on the 3d of March, 1892, the appellant filed this bill of complaint for a dissolution of the partnership, a receiver, an accounting, and an injunction. The case was submitted on bill, answer, and exhibits, and a decree was passed appointing Messrs. Armstrong and McComas, as receivers, and the questions here for consideration arise upon exceptions to the correctness of the auditor's accounts distributing the funds collected by the receivers.

The first account, upon the report of the receivers, charged them with the sum of \$2,121.34, and, after an allowance for commissions and expenses, distributes the residue to the payment of the firm's indebtedness, including the claim of the appellee for

\$1,191.74, advanced the firm beyond his share of capital; and, there being a balance of \$441, it was distributed equally to the partners. To this account exceptions were filed, but the account was ratified and confirmed, except as to the allowance of the appellee's claim. The exception to the distribution of the residue of the partnership funds, after the payment of the appellee's claim and the partnership creditors, until the rights of the partners were adjusted, was sustained by the court, and there was no appeal therefrom.

First, then, as to the allowance of the appellee's claim. The proof is clear that this money had been paid by Mr. Adams, and at a time when it was necessary to be paid in order to preserve the property and carry on the business. And it is equally clear that it was money paid by him in excess of his share of the capital not derived from partnership profits. In the case of *Pierce v. Tierman*, 10 Gill & J. 253, it was distinctly held that the excess of one of the partners' advances over those of the other constitutes a preferred claim upon the partnership property or its proceeds, and must be paid before any surplus can be ascertained which is to be divided among partners. So advances or loans to the partnership by one partner are not like capital, but like borrowing from a third person, and interest is allowed thereon. *Turner v. Holloway*, 61 Md. 219; 2 Bates, Partn. 785; 2 Lindl. Partn.; *Baker v. Mayo*, 129 Mass. 517; *Hill v. Beach*, 12 N. J. Eq. 31; *Uhler v. Semple*, 20 N. J. Eq. 288. So far as the statute of limitations, relied upon by the appellant, is concerned, we need only say that it cannot avail him here. The statute does not begin to run until an account has been settled between the partners and a balance ascertained, when a right to sue arises. *Holloway v. Turner*, 61 Md. 223. We find no error in the allowance of the claim of Mr. Small for clerical services rendered in making out books for the receivers. For a long period during the continuance of the partnership, no books have been kept by the firm, and the receivers found it impossible to adjust the accounts without capable and experienced clerical assistance. Having disposed of all the questions raised on this appeal, the orders appealed from will be affirmed, and the cause remanded, to the end that the matter of the accounting between the partners may be had. When this appeal was before us at the October term, 1895, we affirmed the orders appealed from, and remanded the case, to the end that an accounting could be had between the partners. Upon petition and leave of court, a reargument of the case was allowed upon notes. We find no reason for changing the conclusion reached by us at the first hearing of the case, and shall affirm the orders for the reasons expressed in the foregoing opinion. Orders affirmed, and cause remanded, with costs to the appellee.

(33 Md. 377)

STATE, to Use of JAMES et al. v. COMMISSIONERS OF KENT COUNTY.

(Court of Appeals of Maryland. June 16, 1896.)

HIGHWAY BY PRESCRIPTION—WHAT CONSTITUTES
—LIABILITY OF COUNTY FOR DEFECTS—MILL DAM
USED FOR PUBLIC TRAVEL—BILL OF EXCEPTIONS
—SIGNATURE OF JUDGE.

1. In an action for the death of one drowned while attempting to cross a mill pond by walking on the dam, it appeared that the dam crossed the pond in such a way as to approach at each end a public highway extending partially around the pond; that for 50 years the public had been accustomed to use the dam as a footway; that the dam was private property; and that the accident occurred at a sluiceway, over which loose planks had been placed for the convenience of employes. It was not shown that the owner of the dam ever intended to dedicate it to the public, or that the commissioners had ever accepted the same as a highway. *Held*, that the dam was not a highway by prescription, so as to render the county liable.

2. In the absence of statutory regulation, the court, after granting an instruction taking the case from the jury, need not sign an exception to the ruling before the jury leaves the box, but may do so at any time during the term.

Appeal from circuit court, Kent county.

Action by the state of Maryland, to the use of Hannah James and others, against the county commissioners of Kent county. Judgment for defendants, and plaintiffs appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, PAGE, BOYD, FOWLER, and ROBERTS, JJ.

H. H. Barroll, for appellant. H. W. Vickers, for appellees.

McSHERRY, C. J. The declaration in this case alleges, in substance and effect, that one of the public roads in Kent county, to wit, the public road which leads from Lankford to Rock Hall, was, by the wrongful act, neglect, and default of the county commissioners, suffered to be out of repair and unmended, so as to be impassable with safety; and that Lee James, the husband of Hannah James, and the father of Lee and Isaac James, the equitable plaintiffs, in traveling on and over the said road, and using due care, fell into the mill pond which adjoins said public road, and was drowned, in consequence of the wrongful neglect of the defendant in not keeping said public road in safe and proper condition. Upon the conclusion of the plaintiffs' evidence, the court, at the instance of the defendants, granted an instruction which withdrew the case from the jury, and from the judgment subsequently entered against the plaintiffs this appeal was taken. The granting of this instruction is the ruling complained of in the first exception.

The evidence shows that, in the public road alluded to, there is, between Price's or Connelly's Mill and St. Paul's Church, a considerable bend or curve, which, for brevity of description, may be likened to the seg-

ment of a circle; that opposite to and distant some 50 or 60 yards, at the furthest point, from the concavity of this curve, there was a mill dam, belonging to and being the property of the owner of the mill, and extending from the mill, at one end of the curve, to, or nearly to, a fence surrounding the churchyard, at the other end of the curve. This dam and a footpath connecting with it on the church side of the dam may be considered the chord of the above-mentioned curve or arc. In the breast of this dam there were automatic waste gates, which worked in frames made of timber; and, across the sills forming the tops of these frames, loose planks were laid, for the convenience of the mill employes when removing brush and other debris as it accumulated and obstructed the free play of the gates. It further appears that a prong of Lankford Bay extends across the curve in the public road, and that, as the tide rises, this portion of the road becomes, because inundated, more or less difficult to traverse by persons on foot. In consequence of this, and to avoid crossing this prong of the bay, it had been the habit of persons in the neighborhood, for upward of 50 years past, to leave the public road at the mill, on the one side, or near the church, on the other side, and to walk on the surface of the dam and on the loose planks over the waste-gates, and thus to pass, by a short cut, from one point in the public road to another point in the same road, without going around the curve. About dusk on the evening of January 20, 1895, Lee James, the husband and father of the equitable plaintiffs, left the vicinity of the church, and started for his home on the mill side of the dam. Instead of walking around the curve in the county road, he took the shorter cut, across the breast of the dam. In an hour afterwards his dead body was found in the dam, at the waste gates,—a point distant at least 50 yards from the public highway. One of the sills showed traces of a footprint, and it seems probable that the deceased slipped as he stepped upon the sill, and that he then fell into the water, and was drowned. This action was brought to recover damages for the death thus occasioned.

It is perfectly obvious that if the place where the accident happened was not a public thoroughfare, or part of a public thoroughfare, which the county commissioners were under a legal obligation to keep in repair, its disrepair furnishes no evidence of negligence for which the county was amenable. This proposition is so self-evident that its statement is its demonstration. Now, confessedly, the man met his death, not in the known and established public highway, but upon private property, belonging to an individual, and located at least 50 yards distant from the county road. To avoid the inevitable result of such a situation,—the certain defeat of the plaintiff's claim against

the county,—it was insisted that the long-continued user of the mill dam by the public in the manner hereinbefore stated converted the mill dam into a public highway, and, as a corollary, that the county commissioners were legally bound to keep the dam and the planks across the waste gates in proper repair, as a public road or thoroughfare, and that their failure and conceded omission to do this was actionable negligence, for which they were liable in the pending action.

There is no doubt that an owner of land may dedicate it to the public for a highway, but an intent on the part of the owner to do so is absolutely necessary, and, unless such intention is clearly proved by the facts and circumstances of the particular case, no dedication exists. *McCormick v. Mayor, etc.*, 45 Md. 512. There is no pretense that there was such a dedication in the case at bar. But a public way may also be proved either by a copy of the record, or other documentary evidence of the laying out of the same by the proper authorities, pursuant to statute, or by evidence of immemorial usage. *Day v. Allender*, 22 Md. 511. It is upon an alleged prescriptive right that reliance is placed. While the public may, as against the owner of the soil, acquire, by prescription, a right of way, something more is needed to make the way so acquired a thoroughfare that the public authorities are bound to keep in repair. There must be not only a dedication or a right acquired by prescription, but there must be also an acceptance before the road becomes a public road that the county commissioners are obliged to maintain. Where there is no obligation to keep a way in repair, there is no negligence in a failure to repair; and, where there is no negligence, there is, of course, no liability. If it be conceded that the user proved in the case at bar was sufficient, as against the owner of the dam, to give to the public a right to use the dam as a way, still there is not the slightest evidence to show that the county commissioners of Kent county ever accepted the alleged way over the dam as a public way or thoroughfare. Not only is such an acceptance necessary, but it must be proved by the party who asserts the way to be a public way; and it may be proved, when express, by the record, or it may be implied from repairs made and ordered or knowingly paid for by the authority which has the legal power to adopt the street or highway, or from long user by the public. 2 Dill. Mun. Corp. § 642; *Kennedy v. Mayor, etc.*, 65 Md. 521, 9 Atl. 234; 5 Am. & Eng. Enc. Law, 414.

The record explicitly states that the county commissioners of Kent county never made any repairs to the dam or to the planking over the waste gates, "or in any manner exercised any control over the same"; that the mill pond and dam were part of the mill property; "that the planks over the flood

gates were placed there originally by the owners of the mill property," and were from time to time replaced and changed by them; "and that all repairs to said dam and bridge were made by the owners of the property." In the face of these facts, it would be futile to contend that there had been an express acceptance of this way, or to insist that an acceptance can be legitimately implied. There is, and can be, no uniform and unbending rule by which every case presenting the question of acceptance by implication arising from long-continued user by the public may be decided. The surroundings, including the particular locality, the character of the use, and the condition of the alleged way, must in each instance have due weight in determining whether user alone justifies the inference that there has been an acceptance. If this were not so, and if the naked circumstance that a designated way had been immemorially used as a footway were sufficient of itself to found a presumption of acceptance on, there would be hundreds of by-paths in every county, now used over private property, as convenient and short routes from points on public roads to other points on the same or different public roads, that would require the supervision of the county authorities, and that might, if permitted to become dangerous, subject the county to pecuniary liability for injuries occurring on them. It cannot be pretended that the mere use of such by-paths converts them into public ways, or raises a presumption that they have been accepted as such by the county authorities. The peculiar situation of this particular alleged way conclusively negatives an inference of acceptance by the public, and equally precludes an implication that the public have, as against the owner, acquired by prescription a right of way over and upon the dam. The breast of the dam was not a continuous structure. It was broken by an opening for the waste gates for a distance of several feet. Without planks or flooring over the frames containing the gates, it was not possible to traverse the bank from end to end, except by stepping on the sills of these frames. This physical condition of itself showed there was no design on the part of the owners of the dam to throw it open as a public thoroughfare, because a portion of it, where the gates were located, was practically impassable. The record distinctly shows that the planks were placed across the sills, not to accommodate the public, or to afford them facilities for passing over and along the dam, but solely for the convenience of the employes of the mill, in regulating the movements of the gates, and freeing them from accumulated debris. This circumstance is of itself sufficient to indicate that there was no acceptance of the way by the public authorities, and no intention on the part of the owners of the dam to dedicate it as a public way, even if there were not the further fact that a right by prescription to use it as a thoroughfare

would be utterly inconsistent with the owner's occupancy of it as a dam.

It was objected that the instruction granted was too general; but this we do not assent to. In form, it was a demurrer to the evidence, and denied the right of the plaintiff to recover, conceding the plaintiff's evidence all to be true. *Commissioners v. Wise*, 75 Md. 43, 23 Atl. 65.

We find no error in the second exception. After the court below had granted the instruction set forth in the first exception, the plaintiff's counsel presented a bill of exceptions embodying the ruling on the instruction, which exception he insisted on having signed before the jury left the box; but the court, not deeming that the bill of exceptions as prepared contained an accurate statement of the testimony, declined to sign it at that time, and directed the jury, after they had rendered their verdict, to be discharged. From this ruling, the second exception was taken. The decision in *Roloson v. Carson*, 8 Md. 208, relied on to establish error in this ruling, was founded on Act 1834, c. 233, § 11. That act provided that bills of exception must be signed before the verdict is rendered, if the party requires it. But the Code does not contain this statute, and a different rule now prevails. In the "absence of any special rule upon the subject, the general rule of practice is that the exception must be taken and noted at the time of the ruling made; but the reduction of the exception to form may and should be deferred to some more convenient time after the trial, but during the same term of court, when the exception should be presented for the signature and seal of the judge." *Thomas v. Ford*, 63 Md. 348; *Wheeler v. Briscoe*, 44 Md. 308.

As we discover no errors in the rulings excepted to, the judgment appealed from will be affirmed, with costs. Judgment affirmed, with costs above and below.

(83 Md. 586)

DUTTERA v. BABYLON et al.

(Court of Appeals of Maryland. June 17, 1896.)

WITNESS—CROSS-EXAMINATION—CREDITORS' BILL—EVIDENCE—SUFFICIENCY.

1. Plaintiff, in a creditors' bill against her deceased father's widow to set aside conveyances by him to defendant, alleged an indebtedness to plaintiff on a single bill for \$26,500 purporting to have been executed by deceased by making his mark, and to have been witnessed by plaintiff's husband. The husband testified for plaintiff as to the execution of the instrument. *Held*, that it was not error to permit such witness to be cross-examined as to who were present and what was said by deceased at the time the paper was executed.

2. A daughter, fearing that her father would marry again, wished a settlement with him for her share of his estate, which, she claimed, was in part derived from her mother. There was no evidence that the estate was in any part so derived. The parties estimated deceased's property at \$39,000, and the father gave to his daughter a single bill for \$26,500. *Held*, that the bill was without consideration,

and the evidence failed to show the relation of debtor and creditor between the parties, so as to authorize a creditors' bill to set aside certain conveyances by the father as fraudulent.

3. It appeared that deceased made a will in which he declared certain conveyances to his wife to be in lieu of dower, gave his wife a small legacy of furniture, and the residue of his estate, amounting to over \$5,000, to plaintiff and her sons; that plaintiff kept the execution of the single bill a secret from the wife; and that, while she held it, she permitted deceased in his lifetime to give her, her husband, and her sons \$12,000 worth of property, in a large part of which would have been included the dower right of the wife, had she not united in the deeds of the same. *Held*, that plaintiff was not entitled to relief in a court of equity.

Appeal from circuit court, Carroll county.

Bill by Martha A. Duttera, by her next friend Maurice C. Duttera, against Sarah Babylon and others, to vacate, annul, and set aside a certain conveyance of land and sundry assignments of choses in action by William Babylon, deceased, plaintiff's father, to defendant Sarah Babylon, his second wife, as fraudulent, and because procured by undue influence. From a decree in favor of defendants, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, BOYD, and FOWLER, JJ.

Clabaugh & Roberts for appellant. J. A. C. Bond, D. N. Henning, and E. O. Weant, for appellees.

McSHERRY, C. J. The bill of complaint with which the proceedings in this case were begun is a creditors' bill, and was filed by Martha A. Duttera against her stepmother and other defendants, most of whom are but nominal parties. It seeks to have vacated, annulled, and set aside, as fraudulent, and because procured by the undue influence of a young woman over an old man, a conveyance of a small parcel of real estate and sundry assignments of choses in action, which conveyance and assignments were all made by William Babylon, the father of the plaintiff, to Sarah Babylon, his second wife, and now his widow. The bill is founded on an alleged indebtedness claimed to have been due by the father in his lifetime to the daughter, and evidenced by a single bill, purporting to have been executed by William Babylon, payable to the plaintiff for \$26,500. This single bill bears date the 3d day of March, 1887. It was not signed by Babylon, but his name was appended to it, and what professes to be his mark was affixed. The body of the instrument and the name of the obligor are in the handwriting of Amos Duttera, the husband of the plaintiff, who signed it as attesting witness. On its face it sets forth that the sum of \$26,500 is the amount due to the obligee from her mother, Anna Barbara Babylon, deceased, and it bears interest from its date. William Babylon was an aged man and a widower, upward of 73 years old when this single bill professes to have been given. He married his first wife, the mother of the plain-

tiff, in 1838, and she died in 1838. Less than a year afterwards, and subsequent to the date of the single bill, he married his second wife, a woman of 82 years of age; and she is the only real defendant in the pending case. Before his death, which occurred in 1838, he made his will, wherein, after giving to his wife a small legacy of household furniture, he declared that he had already conveyed to her the parcel of real estate above alluded to, and had assigned to her certain mortgages and given her certain moneys "in lieu of all dower, rights, or claims which she would otherwise possess in the property bequeathed and disposed of by this will." He then directed all his cash to be divided between his daughter and her two sons, and made the daughter residuary devisee and legatee. Prior to the date of this will, but after the date of the alleged single bill, he and his second wife, the defendant Sarah, conveyed by deed, as a voluntary gift, to one of the sons of his daughter, a farm of about 169 acres of land, valued at from \$8,000 to \$10,000, and in like manner they also conveyed to the husband of the plaintiff a house and lot valued at \$600, and he transferred to the plaintiff bank stock and a mortgage aggregating in value \$1,750. Under the will something over \$5,000 will pass to the daughter and her two sons. The total value of the property which the daughter, her husband, and sons received from William Babylon, in his lifetime after his second marriage, and under his will after his death, is nearly \$18,000. The daughter, suing by one of her sons as next friend, now seeks to have the conveyance and the transfers made to the second wife in lieu of dower, as declared in the will, set aside, to the end that the single bill for \$26,500 may be paid out of the proceeds of their sale and collection, though thereby the widow, who voluntarily parts with her potential dower right in the farm given to one of the plaintiff's sons and her potential dower right in the house given to the plaintiff's husband, in total ignorance of the existence of the alleged single bill, would be stripped of every vestige of interest in William Babylon's estate.

We do not deem it necessary to go into an examination of the facts which throw, to say the least, grave suspicion around the genuineness of the single bill, because there are other grounds upon which the decree dismissing the bill and denying the relief sought by the plaintiff must be affirmed. The answer denies that this conveyance and these transfers to Sarah Babylon which are now attacked and assailed were made under the dominion of an undue influence, or with an intent to hinder or delay the creditors of William Babylon, and it further denies that they operate to so hinder or delay such creditors. It also denies that the decedent was a debtor of the plaintiff. If, conceding that William Babylon made his mark to the single bill, it nevertheless appears with sufficient clearness and certainty from the evidence that there was no consideration

to support the obligation, then, as is perfectly obvious, the single bill does not establish a debt which constitutes the plaintiff a creditor of her father; and if she be not a creditor, she has not, apart from all other objections, a standing in a court of equity to impeach the transactions which, as creditor, and only as creditor, she seeks to nullify. Now, there is not the faintest trace of evidence in the somewhat lengthy record before us to indicate that Sarah Babylon exerted or attempted to exert an undue or forbidden influence over her aged husband. The mere inequality in their ages furnishes, of itself, without more, no ground to base even a conjecture of undue influence on, when it is remembered, as the testimony shows, that William Babylon was, though feeble in body, a self-willed and rather strong-minded man. This feature of the controversy, in the absence of any evidence bearing upon it calls for no further comment.

While a husband cannot, by voluntary transfers and conveyances to his wife, lawfully strip himself of his property to the prejudice of his creditors, a wife to whom transfers are made in lieu of a potential right of dower, and who has relinquished her inchoate dower in other property on the faith of the validity of such transfers, cannot be treated as a mere volunteer, entitled to no consideration at the hands of a court of equity. Her inchoate right of dower in lands is a substantial and valuable interest, which will be protected and preserved to her, though it is not such a right as may be bargained and sold. *Reiff v. Horst*, 55 Md. 42. Nevertheless its release by the wife may constitute, even as against the husband's creditors, a valuable consideration for a valid payment to her by him of such a sum as a court of equity may, in a given case, deem reasonable. *Reiff v. Horst*, supra. And as to personal property, though the husband may lawfully, as against his wife, dispose of it during his life, yet she is so far interested in it that he cannot part with it to her detriment, if the transaction be but colorable, or be attended by circumstances indicative of fraud upon her rights. *Hays v. Henry*, 1 Md. Ch. 337; *Feigley v. Feigley*, 7 Md. 562; *Sanborn v. Lang*, 41 Md. 113; *Rabbitt v. Gaither*, 67 Md. 94, 8 Atl. 744. A widow to whom a bequest is made by her husband in lieu of dower does not take as a donee or volunteer, but as a meritorious purchaser and contractor. *Durham v. Rhodes*, 23 Md. 242. Hence, when such a bequest to her is assailed as unjust or injurious to creditors, and in fraud of their rights, she will be allowed full satisfaction for her dower. *Hall's Case*, 1 Bland, 204; *Gibson v. McCormick*, 10 Gill & J. 113. The property transferred to the second wife by her husband in his lifetime, and declared by his will to be in lieu of dower, was as effectively given in lieu of dower as if it had been bequeathed in the first instance by the will. There is nothing per se fraudulent in the fact that it was thus given, because she took it, not as a mere volunteer, but, being a

meritorious purchaser, she took it for a valuable consideration.

Whether, regard being had to the rights of creditors, the amount thus given in lieu of dower was reasonable or not is another question, and one which only a creditor can raise. As against the plaintiff, if she were not a creditor, William Babylon had the undoubted right to give to his second wife in his lifetime, or by his will after his decease, whatever he pleased that belonged to him. This being so, the underlying question in the case recurs: Was the plaintiff in fact a creditor of her father? There is no pretense, apart from the evidence furnished by the single bill, that she was; and the expressed consideration of the single bill is disputed and assailed. The fact that the obligation is under seal interposes no objection that a court of equity cannot brush aside whenever it becomes necessary to investigate the validity and the good faith of any instrument which, in the exercise of its far-reaching jurisdiction, is properly brought before it. The form of an instrument can never preclude that court from looking beneath the surface, and inquiring into the real consideration, if any there be, for which it was given. This power confessedly existing, the inquiry becomes one largely of fact, and we now turn for its solution to the evidence contained in the record.

Amos Duttera, the husband of the plaintiff, who, as we have said, attested the execution of the single bill, was called by the plaintiff as a witness to prove that William Babylon made his mark to the instrument. He testifies at large as to his having drawn up the paper, as to his having written Babylon's name, and as to Babylon having made his mark. He further testified as to attesting the mark, and described his delivery of the single bill to Babylon, and Babylon's delivery of it to the witness' wife, the plaintiff. He also gave evidence as to certain indorsements found on the back of the single bill, which purport to be credits of payments thereon. The single bill having been thus identified by Duttera, and having been filed as an exhibit, he was interrogated on cross-examination as to who were present and what was said by Babylon at the time the paper was drawn up and signed; but these questions and the answers thereto are excepted to as not competent or admissible, because not properly within the scope of legitimate cross-examination. These exceptions are not tenable. It was competent to inquire, on cross-examination, into the details of the events testified to in chief by the witness, and to develop and unfold the whole transaction, about which he had been interrogated but partially. One of the main purposes of a cross-examination is to elicit such parts of a transaction imperfectly or not fully disclosed as may qualify or explain that portion of it which has been given, so that the whole and entire occurrence may be exhibited precisely as it took place. To allow the witness merely to state such facts as tended to

support the theory of the party who calls him, and then to preclude an inquiry into other events forming part of the same transaction, might, and probably would, result in suppressing or stifling, rather than in laying bare, the truth. 1 Greenl. Ev. § 446; *Howard v. Oppenheimer*, 25 Md. 367; *Griffith v. Dufferin*, 50 Md. 478. Upon cross-examination the witness testified that, "just before the single bill was drawn up, a conversation which led to its execution took place between himself, his wife, and her father. In this conversation William Babylon spoke about marrying again, whereupon his daughter, the plaintiff, said: 'Father, I am surprised at your thinking about getting married so soon after mother's death. The best thing we can do is to make a settlement.' Her father then asked her what she wanted, and she replied: 'Twenty-six thousand dollars from mother and Johnny, and five hundred dollars for the year Amos and I worked for you and never received any pay.' To which William Babylon made answer: 'I think that's pretty steep, and I have made up my mind that I would not give away any of my estate during my lifetime.' Whereupon the plaintiff said: 'That is not what you promised mother. Give me your obligation, and I will not press the payment of it during your lifetime.' He said: 'That is a horse of another color.' And then the single bill was drawn up, and, when it was read to him, Babylon remarked, 'Now I can spend as much money as I please, and be my own master.'" When the witness was asked, "What was the object in view in taking this note?" he answered, "Just to get what he promised his wife to give his daughter." And when asked how the amount of \$26,000 was ascertained, he said, "Mrs. Duttera and myself estimated his property at \$39,000, and estimated \$26,000 to be two-thirds of that."

Now, it is perfectly obvious that the amount fixed in this single bill as the amount now claimed by Mrs. Duttera to be due to her by her father represented no indebtedness by him to her at all. A rough estimate of Babylon's worth was evidently made, and the obligation was drawn up for two-thirds of that amount, not because that sum or any other was really due, but because the daughter and her husband assumed that the daughter would be entitled to that proportion of her father's estate, and they were both apprehensive that he would marry again, as the testimony just quoted indicates, and that the second wife might get possession of his property. That Babylon himself never supposed he was contracting a debt is apparent from his unwillingness to sign the paper until he was assured its execution would not interfere with his disposal of his property as he pleased. The pretense that the sum named in the single bill represented the amount which Babylon had received from his first wife, and what he promised her to pay to his daughter, is wholly insufficient to constitute a consideration that will support the obligation. If Babylon re-

ceived any money from his first wife, of which averment there is no evidence but the most vague hearsay, he received it long before the act of 1860 was passed, and when, therefore, he had a right to treat it as his own (*Diggs v. McCullough*, 69 Md. 592, 16 Atl. 453); and he either never promised her to repay it, or, having promised, he never did repay it, and she died without having received it. If he promised his first wife that he would pay the money he received from her to his daughter, that promise was a mere nudum pactum. In either event there was no money due to the daughter from her mother, as the single bill on its face asserts. The testimony of Duttera utterly explodes the theory of there ever having been the relation of debtor and creditor between Babylon and his daughter, and places her in the attitude of claiming payment of a debt where no debt is due.

But there is another aspect of the plaintiff's case that ought not to be passed by without some comment. Knowing, as she did, all the circumstances attending the execution of the single bill, and keeping its execution a profound secret from her stepmother and being aware that her father believed he had the perfect right to spend his money, and to do what he pleased with his property, notwithstanding she held the bond, she permitted him to give to herself, her husband, and her sons, in his lifetime, nearly \$12,000 worth of property, in a large part of which would have been included the dower right of the second wife, had she not united in the deeds, and then, after his death, while holding onto what she thus received, she is endeavoring to strip his widow of every farthing given to her in lieu of the very dower right which the second wife relinquished to the plaintiff's husband and son. Such an attempt does not commend itself to a court of equity. As, then, the appellee does not hold without a consideration or in the capacity of a volunteer the property which she received from her husband, and as the appellant is not and never was a creditor of her father, the circuit court for Carroll county was clearly right in dismissing the bill of complaint, and in refusing to grant the relief prayed under it. This being the conclusion to which we have come, we affirm the decree appealed from. Decree affirmed, with costs above and below.

(19 R. I. 537)

SANFORD v. PAWTUCKET ST. RY. CO.

(Supreme Court of Rhode Island. July 11, 1896.)

MASTER AND SERVANT—NEGLIGENCE OF INDEPENDENT CONTRACTOR—STREET RAILROADS—DELEGATION OF CHARTER POWERS—LIABILITY FOR NEGLIGENCE.

1. Where a street-car company, authorized by charter to build a street railroad, lets a contract for constructing the road to an independent contractor, without any agreement as to the particular manner in which the work shall be done, it is not liable for injuries caused by a

wire stretched across the road by such contractor in the course of the work.

2. The rule that a railroad company cannot delegate to a contractor its charter right to construct the road, so as to exempt it from liability, does not extend to the use of the ordinary means employed for its construction, but to the use of such extraordinary powers as the corporation itself could not exercise without first having complied with the conditions of its charter.

3. A charter of a street-railroad company, which provided that it should be liable for the negligence or misconduct of its agents and servants in constructing the road, does not apply to the negligence of an independent contractor.

Action by Peleg A. Sanford against the Pawtucket Street-Railway Company for damages for personal injuries. Heard on demurrer to the plea. Overruled.

J. F. Lonsdale, J. S. G. Cobb, and J. M. Ripley, for plaintiff. D. S. & W. O. Baker, for defendant.

TILLINGHAST, J. The first count in the declaration alleges that the defendant corporation, by its agents and servants, negligently, carelessly, and wrongfully placed and stretched, and negligently and wrongfully maintained, a rope or wire across Lonsdale avenue, a public highway in the city of Pawtucket, whereby said highway was rendered dangerous to travelers in carriages, and that the plaintiff, while riding along said highway in a carriage, in the exercise of due care, was caught by said rope or wire, and thrown to the ground, receiving serious bodily injury. The second count alleges that the defendant is a corporation, incorporated by the general assembly of the state, and that in the charter it is provided that the defendant shall be liable for any loss or injury that any person shall sustain by reason of any carelessness, neglect, or misconduct of its agents or servants in the construction, management, or use of its tracks, or of the streets where its tracks are laid; that the defendant intrusted the construction of its road, under a contract made by said defendant with certain contractors, not residing in the state, to said contractors, and that the latter, in the process of such construction, on, to wit, the 3d day of December, 1891, at said Pawtucket, negligently and carelessly placed and maintained a rope or wire across said Lonsdale avenue, in such a manner as to render said highway dangerous to travelers in carriages, whereby the plaintiff, on, to wit, said 3d day of December, 1891, who was then and there riding in a carriage along said public highway, in the exercise of due care, was caught by said rope or wire, thrown to the ground, and seriously injured, etc. To the first count of this declaration the defendant has filed a plea of not guilty. To the second count the defendant has filed a special plea in bar, setting up that the acts and deeds complained of therein were not the acts and deeds of the said defendant corporation, nor

the acts and deeds of any of its servants or agents, but were the acts and deeds of an independent contractor, over whom, and over whose agents and servants, said defendant corporation had no management, care, or control; and also setting up that the said defendant corporation had no notice whatever of the alleged wrongful acts of said independent contractor, and that said wrongful acts did not continue for a sufficient length of time to impute notice thereof to the said defendant corporation. To this special plea in bar the plaintiff has demurred, on the grounds (1) that the fact that the work was done by an independent contractor, as set forth in said plea, does not constitute a valid defense to the plaintiff's cause of action; (2) that the lack of notice to the defendant, as set forth in said special plea, does not constitute a valid defense to the plaintiff's cause of action; and (3) that said facts in regard to the work being performed by an independent contractor and said want of notice, as set forth in said plea, do not together constitute a valid defense to the plaintiff's cause of action.

The only question before us for decision, therefore, is as to the sufficiency of said special plea in bar. The plaintiff admits at the outset that the law, as stated by this court in *Williams v. Tripp*, 11 R. I. 454, 455, is correct, viz. that "when a person has work done for him under contract, without reserving to himself any direct control of the contractor or of his men, there is no relation of principal and agent, or of master and servant, between him and them, and consequently no such liability for their torts and negligences as is incident to that relation." But he contends that to this well-recognized rule there is one equally well-recognized exception, and that is that no one can escape from the burden of an obligation imposed upon him by law by the engaging for its performance a contractor. In view of this contention, it becomes necessary to ascertain precisely what obligation was imposed by law upon the defendant corporation regarding the construction of its road. Under the provisions of section 3 of its charter, the duties devolved upon the corporation are these, viz.: That it must put the streets and highways, in which it shall lay any rails, in as good condition as they were, and keep in repair such portions of the streets as shall be occupied by its tracks; and it makes it liable for any loss or injury that any person shall sustain by reason of any carelessness, neglect, or misconduct of its agents and servants in the management, construction, or use of said tracks or streets. Of course, the defendant cannot discharge itself from its statutory obligations by engaging for their performance by another; that is to say, it is bound, at its peril, to put the streets in which it shall lay any rails in as

good condition as they were before, and to keep in repair such portions of the streets as shall be occupied by its tracks, and hence, if it should contract with a third person to do this work, and this third person should fail to do it, the defendant would doubtless be liable. *Hole v. Railway Co.*, 30 Law J. Exch. 81, 6 Hurl. & N. 488. But such is not the case before us. Here the case shows, not that the defendant failed to perform its said statutory duty, but that an independent contractor, in constructing the road,—a thing which the defendant had the right to do itself, but was under no obligation to do,—was guilty of negligence. This negligence, however, cannot be imputed to the defendant, as the relation of master and servant was not created by the contract between the parties. The defendant had no control, either of the work or of the workmen employed to perform it. It merely prescribed the end to be accomplished, and contracted with another to accomplish that end by such means as the latter might in his discretion employ. And hence, as to the means employed, the contractor was not a servant or agent of the defendant, but himself a master, and for any negligence in connection therewith he alone is liable. The defendant made no agreement with the contractor as to the particular manner in which the road should be constructed or the trolley wire erected; that is to say, the defendant did not authorize the contractor to place, stretch, or maintain a wire or rope across the street in the manner complained of. He was simply authorized to construct the road, thus leaving the manner of doing the same to his skill and judgment. Moreover, the work authorized to be done was not in itself a nuisance, nor was it necessarily dangerous or injurious. It was authorized by law. The manner in which it was done was the sole cause of the injury complained of. Hence the obstruction or defect created in the street was purely collateral to the work contracted to be done, and was entirely the result of the wrongful or careless acts of the contractor or his workmen; and in such case it is well settled that the employer is not liable. *Robbins v. Chicago City*, 4 Wall. 679. It is to be observed, also, that the defendant not only did not authorize the obstruction complained of, but had no notice thereof, either express or implied.

Had the obstruction resulted directly from the act which the contractor agreed and was authorized to do, then both the defendant and the contractor would have been equally liable to the injured party. *Water Co. v. Ware*, 16 Wall. 576; *Carman v. Steubenville*, 4 Ohio St. 399. This principle is well illustrated in *Ellis v. Gas Consumers' Co.*, 2 El. & Bl. 767. There the defendant made a contract with *Watson Bros.* to open trenches along the streets of *Sheffield*, in order that defendant might lay gas pipes therein, and

afterwards to fill up the trenches and make good the surface with flagging. Watson Bros., by their servants, opened the trenches along one of the streets in question, and after the pipes were laid proceeded to fill up said trenches and restore the flagging. In doing so, however, they carelessly left a heap of stones and earth upon the footway; and the plaintiff, passing along the street, fell over the same, and was injured. Neither the defendant nor Watson Bros. had any legal excuse for breaking open the street in the manner described, which was a public nuisance. In a suit against the gas company to recover for the injury sustained, the court held that the cause of the accident was the very thing done in pursuance of the specific directions of the defendant contained in their contract, and not the negligence of those doing the thing, and hence that defendant was liable. *Town of Pawlet v. Rutland & W. R. Co.*, 28 Vt. 297, is strongly in point. In that case the defendant had made a contract with Page & Eastman to build a section of its road. Page & Eastman underlet a job of building the abutments of a bridge to one Chandler, who, with his own men, built the abutments. And the obstruction in the highway which caused the injury to the plaintiff was the act of Chandler's employés in drawing the stone for the abutments. The court held that, as the act contracted to be done was a lawful one, and in no way involved the commission of a public nuisance, and that as it had become such purely from the neglect of the person who had contracted to do the job, the latter alone was liable for the damage occasioned. To the same effect are *Pack v. Mayor, etc.*, 8 N. Y. 222; *Hole v. Railroad Co.*, 6 Hurl. & N. 488; *Peachey v. Rowland*, 13 C. B. 162; *Hilliard v. Richardson*, 3 Gray, 349; *Bailey v. Railroad Co.*, 57 Vt. 252; *Storrs v. City of Utica*, 17 N. Y. 104; *Hughes v. Railway Co.*, 39 Ohio St. 461; and numerous other cases which might be cited.

Again, the principle that a railroad company cannot delegate to a contractor its chartered rights and privileges, so as to exempt it from liability, does not "extend to the use of the ordinary means employed for the construction of the road, but to the use of such extraordinary powers as the corporation itself could not exercise without first having complied with the conditions of legislative grant." In other words, where the wrong and injury for which the action is brought were committed in the performance of acts by virtue of the authority of the corporation derived from its charter, and could have been performed in no other way, then the party injured has the right to hold the corporation responsible, "because it is really the corporation that is acting." *West v. Railway Co.*, 63 Ill. 546, 547; *Cunningham v. Railroad Co.*, 51 Tex. 513; *Railroad Co. v. Fitzsimmons*, 18 Kan. 34; *Eaton v. Railway Co.*, 59 Me. 520; *Callahan v. Railway Co.*, 23

Iowa, 562; *West v. Railway Co.*, 63 Ill. 545. This doctrine is well illustrated in the case of *Rogers v. Railroad Co.*, 31 S. C. 370, 9 S. E. 1059, cited by defendant's counsel. The statute of that state makes a railroad company "responsible in damages to any person or corporation whose buildings or other property may be injured by fire * * * originating within the limits of the right of way of such road, in consequence of the act of any of its agents or employés." In that case the gradation of a portion of the road was let out under contract to one Hardin. During the progress of the work a fire, which had been kindled within the right of way of the defendant, escaped therefrom, and ran over the adjoining land of the plaintiff, causing him damage. It was contended on the part of the plaintiff that the defendant was liable, on the ground that "when the employer, as a corporation, is charged with certain obligations, reciprocal to the privileges and franchise granted, it cannot shift the responsibility from itself by employing a contractor to do the work for it." In reply to this contention the court said: "If it means that a railroad corporation, on account of the large powers generally granted to them, eminent domain, etc., cannot be allowed to construct their track, etc., through an independent contractor, but must do such work through their own servants and employés, we have only to say that we have found no authority for such a position. * * * If it means that where certain obligations exist, growing out of the privileges and franchises granted to the corporation, which would be inconsistent with the right of the company to employ an independent contractor to meet said obligations, from public policy or otherwise, then the principle may be conceded. But the propriety of its application must be shown. No obligation of the defendant has been pointed out here inconsistent with having its road graded by an independent contractor." We fail to see any material distinction, in principle, between that case and the one before us. There the statute made the corporation liable for the acts of its agents or employés in causing damage by fire; but the court held, nevertheless, that where the injury was caused by an independent contractor, the corporation was not liable. Here the statute makes the corporation liable for the carelessness, neglect, or misconduct of its agents and servants in doing the work, but not for the carelessness or misconduct of an independent contractor. In short, the language of the charter making the corporation liable for the negligence of its servants and agents does not apply in this case. It does not include independent contractors, and is merely declaratory of the common law.

The argument ab inconvenienti, urged by plaintiff's counsel, while it is doubtless entitled to some weight in the determination of the question at issue, yet is not of suffi-

cient importance to control the decision. We are aware of the fact that much of the work of constructing railroads and other public works, especially in a small state like ours, is done by foreign contractors, and that our citizens having claims against them are sometimes obliged to follow them into another jurisdiction in order to obtain redress. But this is a matter over which the court has no control, and the only way which occurs to us whereby the difficulty may be remedied is by means of such legislation as shall render the corporation that obtains the franchise liable for the negligence or misconduct of the contractor. Demurrer overruled, plea sustained, and case remitted to the common pleas division for further proceedings.

(19 R. I. 583)

AMSDEN v. DANIELSON.

(Supreme Court of Rhode Island. July 7, 1896.)

ACTION BY EXECUTOR ON NOTE—DEFENSES—VOLUNTARY PAYMENT IN FOREIGN STATE—PARTIES.

1. It is no defense to an action by a resident executor on a note executed by a nonresident that after commencement of the action an administrator with the will annexed was appointed in the state of defendant's residence, and that he made voluntary payment of the amount of such note to such administrator.

2. In assumpsit by an executor on a note, the rights of legatees under the will, who were not made parties cannot be determined.

Action by Frederick B. Amsden, executor, against Simeon Danielson. The case was heard on demurrers to rejoinders. Sustained.

John F. Lonsdale, for plaintiff. Edwards & Angell and Carpenter & Williams, for defendant.

STINESS, J. This case was before us at a previous term on demurrers to plaintiff's replications. After the opinion given thereon (Index PP. 84, 31 Atl. 4), overruling the demurrers, the case went back to the common pleas division, and the defendant filed rejoinders, to which the plaintiff has demurred, and the demurrers are certified to this division. The pleadings set up these facts: The plaintiff is the domiciliary executor of the will of Lucretia C. Danielson, a resident of this state. He holds the promissory note of the defendant, payable to the testatrix, upon which this suit is brought. The writ issued January 12, 1894, and was served by attaching real estate of the defendant in the city of Providence. The defendant is a resident of Killingly, Conn., who pleads that after the commencement of this suit, to wit, January 18, 1894, William H. Chollar was appointed administrator with the will annexed in Connecticut; that he demanded payment of said note of the defendant, who thereupon paid to him all that was due thereon. To this the plaintiff replied that there was no property in Connecticut, except a

trifling amount of furniture, which had been fully administered before the application to record the will in that state; that the defendant induced the plaintiff to forbear the bringing of this suit by a payment on account, and by a promise to pay the balance on a certain day; that, taking advantage of the delay thus obtained, and contriving to evade the payment of the amount due on said note to this plaintiff, he procured the appointment of said Chollar as administrator in Connecticut, and made the payment set forth in the plea. On demurrer to the replications we decided that the plaintiff had the right to sue the defendant in this state, if he could find him or his property within this jurisdiction; and that a voluntary and collusive payment, such as was set up in the replications, was no bar to a suit in this state, which had been commenced before the appointment of the foreign administrator to whom such payment was made. The rejoinders now filed deny that there was no property in Connecticut; that a payment on this note had been made to the plaintiff; that the payment to Chollar was voluntary and collusive, and that the promise to pay was made in consideration that the plaintiff would forbear to sue or for the purpose of preventing the attachment; but they allege that the promise to pay was made before the defendant had been advised by counsel that said note was assets in the state of Connecticut. It thus appears that the underlying fact of defense set forth in the pleading is the payment to Chollar, and we do not see that the rejoinders substantially change the question which was heard and decided before. It is also evident that the counsel for the defendant consider that the question is the same, since they present the same argument and authorities as in their previous brief, adding little except strictures upon the decision of the court. The burden of the argument for the defense is that the debt was an asset in Connecticut. We have not said that it was not. But, suppose it was; the cases are practically unanimous that an executor may collect it elsewhere, than in the debtor's domicile, if he can; and the counsel for the defendant cite no case to the contrary. Of course, as we said before, the debtor will not be compelled to pay twice, and so we pointed out that the payment here relied on was a voluntary payment. It appears by the replications, without denial, that the defendant himself, as next friend for his minor daughters, started the proceedings in Connecticut, and, by his own plea, that upon demand for the debt by Chollar he paid it. Counsel now argue that "a voluntary payment is a gratuitous payment, or one without consideration." They overlook the fact that the word "voluntary," as used in this connection in all the cases, means "without compulsion." Thus, in *Whipple v. Robbins*, 97 Mass. 107, where a trustee allowed himself to be defaulted, without disclosing the pend-

ency of a suit against him in Connecticut, and paid the judgment against him, the court said: "His payment under such circumstances must be regarded as voluntary, if not collusive, and therefore no protection against the present action." It is familiar phrase to speak of a voluntary assignment, as distinguished from one in proceedings in invitum. After one has been sued in one jurisdiction he cannot plead in bar of the suit a voluntary payment in another jurisdiction. If he is sued the second time, he can plead the former pending suit or judgment, and courts will so proceed as to protect one who has acted in good faith from being compelled to pay twice. The situs of the assets is a matter which affects the accounting, and not the jurisdiction in the collection of debts. If, under a proper construction of the will, the money collected belongs to parties in Connecticut, the executor in this state will be bound to account for it accordingly. But the point of confusion on the part of the defendant's counsel is right here: They say that Ada C. and Florence H. Danielson are legatees under the will, and that they procured the proceedings in Connecticut. Then they say in their brief: "The opinion does not refer to the legatees, although they are the parties principally interested. Now, I ask this court, pointedly, it is true, but in all candor and fairness, and with no unkindly feeling, is this right?" We are obliged to say that we think it is. We cannot settle the rights of legatees under a will in a suit upon a promissory note to which they are not parties. We have only the plaintiff and defendant before us. Even the will is not before us in the pleadings, and we do not see how we could construe it in this action of assumpsit if it was. The simple question is, can the defendant, after an action is brought in this state upon a promissory note, held by the executor in this state, defeat the action by getting an administrator appointed in his own state, and then making a voluntary payment to him? We do not think he can. The rejoinders do not set up a compulsory payment, or any facts which raise any new question. The simple denial that the payment was voluntary, in the face of the plea which shows that it was so in law, is no answer to the replications. We therefore sustain the demurrers to the rejoinders.

(68 Vt. 224)

TOWN OF GRAND ISLE v. TOWN OF MILTON et al.

(Supreme Court of Vermont. Chittenden.
April 25, 1896.)

TOWNS — ASSESSMENT FOR HIGHWAY PURPOSES — VACATION — REPEAL OF STATUTE — EFFECT — STIPULATIONS.

1. Where the petition by a town to vacate an assessment in favor of other towns for highway purposes was served on the towns to which

payment had been made, such towns having been made the only necessary parties defendant to such proceeding (St. 1884, No. 18, § 6, as amended by St. 1886, No. 16, § 7), it was proper to overrule a motion to dismiss for nonjoinder of a town which was merely a party to the assessment proceedings.

2. The fact that a judgment assessing a town for highway and bridge purposes in favor of adjoining towns was entered on a stipulation by all the parties does not render the assessment a matter of contract, so as to preclude relief under St. 1884, No. 18, § 6, as amended by St. 1886, No. 16, § 7, providing that any town assessed for the expense of maintaining a bridge or highway in another town may petition the court which ordered the assessment to vacate the same.

3. R. L. §§ 2975-2977, providing for the maintenance and repair of highways and bridges extending through two or more towns, and providing for assessments for such purpose, were in force when assessment proceedings were begun, and were repealed, pending such proceedings, by St. 1884, No. 18, but section 8 of the latter act provided that it should not apply to pending causes. After the rendition of the judgment assessing plaintiff as one of such towns, and before the commencement of an action to set aside the assessment, said section 8 was repealed by St. 1886, No. 16, § 7. *Held*, that the repeal of said section 8 did not affect the body of the act, but that thereafter the statute should be applied without the proviso.

Exceptions from Chittenden county court; Taft, Judge.

Petition by the town of Grand Isle against the towns of Milton and Colchester for relief from liability to assessment for highway and bridge purposes. There was a trial by the court, who rendered judgment vacating the assessment. Defendants except. Affirmed.

W. H. Bliss, for petitioner. H. F. Wolcott and A. G. Whittemore, for defendants.

THOMPSON, J. This is a petition by the town of Grand Isle to be relieved from liability to assessment for the expense of maintaining and repairing a highway, including a bridge, wholly within the defendant towns of Milton and Colchester. This liability was imposed by a judgment of the Chittenden county court rendered at its April term, A. D. 1886, pursuant to the prayer of a petition preferred at its September term, A. D. 1882. That petition was brought under R. L. §§ 2969, 2975-2977, in force at the time of bringing the petition, which provided for the paying out, building, and maintaining a highway, including bridges, extending into or through two or more towns, and also provided for assessing other towns especially benefited thereby, towards the expense thereof, in case the towns in which such highway was located would otherwise be excessively burdened. While the proceedings under which the plaintiff was assessed were pending, R. L. §§ 2975, 2976, 2977, were repealed by St. 1884, No. 18, § 7, but section 8 thereof provided that that act should not apply to pending causes. After the rendition of the judgment by which the plaintiff was assessed, and before the commencement of this suit, St. 1884, No. 18,

§ 8. was repealed by St. 1886, No. 16, § 7, which went into effect January 1, 1887 (R. L. § 29). The repealing effect of St. 1884, No. 28, and St. 1886, No. 16, was fully discussed and adjudicated in *Underhill v. Town of Essex*, 64 Vt. 28, 23 Atl. 617. It was held that the law in respect to assessing towns benefited was repealed except the provision of St. 1884, No. 18, § 6, which provided the method by which any town assessed towards the expense of maintaining or repairing any bridge or highway in another town might procure the vacation of the assessment.

1. The defendants claim that the petition should have been dismissed for the reason that the town of South Hero is not made a party defendant, that town being a party to the judgment sought to be vacated. Section 6, No. 18, St. 1884, as amended by section 7, No. 16, St. 1886, is as follows: "Any town assessed towards the expense of maintaining or repairing any bridge or highway in another town, under the laws now in force, may petition the court, which ordered said assessment, such petition to be served upon the town to whom the assessment is paid, and said court shall vacate the order or decree for such assessment. And whenever any such petition is brought, the court shall, upon application, order a stay of any and all proceedings to enforce the collection or payment of such assessment." This section is still in force unless repealed by V. S. It is not necessary to decide whether it has been repealed or not. It was in force when this suit was brought, and, for the purpose of determining the rights of the parties thereto, is to be considered as still in force. V. S. §§ 28, 29, 5456. The defendant towns of Milton and Colchester are the towns to which the assessment is paid, and they appear and defend; hence, if the nonjoinder of a defendant could be raised by a motion to dismiss for such nonjoinder, the motion was properly overruled, as all the parties required by the statute were before the court. *Hyde v. Lawrence*, 49 Vt. 363.

2. The defendants contend that the assessment was a matter of contract between the towns, and not imposed by judgment of the county court, and that consequently the case does not fall within the relief for which the statute provides. This contention is based upon the fact that after the cause had been fully heard in the county court before commissioners, and had been to the supreme court, and remanded to the county court, the latter court rendered judgment pursuant to a written stipulation filed in the case by the parties. This stipulation did not provide for anything not within the province and duty of the court to adjudge in that case. Because the parties took that way of ending a long and expensive litigation, the final judgment is none the less a judgment of the court; hence this contention cannot be sustained.

3. The defendants also insist that notwithstanding the repeal of section 8, No. 18, St. 1884, before the commencement of this action, the court cannot grant the relief for which the plaintiff asks, because of the effect of the provision therein that that act should not affect pending causes. In support of this contention, V. S. § 29, is cited, which provides "that the repeal of an act shall not revive one which has been repealed, nor affect an act done, a right accruing, acquired, or established, nor a suit or proceeding had or commenced in a civil cause before the time when the repeal takes effect; nor shall it affect a suit pending at the time of such repeal for the recovery of a penalty or forfeiture incurred under the acts so repealed." The provisions of this section are the same as R. L. § 28. The right of the plaintiff to relief is based upon section 6, No. 18, St. 1884, above quoted. At the time of the repeal of section 8 of the same act, there was no cause pending between these parties, it having been ended by the judgment therein. The sound rule is that where a statute merely excepts a particular class of subjects from the provisions of a general law, which continue to be in force, the repeal of the excepting part of the statute operates to bring such subjects again under the general law. If a proviso creating an exception to the general terms of a statute is repealed, courts are afterwards bound to give effect to it according to its general terms. And this cannot be said to revive a repealed statute. The rule against this relates to cases of absolute repeal, and not to cases where a statute is left in force, and all that is done in the way of repeal is to except certain cases or subjects from its operation. In such cases the statute does not need to be revived, for it remains in force; and, the exception being taken away, the statute is afterwards to be applied without the exception. *Smith v. Hoyt*, 14 Wis. 252; *Goodno v. Oshkosh*, 31 Wis. 127. Full effect was given to the proviso on which defendants rely, by allowing the case then pending to pass to final judgment; but subsequently, when repealed, and the general provisions of the law became operative as to all subjects and cases embraced therein, the respective rights of the parties were determined by the general provisions, unaffected by the proviso. The defendants have no vested right in the judgment assessing the plaintiff, or in the law under which it was done. In maintaining or repairing highways and bridges, the town is simply the hand—the instrumentality—of the state. The state has the power at all times to determine upon whom this burden shall rest, and how it shall be borne. It may relieve from such burdens, or impose greater ones. *Underhill v. Town of Essex*, 64 Vt. 28, 23 Atl. 617. There was no error in respect to the defendants in the judgment below. Judgment affirmed, with costs.

(68 Vt. 225)

EASTMAN v. DAVIS.

(Supreme Court of Vermont. Caledonia. May 5, 1896.)

ACTION AGAINST EXECUTOR—PARTIES—PRACTICE—ACCOUNTING—CONCEALMENT OF ASSETS—LIMITATIONS—COMPENSATION.

1. Where a petition, by parties interested in a decedent's estate, to compel the executor to account for assets alleged to have been concealed by him on final settlement, is denied by the probate court, a judgment, on appeal, in favor of petitioners, does not determine who is entitled to the sum found due, but merely ascertains that sum, and certifies it to the probate court to be there disposed of as the law may require.

2. On appeal from an order of the probate court denying a petition by the heirs of F. to compel the personal representative of F.'s executor to account for assets claimed to have been concealed by his decedent on final settlement, it was not reversible error for the county court to permit the administrator de bonis non of F.'s estate to be made a co-petitioner.

3. Limitation does not begin to run in favor of an executor until the trust is terminated or repudiated.

4. Where an executor, on final settlement, conceals assets belonging to the estate, there is no such termination or repudiation of the trust as will set in motion the statute of limitations against the right to demand a further accounting. *Davis v. Eastman*, 30 Atl. 1, 66 Vt. 651, followed.

5. An executor who is compelled to account for assets previously misappropriated, and concealed on final settlement of the estate, is not entitled to any compensation for collecting and caring for such assets.

6. An executor who wrongfully appropriated assets of the estate is chargeable with annual interest thereon from the date of the appropriation.

Exceptions from Caledonia county court; Start, Judge.

Petition by the heirs of Brainard Flint, deceased, against George T. Eastman, executor of Mary Flint, deceased, late executrix of Brainard Flint's estate, to compel an accounting of her trust as executrix. On appeal from an order of the probate court denying the petition, George B. Davis, administrator de bonis non of the estate of petitioners' testator, was made a co-petitioner, and from a judgment for petitioners the petitionee brings exceptions. Reversed.

M. Montgomery and W. P. Stafford, for petitionee. Bates & May, for petitioners.

THOMPSON, J. In October, 1868, Brainard Flint died, testate, leaving a widow, Mary Flint, but no issue. By his will, which was duly proved, Mary Flint was constituted his executrix, and was appointed by the probate court, accepted the trust, and duly qualified and acted as executrix. The personal and real estate of Brainard Flint was appraised at \$1,743.24 by the appraisers appointed by the probate court. She waived her rights under the will, and demanded her rights in the estate under the law of distribution. June 19, 1869, after due notice, she settled her account as executrix in the probate court. By this settlement it appeared that the personal

estate was not sufficient to pay the debts and the expenses of administration, by the sum of \$88.79, which sum, in this settlement, was treated as a balance due her as executrix. The residue of the estate, so far as appeared at the settlement, was the real estate, appraised and inventoried at \$1,100. On the same day the probate court assigned to her, as widow, a homestead in the real estate, of the value of \$500, and decreed to her the remainder of the estate, as inventoried, as being thereto entitled under the then existing laws of distribution. No appeal was taken from this settlement and distribution. Mary Flint died testate in February or March, 1892. Her will was duly admitted to probate, and George T. Eastman, named therein as executor, was appointed executor thereof by the probate court, and accepted the trust, and qualified and is acting as such executor. After the decease of Mary Flint, and the appointment of her executor, a petition was preferred to the probate court by some of the heirs of Brainard Flint, setting forth that in her life she received, as such executrix, a large sum of money, belonging to Brainard Flint's estate, for which she never accounted in her life, and praying to have her executor cited before the probate court to further render her account as executrix, and that her estate be held to account for such money. On hearing, the probate court denied the prayer of the petition that her estate account for such money, and from this denial an appeal was taken to the county court. In the county court the petitioners asked and were granted leave to make George B. Davis, administrator de bonis non of the estate of Brainard Flint, a co-petitioner, and he entered as a co-petitioner. To his being allowed to be made a party, the appellant excepted. The county court found that April 7, 1869, Mary Flint received, as assets of Brainard Flint's estate, \$1,086.90, the amount of a note he held at the time of his decease against R. B. Flint, and that in her life she never accounted for the same as executrix, but on the contrary, at the time of the settlement and distribution, June 19, 1869, she declared, in the presence of the heirs present, that there was no estate except what she then accounted for.

1. The appellant contends that it was error for the court below to permit the administrator de bonis non on the estate of Brainard Flint to become a co-petitioner for an accounting. Any person interested in the estate of Brainard Flint, as an heir or otherwise, had a right to apply to the probate court for a further accounting in the premises. Such application could properly be made by any such person alone, or jointly with others so interested. The probate court, or the county court as an appellate probate court, could permit parties to be added or stricken out. If one person entitled to ask for such accounting applied to the probate court for it, it would become the duty of that court to act in the matter,

and it would not vitiate its proceedings if parties not in interest joined in the application with those who were interested. This point has been argued by the appellant as if the question as to the respective rights of the heirs of Brainard Flint and his administrator de bonis non to any sum which may be found to be due from Mary Flint as executrix were involved, but that question was not passed upon by the probate court, was not before the county court, and is not before this court. The question brought up by the appeal is whether Mary Flint, by her representative, shall account for assets which she received as executrix, for which she never accounted in her life, and, if so, for what sum. When that sum is ascertained, it is to be certified to the probate court, to be there disposed of as the law may require. An examination of the cases shows that this is the proper procedure in a matter of this kind, where no order or decree was made in the probate court in respect to the distribution or payment of the funds found to be in the hands of an executor or administrator on final accounting. *Richardson v. Merrill*, 32 Vt. 27; *Holmes v. Bridgman*, 37 Vt. 28; *Atherton v. Fullam*, 55 Vt. 388; *Perkins' Estate v. Hollister*, 59 Vt. 348, 7 Atl. 805; *In re Worcester's Estate*, 60 Vt. 420, 15 Atl. 336; *Riley v. McInlear's Estate*, 61 Vt. 254, 17 Atl. 729, and 19 Atl. 996; *In re Brown's Estate*, 65 Vt. 331, 26 Atl. 638; *Allen v. Tarbell's Estate*, 65 Vt. 150, 28 Atl. 65; *Foster's Ex'r v. Stone*, 67 Vt. 336, 31 Atl. 841. In *Atherton v. Fullam*, supra, the plaintiff, as administrator de bonis non, sought to recover of the defendant, on an administrator's bond signed by his testator, Sewall Fullam, as surety, and given by one Sylvanus O. Mathewson, the plaintiff's predecessor, as administrator of the estate of Ira Mathewson. On an appeal by Sylvanus O. Mathewson from the probate court, the county court adjudged that he had in his hands as such administrator, at the time of his removal, \$350.27 belonging to the estate, and decreed that he account for the same, with costs. It was held that the plaintiff's cause of action on the bond for default, in not paying these sums, did not accrue until the probate court, upon the judgment of the county court being certified to it, had made a decree ordering said Sylvanus to pay to the plaintiff, as administrator de bonis non, the amount determined by the judgment of the county court. The strict rule requiring all parties in interest, and only such, to be parties of record, which applies in an ordinary action at law, does not govern in a proceeding of this kind. If actual or constructive notice is given as required, all parties in interest, whether they enter as parties to the proceeding or not, are bound by the judgment of the probate court in respect to all matters properly presented by an executor or administrator in his accounting as such, whether the judg-

ment be that he shall account, or shall not account. Ordinarily, to enable the probate court to take action in a matter of this nature, it is only necessary that some person in interest should invoke its action. However, we do not hold that in cases requiring it the probate court may not require an accounting even without an application therefor by some person interested in the estate; an executor or administrator being an officer of the court for the purpose of properly administering the estate, who is required by his bond, and by law, to render an account of his administration within one year from the time of receiving letters testamentary or of administration, and to render further accounts of his administration, as required by the court, until the estate is wholly settled. V. S. §§ 2374, 2384, 2388, 2404. A judgment against the appellant does not entitle the appellees to execution against him. It does not determine who are the heirs of Brainard Flint, or who is entitled to a distributive share of his estate, or to whom the appellant shall pay any sum found due from the executrix, in the due course of administration; but it simply determines the amount for which she, as executrix, by her representative, shall be charged for assets for which she has not accounted. It fixes her status, and that of her representative, in respect to the estate of Brainard Flint at the time of her decease. We therefore hold that it was not reversible error to permit the administrator de bonis non to become a co-petitioner.

2. The appellant also insists that any claim against his testate as executrix is barred by the lapse of more than 20 years since the settlement of June 19, 1868, which purported to be final, on the ground that she repudiated the trust relation, and that the statute of limitations therefore began to run from that date. This same question was before this court in *Davis v. Eastman*, 66 Vt. 651, 30 Atl. 1, and it was then said: "The probate court is not debarred from proceeding in this matter by the lapse of time. No mere lapse of time can prevent that court from enforcing the settlement of an estate. Executors and administrators hold the property of the deceased as direct trustees for the persons entitled to it, and are liable to account to the probate court for the benefit of such persons until the estate is wholly administered. A period of limitation will not commence to run in favor of trustees of this character until the trust relation is terminated or repudiated. *Miles v. Thorne*, 99 Am. Dec. 389, note; *Kimball v. Ives*, 17 Vt. 430; *Bigelow v. Catlin*, 50 Vt. 408; *Drake v. Wild*, 65 Vt. 611, 27 Atl. 427. The settlement of an estate on what purports to be a final account is not necessarily a termination of the trust. If assets remain in the hands of the accountant, undisclosed, he continues to hold them in his fiduciary capacity. It cannot be said that this executrix ever repudiated the trust relation. She

fraudulently kept from the heirs the knowledge which might have given her conduct the effect of repudiation." The facts in respect to the concealment of the fact by the executrix that at the time of the settlement of June 19, 1869, she had received \$1,086.90 on the R. B. Flint note, belonging to her husband's estate, and for which she should then have accounted, are substantially the same in the case at bar as they appeared in that case. A party setting up the statute of limitations must prove such facts as bring the case within it. To make it operative in this case, the appellant must establish that the heirs of Brainard Flint knew at the time of said settlement, or at a period more than 6 years and 30 days next before the death of Mary Flint, that she had received this money, and claimed it as her own, repudiating the trust and the right of the estate or the heirs to the money. So far as the case discloses, the appellant failed to do this, and the statute of limitations is no bar to the accounting.

3. The county court charged the estate of Mary Flint with the \$1,086.90, and interest thereon, making in all the sum of \$2,603.80, to which judgment the appellant excepted. This exception must be sustained. Her estate must account as of June 19, 1869, for so much of Brainard Flint's estate, not accounted for, as by law did not belong to her. All the debts had been paid by her. As the law then stood, she was entitled, after the payment of debts and other charges, and the expenses of administration, to a homestead of the value of \$500, the further sum of \$1,000, and one-half of the residue of the estate, personal and real. She took this, as a matter of right, under the statutes relating to descent and distribution of estates, and it vested in her by law at the death of her husband. Gen. St. c. 51, § 1; Id. c. 56, § 1; *Sawyer v. Sawyer*, 28 Vt. 249; *Johnson v. Johnson*, 41 Vt. 467. Having been willfully in default, in not accounting for the avails of the R. B. Flint note, she was not entitled to any compensation in respect to what she may have done in collecting and caring for the same. *Shaw v. Bates*, 53 Vt. 360; *McClosky v. Gleason*, 56 Vt. 264; *Foster's Ex'r v. Stone*, 67 Vt. 336, 31 Atl. 841. It does not appear that any claim for compensation or disbursements, if any, was made in the court below. Annual interest—the highest interest known to our law—is to be charged on the sum for which her estate must account, from June 19, 1869, to March 6, 1896, the last day of this term. *Spaulding v. Wakefield*, 53 Vt. 660; *McCloskey v. Gleason*, 56 Vt. 264; *Walton v. Hall's Estate*, 66 Vt. 455, 29 Atl. 803; *Foster's Ex'r v. Stone*, 67 Vt. 336, 31 Atl. 841. Applying these principles, we deduct the balance of \$88.79 found due the executrix at the settlement from the \$1,086.90, and there remains a balance of \$998.11 of the personal estate, after the payment of all charges. This bal-

ance, with the real estate appraised at \$1,100, makes a total of \$2,098.11. Of this sum the executrix, as widow, was entitled to \$500; for a homestead, \$1,000; and one-half the remainder, being \$299.055; making in all \$1,799.055. This, deducted from the total amount of \$2,098.11, leaves \$299.055 to which she, as widow, was not entitled. The annual interest on this sum is \$849.14, which makes \$1,148.20, for which the estate of the executrix must account. Judgment reversed, and judgment that the appellant, as executor of Mary Flint, deceased, account for \$1,148.20, as the amount for which she is in arrears as executrix of the last will of Brainard Flint, and that the same be enrolled as a valid claim and charge against her estate, to be paid and satisfied out of the assets thereof, the same as other debts and charges against it. The appellant to recover his costs in this court, and the appellees to recover their costs in the court below. To be certified to the probate court.

(68 Vt. 253)

MASCOTT v. GRANITE STATE FIRE INS. CO.

(Supreme Court of Vermont. Rutland. March 17, 1896.)

INSURANCE — ACTION ON POLICY — CONDITIONS — CONSTRUCTION — PAROL EVIDENCE.

1. Where the insurance was on "paints, oils, varnishes," etc., "and such other articles as are usually kept in a sign painter's and carriage painter's and trimmer's shop," parol evidence was admissible, in an action on the policy, to amplify the clause, and show what articles are usually kept, within its meaning.

2. A typewritten rider attached to a fire insurance policy provided that the insurance was against loss on "paints, oils, varnishes," etc., "and such other articles as are usually kept in a sign painter's and carriage painter's and trimmer's shop," while a printed stipulation in the body of the policy provided that "this entire policy, unless otherwise provided by agreement hereon, or added hereto, shall be void * * * if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed, on the above-described premises, benzine," etc. It was shown that benzine was usually kept in a shop such as that maintained by the insured. *Held*, that the prohibition of keeping benzine applied only when that article was not insured, and by insuring benzine, it was "otherwise provided, by agreement indorsed upon the policy," that benzine might be kept on the premises.

3. When a repugnancy exists between a typewritten rider on a policy and the printed parts thereof, the provisions of the rider will prevail.

Exceptions from Rutland county court; Ross, Chief Judge.

Assumpsit by Fred E. Mascott against the Granite State Fire Insurance Company. There was a judgment for defendant, and plaintiff excepts. Reversed.

The description of the property insured was typewritten and attached to the policy. A portion of that description was as follows: "\$200, on his paints, oils, varnishes, leather, rubber and enameled cloth, broadcloth, car-

riage tops, backs, dusters, and cushions, paint mill, tools, letter patterns, and such other articles as are usually kept in a sign painter's and carriage painter's and trimmer's shop." One printed condition of the policy was as follows: "This entire policy, unless otherwise provided, by agreement indorsed hereon or added hereto, shall be void, * * * If (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole," etc. The plaintiff was a carriage painter. He testified that he had in his paint shop a kettle containing benzine and asphaltum, and that in backing a wagon into the shop this kettle was in some way overturned, and a portion of the contents thrown upon a heated stove, by which the fire and loss occurred. To avoid the effect of the printed condition as to the keeping of benzine, he offered to show that benzine was an article usually kept in the shop of a sign painter, was necessary to the transaction of the business named in the policy, and was one of the articles insured under the general terms of the policy. The court excluded the testimony, and the plaintiff excepted. At the close of the evidence the court directed a verdict for the defendant.

W. H. Preston, F. S. Platt, and T. W. Moliney, for plaintiff. Joel C. Baker, Henry L. Clark, and F. W. McGettrick, for defendant.

TYLER, J. The defendant made the insurance contract with the plaintiff, and issued the policy to him, in consideration of the stipulations named therein, and of the sum of \$36 paid by the plaintiff to the defendant as premium, and insured for one year certain property of the plaintiff as follows: "Twelve hundred dollars,—\$800 on his stock of undertakers' goods, including caskets, coffins, robes, trimmings, and funeral furniture; \$400 on his stock of carriages and sleighs, and parts thereof, and silver-mounted hearse; \$200 on his paints, oils, varnishes, leather, rubber and enameled cloth, broadcloth, carriage-tops, backs, dashers, and cushions, paint mill, tools, letter patterns, and such other articles as are usually kept in a sign painter's and carriage painter's and trimmer's shop." The list is in typewriting, upon a separate piece of paper, which is attached to the face of the policy. Following the description is the clause: "To be attached to and form a part of the policy, * * *" and the paper is signed by the defendant's agents. The words "and such other articles as are usually kept," etc., are not without meaning. They are employed by the defendant in place of a full list of the property insured in that clause, and the articles usually kept must be read into the clause. If benzine was such an article, the clause should be read with that article added. In *Whitmarsh v. Insurance*

Co., 16 Gray, 359, the property insured for the plaintiffs was "their stock in trade, consisting of the usual variety of a country store (except dry goods) and their store fixtures." It was held that the insurance covered the usual variety of a country store, and what such usual variety was could be ascertained by parol evidence. In *Haley v. Insurance Co.*, 12 Gray, 545, a policy on "stock in trade, being mostly chamber furniture in sets, and other articles usually kept by furniture dealers," was held to cover paints and varnishes used to finish the furniture, if usually kept by furniture dealers, and that whether they were so kept might be ascertained by the jury. *Steinbach v. Insurance Co.*, 54 N. Y. 90, and *Carrigan v. Insurance Co.*, 53 Vt. 418, are directly in point. In *Archer v. Insurance Co.*, 43 Mo. 434, the insurance was on a wagon maker's shop and materials, with a printed prohibition of benzine. The insured kept benzine in a paint shop in the same building. The same doctrine was held as in the Minnesota case hereafter noted, following the New York cases. The rule requires no further exposition that in a case like the present resort may be had to parol evidence to amplify the clause, and show what articles are usually kept, within its meaning.

The plaintiff testified that he habitually used benzine in his shop for various purposes, and offered to show that its use was necessary in his business, and that it "was usually kept in a sign painter's and carriage painter's and trimmer's shop." If he had been permitted to show this fact, benzine would have been covered by the policy, the same as if it had been one of the articles enumerated. The stipulations are printed in the body of the policy, and among them is the following: "This entire policy, unless otherwise provided, by agreement indorsed hereon or added hereto, shall be void if,"—enumerating the conditions. One of the conditions is as follows: "Or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises, benzine, benzole, dynamite," etc. If the plaintiff had shown what he proposed, the case presented would be that benzine was insured with the other articles described in the written part of the policy, while the keeping of benzine on the premises was prohibited in the printed stipulations, and there would be an apparent inconsistency between the two parts of the policy. But it would be only seeming. The true construction to be given the policy is that the prohibition of keeping benzine and other articles on the premises applies only when those articles are not insured. If the insurance did not include them, the keeping of them might reasonably be prohibited. By insuring benzine, it was "otherwise provided, by agreement indorsed upon the policy," that benzine might be kept on the premises, and thus the

condition of the stipulation was complied with. In *Insurance Co. v. De Graff*, 12 Mich. 124, the policy provided that the same should be void if the premises were used for storing or keeping therein any articles in certain classes of hazards described, "except as herein specially provided, or hereafter agreed to by the insurers in writing upon the policy." It was held that, where a stock was insured under the general designation of "groceries," which included some of these hazardous articles, the insurance by this designation did specially provide for them in writing upon the policy. *Whitmarsh v. Insurance Co.* is to the same effect. See note to *Insurance Co. v. Lenheim*, 89 Pa. St. 497, in 38 Am. Rep. 778, where many cases are reviewed and this rule is fully sustained. But where a repugnancy exists between the written and the printed parts of a policy, the written part must prevail. It was said by the court in *Insurance Co. v. Taylor*, 5 Minn. 492 (Gil. 393), that the written part of the policy, inserted by the parties, is more immediately expressive of their meaning and intention concerning the contract they are entering into than the printed portion. *Benj. Prin. of Cont.* 107. Other cases cited on plaintiff's brief sustain this point.

The general propositions contended for by the defendant's counsel, that "a policy of insurance, with its clauses, conditions, and stipulations, is the law of the legal relations between the parties," and "the contract of insurance is at an end the moment the warranty is broken, and cannot be revived without the consent of both parties, unless the insurer has, by some act or line of conduct, waived the breach," are not in conflict with the rules here laid down. There was error in excluding the evidence offered. Judgment reversed, and cause remanded.

(68 Vt. 386)

IN RE HURLBURT'S ESTATE.

(Supreme Court of Vermont. Chittenden.
April 25, 1896.)

DEATH—PROOF OF—GENERAL REPUTATION IN THE FAMILY—REPUTATION AMONG ACQUAINTANCES.

1. "General reputation in the family," which is admissible in matters of pedigree, or to establish the facts of birth, marriage, or death, is confined to declarations of deceased members of the family, and family history and traditions handed down by declarations of deceased members, in either case made ante litem motam, and originating with persons presumed to have competent knowledge of the facts stated; and evidence of the opinion or belief of the living members of a family as to the death of another member is not within the rule, and is inadmissible.

2. A person's death cannot be established by general reputation among his living friends and acquaintances.

Rowell and Start, JJ., dissenting.

Exceptions from Chittenden county court; Loveland Munson, Judge.

Proceeding in the matter of the estate of Wait Hurlburt, deceased, in the probate court for the district of Chittenden. There

was a jury trial at the September term, 1893, and a special verdict finding that Edmund W. Hurlburt was alive at the death of his father, the decedent. George W. Hurlburt excepts, and appeals from the decree entered thereon. Affirmed.

W. L. Burnap and Henry Ballard, for appellant. Dillingham, Huse & Howland, for appellee.

THOMPSON, J. The issue was whether Edmund W. Hurlburt was dead, and, if dead, whether he died before his father, Wait Hurlburt, did, which was on December 14, 1884. It appeared that Edmund went to Devil's Lake, Dak., some time in 1882, and continued to reside there, and at Grand Forks, Dak., living a rather reckless and dissipated life, till about August 25, 1885, when he disappeared from Grand Forks, and has not been seen nor heard of since. As tending to prove that he was dead, and that he died before his father did, the appellant offered to show by the mother and sister of Edmund, residents of Chittenden county, Vt., and his brother, George W. Hurlburt, the appellant in this case, and a resident of Massachusetts, the general reputation in the family as to Edmund's death, not claiming that such reputation was derived from the declarations of any deceased member of the family. The offer was excluded.

In case of pedigree, both in this country and in England, the declarations of deceased members of the family, made ante litem motam, before there was anything to throw doubt upon them, are admissible to prove pedigree. Such declarations are received as original evidence, and upon the ground of the interest of the declarants in the person from whom the descent is made out, and their consequent interest in knowing the connections of the family. The rule of admission is restricted to the declarations of deceased persons, who were related by blood or marriage to the person, and therefore interested in the succession in question. The term "pedigree" embraces not only descent and relationship, but also the facts of birth, marriage, and death, and the times when these events occurred. 1 Greenl. Ev. § 104; *Stein v. Bowman*, 13 Pet. 220. In England the rule is limited strictly to cases involving pedigree, and does not apply to proof of the facts which go to make up pedigree, such as birth, death, and marriage, when they have to be proved for other purposes. *Haines v. Guthrie*, L. R. 13 Q. B. 818. But in this state, and generally in this country, we think, the rule goes further, and you may prove these facts in that manner in any case where they become material.

Counsel for the appellant contend that, in cases of pedigree, death may be proved by general reputation in the family, without regard to the source from which such reputation had its origin, or the time when it came into existence. They say that "reputa-

tion," as used in this connection, means "opinion" or "established opinion,"—the opinion generally entertained; and that it is more limited in its scope than hearsay evidence, and, while it may be the result of the latter, it is not necessarily dependent upon it, and may exist without it. It would be useless to attempt to reconcile the utterances of the various courts that have spoken directly or indirectly upon this subject. Counsel upon both sides have collected quite a number of cases bearing upon it, and there are still others germane to it, to which they do not refer. Upon careful examination, much that is said in many of them upon this subject will be found to be wholly obiter dictum. Some of the cases, on account of the alleged peculiar exigencies of those cases, substantially adopt the doctrines for which appellant contends. In some instances the difference in the holding of various courts on this subject has arisen from their not giving the phrase "family reputation" the same meaning when applied to matters of pedigree. Some American cases have held this kind of evidence admissible, on authority of 1 Greenl. Ev. (12th Ed.) § 103, where it is said: "General repute in the family, proved by the testimony of a surviving member of it, has been considered as falling within the rule" admitting hearsay evidence in cases of pedigree. If by "general repute in the family" Greenleaf means general opinion or belief, however acquired, in the edition of his work on Evidence to which we refer, he cites only one case that can be claimed to support the text on this point. That is *Doe v. Griffin*, 15 East, 293, which was an action of ejectment. The question arose whether Thomas Griffin, a younger brother of the person last seised, through whom both the lessor of the plaintiff and the defendant were to make title, if at all, had died without issue, which it was incumbent upon the lessor of the plaintiff to show before he could entitle himself to recover upon the general merits of the case. For this purpose, Mrs. Jeffries, an elderly lady, one of the family, had been called to prove that Thomas had many years before, when a young man, gone abroad, and, according to the repute of the family, had afterwards died in the West Indies, and that she had never heard in the family of his having been married. The defendant moved for a new trial, on the ground that this was not sufficient evidence for the lessor of the plaintiff, on whom the affirmative proof lay, that Thomas in fact died unmarried and without lawful issue. The entire opinion of the court, delivered by Lord Ellenborough, C. J., is as follows: "The evidence was sufficient to call upon the defendant to give *prima facie* evidence, at least, that Thomas was married; for what other evidence could the lessor be expected to produce that Thomas was not married than that none of his family had ever heard that he was. Per Curiam: Rule refused." It is evident that

no question was made in respect to the death of Thomas. In effect, the witness testified that she, a member of the family, had never learned that he was married. It was not a question of reputation in the nature of an opinion, but a negative was to be established, and the actual knowledge of the witness that she knew of no marriage tended to prove it. We do not think this case supports so broad a proposition as that laid down by Greenleaf, if by "repute" he means "opinion." It is said in 2 Best, Ev. (Am. Ed., with Wood's notes) *631, that matters of pedigree may be shown by "general repute in the family, proved by a surviving member of it"; but no authority is cited to support the statement, nor does it appear in what sense the author uses the word "repute" in this connection. It is important to ascertain, if we can, what the words "repute in the family" and "reputation" signify when used in respect to pedigree. It will be observed that both Greenleaf and Best speak of family repute as something to be proved by a surviving member of the family, thus impliedly saying that it is something that has come down from deceased members of it, or that was known to them. In *Higham v. Ridgway*, 10 East, 109, Le Blanc, J., says: "On inquiring into the truth of facts which happened a long time ago, the courts have varied from the strict rules of evidence applicable to facts of the same description happening in modern times, because of the difficulty or impossibility, by lapse of time, of proving those facts in the ordinary way, by living witnesses. On this ground, hearsay and reputation, which latter is no other than the hearsay of those who may be supposed to have been acquainted with the fact handed down from one to another, have been admitted as evidence in particular cases." This quotation is incorporated into 1 Phil. Ev. (Edition with Cowen, Hill & Edward's notes) *248, as a statement of law in respect to the admissibility of hearsay evidence in cases of pedigree. In 1 Starkie, Ev. 31, it is said: "Reputation seems to be no more than hearsay, derived from those who had the means of knowing the fact. Hence it is that reputation may exist when those who were best acquainted with the facts are dead; and such reputation, and even traditional declarations, become the best, if not the only, means of proof." In *Goodright v. Moss*, Cowp. 591, Lord Mansfield said: "Tradition is sufficient in point of pedigree." In the *Berkeley Peerage Case*, 4 Camp. 401, Lord Mansfield C. J., said: "In cases of general rights, which depend upon immemorial usage, living witnesses can only speak of their own knowledge to what has passed in their own time; and, to supply the deficiency, the law receives the declarations of persons who are dead. There, however, the witness is only allowed to speak to what he had heard the dead man say respecting the reputation of the right of way, or common, or the like. A declaration with regard

to a particular fact which would support or negative the right is inadmissible. In matters of pedigree, it being impossible to prove by living witnesses the relationships of past generations, the declarations of deceased members of the family are admitted; but here, as the reputation must proceed on particular facts, such as marriages, births, and the like, from the necessity of the thing, the hearsay of the family as to these particular facts is not excluded." In *Monkton v. Attorney General*, 2 Russ. & M. 147, Brougham, Ld. Ch., said: "Another restriction was a good deal pressed, that you cannot mount, as it were, an hearsay upon an hearsay, but that what is given in evidence as hearsay must only be of the first degree, so to speak; in other words, that, after connecting A. with the family, it is competent, after his death, to give in evidence declarations made by A. as to what came within his personal knowledge, but not declarations as to what he had heard respecting the family from others. There is no warrant, however, for any such distinction. The declarations tendered in evidence may refer to what the party knew of his own personal knowledge, or, as is much more frequently the case, to what he had heard from others to whom he gave credit; for they are only adduced as evidence of reputation in the family, and it is the only mode in which the tradition in a family can be proved, and the subject-matter of that tradition can be perpetuated in testimony. In *Stein v. Bowman*, 13 Pet. 209, the court said: "From necessity, in cases of pedigree, hearsay evidence is admissible. But this rule is limited to members of the family, who may be supposed to have known the relationships which existed in the different branches. The declarations of these individuals, they being dead, may be given in evidence to prove pedigree; and so is reputation (which is the hearsay of those who may be supposed to have known the fact, handed down from one to another) evidence. As evidence of this description must vary by the circumstances of each case, it is difficult, if not impracticable, to deduce from the books any precise and definite rule on the subject. 'It is not every statement or tradition in the family that can be admitted in evidence.' The tradition must be from persons having such a connection with the party to whom it relates that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken." In *Haddock v. Railroad Co.*, 3 Allen, 298, in which general reputation was offered as evidence on a question of pedigree, and excluded, the court, in affirming the ruling, said: "The admission of hearsay to prove pedigree of a person is restricted to the declarations of deceased persons who were related to him by blood or marriage. 1 Greenl. Ev. § 103, and cases there collected. And 'reputation,' says Le Blanc, J. (10 East, 120), 'is no other than the hearsay of those who may be sup-

posed to have been acquainted with the fact, handed down from one to another.'" In *Whitelocke v. Baker*, 13 Ves. 511, Lord Chancellor Eldon said: "I accede to the doctrine of Lord Mansfield as it has been stated from Cowper; but it must be understood as it has been practiced and acted upon, and one word in that passage wants explanation. It was not the opinion of Lord Mansfield or of any judge that tradition, generally, is evidence even of pedigree; the tradition must be from persons having such a connection with the party to whom it relates that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken. The whole goes upon that. Declarations in the family, descriptions in wills, descriptions upon monuments, descriptions in Bibles and registry books, are all admitted, upon the principle that they are natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without temptation to exceed or fall short of the truth. But there may be many circumstances, forming part of the tradition, which you would reject, taking the body of the tradition."

It is urged by the plaintiff that marriage may be proved by general reputation, and that the case at bar is analogous to that. It is true that some authorities favor the idea that uniform and general reputation of itself may be received as sufficient proof, *prima facie*, of marriage. On the other hand, its sufficiency in any case has been denied, unless there be accompanying proof of matrimonial cohabitation. 1 Bish. Mar. & Div. (4th Ed.) § 438. In *Northfield v. Vershire*, 33 Vt. 110, it was held that evidence of reputation and cohabitation is competent to prove marriage. If reputation, in the sense of general opinion or general belief, is evidence of marriage when taken in connection with proof of cohabitation, it is difficult to see why marriage may not be found from it alone, if it satisfies the mind of the trier that the fact of marriage exists. But the truth is that what is spoken of as proof of marriage by general reputation in the community or among individuals is not a belief nor opinion, as such. On this subject Mr. Phillips says: "For the evidence usually produced in such cases cannot properly be called hearsay evidence, as it consists of original evidence of facts and circumstances. Thus, in the case of general reputation as to parties being married, it consists of evidence that they were received in society as man and wife, or that respectable families in the neighborhood visited them, or that the woman was churchered after childbirth, and the like, all which circumstances show that the parties acted or demeaned themselves as if they were married, and not living in a state of concubinage; and thus the ground of presumption is afforded that they were actually married." 1 Phil. Ev. (Edi-

tion with Cowen, Hill & Edward's Notes) 274. Says Greenleaf: "It is frequently said that general repute is admissible to prove the fact of the marriage of the parties alluded to, even in ordinary cases, where pedigree is not in question. In one case, indeed, such evidence was, after verdict, held sufficient, *prima facie*, to warrant the jury in finding the fact of marriage, the adverse party not having cross-examined the witness, nor controverted the fact by proof. But the evidence produced in the other cases cited in support of this position cannot properly be called hearsay evidence, but strictly and truly original evidence of facts, from which the marriage might well be inferred; such as evidence of the parties being received into society as man and wife, and being visited by respectable families in the neighborhood, and of their attending church and public places together as such, and otherwise demeaning themselves in public, and addressing each other, as persons actually married." Greenl. Ev. (12th Ed.) § 107. Bishop says: "What weight is to be given to the single fact that parties are reputed to be married is a question of difficulty, because, in cases, this fact seldom or never stands alone." 1 Bish. Mar. & Div. (4th Ed.) § 540. It is not clear from the context in what sense Bishop used the word "reputed." What has been called evidence of marriage by reputation can more properly be called evidence of marriage by conduct of the parties alleged to be married, and of those with whom they live and associate in respect to them.

Neither is the question under consideration analogous to cases in which an issue is raised in respect to a person's reputation for truth, good character, and the like, for in such case the very thing to be proved is the general reputation in the community in respect to these phases of personal character.

Somewhat analogous to the point to be decided is the exception to the rule excluding hearsay evidence which admits it in certain instances in proof of matters of public and general interest; such as the boundaries of counties or parishes, rights of common claims of highway, etc., of which Best says: "Now, it is obvious that rights of the public or general interest, which are supposed to have been exercised in times past, partake, in some degree, of the nature of historical facts, and especially in this: that it is rarely possible to obtain original proof of them. The law accordingly allows them to be proved by general reputation,—e. g. by the declarations of deceased persons who may be presumed to have had competent knowledge on the subject; by old documents of various kinds, which, under ordinary circumstances, would be rejected for want of originality, etc. But, in order to guard against fraud, it is an established principle that such declarations, etc., should

have been made *ante litem motam*." 2 Best, Ev. (5th Am. Ed., with Wood's Notes) § 497. Best's definition of reputation, just quoted, is adopted in 2 Rap. & L. Law Dict. subject "Reputation."

It is urged that the contention of the appellant is supported by *Webb v. Richardson*, 42 Vt. 465. All that was said in that case in regard to proving matters of pedigree by "near relatives, from reputation in the family," was said in disposing of an exception taken to the admission of a deposition, on the ground of "lack of substance." Portions of the depositions were unquestionably admissible. The court held that the exception was too general to avail the excepting party, and then proceeded to make some remarks in respect to family reputation as evidence in a case of pedigree. *Hurlburt v. Hurlburt's Estate*, 63 Vt. 667, 22 Atl. 850. The remarks of the court were entirely unnecessary for the decision of the question before it. It was said that the court would presume that the deponent derived his knowledge in a proper manner, rather than that it came from an illegitimate source; but no attempt was made to define what was a legitimate source, or what was meant by reputation in the family in such cases. Hence that case cannot be considered as aiding in the decision of this. It is also said that *Mason v. Fuller*, 45 Vt. 29, is authority for the claim urged by the appellant. That was a bastardy proceeding. In the course of the trial, it became material to show the death of the complainant's first husband. On cross-examination, and without exception, she testified as follows: "My husband died two years ago last March. I was not with him at the time of his death, or present at his burial, and have no personal knowledge of his death. I only know from his folks telling me, and writing me. They wrote me three letters this winter, and his brother told my husband." Previous to the trial, the complainant had remarried. The question of the sufficiency of this evidence to prove the death of the former husband was raised by a motion to direct a verdict for the defendant. This court held that this evidence tended to prove his death. In that case the question of family repute or family reputation, in the sense of general opinion or belief, was not raised nor discussed. The evidence admitted was wholly declarations by third parties out of court. The only ground, either on authority or principle, upon which that holding can be sustained, is the assumption that the relatives making the declarations were deceased at the time of the trial, and that the declarations were made *ante litem motam*. The record does not disclose whether such was the fact or not. The contrary not appearing, to sustain the ruling of the county court and the judgment of this, it is to be presumed that the evidence showed that they were dead, and

that the declarations were made ante litem motam. If the declarants were living at the time of the trial in the county court, then it is not a case to be followed. The question involved in the case at bar was not passed upon in *Hammond v. Noble*, 57 Vt. 203.

It will be observed that some of the authorities speak of "repute," "reputation," and "tradition" as convertible terms when applied to cases of pedigree. Now, "tradition" is knowledge, belief, or practices transmitted orally from father to son, or from ancestors to posterity. When these authorities speak of "repute," "reputation," or "tradition" in matters of pedigree, we think they mean such declarations and statements respecting the pedigree as have come down from generation to generation from deceased relatives in such a way that even though it cannot be said nor determined which of the deceased relatives originally made them, or was personally cognizant of the facts therein stated, yet it appears that such declarations and statements were made as family history, ante litem motam, by a deceased person, connected by blood or marriage with the person whose pedigree is to be established.

It is urged that general reputation, meaning thereby opinion or belief, among relatives or friends, in respect to one's death, must be admissible; otherwise, in some cases, it would be impossible to prove death, when there was no doubt in respect to it. But it does not seem that there is much force to this contention. The proof of death is no more difficult than many other facts which are required to be proved to determine rights of litigants. If the person supposed to be dead has been absent and not heard from for seven years, the legal presumption of death at the end of seven years arises. In addition to this, any facts or circumstances relating to the character, habits, condition, affections, attachments, prosperity, and objects of life, which usually control the conduct of men, and are the motives of their actions, are competent evidence from which may be inferred the death of one absent and unheard from, whatever has been the duration of such absence. *Tisdale v. Insurance Co.*, 28 Iowa, 170. The rule admitting any kind of hearsay evidence in cases of this kind had its origin in the general necessity growing out of the extreme difficulty of establishing pedigree, especially after the long lapse of time, and when, as is sometimes the case, the family connection must be traced through several generations. When all the facts relative to a question of pedigree are within the knowledge of living witnesses, and none of such facts are derived from the declarations of deceased members of the family, there is no necessity for resorting to so-called "family reputation," created wholly by the living, any more than in any other kind of case not involving pedigree. The testimony of such witnesses can be produced

in court, and from it the triors can find such facts as they think it proves. However much and long the members of a family may have reflected upon and brooded over such known facts, circumstances, and incidents of the case, considered in reference to the character and habits of the person whose death is in question, the result of such cogitation is only their opinion or belief based on such facts, circumstances, and incidents. It does not change the nature of the result of such cogitation to call it "family reputation," instead of its true name, "belief" or "opinion." It is urged that such opinion is independent evidence, without regard to whether it existed ante litem motam, or not. This would, in a case like the one at bar, in effect, substitute interested heirs for a disinterested jury; for, by such opinion, the heirs, on the same evidence, pass upon the very question which the jury is to decide, and which is determinative of the rights of the parties. The ante litem motam safeguard is ignored, and self-interest given full sway. An exceptional rule of evidence, created to meet a general necessity and promote justice, should not be extended unnecessarily, so as to invite and promote fraud; nor should the limitations by which the rule is guarded to secure the truth, and prevent deception and fraud, be ignored.

On reason and authority, we think that the phrase "general repute in the family," or "general reputation in the family," when applied to cases of pedigree, means declarations of deceased members of the family made ante litem motam, and family history and tradition, handed down by declarations of deceased members of the family, made ante litem motam. The same would be the case when it is necessary to prove marriage, birth, or death for any other purpose. The evidence in respect to the general reputation in the family of Edmund in respect to his death was therefore properly excluded.

The appellant also offered to prove that, at the time of Edmund's disappearance, it was generally reputed among his friends and acquaintances, both at Grand Forks and Devil's Lake, that he was killed or drowned, and that such was still the reputation there in 1893; but the evidence was excluded.

There are cases in which it has been held that general reputation among a person's friends and acquaintances is admissible to prove his death. Of this character are *Ringhouse v. Keever*, 49 Ill. 470, and *Ewing's Heirs v. Savary*, 3 Bibb, 235. In the former of these cases, it was admitted, as was said, because the deceased left no kindred that were known. In *Ewing's Heirs v. Savary* the court said such evidence was admissible, when, as in that case, the death happened out of the state. 2 Rice, Ev. 1224 (a recent text-book on evidence), goes no further on this subject than to say that a person's death may be proved "by general repute among

acquaintances, when he left no kindred, or in connection with family repute where he died abroad," and cites these two cases in support of this statement. Some of the other cases cited by the appellant tend to support his contention in this behalf. But the reasons given in this class of cases for extending the rule admitting hearsay in cases of pedigree, so as to include general reputation of this kind, are far from satisfactory,—and, if followed to their logical conclusion, would admit general reputation in regard to any fact in issue in every case, whether involving pedigree or not, where there is a shortage of proof, or it is more convenient to obtain evidence of such reputation than to procure evidence not of the nature of hearsay. *Scott v. Ratcliffe*, 5 Pet. 81, is said to hold that general reputation of death is admissible to prove the fact of death, but it does not so hold. In that case, a witness, Mrs. Epps, without stating her informant, testified that "she was told that Mr. Madison was dead." This evidence was held admissible, but the court did not attempt to state its reasons for so holding. It is apparent that the question of reputation, in the sense for which the appellant contends, was not involved in that case. The case of *Secrist v. Green*, 3 Wall. 744, is cited as supporting the claim that such reputation is admissible. In that case a deposition was read to prove the death of one William James. Exceptions having been taken to its admission, by *Secrist*, the court said: "But they cannot avail him, for the witness really certifies to every material fact as of his own knowledge, although it is competent to prove death and heirship by reputation." It will be observed that what was said in regard to reputation being evidence was wholly obiter dictum, nor does it appear in what sense the word "reputation" was used by the court. Among cases holding that such reputation is not admissible are *Chapman v. Chapman*, 2 Conn. 347; *Haddock v. Railroad Co.*, 3 Allen, 298; *Blaisdell v. Bickum*, 139 Mass. 250, 1 N. E. 281; *Carnes v. Crandall*, 10 Iowa, 377; *Ross v. Loomis*, 64 Iowa, 432, 20 N. W. 749; *De Haven v. De Haven*, 77 Ind. 239; *Wilson v. Brownlee*, 24 Ark. 586, 91 Am. Dec. 523, and note, page 528; *Stein v. Bowman*, 13 Pet. 209; *Vowles v. Young*, 13 Ves. 140; *Johnson v. Lawson*, 2 Bing. 86, 9 E. C. L. 493. What has been said in respect to so-called "family reputation" of this character applies with still greater force to this class of reputation. We think the better rule is that which excludes as evidence such general reputation of death among friends and acquaintances. Some of the cases holding such reputation admissible limit its admissibility to cases where the fact to be proved is ancient, and better evidence is not attainable. Such a case is *Birney v. Hann*, 3 A. K. Marsh. 322. This distinction would exclude the testimony offered.

We think that on another ground, also, all

the evidence of reputation offered was inadmissible. The rule of law admitting any kind of hearsay evidence in cases of pedigree rests upon the presumption that the declaration, family history, or family tradition, constituting the evidence offered, comes from persons having competent knowledge in respect to the subject-matter of the declaration, family history, or tradition. 1 Phil. Ev. (Edition with Cowen, Hill & Edward's Notes) 248; 2 Starkie, Ev. (5th Am. Ed., with Notes by Metcalf, Ingraham, and Gernard) 605; *White-locke v. Baker*, 13 Ves. 511; *Stein v. Bowman*, 13 Pet. 209; *Higham v. Ridgway*, 10 East, 109; *Haddock v. Railroad Co.*, 3 Allen, 298. When it appears that the evidence of this kind offered does not come from such a source, this presumption is rebutted, and it becomes inadmissible. *Lynch v. Town of Rutland*, 66 Vt. 570, 29 Atl. 1015. It appeared from the uncontradicted evidence introduced by the appellant that neither the members of the family, nor the friends and acquaintances of Edmund at either of the places named, nor any one else, so far as was known, had any knowledge as to whether Edmund died prior to the death of his father, or is still living. For this reason, this evidence was inadmissible.

What the detective, the chief of police, and others deposed was told to them about *Hurlburt*, and was learned by them about him, which was but another way of stating what was told to them, was properly excluded. It belongs to the class of testimony that was held inadmissible as hearsay when the case was here before. Further discussion of the matter is not necessary. We refer to the report of the case in 63 Vt. 667, 22 Atl. 850, for the ground and reason of the holding.

The appellant presented several requests to charge, and excepted for alleged noncompliance. Some of these requests were not of sufficient scope. They presented only a partial view of the testimony, and put the case on too narrow ground, and too favorable to the appellant. Others of them were better in this regard, and well enough, perhaps; and they were complied with, we think. True, the court did not comply with them categorically, but it did in substance and effect, and put the case to the jury fairly and fully in every aspect presented by the testimony, and in a manner not excepted to. On a careful consideration of this point, we see nothing of which the appellant has a right to complain.

Judgment affirmed, and ordered to be certified to the probate court.

ROWELL, J. (dissenting). According to the opinion, general reputation in the family, when applied to cases of pedigree, means family history and tradition, handed down by declarations of deceased members of the family, made ante litem motam. This limits such reputation wholly to hearsay, for such declarations are nothing else, as they are handed down by relation, the narrator simply telling

what he has heard. This is undoubtedly the rule in England; but in this country I think the phrase has a broader and more comprehensive meaning when the word "reputation," as therein used, is rightly understood. One primary meaning of "reputation" is a thinking over, pondering, considering, reflecting upon. This meaning, to my mind, is involved in the word as used in this connection; and, in respect to death, I venture to assert that it is the matured product of the family thought and reflection upon the known circumstances and incidents of the case, considered with reference to the character and habits of the person whose death is in question. That thought and reflection lay hold of those circumstances and incidents, and brood over them, gradually therefrom creating belief, which, though weak at first, continually increases and strengthens as the mental operation goes on, until at last it becomes a settled and an abiding conviction in the family mind. Then, and not till then, is the product matured,—is reputation accomplished. This is family reputation, as distinguished from family history, handed down by declarations of deceased members of the family. Viewed in this light, such reputation is a fact of which the law takes cognizance as evidence, because it regards it as sufficiently deserving of consideration as a means of proof to entitle it to be submitted to a jury. If evidence, it is manifestly original and primary evidence, and therefore it makes no difference with its admissibility that the circumstances and incidents that constitute the seed of that product appear in the case, so that the jury has before it substantially the same material from which to draw inferences and conclusions that the family had. This is shown by *Cochrane v. Libby*, 18 Me. 39. Much other testimony was introduced in that case to prove death, and it was evidently what the family belief of death was based upon; yet family reputation was received, and the court said it was *prima facie* evidence of death.

In this country the authorities on the subject are conflicting. Some of the cases, and the text writers generally, I think, sustain the view for which I contend. Thus, in *Clark v. Owens*, 18 N. Y. 434, the lease in question was for the longest of three lives. Plaintiff proved the death of two of the persons, and gave evidence that the third, if living, would be 80 years old; that he had not been heard from for 50 years; and that for over 40 years he had been reputed among his family and connections to be dead. The court sustained the admission of the reputation, and said that it is well settled that on all questions of genealogy, and generally on questions relating to births, deaths, and marriages, in the absence of higher evidence, resort may be had to what is commonly said and understood to be true among the immediate relations and family connections of the party to whom the inquiry relates. It is true, the court said "in the absence of higher evidence"; but as this evi-

dence, if admissible at all, is original and primary, and in no sense secondary, there is no higher evidence in degree; and although, with other evidence of death in the case, it would be cumulative, yet it would not thereby be rendered inadmissible, nor because other evidence of more probative force could be obtained. It would stand in this regard like evidence generally of equal degree. If, without the admission of such evidence, the difficulty of proving death in some cases, and the impossibility in others, necessitated its admission as a rule of law, as I think they did, then that rule is general in its application; and, in administering it, you cannot take cognizance of the difficulty or the impossibility in the particular case, and admit or reject the evidence as the necessity of the case seems to require. *Norris v. Edwards*, 90 N. C. 382, when carefully examined, will be found to sustain the admission of general belief prevailing in the family as proof of death. In a Wisconsin case, the name of which I have not before me, testimony relating to family connection and membership, and to the death and times of death of members, and whether they had been or were married or not, was held admissible, in view of the nature of the subject, although based in part on the course of speech and understanding in the family, instead of on direct personal knowledge. In *Ringhouse v. Kever*, 49 Ill. 470, reputation of death among acquaintances was admitted, because the deceased left no relatives. His death was announced in the newspapers, and he was spoken of by his acquaintances as dead. The court said that, in a population as unstable as theirs, the refusal of all evidence of reputation in regard to death, unless it came from family relatives, would sometimes render proof of death impossible, though there might be no doubt of the fact, and thus the ends of justice be defeated. This case expressly recognizes the admissibility of family reputation in regard to death, and is authority for its admission; for, if reputation among acquaintances is admissible, all the more is family reputation. In *Ewing's Heirs v. Savary*, 3 Bibb, 235, it was proved that in his family, and among his acquaintances where he had resided, the person was reputed to be dead. The court said that such evidence was undoubtedly admissible when, as there, the death happened out of the state. In the case at bar the person whose death is in question, if dead, died out of the state, if that makes any difference, which I think it does not. In *Jackson v. Etz*, 5 Cow. 314, the question was whether John Tool died at a certain place in the spring of 1779, at which time he was a soldier in the American army. Witnesses for the plaintiff testified that he was lost or missing when returning from a tavern to the camp on the night of St. Patrick, and that it was afterwards generally reported and believed that he was dead. Proof of the report and belief was not objected to, but the court said that in analogy to cases of pedigree, etc.,

it seemed to be admissible, and that the fact that a soldier or any other person was missing at a particular time, accompanied with a report and general belief of his death, must in many cases be not only the best, but the only, evidence of his death that could be supposed to exist. The circumstances of the case in hand make especially applicable what is there said. In *Jackson v. Boneham*, 15 Johns. 226, general opinion in the family that a certain member of it was dead, testified to by a sister of such member, was objected to as hearsay, but held admissible.

I do not care to discuss as a separate proposition the admissibility of reputation among friends and acquaintances, for I think it stands in this regard on much the same ground as family reputation.

The other ground stated in the opinion for excluding all the evidence of reputation is not, to my mind, another ground at all, but only another phase of the same ground already taken by the court; and, if that ground fails, this must fail also.

If the position I have taken is right, it is obvious that the fact that the reputation did not antedate the controversy goes only to its weight as evidence, not to its competency.

START, J., concurs.

(66 Vt. 309)

SAWYER v. CHILD.

(Supreme Court of Vermont. Washington.
March 14, 1896.)

NOTES—ACTIONS ON—CONSTRUCTION—FRAUD— BURDEN OF PROOF.

1. A note was conditioned that the payees "sustain their case" against certain persons, and find the defendants therein indebted to them in the amount of the note. Held, in an action on the note, that plaintiffs need not show that the decree in the suit referred to had been drawn and enrolled.

2. The fact that the suit referred to had at the time been submitted to a master to determine the amount due the orator does not require that the amount due should be found by the master, instead of by stipulations of the solicitors of the parties.

3. The burden is upon the maker of the note to show that the stipulation of the solicitors as to the amount due the payee was procured by fraud.

Exceptions from Washington county court; Thompson, Judge.

Assumpsit by Russell Sawyer against Roswell Child upon a promissory note. Plea, the general issue, with notice of special matter. Trial by jury at the September term, 1895, Washington county, Thompson, J., presiding. Verdict and judgment for the plaintiff. The defendant excepts. Affirmed.

E. A. Heath, T. J. Devitt, and S. C. Shurtleff, for plaintiff. Dillingham, Huse & Howland, for defendant.

ROSS, C. J. This is an action to recover upon a promissory note. The note reads: "Moretown, August 25th, 1883. For value

received, I promise to pay Russell Sawyer, or order, three hundred and twenty dollars and thirty-five cents, on demand, with interest, provided the plaintiff in the suit against I. D. and Mary Robinson sustain their case, and find the defendants the above amount indebted to them. Roswell Child." The suit referred to in the proviso is *Dale v. Robinson*, 51 Vt. 20. The orator in that suit sought to have certain debts due him paid out of the separate property of the wife. Her property was sequestered, and sold by the plaintiff, as an officer, at auction. The plaintiff was to hold the funds to await the result of the suit. The defendant bid off the property sequestered. Instead of paying the money for the property purchased, he gave the plaintiff a duebill therefor. When that was about to outlaw, he took it up, and gave the note in question, with the consent and approval of the Robinsons. The suit was heard and decided in this court at its general term in 1878, and a mandate was sent to the court of chancery, commanding that court to have the amount due the orator on the claims set forth in the bill ascertained by a master, and decreed to be paid out of the separate property of the wife; the decree to be enforced by any proper process. The suit remained pending in the court of chancery until its September term, 1894. At that term of the court the solicitors for the parties filed a stipulation, duly signed, agreeing that there was due the orator upon the grounds mentioned in the pleadings the sum of \$583.30 from the defendants, and that a decree be rendered for the orator for that amount. A decree was entered upon the docket in accordance with the stipulation, and the proceeds of the sale of the property upon the writ of sequestration was ordered to be paid to the orator.

1. When this suit came on for trial a decree in that suit had not been drawn and signed, nor enrolled. The defendant duly excepted to the admission of the entries in the equity suit, testified to by the clerk of the court of equity, to establish a compliance with the conditions of the note. He contends that the only record in a suit in equity is the decree and its enrollment. This is established by the decisions of this court cited by the defendant. But the condition is not that the rights of the orator in *Dale v. Robinson* shall be established by a duly signed or enrolled decree. It is that he shall sustain his case, and find the defendants indebted to him to the amount of the note. The defendant further contends that, the trial being on the law side of the court, the court could not look into the files and docket entries in the equity suit, and that the only way it could be shown that the orator had sustained his suit was by a duly-certified copy of the decree or record, and, as there was no such decree or record, no proof could be made. He did not except to these facts being shown by the clerk of the court of

chancery if they could be shown otherwise than by a duly-certified copy of the decree or record. This contention is not maintainable. *Viles v. Moulton*, 11 Vt. 470, is authority for allowing this kind of proof to establish what has been adjudicated in a suit in equity in which a decree has not been drawn and signed nor enrolled. The defendant further contends that the proviso contemplates that the amount due the orator in the suit in equity should be ascertained by a master, and not by the agreement of the solicitors of the parties. He contends that the cause had been referred to a master at the time the proviso was made, and the proviso impliedly contemplated that the amount due should be ascertained by the master, because such was the ordinary course of proceeding. It is a sufficient answer that the proviso does not confine the ascertainment of the amount due the orator in that suit to any particular method. The parties might, therefore, use any lawful method for ascertaining the sum due the orator in that suit, provided the decree thereon was a lawful decree of the court in the suit. There is no legal objection to parties, in a suit at law or in equity, through their attorneys, as solicitors, stipulating in regard to the amount for which judgment or decree is to be rendered. Such agreement is in the line of the process under which the court is proceeding, and is clearly distinguishable from agreements for judgments or decrees alunde the process before the court. Any concession or agreement which only furnishes to the court what it otherwise must ascertain by proof when proceeding orderly upon the process before it, does not render the judgment or decree rendered on the process under consideration a consent judgment or decree, or one which denies its force from the agreement of the parties. Such judgments and decrees rendered upon pending processes are none the less the judgments and decrees of the court rendered in due course because the parties have conceded some or all the facts necessary for the rendition of them. When the court has the parties before it on a proper and legal process, its judgment and decree is none the less a judgment and decree of the court because rendered on an agreed statement of facts, submitted by the parties. The defendant does not contend that either a rehearing or bill of review would now be available to the defendants in the equity suit. Hence, on the evidence properly admitted, the orator in that suit had fully sustained his suit, and fulfilled the conditions of the note. There was no error in the charge of the court on this branch of the case.

2. The defendant contends that the court erred in holding that the burden was upon the defendant to establish that the stipulation filed in the equity suit was procured by fraud. Fraud is not to be presumed. Good faith and fair dealing is to be presumed until

something is shown to the contrary. The stipulation, presumably, was an honest, binding one, until the contrary was shown. The defendant alleged that it was fraudulently obtained. It was for him to establish this. As tersely stated by Stephens in the Digest of the Law of Evidence (article 93): "Whoever desires any court to give judgment to any legal right or liability dependent on the existence of facts which he asserts or denies, must prove that those facts do or do not exist."

3. The court correctly allowed simple interest on the note. This was according to the agreement of the defendant in the note. What might have been the plaintiff's right in this respect if no note had been given need not be considered. Judgment affirmed.

THOMPSON, J., did not sit.

(84 Md. 151)

BOARD OF SCHOOL COM'RS OF WASHINGTON COUNTY v. WAGAMAN.

(Court of Appeals of Maryland. June 18, 1896.)

TEACHER'S CERTIFICATE — VALIDITY — RENEWAL — EXAMINATION.

Code, art. 77, provides that a teacher's certificate shall not continue in force for more than six months, unless the person receiving the same shall satisfy the examiner of his fitness etc., whereupon the examiner shall be empowered to issue a certificate which shall continue in force for five years, unless revoked for cause. *Held*, that a certificate granted in 1886, and after six months extended for three years, to July, 1889; then, in July, 1889, for three years, to July, 1892, and afterwards to June, 1897,—was invalid, and therefore the holder thereof could not recover for services rendered as a teacher, where he refused to submit to an examination as required by an order passed by the school commissioners in 1895, of which he had notice.

Appeal from circuit court, Washington county.

Action by John E. Wagaman against the board of school commissioners of Washington county to recover for services rendered as a school teacher. There was a judgment for plaintiff, and defendant appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, FOWLER, and BOYD, JJ.

Hy. Kyd Douglas, for appellant. C. D. Wagaman, for appellee.

BRISCOE, J. John E. Wagaman brought suit against the board of school commissioners of Washington county to recover for services rendered as principal teacher of one of the public schools of that county. He recovered a judgment of \$152.40, with interest from the 29th of February, 1896, and from this judgment an appeal has been taken. There were four bills of exceptions taken at the trial below. Three of these relate

to the admissibility of evidence, and the fourth to the ruling of the court upon the prayers. The facts of the case are that Wagaman held a certificate, dated July 1, 1886, to teach in the public schools of Washington county, and for the first two years thereafter taught as assistant teacher of Sharpsburg school No. 1, district No. 1. Subsequently he was appointed principal of the school by the district trustees, was confirmed by the board of school commissioners, and acted as such from the date of his appointment. He held a first-grade, first-class teacher's certificate, in the following words:

State of Maryland, County of Washington. No. 228.
General System of Free Public Schools.
Grade 1. Class 1.

Studies.	Per Cent.	
Orthography	80	Know all men by these presents,
Reading	80	that John E. Wagaman, having
Writing	88	given evidence of good moral
Arithmetic	80	character, and having been ex-
Geography	70	amined in the branches required
History	80	by law for a first-grade certificate,
Eng. Grammar	80	as per margin, is hereby author-
Bookkeeping	95	ized to teach in the public schools
Geometry	100	of Washington county for one-
Algebra	100	from the date hereof, unless his
N. Philosophy	80	certificate be annulled. Given un-
Physiology	80	der my hand, and the seal of the
Average	84	board of county school commis-
Teaching power.		sioners, this first day of July, eight-
		teen hundred and eighty-six. Sal-
		ary \$90.00, less 10 per cent. first
		year. P. A. Witmer, Examiner.

Indorsed as follows:

The within-named John E. Wagaman having taught in the public schools of his county for six months subsequent to the issue of this certificate, and having satisfied me, from personal observation, of ability to govern a school and impart instruction according to the most approved methods, this certificate is renewed and extended to the first day of July, 1889. [Signed] P. A. Witmer, Secretary, Treasurer, and Examiner.

June 15th, 1889, extended to July 1st, 1892, and raised to first-class. P. A. Witmer.

Extended to June 1st, 1897. P. A. Witmer, Examiner.

On the 15th of February, 1895, the board of school commissioners passed an order annulling, on and after June 1, 1895, all teachers' certificates, except life certificates and normal school diplomas, and requiring an examination of all teachers at the end of the scholastic year. The plaintiff had notice of this order, but refused to take the examination, stating "that his certificate did not expire until 1897, and that he did not feel like taking it." He was afterwards, in August, 1895, appointed principal of Sharpsburg school, but was rejected by the school board. Notwithstanding this rejection, he was appointed by the district trustees, and entered upon his duties as such principal with full knowledge of his rejection by the board. His salary was refused by the school board at the end of the school term, and this suit is brought for its recovery.

In the view we take of this case, it does not become necessary for us to consider all the questions presented on the appeal. Now, it is quite clear that the teachers are employed by the district school trustees, subject to confirmation by the county school commissioners, and "shall be appointed from among the persons holding legal certificates." Code, art. 77, § 27. The contract

of employment prescribed by the rules and regulations of the state board of education requires that the teacher "is hereby appointed to teach, subject to the confirmation and the requirements of the board of county school commissioners." And it is provided by section 48 of article 77 of the Code that "no person shall be employed as a teacher, unless such person shall hold a certificate of qualification issued by the examiner of the county in which he or she proposes to teach, or from the principal of the State Normal School, a diploma as graduate of said school, or certificate from the state board of education." And by section 63 of the same article it is further provided that "such a certificate shall, however, not continue in force for more than six months unless the person receiving the same shall satisfy the examiner of his fitness for governing a school and his ability to impart instruction in the various branches taught in the public schools; but when the examiner shall satisfy himself upon those points he shall be empowered to issue a certificate, which shall continue in force for five years, unless revoked for cause." It appears, however, that the certificate held by the plaintiff was granted to him in July, 1886. It was extended after six months for three years, to July, 1889; then, in July, 1889, for three years, to July, 1892; and then, on some date not mentioned on the certificate, for five years, to June, 1897. But it is urged that by article 6, § 3, of the by-laws of the state board of education, certificates of the first grade, etc., may be renewed by the examiner without an examination. But assuming, without deciding, that the adoption of this rule was a valid and legal exercise of power by the state board, under section 11, art. 77, of the Code, yet we find nothing in this rule in conflict with the view we take of this case. Here the certificate was first extended by the examiner for three years, then again for three years, and further for the period of five years. This was manifestly never contemplated by article 6, § 3, of the rules of the state board. The renewal referred to by this rule clearly means the renewal of a certificate which had been validly continued by the examiner under section 63, art. 77, of the Code. A certificate of the first grade, under this rule, may be renewed after the expiration of five years by the issue of a new certificate in compliance with article 77 of the Code, but this is not that case. The appellee, then, not holding a valid certificate to teach, should have submitted to the examination directed by the school board, of which he had full notice; and, failing to comply with requirements of this order, he was not qualified to teach the school under his former appointment. There can be no question that his appointment of August, 1895, was invalid, because it failed of confirmation by the school board. It follows, then, that there was error in granting the

plaintiff's prayers, because they practically instructed the jury that upon the facts of the case the plaintiff was entitled to recover, and in rejecting the defendant's prayer, which instructed the jury that there was no legally sufficient evidence which would entitle the plaintiff to recover. For these reasons we shall reverse the judgment, and, as there can be no recovery by the plaintiff, we shall not award a new trial. Reversed, without awarding a new trial, with costs.

(33 Md. 409)

LOWE v. CONVENTION OF PROTESTANT EPISCOPAL CHURCH IN DIOCESE OF EASTON et al.

(Court of Appeals of Maryland. June 17, 1896.)

TRUSTS—RELEASE OF MORTGAGE—VALIDITY IN EQUITY—POWERS OF TRUSTEES—DISCRETION.

1. Where an estate was devised to trustees, the survivor of them, or "such person or persons as they or the survivor of them may by last will appoint," with power to invest the same "in their discretion," but the trustees appointed by will failed to appoint any successor, a trustee appointed by the court did not have the discretion vested in the trustees named in the will.

2. A trustee executed, without authority, a release of certain land situated in T. county from a mortgage which also covered land in K. county, given to secure a loan of the trust funds. Afterwards the mortgagor executed a mortgage to appellee on the land in T. county. Upon the resignation of said trustee, he assigned the mortgage to appellant, who was appointed in his place. Afterwards appellant took a new mortgage, and wrote a release on the original mortgage, and sent it to the clerk of K. county, which release was recorded, and the original kept by the clerk. In an action to subject the land in T. county to the lien of the mortgage, on the ground that it had never been released in that county, the former trustee, the mortgagor, and another witness testified that appellant, who acted for the cestuis que trustent, knew of the release of the land in T. county before he accepted the securities held by the former trustee; but appellant denied knowledge thereof, and asserted that he did not send a release to T. county, because he wished to retain the lien on the land in that county, and that, when the securities were delivered to him, said trustee represented that nothing had been done to affect them. *Held*, that the evidence established that appellant did know of the release by the former trustee of the land in T. county, and that, as he accepted the securities with that understanding, he and the other cestuis que trustent, whose agent he was, were bound by the act, and the release, though invalid at law, was binding in equity.

Appeal from circuit court, Talbot county.

Action by John H. Lowe against the Convention of the Protestant Episcopal Church in the Diocese of Easton and others to subject certain land to the lien of a mortgage. There was a decree for defendants, and plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, and BOYD, JJ.

J. F. Bateman and Wilfred Bateman, for appellant. Wm. H. Adkins and James A. Pearce, for appellees.

BOYD, J. James M. Seth, of Talbot county, departed this life, leaving a last will and testament, by which he bequeathed a large personal estate to his wife and his son-in-law, in trust for his two daughters, Mary Lowe and Sally Covey, with remainder to their children. He directed that no part of the principal should be paid to his daughters during their lives, but "shall remain in the hands of my said executors, who are also hereby specially constituted trustees for such uses, purposes, and trusts, or in the hands of the survivor of them, and, in the event of the death of both in the lifetime of my said daughters, in the hands of such person or persons as they, or the survivor of them, may by last will and testament nominate and appoint to be my said executors and trustees, or the survivor of them, or by such person or persons named by them as aforesaid, invested, in their discretion, in some safe and profitable manner during the natural life of my said two daughters," etc. He then directed that the income, interest, and profits should be paid to his daughters during their natural lives, and, at their death, to the children of his daughters, and provided for the child of any deceased child of either of his daughters taking his parent's share. The trustees named in the will died without naming their successors, so far as disclosed by the record; and J. Frank Turner was appointed trustee by the circuit court for Talbot county, "to execute the trusts created by the last will and testament of James M. Seth, deceased, in favor of Mary F. Lowe and her children." It is only the Lowe interest that is affected by this appeal, and it will be unnecessary to refer to other portions of the will. Mr. Turner duly qualified, and took control of the trust estate. He invested a large amount of the fund in mortgages, but did not obtain the sanction of the court before doing so. On August 1, 1878, he loaned George W. Minnick \$3,000 of the fund, secured by a mortgage on two properties,—one in Kent county, and the other in Easton, Talbot county,—payable one year after date. On September 23, 1887, he executed at the foot of the mortgage on the record books of Talbot county the following writing: "I hereby release the dwelling and storehouse in the town of Easton, Talbot county, Md., from the operation of the foregoing mortgage. Witness my hand and seal, this 23d day of Sept., A. D. 1887. J. Frank Turner, Trustee. [Seal.]" He, as attorney for C. J. Bonaparte, then loaned Minnick \$3,000 on a mortgage on the Easton property and a farm in Talbot county, which was subsequently released; and on December 16, 1891, Minnick and wife executed a mortgage to the appellee on the Talbot county property, to secure the sum of \$3,000, payable five years after date. Some time afterwards the cestuis que trustent endeavored to have Mr. Turner removed, which the court refused to do, but on July 25, 1892, he voluntarily

resigned. Before doing so, however, he entered into an agreement, under seal, with all the cestuis que trustent, including the appellant, who was one of them, in which there was a list of 17 mortgages held by Turner referred to (the names of the mortgagors and the amounts being stated), which, together with the cash in hand, amounted to \$40,000. Certain agreements were therein made, some of which we will have occasion to refer to more particularly. On July 25, 1892, the court passed an order directing Mr. Turner to transfer and assign these mortgages and the money to "John H. Lowe, as trustee for the said Mary E. Lowe and her children, under the will of James M. Seth, as soon as he shall have filed his bond as required by the decree appointing him." He duly qualified, and received the mortgages and cash from Turner, including the Minnick mortgage, which was the first named in the list, and which was assigned to the appellant by indorsement on the original mortgage. On December 28, 1892, the appellant took a new mortgage from Minnick and wife, with a note for the sum of \$3,000, payable five years after date, and ten interest notes, one payable every six months. On December 29, 1892, the appellant wrote a short release, as prescribed by the statute, on the mortgage originally given to Turner, and sent it, together with the note which it secured, to the clerk of the circuit court for Kent county, which release was duly recorded, and the original kept by the clerk, as required by the statute. In April, 1894, Minnick made a deed of trust for the benefit of his creditors, and, by permission of the creditors, his trustees sold the Talbot county property. The appellant sold the Kent county property under his mortgage, there having been a default. The Kent county property did not realize sufficient to pay the mortgage held by the appellant, and he now claims that, under the circumstances, the Turner mortgage is still valid against the appellee on the proceeds of sale of the Talbot county property, the release of his mortgage not having been filed in that county.

A number of questions were argued, some of which are not very material under our view of the case. The one that the above statement of facts would first suggest is whether the discretion reposed in the trustees named in the will was vested in Mr. Turner by his appointment under the decree of the court. We have no hesitancy in answering that in the negative. The trustees appointed by the testator were his wife and son-in-law, the survivor of them, or "such person or persons as they or the survivor of them may, by last will and testament nominate and appoint to be my said executors and trustees, or the survivor of them, or by such person or persons named by them as aforesaid." To such persons he gave power to invest, "in their discretion, in some safe and profitable manner, during the natural life of my said two daughters," etc.; but he

did not authorize, and cannot by us be declared to have meant, that a trustee appointed in some other way (by the court, for example) should have such discretion. We are of the opinion that the case of *Zimmerman v. Fraley*, 70 Md. 561, 17 Atl. 560, is conclusive of the question, and that the cases of *Trust Co. v. Sutro*, 75 Md. 261, 23 Atl. 732, and *Heights Co. v. Oettinger*, 53 Md. 46, cited by appellees, are not applicable. A court of equity will not permit a trust to fail for want of trustees, and will appoint one to carry out the trust as far as he can, but it by no means follows that it will or can give him all the freedom from responsibility and the unlimited powers that a testator may confer upon those selected by himself. A trustee may act with the best intentions and the utmost good faith; and, while his not seeking the aid and instruction of the court may be no evidence to the contrary, yet, if he wants to avoid responsibility for losses by reason of investments which may prove to be unprofitable or worthless, he should first obtain authority from the court having jurisdiction over him, unless his discretion and powers are undoubted. In this case there is no evidence of any bad faith on the part of Mr. Turner, but it is clear that he took the risk of the investments being safe, and he was not authorized to make or change them at his pleasure, even if bona fide done, without being responsible to the cestuis que trustent.

Nor do we think that the form adopted by him to release the Talbot county property was sufficient to pass the legal title to it. The mortgage was overdue, and hence there had been a default. The legal title was therefore vested in the mortgagee, and, such being the case, the attempted release made by him was not sufficient to reconvey it to the mortgagor. The statute has adopted a short form for the release of a mortgage, which can be executed either by writing it on the record in the office where the mortgage is recorded, and having it attested by the clerk, or by indorsing it on the original mortgage, and filing it in the office, in which event the clerk must retain it. The statute has not, however, authorized the release of a portion of the property from the operation of the mortgage by that method so as to pass the legal title. But, while that is true, a court of equity can and should recognize such an act if otherwise a third person would be prejudiced thereby, for it would not be in accord with justice to permit a mortgagee to proceed against property so attempted to be released after agreeing under seal that he would not proceed against it in case of default, which is, in effect, the meaning of this writing, and thereby induce an innocent person to purchase or lend money on the property. It should, at least, have the effect of an agreement to release, or of a deed of release, that has been signed, but not acknowledged. It would not be constructive notice, but would bind those having actual knowledge of the transaction. We, of course, only refer, in what we have just said, to the form of this

attempted release, and not to the question as to whether Mr. Turner could, as trustee, execute any release of a part of the property included in the mortgage, to the detriment of the cestuis que trustent, unless consented to or ratified by them.

The appellant subsequently executed a release of this mortgage, and filed it with the clerk of Kent county, as above stated. He contends that he purposely withheld the release from the Talbot county records, and that it was not intended to discharge the property in that county. It was certainly a novel way to keep the mortgage operative on the Talbot county property,—to indorse a release on the original mortgagee, and file it with the clerk of Kent county. But he surrendered the evidence of his debt with the mortgage,—that is to say, he sent it attached to the mortgage to the clerk; and the law requires the clerk to “retain such mortgage in his office, and not permit the same to be again withdrawn.” In order to release the Kent county property from the effect of the mortgage, it was not necessary to send the note, or to release the whole mortgage. That could have been done by a separate release as to that property, and still retain the note so as to hold it against the property in the other county. Mr. Lowe’s explanation is: “I wrote a short release on the mortgage, and sent it to the clerk in Kent county. It was simply because the property was away from my home, and if, at any time, the capious conveyancer, if the property was sold by Mr. Minnick, at any time after the mortgage should be paid off, and should not draw a release of the renewal mortgage, a clean record.” The record has doubtless omitted part of his language, but what he intended to say is evident. There certainly could not be a “clean record” before the “renewal mortgage” was paid and released, and, if the intention was to continue in force the original mortgage why could he not have waited to release both when the money was paid? If the appellant’s contention as to the value of the Kent county property be correct, there was no probability of Minnick’s being able to sell the property subject to a \$3,000 mortgage. It is true that the mortgage to Lowe recites the fact that Minnick was indebted to him as trustee in the sum of \$3,000, which sum is secured by a mortgage to Turner, trustee, recorded in the land records of Kent and Talbot counties; but that recital is not inconsistent with the intention to release the Turner mortgage, as it was perfectly proper to refer to it as the basis of consideration for the new notes and mortgage. The conduct of the appellant is strong, if not conclusive, evidence that it was intended to release the original mortgage. But let us examine the evidence as to the Talbot county property. There is nothing in the record to impeach the character of any of the witnesses, but there is a manifest conflict between the testimony of the appellant and that of three witnesses offered by the appellee. He testifies that he did not know of the at-

tempt to release the Talbot county property until after Minnick made the deed of trust. Minnick swore that, in the interview with the appellant about the renewal of the mortgage, “Mr. Lowe said a new lien would necessarily have to be given upon the Easton property, inasmuch as the old mortgage upon the same had been released by Mr. Turner. I asked, ‘Is there not still a claim upon the Easton property?’ or words to that effect. Mr. Lowe said, ‘No, as the release given by Mr. Turner had been absolute or was absolute.’” W. R. Martin testified that Mr. Lowe remarked to him, after Minnick’s failure, in a conversation about the Kent county property: “Of course, I knew about the Easton property; that there was nothing in that for me.” Mr. Turner testified that he agreed with Mr. Lowe, for himself and the others interested, that he would resign if they accepted the securities he then held, and relieved him from further responsibility on account of the trust; that he told Mr. Lowe he could examine the securities in the clerk’s office, confer with his sisters and mother, and let him know; “that he subsequently came to my office, and told me that he had examined the records, that he had conferred with his mother and sisters, and they were ready to accept my proposition, take the securities as I held them, and release me from further responsibility on account of the trust; and, in pursuance of that declaration, this agreement, marked ‘Deft’s Ex. M’ [the one above referred to], was prepared by me, and signed by all the parties in interest, and, when this paper was brought to me executed, I resigned the trusteeship.” He also said that, after Mr. Lowe qualified, he went to him to get the securities, and “When I began to make the transfer to him, and read without guaranty or recourse, I distinctly remember, when he came to the Minnick mortgage, he referred to the fact that the mortgage only rested on the farm in Kent county, and we had some discussion about the Kent property and its value. I distinctly remember of telling him the estimate Mr. Minnick placed upon the property, and of Mr. Minnick’s ability to pay, which I thought at that time was ample; and he took that with the other securities without guaranty or recourse, with the knowledge, as he at that time stated to me, that the house and property in Easton had been released. I delivered the securities, and he accepted them.” Mr. Lowe admits that Mr. Turner gave him a list of securities held by him, but alleges that he represented to him “that they were all right as they appeared, and that nothing had been done to affect them, and asked me to inquire into the property that they covered, and see if I thought they were such as I would be willing to accept.” He denied the statements made in reference to this property by the three witnesses above mentioned, and was flatly contradicted by them. The agreement referred to by Mr. Turner recited the fact of Turner’s appointment as trustee; that he had received

into his hands cash and securities amounting to \$40,000; that he had from time to time made investments; that he then had in his hands certain investments, which were named, with Minnick's at the head of the list; that Turner proposed to resign, and Mary F. Lowe, John H. Lowe, Lulle S. Ensey, Lot Ensey, her husband, Blanch L. Butler, and Nathan R. Butler, her husband, were willing to accept the aforesaid securities, investments, and cash in full payment and satisfaction. The cestuis que trustent and the husbands of the two married ladies then agreed, upon the resignation of Turner, and the transfer of the mortgages and securities recited, and the payment of the cash to his successor to be appointed, to "execute a release in full of all claims or demands which they may have now or hereafter by reason of said principal sum of forty thousand dollars, as set forth and stated."

We cannot hesitate to find, under the evidence, that the appellant did know that Turner had released, or at least had attempted to release, the Easton property, and that he accepted the securities with that understanding, and he and the other cestuis que trustent, whose attorney and agent he was in this transaction, are bound by his act. It could not be pretended that, under such circumstances, they could hold Turner responsible, for they expressly agreed to release him, and that, too, with full knowledge, as shown by the testimony, of all the facts necessary to inform them of the true condition of the securities, for the knowledge of John H. Lowe, the agent of the other cestuis que trustent, was notice to them. It is true that Turner certified at the bottom of the list he furnished the appellant before his resignation, "I examined the titles to the property upon which the investments rest as liens before making the same, and found them, in my opinion, correct in every respect," and inserted in the agreement made with the cestuis que trustent, "The securities and titles upon which they rest were examined by the said party of the second part [Turner], and found by him to be correct in every particular;" but neither Turner nor appellant supposed that the Minnick mortgage rested upon the Easton property, according to the evidence of Turner, which is corroborated by Martin and Minnick, and the fact that appellant sent the release of the mortgage itself to Kent county is altogether inconsistent with the idea that he supposed it was still a lien on the Easton property. Another very significant fact is that, although the appellant testified that his mother was present when Mr. Turner gave him the list of securities and made the statements attributed to him, yet she is not called as a witness, and no explanation of her absence is given.

It is clear, then, that, although Turner did not make the investment or release the Easton property under authority of the court, yet the cestuis que trustent ratified and sanctioned his act, and thereby induced him to re-

linquish a valuable trust. It is possible that, if Turner had not resigned, he might have collected all the money from Minnick, as he might not have extended the time of payment, and his resignation was nearly two years before Minnick made an assignment. In 1892 the Kent county property may have been worth the amount of the mortgage; but, if he had been unable to collect the money from it, he was personally responsible for the same to the cestuis que trustent, before they executed the agreement, and would have been under moral obligation, if not legal, to protect the appellee from any loss occasioned by his act in thus attempting to release the Easton property.

The appellant states in his petition that he, too, acted without authority of the court in executing the release. But is a trustee to have the aid of a court of equity, to relieve him from possible personal liability, especially when he is one of the cestuis que trustent, and attorney and agent of the others, because he acted without its authority? Courts of equity will unhesitatingly use their powers to preserve and protect trust property at the instance of cestuis que trustent who are not themselves estopped or precluded on some equitable grounds, but it would be an unwarranted stretch of that power to apply it in favor of a trustee confessedly acting without authority under ordinary circumstances, and without any precedent to do so, when all the cestuis que trustent were parties to the arrangement which resulted in his act. In point of fact, his taking a new mortgage probably did not place the cestuis que trustent in any worse condition as to the Easton property than they were before by their own sanction and ratification; but, if it did, it would not entitle the trustee to relief against the appellee. Being of the opinion that the writing of Turner, although not a valid release in a court of law, is, in a court of equity, binding on him, and as his act was fully ratified and sanctioned by the appellant and the other cestuis que trustent, it is binding on them, and the mortgage of the appellee must be given priority over the claim of the appellant. The decree therefore must be affirmed. Decree affirmed, with costs to the appellees.

(83 Md. 434)

WESTERN MARYLAND R. CO. v. KEHOE.

(Court of Appeals of Maryland. June 17, 1896.)

RAILROAD COMPANIES—NEGLIGENCE—ACCIDENTS
AT CROSSINGS—ACTION FOR INJURIES
—INSTRUCTIONS.

1. In an action for personal injuries, the evidence showed that at a crossing of defendant's tracks at a station plaintiff was thrown from his buggy so that one of his legs was across the rail of the side track outside the limits of the crossing, and that cars being switched ran over it. There was no pretense that any employe of defendant saw plaintiff lying on the siding. *Held*, that it was error to charge that, though plaintiff was guilty of a want of ordi-

nary care attempting to cross defendant's tracks, yet if defendant, by its servants, could have avoided the injury by ordinary care after they saw or might have seen plaintiff lying on the track, plaintiff was entitled to recover.

2. It was error to refuse to charge that if plaintiff was riding in a buggy, and drove violently down a hill to the crossing, where, by reason of his careless driving, his horse swerved, breaking the wheel, and throwing plaintiff out on the side track, where he lay unconscious and unseen till he was run over by the cars as they were being drifted back into said side track, plaintiff is not entitled to recover.

3. It was plaintiff's duty, before attempting to drive across the tracks, to look and listen for approaching cars; and if he failed to do so, but drove rapidly across the track, and his vehicle was struck by one of defendant's cars, and he was run over, he could not recover, though the cars were being moved without the showing of any light or the ringing of any bell.

4. To entitle plaintiff to recover, the jury must be satisfied, not only that defendant was guilty of negligence in moving its cars at the crossing, but that said negligence was the direct cause of the accident; and, even though defendant was guilty of such negligence, plaintiff is not entitled to recover if, notwithstanding such negligence, the accident would not have occurred if plaintiff had used due care in driving across the track.

5. It was plaintiff's duty to look and listen for trains without regard to whether the bell was rung or light shown or other signal of their approach was given; and if plaintiff could, by looking and listening, have discovered the approach of defendant's cars in time to have avoided a collision, he was not entitled to recover, though no bell was rung or light shown.

6. Defendant's brakeman who had charge of the car which ran over plaintiff was not bound to anticipate the possibility of any one lying on the track, or between the tracks, 8 or 10 feet beyond a crossing, and it was not negligence for said brakeman not to have looked for or seen plaintiff lying at that point.

Appeal from circuit court, Baltimore county, in equity.

Action by Lawrence Frank Kehoe against the Western Maryland Railroad Company for personal injuries caused by defendant's negligence. From a judgment for plaintiff, defendant appeals. Reversed.

Plaintiff offered the following five prayers:

"(1) If the jury find that the plaintiff, on the night of the accident, was proceeding to his home along the county road, driving his horse and buggy, and that before attempting to cross defendant's railroad he slowed up his horse to look and listen for trains on the railroad, and that he neither saw nor heard any cars or locomotive near the crossing or in motion, and that while attempting to cross the first or main track of defendant's road his buggy was struck by a car which had been detached from the engine, and was running down that track by its own momentum, and upon which no light was visible to plaintiff, and that he was thereby thrown from his seat, upon and between the rails of defendant's switch or second track, a few feet from the traveled way, where he lay stunned and unconscious, and was immediately thereafter run over and his leg crushed by cars of the defendant which had been likewise detached and started into the switch at the same time

the other car was running down the main track; and if the jury shall be of opinion, from all the circumstances, that the injury was caused by a want of ordinary and proper care on the part of defendant, its agents and servants, and without any fault of the plaintiff contributing thereto,—then the plaintiff is entitled to recover. (Refused.) (2) If the jury shall find that the plaintiff, on the night in question, while proceeding to his home, and driving his horse and buggy, before attempting to cross defendant's railroad, slowed up his horse to look and listen for trains on the railroad, and neither saw nor heard cars or locomotive near the crossing or in motion, and that, seeing no danger, he started forward, and as the horse was on the point of reaching the first or main track a car of defendant's slid down the track, which had been detached from the engine, and which up to that moment had not been seen, and running by its own momentum, and that at the same time the horse swerved and dashed against a signal post standing in the edge of the road a few feet from the track, and that the plaintiff was thereby thrown from his seat, and fell upon and between the rails of defendant's second track, a few feet from the traveled way, where he lay stunned and unconscious, and was immediately thereafter run over and crushed by defendant's cars, which had likewise been detached from the engine, and allowed to drift down the switch by their own momentum; and if the jury shall be of opinion, from all the circumstances, that the injury resulted from a want of ordinary and proper care on the part of the defendant, its agents and servants, and without any fault of the plaintiff contributing thereto,—then the plaintiff is entitled to recover. (Refused.) (3) If the jury find that upon the night of the accident a burden train of defendant's left Baltimore about 7:18 p. m., and reached Howardville about 10 p. m., where the railroad crosses a county road at grade; and that the bulk of the train was left on the main track, some distance east of the crossing, and the engine proceeded beyond the crossing to a switch, which it ran back upon, and coupled to a number of cars standing on said switch, which it proceeded to haul westwardly beyond the switch, and from that point proceeded to throw the rear car on the main track, and the others on the switch by the movement described by the witnesses; and if they shall find that, while said engine and part of the train was west of the crossing, the plaintiff on his way home upon the county road approached the railroad, and that he paused, or slowed up his horse, to look and listen, and that he neither saw nor heard any cars near the crossing or in motion, and that he thereupon attempted to cross, and was suddenly struck by a car of the defendant's, on which no light was visible to the plaintiff, running against the right side of his buggy as he was at the main track, and

that he was thereby thrown from his seat, upon and between the tracks of the switch, where he lay stunned and unconscious, and was immediately run over and crushed by the cars of the defendant moving along said switch; and if the jury shall be of opinion, under all the circumstances of the case, that the injury complained of resulted from a want of ordinary and proper care on the part of the defendant, its agents and servants, in the management of its cars, and without any fault of the plaintiff contributing thereto,—then the plaintiff is entitled to recover. (Refused.) (4) Even though the jury believe that the plaintiff was guilty of a want of ordinary care and prudence in crossing or attempting to cross the defendant's tracks under the circumstances testified to before them, yet if they further find that the defendant, by its servants and agents, could have avoided the injury complained of by ordinary care in the management of its cars, after they saw, or by the exercise of ordinary care might have seen, the plaintiff lying in the track in the position described by the witnesses, then the plaintiff is entitled to recover. (Granted.) (5) If the jury find for the plaintiff, they are to consider, in estimating damages, the health and condition of the plaintiff before the injuries complained of, as compared with his present condition in consequence of said injury; and whether said injury is in its nature permanent; also the physical and mental suffering to which he has been subjected by reason of said injury; and they are to allow him such damages as, in the opinion of the jury, will be a fair and just compensation for the injury which the plaintiff has sustained. (Granted.)

Defendant offered the following prayers: "(1) The defendant prays the court to instruct the jury that according to the uncontradicted evidence the plaintiff, by his own negligence, contributed directly to cause the accident complained of; that he has offered no evidence legally sufficient to entitle him to recover in this case; and that upon the pleadings and evidence their verdict must be for the defendant. (Refused.) (2) Defendant prays the court to instruct the jury that the plaintiff is not entitled to recover in this case, because upon the case made by the evidence no ground of action has been shown, and their verdict must be for the defendant upon the pleadings and evidence in the case. (Refused.) (3) The plaintiff is not entitled to recover in this action, and the verdict of the jury must be for the defendant, because the evidence of the plaintiff shows the negligence of the plaintiff directly contributed to the accident which caused the injury complained of. (Refused.) (4) It was the duty of the plaintiff, if he was approaching the crossing at a high rate of speed, to stop, look, and listen before attempting to drive across defendant's tracks, and inasmuch as, according to the undisputed evidence in the case,

he drove across the tracks without stopping, he is not entitled to recover in this case, and the verdict of the jury must be for the defendant. (Refused.) (5) If the jury find from the evidence that on the evening when the accident complained of in this case occurred the plaintiff was riding in a buggy; that he and his two brothers (the latter in another buggy) were driving along the Reisterstown turnpike in the manner testified to by the witnesses Ryland and Seltz; that they all then drove violently down the hill to the crossing at Howardsville, where, by reason of his unduly rapid and careless driving, plaintiff's horse swerved towards the left out of the road, and brought the left hind wheel of his buggy into contact with the signal post mentioned in the evidence, tearing the rim and spokes from the wheel, causing that side of the buggy to fall, and throwing the plaintiff out upon the side track, where he lay unconscious and unseen upon the track some ten feet from the side of the county road until he was run over by defendant's cars as they were being drifted back into said side track,—then the plaintiff is not entitled to recover in this case, and their verdict should be for the defendant upon the issues joined in this case. (Refused.) (6) That it was the duty of the plaintiff, before attempting to drive across defendant's tracks, to look and listen for approaching cars, and either to stop his vehicle entirely, or so far reduce its speed as to enable him to obtain the full use of his sight and hearing unimpeded by the movement or noise of said vehicle; and if they find that the [plaintiff] failed to do this, but drove rapidly across the track, and that his vehicle was struck by one of defendant's cars, and himself knocked out and run over by the cars moving on the side track,—then the plaintiff is not entitled to recover upon the issues joined in this case, even though the jury find further that the cars were being moved without the showing of any light or the ringing of any bell to give warning of their approach to the crossing. (Refused.) (7) To entitle the plaintiff to recover in this case, the jury must be satisfied from the evidence not only that the defendant company was guilty of negligence in the handling and moving of its cars at the crossing where the accident complained of occurred, but that said negligence was the direct cause of the accident; and, even though they should find that the defendant was guilty of such negligence, still the plaintiff is not entitled to recover upon the issues joined in this case, if they believe that, notwithstanding said negligence, the accident would not have occurred if the plaintiff himself had used due care and caution in driving across the track. By negligence is meant a failure to exercise ordinary care; that is to say, such care as ordinarily prudent persons would exercise under such circumstances. (Refused.) (8) That it was the duty of the plaintiff, in driving across the defendant's tracks, to look and

listen for trains or cars without regard to whether the bell was rung, light shown, or other signal of their approach given; and if the jury shall find that the plaintiff could, by looking and listening, have discovered the approach of defendant's cars in time to have avoided a collision with them, then he is not entitled to recover in this case, and their verdict must be for the defendant upon the issues joined in this case, even though they should find that no bell was rung or light shown. (Refused.) (9) That the plaintiff is not entitled to recover in this case unless the injury complained of was caused exclusively by the negligence of the defendant company,—that is to say, exclusively by its failure to exercise ordinary care in the management of the cars alleged to have caused the injury; and if the jury find that such was not the exclusive cause of the accident, but that the plaintiff himself was guilty of lack of ordinary care in his attempt to cross the defendant's tracks, which lack of ordinary care directly contributed to cause the accident, then, upon the pleadings and evidence in this case, their verdict must be for the defendant. (Refused.) (10) Defendant prays the court to instruct the jury that defendant's brakeman Keefer, who had charge of the cars which ran over the plaintiff, was not bound to anticipate the likelihood or possibility of the plaintiff or any one being or lying on the track or between the tracks, eight or ten feet beyond the crossing; and it was not negligence for said brakeman not to have looked for or seen the plaintiff lying at that point. (Refused.) (11) There is no evidence in this case legally sufficient to show that the injury complained of was directly due to any lack of ordinary care on the part of the defendant, and the verdict of the jury must be for the defendant upon the pleadings and evidence in the case. (Refused.)"

Argued before McSHERRY, C. J., and BRISCOE, BRYAN, RUSSUM, PAGE, FOWLER, and ROBERTS, JJ.

Charles Marshall, William L. Marbury, and C. Bohn Silngluff, for appellant. D. G. McIntosh, Rand. Barton, Jr., and Redmond C. Stewart, for appellee.

McSHERRY, C. J. This suit was brought to recover damages for a personal injury sustained by the appellee in consequence of the alleged negligence of the appellant. With respect to some of the circumstances testified to there was conflict in the evidence, but some of the facts seem to be unquestioned. According to the plaintiff's version of the occurrence, he was driving along in a buggy on July 30, 1895, about 10 or 10:30 p. m., along a public road in Baltimore county, called the "Seven-Mile Lane," and his two brothers, in another buggy, were 20 or 30 yards in advance of him. The seven-mile lane is crossed at grade by the main track and a siding of the Western Maryland Railroad at a place

called "Howardsville." His brothers crossed the tracks, and when the plaintiff neared them he brought his horse down to a slow walk, looked and listened, and, not seeing or hearing any cars, he attempted to cross. His horse, he says, gave a jump, and started off. He tried to check the horse, and then something struck the buggy on the right side, and the plaintiff remembered nothing more. On the evening in question a freight train of the defendant company, proceeding from Baltimore westward, stopped at Howardsville station to remove from the siding two of the five cars that were there. The whole train accordingly stopped east of the crossing; that is, before reaching the crossing. The engine, after being cut loose from the rest of the train, moved over the crossing up to the switch, about 150 feet west of the crossing. It then backed down the switch into the siding, drew out the five cars therefrom to the main track, shoved the rear one—a box car in charge of a brakeman—down the main track towards the detached part of the train, dropped three gondola cars, also in charge of a brakeman, back over the switch into the siding, and then with the remaining car backed down the main track, and coupled to the train. There is a down grade from the switch post to the crossing, and the cars drifted down both the main track and the siding at the rate of four or five miles an hour. The brakeman in charge of the box car testified that he saw a buggy pass rapidly over the tracks in front of his car, and immediately afterwards a second buggy attempted to cross, but was struck by his car, and he instantly called out, "Stop the cars!" In a moment afterwards the train hands found the plaintiff lying between the main track and the siding, from 6 to 12 feet east of the east margin, and therefore outside the limits of the crossing, with one leg over the inner rail of the siding. Over this leg the gondola cars had passed, crushing it so badly that amputation below the knee became necessary. There was no evidence adduced on the trial to controvert or question the fact that the plaintiff was, when run over, wholly off the crossing, and wholly on the company's right of way. On the part of the defendant it was shown that the plaintiff and his brothers, together with others, had been drinking quite freely during the afternoon and evening; that they were speeding their horses—driving in a gallop—down the seven-mile lane towards the railroad, and that within 14 feet of the track the plaintiff drove into a post supporting a danger signal, tore off the left rear wheel of his buggy, and dashed across the track on three wheels without the buggy coming in contact with a car. It is a fair inference that in thus crossing the track he was thrown out of the buggy, not because the buggy was struck by a car, but because, the left rear wheel being off, the buggy tilted to that side, and upon that side he fell. It was further shown that the brakeman who was in charge

of the three gondola cars that must have caused the injury to the plaintiff by running over his leg, because they were the only cars that passed down the siding after the plaintiff attempted to cross, was standing between the first and second cars, and that he saw no one on the track ahead of him, and heard no shout to stop the cars. No employé of the company saw the plaintiff lying on the track before he was run over. It was also proved by a disinterested witness that, having heard the noise made by rapidly approaching horses and then a crash,—possibly the crash against the signal post,—he went to his window, and from there saw a dark figure lying on the track of the siding, and at the same time he noticed the gondola cars moving along the siding over the crossing towards the figure, over which they passed in a moment, and, upon hurrying to the spot, he found the plaintiff had been injured. Upon the conclusion of the evidence the plaintiff presented five and the defendant eleven prayers for instructions to the jury. The plaintiff's fourth and fifth prayers were granted, and his first, second, and third, and all of the defendant's, were rejected. The verdict and judgment were for the plaintiff, and the defendant has appealed.

The fourth prayer of the plaintiff is in these words: "Even though the jury believe that the plaintiff was guilty of a want of ordinary care and prudence in crossing or attempting to cross the defendant's tracks under the circumstances testified to before them; yet if they further find that the defendant, by its servants and agents, could have avoided the injury complained of by ordinary care in the management of its cars, after they saw, or by the exercise of ordinary care might have seen, the plaintiff lying in the track in the position described by the witnesses, then the plaintiff is entitled to recover." Now, actionable negligence consists in an inadvertent breach of a legal duty that is due. "Some relation of duty, public or private, special or general, must exist, either by contract or as an implication of public policy, before one man becomes liable to another for the consequences of a careless act or omission on the part of the first man which causes injury to the second man; and where such duty does exist, and such careless act or omission occurs, causing an injury in direct and regular sequence, the careless act becomes, in the eyes of the law, actionable negligence, for which the party injured has a right of action against the person inflicting the injury." *Poll. Torts*, 352; *Bank v. Ward*, 100 U. S. 195; notes to *Curtin v. Somerset* (Pa. Sup.) 12 *Lawy. Rep. Ann.* 322, 21 *Atl.* 244. The legal duty whose breach is negligence has reference to and is measured by some correlative right of another with which it is co-extensive; and such a legal duty has been defined by Dr. Wharton as "that which the law requires to be done or forborne to a determinate person or to the public at large, and is correlative to

a right vested in such determinate person or in the public." *Whart. Neg.* § 24. This breach can consist either in the failure to do that which ought to be done, or in doing that which ought not to be done. *Heaven v. Pender*, 11 Q. B. Div. 506. But the duty on the one side is only the correlative of the right on the other side, and hence the duty to act or to refrain from acting cannot be extended beyond the right to have the act done or refrained from. Beyond the limits or scope, therefore, of a particular right, as that right is defined, there is no corresponding legal duty due; and, if there be no duty due, there can be no breach, and consequently no negligence. *Kahl v. Love*, 37 N. J. *Law*, 5. The fourth prayer granted by the court below comprises two conflicting propositions, either one of which, if sufficiently supported by evidence, would present a good cause of action; but both of which, because conflicting, cannot be combined in one and the same instruction. The conditions under which a recovery could be had on the one are essentially different from those which must exist to sustain a recovery on the other; and this is so because the right of the plaintiff and the consequent and correlative duty of the defendant in the one instance are widely and essentially different from the right and its reciprocal duty in the other. As the rights are dissimilar, the duties, measured by them, are likewise variant. The prayer is founded on the postulate that the plaintiff was guilty of negligence in crossing the tracks. Proceeding upon this assumption, it sets forth as one cause of action—as one ground of recovery—a breach of the duty which the defendant owed to the plaintiff not to run over him after its servants saw him on the track; and it sets forth as the other or conflicting cause of action or ground of recovery a breach of duty in not knowing or seeing that he was in fact lying on the track. It is obvious, then, that the one duty arose from a knowledge on the part of the company's servants that the plaintiff was in a place of peril; and that the other duty arose from the servants' want of knowledge of that peril, and a want of knowledge owing to a lack of due care, when the servants were bound to know or to anticipate that the peril existed or might exist. As no one has a right to be negligently or wrongfully on a railroad track, the company owes no duty to a person so situated to anticipate that he will be in such a position; but if its servants see him in a place of peril, though he be wrongfully or negligently there, then the duty arises to avoid injuring him, if possible. The duty which the company owes to such a person originates only when the perilous position is seen or known by the company's servants. When, therefore, a plaintiff is wrongfully or negligently on the tracks of a railroad in a position of peril,—as the prayer we are considering assumes was the fact in the case at bar,—the duty of

the company to use due care to avoid injuring him arises at the moment the servants of the company see and become aware of his peril; and hence, to sustain this branch of the prayer, it was essential for him to show—First, that the company's servants had knowledge of his peril; secondly, that they had that knowledge in time to avert an injury; and, thirdly, that they failed to exert proper care to avoid the injury after acquiring knowledge of the peril. Until the employes are made aware of the peril arising from an act of negligence on the part of the plaintiff, they are under no obligation to assume that he will be negligent, or will be in a dangerous place which he has no right to occupy; and, consequently, they owe him no duty to anticipate that he will be where not to be, or to guard in advance against the possible, or even probable, results of his unknown wrongful occupancy of the tracks. And as they owe him no such duty, their failure to perform it is not an act of negligence on the part of the company. *Baltimore Traction Co. of Baltimore City v. State*, 78 Md. 409, 28 Atl. 397; *Kean v. Railroad Co.*, 61 Md. 154. There is not a pretense that any employé of the defendant saw the plaintiff lying on the siding, and it was obvious error, in view of the special exception taken to this prayer, and founded on the want of such evidence, to leave to the jury the finding of a fact which there was no evidence whatever to establish. If, being where he was as the result of his negligent attempt to cross the tracks, he was not seen by the employes of the defendant, then the duty to use due care and caution not to injure him, despite his own negligence, never arose; because, as we have said, that duty, under these conditions, has its origin in the fact that he was seen, and that his peril was known.

The second cause of action relied on in the prayer is that the company is liable if its servants, by the exercise of ordinary care, might have seen the plaintiff lying on the track in the position described by the witnesses, notwithstanding he was guilty of negligence in attempting to cross in the way he did. This proposition of the prayer assumes as a legal principle that it was the duty of the employes, "under the circumstances testified to," to have seen the peril of the plaintiff, which had resulted, as the prayer concedes, from his own negligence; and that their failure to see that peril, though the peril arose from the plaintiff's carelessness, and though he was in a place where he had no right to be, was a breach of the legal duty due the plaintiff, and was, therefore, negligence on the part of the defendant that warranted a recovery. The extent and limits of the defendant's duty are determined and defined by the scope of the plaintiff's correlative right. Now, the plaintiff had the right to be on the highway, and the right to use it in crossing the tracks of the company. The railroad company had an equal right to

cross the highway with its tracks, and with its cars upon the tracks. The right which the plaintiff had, created a reciprocal duty on the part of the company, and imposed upon it the obligation to use due care that the plaintiff should not be injured by its employes while he was lawfully exercising his undoubted right to use the highway as a highway over the railroad crossing. But this duty or obligation on the part of the defendant was not broader or more extensive than the plaintiff's right to the use of the highway. His right to use it as a crossing gave to him no right to use it for a totally different purpose; and his right to use it at all was obviously qualified by an obligation on his part to exercise proper care himself in using it; and hence his right to use it with due care gave him no right to use it recklessly. His right was a right of transit along the highway and across the tracks, and to that extent the duty of the company to use due care not to abridge or invade that right was imperative, and carried with it the obligation to exercise that degree of diligence which might be necessary to avoid an injury to him while he was in the lawful enjoyment or pursuit of that right. This obligation of the company did not go further, or require the company to anticipate, either, that the plaintiff would be guilty of negligence in using the highway, or that he would use it, or attempt to use it, for a purpose not within the limits of his admitted right. As to those unwarrantable uses that are beyond and outside the scope of his legitimate right, no duty to guard in advance against their consequences is imposed by the law; and, necessarily, therefore, no negligence can be predicated of a failure to take such precautions. All railroad companies are under an imperative obligation, upon approaching a road crossing, to use due care and caution to avoid injury to others lawfully traversing the highway; and to the extent that they fail to employ that care and caution they are responsible for injuries resulting from such omissions. But this duty is only co-extensive with the correlative right of the individual to use the highway for purposes of transit, and clearly imposes no obligation on the company's servants to be on the lookout for persons negligently lying on the track outside of the limits of the highway, for that is not a use of the highway at all. Now, if the plaintiff was lying beyond the limits of the highway, with his leg across a rail of the siding, as testified to by all of the witnesses who saw him after the accident, he was obviously not then using the highway for the only legitimate purpose for which he was authorized to use it; he was not in the exercise of the right which he possessed; and there was clearly no obligation imposed by law on the employes of the defendant to look for him where he was, or to assume that any person might be there, when the cars drifted down the siding towards the crossing. And if there was no such obligation, their failure to see him where he had no right to be was no breach of duty owed to

him, and was therefore not negligence. There is no analogy between a case like this and cases arising out of injuries inflicted by street-railway companies upon persons who have an equal right with the railways to use the public thoroughfares for travel. *Cooke v. Traction Co.*, 80 Md. 551; 31 Atl. 327; *Railway Co. v. McKewen*, 80 Md. 593, 31 Atl. 797. Every portion of a street-railway's track is a public crossing, because persons have the right to cross those tracks at any point along the thoroughfares; and hence the obligation on the part of the company's employes to keep a constant lookout for persons crossing or approaching the track extends to the whole line of the road.

It must be understood that what we have said in discussing the fourth prayer is based upon the assumption which the prayer itself adopts,—that the plaintiff's position on the tracks was due solely to his own negligence. This was the hypothesis upon which the case went to the jury. If, on the other hand, the jury had been required to find that the plaintiff's position on the track when he was run over by the gondola cars was the result, not of his own negligence, but of the carelessness of the defendant in striking the buggy with its car, as was the theory upon which the plaintiff's first, second, and third prayers were constructed, a different state of case would have been presented. We see no reason why those prayers should not have been granted.

Upon well-settled principles, which have been so often announced that no useful purpose would be served by repeating them, we think there was error in refusing to grant the defendant's fifth, sixth, seventh, eighth, and tenth prayers; but we discover no error in the rejection of the others. From what we have said it is apparent that there was error in granting the plaintiff's fourth prayer; and because of that error, and because of the rejection of the defendant's fifth, sixth, seventh, eighth, and tenth prayers, the judgment will be reversed, with costs, and a new trial will be awarded. Judgment reversed, with costs above and below, and new trial awarded.

34 Md. 117)

DORSEY v. HABERSACK.

(Court of Appeals of Maryland. June 18, 1896.)

PARTY WALL — CONSTRUCTION OF AGREEMENT — PHOTOGRAPHS AS EVIDENCE.

1. An agreement whereby defendant purchased the right "to place joists to the depth of four inches and to otherwise build into and against" the wall of plaintiff's house, "and to otherwise use the same as a party or division wall," includes the right to increase the height of said wall.

2. A division wall, built entirely on the land of one person, may, by agreement, actual or presumed, become a party wall.

3. In an action to recover damages caused by building into and upon the wall of plaintiff's house, an objection to photographs of the premises offered by one of the parties, on the ground that they are not shown to be accurate, is un-

tenable, where the experience of the photographer is sufficiently shown, and both parties have photographs in evidence, whose accuracy the jury can determine from the testimony.

Appeal from court of common pleas.

Action by Engelina Habersack against William C. Dorsey to recover damages to plaintiff's premises by the act of defendant in building into and upon a division wall. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, PAGE, and BOYD, JJ.

W. H. De C. Wright and E. C. Eichelberger, for appellant. Otto Hunckel and J. J. Alexander, for appellee.

BOYD, J. The appellee was the owner of a house and lot in the city of Baltimore which adjoined a vacant lot owned by the appellant which he was about to improve. Some negotiations for the use of the wall of the appellee's house resulted in the execution of an agreement under seal between them, which was acknowledged and recorded in the land records of Baltimore city. After reciting the ownership of the respective properties, Mr. Dorsey's desire to build a three-story brick building and that he "has agreed to purchase the right to use the westernmost wall of said Habersack's house as a party or division wall, and the right to build into and against the same," Mr. and Mrs. Habersack, in consideration of \$35, granted to him "the full right, privilege, and license to place joists to the depth of four inches and to otherwise build into and against the westernmost wall of said Engelina Habersack's house above mentioned, and to otherwise use the same as a party or division wall, also to extend said division wall south-erly for a distance of about twelve feet further upon said Habersack's ground; provided, however, the said William C. Dorsey will promptly repair, or cause to be repaired, all damages done to the said Engelina Habersack's house by reason of the exercise of the rights and privileges hereby granted him," etc. The appellee, who was plaintiff below, sued the appellant for damages. The declaration, which is peculiarly drawn, contains three counts, and the defendant pleaded the general issue as to certain allegations, and license under the above agreement or deed, as it is called in the plea, as to the others. The plaintiff claimed that the agreement had been altered after its execution, and a great deal of the evidence was on that question, which, however, is not before us.

The first exception was taken to the ruling of the court in admitting some photographs offered by the plaintiff. The objection to them is upon the ground that there was no evidence to show that they were correct and accurate, but that, on the contrary, the testimony of the photographer was to the effect that he had altered the negatives. But there is nothing substantial in this objection,

as there is sufficient evidence of the experience, etc., of the photographer to justify the court in admitting them; and, as both sides had photographs in evidence, the jury could judge of their accuracy from the testimony of the witnesses.

The important question in the case is whether the court below erred in granting the plaintiff's fifth prayer, which instructed the jury that if they found "that the defendant built on top of the west wall of the plaintiff's house a wall two or three feet in height, and extended the materials of said wall so built by him over the whole thickness of the plaintiff's said west wall for its whole length, and built upon the plaintiff's chimneys several courses of brick, increasing thereby the height thereof, then the defendant is not entitled to rely on said deed as a defense against his so building his said wall on the whole thickness of the plaintiff's said west wall, or against his so building on the plaintiff's chimneys." The effect of granting that was to instruct the jury that the defendant had no right, under the agreement, to build on the wall of the plaintiff, or raise it higher than it was. In thus construing the agreement we think the court erred. The plaintiff was not only authorized to place joists to the depth of four inches and to otherwise build into and against the wall, but to "otherwise use the same as a party or division wall." It is no longer an open question as to whether one having the use of a party wall can build on it. In the recent case of *Poultney v. Depkin*, decided at the October term, 1894, of this court, and referred to in 80 Md. xviii., in the list of cases designated "not to be reported," which can be found in 30 Atl. 705, the court said, in reference to an agreement that the defendant might have the right to use the wall of the plaintiff's warehouse as a party wall: "Under this agreement the defendant had the right, upon the payment or tender of the sum agreed upon, to use the wall for the purposes to which a party wall can be subjected, i. e. to build upon it, or to insert his joist in it, or even to tear it down and build a new wall, provided the plaintiff's rights were properly protected, or he was paid all damages to which he might be thereby subjected." It makes no difference whether the wall be on the land of each contiguous owner, or only on the land of one, for, although the term "party wall" may ordinarily refer to the prior case, "a division wall may become a party wall by agreement, either actual or presumed, and although 'such wall' might have been built exclusively upon the land of one." *Brown v. Werner*, 40 Md. 20. In this case the use of the wall was purchased as a party or division wall, and the consideration agreed upon by the parties paid. The special mention of the right to place joists to the depth of four inches, and to otherwise build into and against the wall, cannot exclude or limit the other and important provision. In contracting for the use

of the wall as a party wall, it was perfectly competent for them to determine the depth to which the joists should be inserted, and, although unnecessary to state it, as it would have been covered by the agreement for the use of the party wall, the provision to otherwise build into and against the wall does not exclude the general provision. Ascertaining the intention of the parties from the written instrument, as we must do, it is perfectly manifest the plaintiff intended to sell, and the defendant intended to purchase, the right to use the westernmost wall of Mrs. Habersack's house as a party wall. If there could be any doubt about it, the recital in the agreement would seem to settle it, as it says: "Whereas, the said William C. Dorsey, being the owner of a vacant lot of ground immediately adjoining the lot above described on the west, and anxious to erect thereon a three-story brick building, has agreed to purchase the right to use the westernmost wall of the said Habersack's house as a party or division wall, and the right to build into and against the same." There is nothing from which we can infer that it was intended to prohibit Mr. Dorsey from building his house higher than the appellee's. The only possible limitation as to the height that can be inferred is from the recital that it was to be a three-story house, which it is. The agreement protected the appellee by requiring Dorsey to promptly repair all damages done to her house by reason of the exercise of the rights and privileges, etc., granted to him.

The theory of the plaintiff's sixth prayer is for the most part correct. In view of what we have said about the fifth, the reference to raising the wall might be misleading. It might be more distinctly brought to the attention of the jury that the alleged loss for the "nonoccupation of her house by tenants" must be occasioned by the damaged condition of the house owing to the acts of the defendant. The defendant's fourth prayer was properly rejected. It was the duty of the appellant under the very terms of the contract to repair all damages done to the house, and such an instruction would have been misleading.

It is not necessary to discuss the defendant's fifth prayer or the second interrogatory, and we do not understand that the exception to the rejection of the third interrogatory is pressed in this court. It is sufficient to say that it would be taking a very broad view of chapter 185 of the Laws of 1894 to suppose that it required or authorized the court to have the jury determine the amount of injury occasioned by some of a number of acts done by the defendant. In many cases it might be impossible for them to determine definitely what proportion of an alleged injury was sustained by one of several acts. In this case the alleged damage done might have been the result of building on, into, and against the wall, and cutting holes in the

same for joists, and not alone from any one cause. As the amount involved in this appeal is very small, we regret the necessity of disturbing the verdict; but, as there was error in granting the plaintiff's fifth prayer, which may have materially affected the result, we must reverse the judgment. Judgment reversed, and new trial awarded, with costs to the appellant.

(33 Md. 352)

BROOKS et al. v. BERGNER.

(Court of Appeals of Maryland. June 16, 1896.)

EXECUTORS—SALE OF PROPERTY—APPLICATION TO ORPHANS' COURT—SALE WITHOUT ORDER.

To authorize a sale under Code, art. 93, § 279, which provides that section 276, requiring an executor to obtain an order of the orphans' court before he shall sell any property of his decedent, shall not apply where he is authorized by the will of his testator to make sale of any property without application to the orphans' court, the words "without application to the orphans' court" must be expressed by the testator in his will, in connection with the power of sale.

Appeal from orphans' court of Baltimore city.

Proceedings by Stephen L. Brooks and Michael S. Brooks, executors and trustees of the estate of John L. Brooks, deceased, against Frederick Bergner, Jr., concerning the sale of certain leasehold property. From an order sustaining exceptions filed by the purchaser, Bergner, and vacating the sale, the executors appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, ROBERTS, PAGE, and BOYD, JJ.

Geo. R. Willis, Fred. C. Dugan, and Julius H. Wyman, for appellants. Saml. J. Harman, for appellee.

BRISCOE, J. On the 1st day of April, 1895, Stephen L. Brooks, one of the executors of John D. Brooks, late of Baltimore city, deceased, sold to the appellee, Frederick L. Bergner, certain leasehold property situate in Baltimore city, under the following power in the will of his testator: "I hereby authorize my executors and trustees, if it becomes necessary at any time during the existence of the trusts aforesaid, to sell, lease, or mortgage any of the property of said estate in order to pay debts or charges upon my estate; and I further authorize them to make changes or investments of said property or estate, or do whatever they may deem advantageous to the interests of said estate." On the 14th day of May of the same year an order was obtained from the orphans' court of Baltimore city authorizing Stephen L. and Michael S. Brooks, the two executors named in the will, to sell at private sale the same property; and on the 21st of May they reported to the court "that, in pursuance of the powers and authority in said will contained, these executors and trustees have sold at private sale,

unto Frederick Bergner, Jr., at and for the price or sum of five thousand dollars, cash, all that lot of ground and premises situate, lying, and being in Baltimore city," and fully described in their report of sale. Exceptions were subsequently filed by the purchaser, Bergner, and from the order sustaining these exceptions and vacating the sale this appeal is taken.

It is admitted that the sale was made without a previous order of the orphans' court, and the only question, then, it becomes necessary for us to consider, is whether these executors were authorized by the power of sale contained in this will to make sale of the leasehold property without application to the orphans' court, and an order of that court being first had and obtained, directing them so to do. There can be no doubt that prior to the act of 1843, c. 304, now constituting section 276 of article 93 of the Code, an executor could sell the property of his decedents without the previous authority of the orphans' court granting his letters. In the case of *Alender v. Riston*, 2 Gill & J. 86, the rule was recognized that, "if there be no collusion, the bare act of sale of the assets by the executor is sufficient indemnity to the purchaser." But, by section 276 of article 93 of the Code, it is expressly provided that "no executor or administrator shall sell any property of his decedent without an order of the orphans' court granting his letters being first had and obtained, authorizing such sale; and any sale made without an order of court previously had as aforesaid, shall be void, and no title shall pass thereby to the purchaser." It will be thus seen that both executors and administrators are not only prohibited from making sale of any property of their decedents, except the sale of real estate of a testator (which is provided for in section 282 of the same article), without an order of the orphans' court, but that such sales are absolutely void, and the purchaser takes no title to the property thus attempted to be sold. The appellants, however, contend that, by virtue of section 279 of article 93 of the Code, nothing contained in section 276 of the same article shall be construed to apply to cases where an executor shall be authorized by will of his testator to make sale of any property without application to the orphans' court, and that, under the power of sale of the will, they were authorized to make sale of this property without application to the orphans' court of Baltimore city. But we cannot assent to this interpretation of section 279 of article 93 of the Code. The words "without application to the orphans' court" must be expressed by the testator in his will, in connection with the power of sale, to authorize a sale without an order of the orphans' court first had and obtained. Where, then, a power of sale is conferred by the will, and the testator desires it to be exercised "without application to the orphans' court," it should be so stated in the will, in connection with the power granted to

sell. It is expressly provided by the 276th section that an executor shall not sell without an order of the court. If, then, the testator desires the power to be exercised without such order, it should be so expressed in the will. The testator, then, in this case, having omitted in the will to direct a sale without application to the orphans' court, the sale made herein without such order was void, and no title passed thereby to the purchaser. We shall affirm the order appealed from, and direct the costs to be paid out of the estate. Order affirmed. Costs in both courts to be paid out of the estate.

(33 Md. 456)

HARRISON v. MORTON.

(Court of Appeals of Maryland. June 17, 1896.)

ACTION ON CONTRACT—PAROL EVIDENCE—ASSIGNMENT OF PATENT RIGHT—REQUEST TO COMMISSIONER TO ISSUE PATENT TO ASSIGNEE—RULES OF PATENT OFFICE—EFFECT.

1. In an action on a contract for assignment of a patent right where defendant pleaded non est factum, and there was evidence that money paid and acts done by defendant were paid and performed under another contract, and evidence that, though the contract was signed by both parties, it had never been delivered, parol evidence as to conversations which took place before the signing of the contract was not objectionable, as varying its terms.

2. In an action on a contract for sale of a patent right, testimony by defendant that he had advanced to plaintiff a certain sum with which to speculate in a gold mine, offered to show that defendant, under the contract, had a right to declare the same inoperative, because of plaintiff's inability to carry it out, was admissible, where it appeared that, in consideration of the loan of such money, plaintiff had promised to pay defendant a larger sum already due, and that, instead of paying the same, he drew a draft on defendant for an additional sum.

3. On a showing that the original paper evidencing a contract to sell a patent right to a corporation had been diligently searched for among the corporate records, and could not be found, a copy from the corporate minutes was admissible.

4. On an issue as to the execution of a contract to sell a patent right to a corporation, the minutes of a corporate meeting, showing that the stockholders ratified a proposition by the inventor to subscribe for a certain amount of stock, and pay therefor by an assignment of his patent, was the best evidence of such ratification.

5. A written assignment of a patent right before the issuance of the patent, which does not contain a request to the patent commissioner to issue the patent to the assignee, as required by Practice Rule 26 of the United States patent office (page 9), as revised April 1, 1892, passes merely an equitable title to the patent after its issuance.

6. Such rule is not merely binding on the patent commissioner and his inferior officers, but on all persons dealing with the department.

Appeal from Baltimore city court.

Action by Walter H. Harrison against Franklin J. Morton. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, PAGE, RUSSUM, BOYD, and FOWLER, JJ.

W. Pinkney Whyte, John P. Poe & Sons, William A. Fisher, and W. H. Harrison, Jr., for appellant. Bernard Carter, H. Stockbridge, Jr., and Gans & Haman, for appellee.

FOWLER, J. On the 8th of December, 1894, Walter H. Harrison, the appellant, claims to have entered into an agreement under seal with the appellee, Franklin J. Morton. By the terms of this agreement, Harrison was to assign to Morton a certain invention for a machine to make barrels and kegs, for which application had been made to the patent office by Henry Campbell, the inventor. Harrison alleged himself to be the owner of this invention, by virtue of an assignment from the inventor. By the terms of this alleged agreement, Morton was to pay Harrison the sum of \$100,000 in consideration of the sale and conveyance to him of all Harrison's rights under said assignment from the inventor, within 10 days after the issuing by the United States of letters patent for the invention; and also, as part of the consideration for said sale and conveyance, Morton was to transfer to Harrison a certain number of full-paid and nonassessable shares of a corporation to be formed by the former, who was also to pay Harrison a sum equal to 40 per cent. of the gross royalties upon sales of the patented machines under patents issued by the government. On the 8th of February, 1895, Harrison sued Morton in covenant on the agreement of the 8th December, 1894, alleging, in his narr., ownership of the patent under assignment from the inventor, the sale and conveyance thereof to Morton, and the consideration therefor as above mentioned, the assignment to Morton, and the issue and delivery to him of letters patent, and acceptance thereof by him, and his failure to comply with said agreement. Harrison claimed as damages \$300,000. To this narr., Morton pleaded—First, non est factum; second, fraud; and, third, undue influence in procuring his signature to the agreement sued on. He also pleaded three additional pleas on equitable grounds: First, that there was no consideration for the alleged contract; second, that, at the date of the alleged contract, Harrison was not the owner of, and had no valid title to, said invention and machine; third, that, at the time of said alleged assignment to Morton of the patent, Harrison, the plaintiff, was not the owner of, and had no valid title to, the same. The defendant also filed a plea of set-off and a bill of particulars thereof, amounting to over \$31,000. The case was tried before the court, without a jury, and resulted in a verdict for defendant for \$35,091.65.

A number of questions which we do not feel called on to consider here were discussed at the hearing by counsel for both parties. The character and standing of the parties, in the city of Baltimore, and the character of one of them as illustrated by former litiga-

tion in the courts of this state, are not necessarily, or indeed at all, involved in this controversy. We are concerned with the exceptions which we find in the record, and shall proceed to discuss them with as much brevity as their proper consideration will permit.

The third and fifth exceptions have been abandoned.

The plaintiff had offered evidence tending to prove that the contract sued on was valid, binding, and operative, and that, in pursuance thereof, the defendant had paid certain sums of money, and had done certain acts. When the defendant was examined as a witness, he was asked whether, before the contract was executed, he had any conversation with the plaintiff, and, if so, what he had agreed upon, and on what terms, in connection with that patent device? The objection of the plaintiff to the asking of this question was overruled, and this constitutes the first exception. The objection appears to be twofold: First, that no parol evidence of prior agreements is admissible to vary or alter the written contract sued on; and, second, that the proposed question, so far as it was asked for the purpose of eliciting testimony upon the issue of fraud and undue influence in procuring the signature of the defendant to said contract, was irrelevant, because there was no such issue in the case, the court below having found, and so declared by plaintiff's second prayer (which was conceded by the defendant), that there was no legally sufficient evidence in the cause to show such fraud. In regard to the first ground of the objection, all difficulty would seem to disappear when we remember that the issue is, not as to the construction of a contract, or what the contract is, but whether there is any contract in existence. The defendant pleaded non est factum, and evidence which tended to show that the money paid and acts done by the defendant were paid and performed, not in pursuance of the alleged contract, but in execution of another contract; and at the same time to show that, although the alleged contract was signed by both parties, it had never become operative, because never delivered, would clearly be admissible. The rule which excludes parol testimony when offered to vary or contradict a written instrument can, of course, have no application here, for the testimony objected to was offered not to vary or contradict the contract, but to prove it had no existence. *Guardhouse v. Blackburn*, L. R. 1 Prob. & Div. 115. In the case of *Pym v. Cambell*, 6 El. & Bl. 370, Erle, J., said: "The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is no such agreement at all is admissible." To the same effect, *Ware v. Allen*, 128 U. S. 596, 9 Sup. Ct. 174. And, in regard to the second ground of objection, it may be said that it does not

appear that the testimony objected to was offered to show fraud, but to establish the defendant's contention that the contract, although signed by both parties, was not to be valid and binding until the defendant should so determine, and that in the meantime he was to hold it "in trust." And, in point of fact, he appears to have held possession of the paper until it was produced in the court below, upon the demand of the plaintiff.

What we have said in regard to the first exception applies also to the fourth.

The second exception was taken to the refusal to rule out a question put to the defendant in regard to an arrangement by which he agreed to, and did, advance \$2,500, to enable the plaintiff to exploit a North Carolina gold mine, and the representations then made by the plaintiff to the defendant in regard to money the plaintiff owed the defendant. The testimony in regard to the gold mine was offered for the purpose of explaining the circumstances under which the defendant, according to his testimony, determined, with the assent of the plaintiff, that the contract, the cause of action here, should never be considered operative. It was by a speculation in this gold mine, with the money borrowed from the defendant, that the plaintiff promised to pay the defendant some \$25,000 then due; and when, instead of paying this or any sum, the plaintiff drew a draft on the defendant for \$1,175, the defendant thereupon determined to exercise his option of declaring the contract inoperative. The object of the plaintiff was to show the contract was valid, and he had offered much evidence in support of his contention, and therefore the defendant had a right, as we have already said, not only to show the contrary, if he could do so, but also the circumstances under which his alleged right to declare the contract void was exercised. As we have said, the testimony admitted certainly tended to that end.

The sixth exception involves the admissibility in evidence of the minutes of the Campbell Barrel Company, to show that the inventor, long previous to the contract of December 8, 1894, and before the date of his assignment to the plaintiff, Harrison, had agreed to sell and transfer, and that the said company had agreed to purchase, the invention and patent rights which are alleged to have been sold and assigned by the plaintiff to defendant, and that, therefore, the plaintiff having assigned all his right and title to said invention to said barrel company, he had nothing to assign to the defendant. It was shown that the original paper by which this alleged assignment was made by the defendant to the barrel company, a copy of which is contained in the minutes of the latter, was searched for among the papers of said company, and in other places where it was believed it might be found, but it was not discovered. We think, under the circumstances, a proper

foundation was laid for the introduction of the copy as secondary evidence. But, independent of this view, it would seem that the minutes are admissible to show—and they were offered for that purpose—that the plaintiff, having sold his patent to the barrel company, could not again sell it to the defendant. The minutes are the best evidence to show that the stockholders agreed to and ratified the proposition of the inventor to subscribe for \$90,000 of the company's stock, and pay for his subscription by an assignment of his said patent. *Beach, Priv. Corp.* § 295. The effect of this evidence will be considered under the seventh and last exception, which relates to the rulings upon the prayers, and which we will now consider.

We think there can be no doubt that the defendant's two prayers were properly granted. By the first, the court declared as matter of law that, upon the pleadings, the burden was upon the plaintiff to prove the delivery of the sealed instrument sued on, and that if the court, sitting as a jury, should find that said paper never was delivered, the verdict must be for the defendant. The second prayer recites the evidence more at length, but asserts the same proposition of law, which appears to be well settled in this state. *Edelin v. Sanders*, 8 Md. 129. We discover no inconsistency between the two prayers. The plaintiff specially excepted to the second, on the ground that there was no evidence in the cause legally sufficient to prove the facts therein set forth. It is clear, however, that the testimony of the witnesses Morton and Coale supports the facts set forth in this prayer, and we have already held it to be competent and admissible under the issue made by the plea of non est factum.

We will now consider the prayers of the plaintiff. He offered five, the second having been conceded, and the fifth granted. The controlling proposition in this part of the case is that contended for by the plaintiff in his first, third, and fourth prayers, namely, that there is no legally sufficient evidence in the case to show that he had any knowledge or notice of the agreement between the inventor, Campbell, and the Campbell Barrel Company. The correctness of this contention of the plaintiff depends—First, upon the legal effect of the assignments from Campbell to the plaintiff; and, secondly, upon the effect of the contract of Campbell with the Campbell Barrel Company,—that is to say, whether said Campbell thereby assigned to said company an equitable title to his invention prior in date to the title he claims to have assigned to the defendant, which latter title the plaintiff claims to be an absolute legal title; and the defendant's contention, on the contrary, is that it is a mere equitable title, subsequent in date, and therefore inferior, to the title of the barrel company. The plaintiff claims title through two assignments from

Campbell, each being for one-half interest in a certain application filed in the patent office of the United States at Washington, D. C., which application is for letters patent covering the invention of a machine for forming and making barrels and kegs. It will be found upon an examination of these instruments that they do not contain a request to the commissioner of patents to issue the patent to the plaintiff. Notwithstanding they were recorded in the patent office, letters patent were issued in the name of Henry Campbell, the inventor; and the defendant contends that the legal effect of such an assignment, in which the inventor fails to embody a request to the commissioner of patents to issue letters to the assignee, is to convey to such assignee only an equitable title. It is conceded that by one of the rules of the patent office the commissioner will not and cannot issue the letters patent to an assignee, unless specially requested so to do by the terms of the assignment. One of the witnesses refers to this rule in his testimony. The patent having been issued to Campbell instead of to the defendant, the witness thus explains: "I ascertained that the probable reason why it [the patent] had not been issued to Mr. Morton was this: the original assignment from Mr. Campbell to Mr. Harrison did not contain the request which the rules of the patent office required in order that the patent should be issued in the name of the assignee." Rule 26, Rules of Practice in the United States Patent Office, p. 9, revised April 1, 1892.

Remembering that the assignments from Campbell to the plaintiff, which we are now considering, were made before the issue of letters patent, let us ascertain what such a conveyance carries. The assignment of a right to obtain letters patent is, "in effect, a contract to assign the patent when issued, and, as such, is enforceable in equity." But "such an instrument creates no legal title to the patent in the assignee." 1 Rob. Pat. §§ 411-414. The same author (section 764) thus speaks of an assignment like the one we are considering, which was made before the issue of letters: "An assignment of a completed invention may be made either before or after the issue of the patent. An inventor has, by virtue of his inventive act, not merely the ownership of his invention, but an inchoate right to the monopoly, which is to become vested upon his application for and receipt of letters patent. This ownership of the invention and inchoate right to perfect his title to the monopoly by obtaining letters patent is made assignable by law equally with the patented invention; and an assignment covering these rights, and properly recorded, secures to the assignee both the invention and monopoly immediately on the issue of the patent. To authorize an issue of the patent directly to the assignee, however, the instrument of assignment must contain a written request to the commissioner of pat-

ents that the letters patent may be granted to the assignee. * * * Such a conveyance transfers to the assignee the legal title, as well as the equitable, to the patented invention. * * * An instrument purporting to be an assignment, but not containing the request, * * * does not convey the legal title to the patented invention." One of the earliest cases in which this rule, thus explained by the learned author, was adopted, is that of *Gayler v. Wilder*, 10 How. 480, in which Chief Justice Taney, delivering the opinion of the supreme court, said: "The discoverer of a new and useful improvement is vested by law with an inchoate right to its exclusive use, which he may perfect and make absolute by proceeding in the manner which the law requires." Again, he says: "It appears by the language of the assignment that it was intended to operate upon the perfect legal title which he then had the lawful right to obtain, as well as upon the imperfect and inchoate interest which he actually possessed. The assignment requests that the patent may issue to the assignee." As we have seen, it is required, when letters are to be issued to an assignee, the assignment must contain that request. Rule 26, p. 9. But it was suggested that such a rule is a mere regulation for the convenience of the patent office, and was not binding. But the rules established by the commissioner of patents are, until abrogated, as binding as the law itself, not only upon him and his inferior officers, but upon persons doing business with his department, provided such rules are not in contravention of any statute. Rev. St. U. S. 1874, § 483; 1 Rob. Pat. p. 84, and note. It follows from what Chief Justice Taney says in *Gayler v. Wilder*, supra, that, prior to the issue of letters patent to the inventor, he has an imperfect, inchoate right to its exclusive use, which he may perfect and make absolute by taking the steps required by law, and especially by having letters patent issued to him; or he may, by an assignment of this inchoate right, coupled with a request to issue letters to his assignee, in compliance with rule 26 of the patent office, transfer to such assignee a legal title to such invention. The legal title passes to the assignee under such an assignment, because he has under it, as the inventor had by law, the right to secure letters in his own name. But the only way in which such letters, which are the evidence of a perfect legal title, can be secured by the assignee, is by the request of the inventor first, and of his assignees, as the case may be, expressed in the assignment. It appears by the evidence that the letters for the invention and patent, which the plaintiff claims to have sold and assigned to the defendant for \$100,000, never have been in the name of either. Letters patent were issued to Henry Campbell, the inventor, although every effort was made by the plaintiff to have them issued to the defendant. In the case of *Wright v. Ran-*

dle, 8 Fed. 591, Blatchford, J., cites *Gayler v. Wilder*, supra, to show that an assignment with request to issue letters to assignee passes the legal title. But, in referring to another assignment before the court, he says in the same case: "The instrument provided that Randle [the inventor] should apply for new patents for the past improvements, but it did not, while assigning the improvements, provide that the new patents should be issued to Randle and the assignee jointly. Out of this all the trouble has arisen." Further on in the opinion, the following language shows what the trouble was: "The omission of a request by Randle to the commissioner to issue the patent to the assignee jointly with himself * * * enabled Randle to make a second transfer of the invention, and to secure the issuing of the patent as it was issued;" that is, to himself and two others. The general rule appears to be that an assignment without the request conveys only an equitable title. See, also, *Davis Improved Wrought-Iron Wagon-Wheel Co. v. Davis Wrought-Iron Wagon Co.*, 22 Blatchf. 221, 20 Fed. 699; *Hendrie v. Sayles*, 98 U. S. 551; *Stamping Co. v. Jewett*, 7 Fed. 877; *Littlefield v. Perry*, 21 Wall. 205; *Newell v. West*, 13 Blatchf. 114, Fed. Cas. No. 10,150; *Nail Co. v. Corning*, 14 How. 193.

It would seem, therefore, that the rule so broadly laid down by the learned author (*Robinson on Patents*), if not adopted in clear and distinct terms, has been often recognized and never repudiated by the courts having general jurisdiction of questions arising under the patent laws of the United States. Applying the rule we have been considering to the assignments from Campbell to the plaintiff, it will follow that the plaintiff took from Campbell, and could sell and assign to the defendant, only an equitable title, because those assignments were not drawn as required by law to carry the legal title. What then is the result? In the case of *Chew v. Barnet*, 11 Serg. & R. 389, Chief Justice Gibson said an equitable title "is in truth nothing more than a title to go into chancery to have the legal estate conveyed, and therefore every purchaser of a mere equity takes subject to every clog that may lie on it, whether he has notice or not." And to the same effect are *Basset v. Nosworthy*, notes to 2 White & T. Lead. Cas. Eq. 67; *Shirras v. Craig*, 7 Cranch, 34-38; *Phillips v. Phillips*, 4 De Gex, F. & J. 208-215. If, therefore, the Campbell Barrel Company acquired an equitable title to the patent, as it undoubtedly did under its contract with the inventor before the assignment of the equity to the defendant, the latter took subject to the equitable title in the said company, and the first, third, and fourth prayers of the plaintiff were properly refused, for they all asked the court to say that there was no legally sufficient evidence to show that the plaintiff had knowledge or notice of the agreement between the plaintiff and the

barrel company. But, as we have seen, knowledge and notice will be imputed to him, as Chief Justice Gibson said in *Chew v. Barnett*, supra, "whether he had notice or not," holding, as he did, only an equitable title.

By the fifth prayer of the plaintiff, which was granted, from which ruling there has been no appeal, the court below held that the agreement of Campbell with the barrel company was no defense to this action, if the court should find that, by the true construction of that agreement, the invention and device described in the contract sued on is not embraced within said agreement. Inasmuch, however, as there was a verdict for the defendant, it follows that the court below must have found that the invention and device described in the declaration was embraced in the Campbell agreement, and that, therefore, the latter was a good defense to this action. It will appear from an examination of the whole case that the only other alternative upon which the court below could have found a verdict for the defendant was that the contract sued on never was in force; so that in neither event could there have been a verdict for the plaintiff.

Finding no error in the rulings of the learned judge below, the judgment will be affirmed. Judgment affirmed.

(54 N. J. L. 326)

MAGEE et al. v. BRADLEY et al.

(Court of Chancery of New Jersey. June 23, 1896.)

MORTGAGES—PRESUMPTION OF PAYMENT—LEGACIES.

1. Where a mortgage is 20 years overdue, and there is no proof that during that period the mortgagor or his assignee in possession has made any payment upon it, or otherwise recognized its existence, it is presumed to have been paid. This presumption is not rebutted by the fact that the owner of the mortgage and the owner of the equity of redemption during this period were brother and sister.

2. A presumption arises after 20 years from the accrual of the right to a legacy that it has been paid, but the presumption may be rebutted by any credible evidence that it is still unpaid.

(Syllabus by the Court.)

Action by Julia Magee and others against Catharine Bradley and others. Decree for complainants.

This bill is filed to obtain a partition of a tract of land, and, incidentally, to have adjusted the respective liens claimed by certain of the owners in common. The parties are the heirs of Forbes Holland, who died on the 14th day of January, 1894. There is no dispute in respect to the fact that the title to the tract was in Forbes Holland at the time of his death, nor in respect to the identity of the heirs of Forbes, nor in respect to their respective interests, apart from the liens which are claimed to exist. The history of the evolutions of title to this land, and the way by which the alleged liens arose, is as follows:

In 1862 these lands belonged to John Holland, the father of Forbes. There was then a mortgage upon it for the sum of \$2,000, held by Eliza Boutillier. This mortgage had been executed in 1845. It was assigned by Eliza Boutillier on the 15th of September, 1865, to Catharine Bradley, a daughter of John Holland, which assignment was recorded September 22, 1865. John Holland died on the 23d day of May, 1862, leaving a will, by the terms of which he devised unto his wife, Nancy, absolutely, an undivided half interest in his real estate. He also devised to his wife, Nancy, a life interest in the other undivided half part of his lands; the remainder in such undivided one-half interest to go to his son Forbes Holland. He charged upon the real estate given to Nancy a legacy of \$500, bequeathed to his son Edward Holland. He charged upon the remainder in the one-half interest devised to Forbes the payment of \$600 for the benefit of his son Thomas Holland. The said \$600 was to be invested in land, to be occupied by Thomas during his life, with power to Thomas to dispose of the same by will, and, in default of such a disposition, the same was to go to Thomas' heirs. Nancy, his widow, occupied the land devised to her until 1863, when she died, leaving a will, by the terms of which she devised to Forbes, her son, the undivided half of the property which she had held absolutely. Nancy also imposed certain additional charges upon the undivided half which she devised to Forbes. In the first place, she bequeathed to Daniel Coghlan, who was one of her executors with Forbes, the sum of \$3,000, to be invested for Julia Magee, her daughter. She bequeathed to her daughter Diana Bradley \$500, to her daughter Eliza Cavanagh \$500, to her daughter Margaret Doyle the sum of \$500. The last bequest was coupled with the condition that she should come into this state, and personally demand the same, within 10 years from the decease of the testatrix. She gave to her grandson John Donnelly the sum of \$300; she gave to her son Joseph Holland and to her daughter Catharine Bradley the sum of \$5 each. All these pecuniary legacies were charged upon the real and personal estate given to Forbes; so that Forbes, after the death of Nancy, had the entire title to that land, subject to charges upon it to pay legacies, which were liens, as follows: \$500, first lien on an undivided half; \$600, first lien on the other undivided half; then the legacies mentioned in Nancy's will, which were liens upon an undivided half, subject to the \$500 legacy to Edward Holland. With Nancy, the widow, there had lived, it seems, her daughter Julia Magee. After the death of Nancy, Forbes told Julia to remain upon the property, and gave her the privilege of doing what she chose with the proceeds. From 1865 down to the time of filing this bill, Julia Magee lived upon the premises in question, occasionally visited by the different relatives. From the time of the death of Nancy to the

death of Forbes, affairs remained in this shape. Nothing appears to have been done in respect to the settlement of the estate, and there appears to have been practically nothing settled, as there was little or no personality and no debts. Little appears in the testimony concerning any transactions in reference to the existing mortgage of \$2,000, or in respect to the legacy of \$3,000 to Julia Magee, or the other legacies charged upon the real estate.

W. W. Cutler, for complainants. McCarter, Williamson & McCarter, for defendants.

REED, V. C. In this posture of affairs, the questions raised by the pleadings are whether the mortgage of \$2,000, held by Catharine Bradley at the time of her death, is a subsisting lien upon the tract; whether the legacy to Julia Magee is a subsisting lien, and, if so, to what amount; and whether the other legacies charged upon the lands are subsisting liens, and, if so, to what amount. The rule is entirely settled that where a mortgagor has remained in possession without making any payments of principal or interest, or doing any other acts in recognition of the mortgage, for a period of 20 years, payment of said mortgage is presumed. 1 Jones, Mortg. § 915. The onus probandi, by reason of the lapse of this period of time, is thrown upon the mortgagee to prove that the instrument is still subsisting unpaid. The presumption does not act like a statutory limitation, but as a rule of evidence, as well as a rule of public policy. The degree of proof required to overcome the presumption must necessarily vary with the circumstances which surround each individual case. In *Executors of Wanmaker v. Van Buskirk*, 1 N. J. Eq. 693, the circumstance that the mortgagor had married the daughter of the mortgagee, and had issue; that the mortgagor had died many years before, leaving his wife and children in possession; that they were not in the situation to pay either principal or interest; that to have exacted payment might have brought distress upon them, and upon those who depended on this property for support, and so would have been harsh,—was deemed sufficient to rebut the presumption of payment. In *Evans v. Huffman*, 5 N. J. Eq. 354, the chancellor cited with approval the remark of Sir William Grant in *Hillary v. Waller*, 12 Ves. 252: "The presumption does not rest on the belief that the payment has actually been made, but is raised because the means of creating belief or disbelief, after such a lapse of time, are so little to be relied on." In this case the chancellor seems to have thought that neither the insolvency of the mortgagor, nor his absence for a portion of the 20 years, would rebut the presumption of payment. In *Downs v. Sooy*, 28 N. J. Eq. 55, Chancellor Runyon, after again quoting the remarks of Sir William Grant, says:

"The presumption of payment in case of a mortgage on which nothing has been paid for twenty years, and there has been no foreclosure, and the mortgagee has had no possession of the mortgaged premises, arises from the policy of the law." In that case he reinforces the presumption of payment. Now, what are the elements of fact in this case to rebut the presumption of payment arising from nearly, or quite, 30 years' delay to foreclose. There is no evidence of payment of any part of principal or of the interest to rebut the presumption. It is true that Ellen Hennessy says that in 1868 Julia Magee came to her mother's, and paid her \$100 upon the mortgage. In respect to this testimony, Julia Magee says she never knew of the existence of the mortgage until after the death of Forbes. In addition to this evidence of Julia Magee, and the length of time that has transpired since the event sworn to, there is the fact that there is nothing to show that Julia was authorized by Forbes to pay any sum upon principal or interest. Forbes, and not Julia, was the owner of the land upon which the mortgage was a lien. Besides, the payment, if made, was made 30 years ago. It appears, further, that there is no indorsement of any sum of principal or interest upon the bond or mortgage. The only element of fact remaining to be considered is the kinship of the parties. It is in evidence that Catharine Bradley was well to do; therefore, it is argued that it can be inferred that she purchased and held this mortgage for the purpose of assisting Julia Magee, who, as has been already remarked, was permitted by Forbes to have the benefit of the equity of redemption. This seems to me a very slender foundation to overturn the presumption arising from this long period of time. For aught that appears, Forbes was as able to pay the mortgage as his sister was to forego payment. What occurred between them during this 30 years in relation to it; what arrangements were made in regard to its payment; what understanding was entered into in respect to its enforcement, surrender, or payment,—can now never be known, as the mouths of both Forbes and Catharine are closed by death. For the very reason that, by this lapse of time, all means of proof have been extinguished, as a matter of public policy, the presumption of payment should be permitted to remain. In my judgment, the mortgage is not a lien.

The next question is, whether the liens of the legacies charged by the will of John Holland and of Nancy Holland upon portions of the estate still exist. In respect to the matter of presumption of payment, these legacies stand upon much the same footing as the mortgage. I take it that the equitable rule is that a suit to recover a legacy will be barred by the same delay as is sufficient to prevent a recovery upon mortgage. It is true that there is no special statute of limitations ap-

plying to the recovery of legacies, and that the general statute does not reach such suits, because such statutes are not recognized in cases of express trusts, and executors or administrators are regarded as trustees of an express trust. *Hedges v. Norris*, 32 N. J. Eq. 192. Yet, as in the case of mortgages, a court of equity will, in analogy to the statute of limitation, raise a presumption, after the lapse of 20 years, that a legacy has been paid. *Hayes v. Whitall*, 13 N. J. Eq. 241. As to what circumstances will suffice to rebut this presumption, there seems to exist some contrariety of judicial sentiment. In *Jones v. Turberville*, 2 Ves. Jr. 11, A. by will charged all his estate generally with the payment of debts to legatees. A bill was filed by the second husband of a legatee after her death. Forty years had elapsed without demand. The plaintiff proved that another legacy of 10,000 guineas was not paid, and also offered to read the evidence of some bond creditors that debts due to them had not been paid. The bill also alleged the existence of certain infancies during the time. The court refused to entertain the suit. In *Campbell v. Graham*, 1 Russ. & M. 453, the failure to bring a bill for a legacy for 28 years, although the legatees had left Jamaica, where the assets were to be administered, previous to testator's death, and never returned there, was held to bar the suit. In *Pickering v. Lord Stamford*, 2 Ves. Jr. 272, Lord Avany, M. R., acknowledged the rule laid down in *Jones v. Turberville*, and said: "I should have held that where an executor, twenty years after the death of the testator, sells leasehold estate upon which legacies have been charged, and no demand has been made during all that time, there was evidence that the charge had been paid." On the other hand, in *Ravenscroft v. Frisby*, 1 Colly. 16, one Morris died in 1789. He had left his property in a state of extreme embarrassment. It was improbable that the assets could ever be sufficient for the payment of the whole of his liabilities. Of all the property, the mortgagees were in possession, whose redemption must have preceded the application of the legacies to the purposes of the will. It was held that, under these circumstances, a presumption of payment of the legacies did not arise from lapse of over 20 years.

In my judgment there is evidence which rebuts the presumption of payment of some of these legacies. Julia Magee swears positively that her legacy was never paid. John Donnelly swears, with equal positiveness, that his legacy was not paid. Thomas Holland is dead, but his wife swears that he never received the benefit of the \$800 which was to be raised out of the property under the terms of his father's will. She married Thomas in 1860, before the death of the father of Thomas, and she still survives. It is absolutely incredible that the provisions in the father's will could have been executed without her knowledge. In respect to the legacies to

Eliza Cavanagh and Diana Bradley, there is no evidence that they were paid or were not paid. To overcome the presumption of payment which 30 years' delay to make a claim for their payment raises, there is nothing but the conditions which existed during this period. But it seems impossible to say that those conditions were so repugnant to probability of their payment as to overcome the contrary presumption. Edward says he thinks his legacy was paid. It is charged in the bill, and undenied in any answer, that Margaret Doyle's was paid. Now, where it is proved that some were paid, and some were left unpaid, it is difficult to see how any reliable inference can be drawn as to the payment of another legacy, concerning which there is absolutely nothing in the testimony, except that the same condition of affairs existed in respect to these legatees as existed in regard to both the paid and unpaid legatees. I am constrained to hold that the legacy to Eliza Cavanagh and the legacy to Diana Bradley are presumed to have been paid.

I will advise a decree that the property be sold; that the mortgage held by Catharine Bradley is paid; that the legacy given to Edward Holland is paid; that the legacy for \$800, given to Thomas Holland, with interest, is a first lien upon the proceeds of the sale of the undivided one-half interest in said lands; that the legacy of \$3,000 to Julia Magee and the legacy of \$300 to John Donnelly are liens upon the other half interest in said lands. As the value of the land seems to be insufficient to pay the legacies to Julia Magee and John Donnelly in full, they must be paid ratably.

(59 N. J. L. 1)

FOLEY v. STATE.

(Supreme Court of New Jersey. June 5, 1896.)

FORNICATION—REPUTE OF FEMALE.

In a trial on an indictment charging the defendant with the statutory offense of sexual intercourse "with a single female of good repute for chastity under the age of twenty-one years," etc., proof that such woman had been unchaste with two other men was properly overruled, as being irrelevant.

(Syllabus by the Court.)

Error to court of quarter sessions, Essex county; Kirkpatrick, Schalk, and Ledwith, Judges.

William B. Foley was convicted of fornication, and brings error. Affirmed.

Argued February term, 1896, before the CHIEF JUSTICE, and MAGIE, GARRISON, and DIXON, JJ.

Samuel Kalisch, for plaintiff in error. Edwin W. Crane, for the State.

BEASLEY, C. J. This writ has brought before the court a conviction of the plaintiff in error of the offense denounced in the supplement to the crimes act, enacted March 30, 1876. Supp. Revision, p. 192. As the only

exception taken to the procedure of the trial relates to the proper exposition of the language of the statute in question, it is necessary that the section of the law to be construed should be recited. These are its terms, viz.: "That if any single man over the age of eighteen years, under promise of marriage, shall have sexual intercourse with any single female of good repute for chastity, under the age of twenty-one years, and she shall thereby become pregnant, any person so offending shall be guilty of a misdemeanor," etc.; "but in such cases the evidence of the female must be corroborated to the extent required in case of indictment for perjury." The state on this occasion made proof of all the statutory essentials of the offense charged, one of these being the "good repute for chastity" of the prosecutrix before and at the time of her seduction. In confutation of the evidence upon that subject, the defense offered to show that on two occasions prior to the time in question she had sexual intercourse with different men. This offer was overruled, and the single question now to be decided is with respect to the legal correctness of that judicial action. That the testimony thus excluded was illegal is, in the opinion of this court, entirely clear. We think it was illegitimate, because it bore no relation whatever to the issue then trying. By force of the statute that issue was whether the prosecutrix was "of good repute for chastity." The offer was to show the immaterial fact that she was not a chaste woman. But the crime consists, under the conditions stated, in the seduction of the woman, whether she be chaste or unchaste, provided she be chaste in public estimation. The discrimination to be made, in view of the act, between the really chaste and the reputedly chaste female, was briefly noticed in the opinion read in the court of errors in the case of *Zabriskie v. State*, reported in 43 N. J. Law, 646. "There is a distinction," is the judicial declaration, "between actual personal virtue and 'good repute for chastity' as used in our statute. The former may be preserved, while the latter is impaired by indiscreet conduct." This being so, it follows, of course, that the testimony presented by the defense had no legal significance. If it had been admitted, it could not have affected the result. Nor has the court been impressed by the argument of the counsel of the defendant upon this subject, which was to the effect that it is the obvious "spirit of the act to protect chaste and virtuous females." The plain fallacy of such a contention consists in this, that it disregards the fundamental rule of statutory exposition, which is that, where the legislative language is unmistakably clear, it is the duty of the court to enforce it in that sense, without the least regard to results. The expressions here used are absolutely free from all obscurity or doubt. The description of "a female of

good repute for chastity" is a definition of a class so plainly marked as to exclude all uncertainty, and, such being the case, this court cannot refuse to carry it into effect according to its terms. It is an instance in which it is the province of the court to interpret the language merely, and to effectuate it in its literal signification. Let the judgment be affirmed.

(176 Pa. St. 172)

WARING et al. v. PENNSYLVANIA R. CO.
(Supreme Court of Pennsylvania. July 15, 1896.)

PROSECUTION OF CAUSE—UNREASONABLE DELAY—
DISMISSAL OF ACTION.

Where no narr. or statement of claim was filed until almost 15 years after the writ of summons was issued, and the cause of action originated almost six years before, and plaintiffs at all times retained full control over the cause, and could at any time have proceeded with it in due course, it was within the power of the court below to grant a non pros., particularly in a county where a rule was in force authorizing the defendant, upon the mere præcipe of his attorney, to have a judgment of non pros. entered by the prothonotary without any action of the court, or notice to plaintiff.

Appeal from court of common pleas, Allegheny county.

Action by Waring Bros. & Co. against the Pennsylvania Railroad Company. From a judgment ordering a non pros., plaintiffs appeal. Affirmed.

M. A. Woodward, for appellant. Scott & Gordon, for appellee.

GREEN, J. In this case the writ of summons was issued on November 29, 1879, and service accepted December 1, 1879. No other step was taken until on October 4, 1894, when the plaintiffs filed a statement and affidavit of claim. Thereupon the defendant obtained a rule to show cause why the statement and affidavit should not be stricken off, and a judgment of non pros. entered, on account of the laches of the plaintiffs in proceeding with their case. No narr. or statement of claim was ever filed until October, 1894,—almost 15 years after the writ was issued. The cause of action averred in the plaintiffs' statement originated in November, 1873,—about 21 years prior to the filing of the statement. During all of this long period of inaction there was nothing appearing on the record to indicate what claim was made against the defendant, or that there was any cause of action whatever. In the meantime Mr. Hampton—who had accepted service of the writ, in writing, in the name of his firm—had died. Mr. Dalzell, his partner, had left the practice a number of years before, and the counsel who now represent the defendant are not the counsel who accepted service of the writ nearly 15 years before. Having carefully read and considered the ex parte affidavit made by Richard S. Waring, one of the plain-

tiffs, as explanatory of the delay in the proceedings, we are bound to say that there is nothing contained therein which in the least degree justifies or excuses the remarkable laches of the plaintiffs in pursuing their cause. They at all times retained full control over the cause, and could at any time have proceeded with it in due course. Neither engagements in Europe, nor absences elsewhere, constitute any excuse for not filing a narr. or statement. The affiant says he never abandoned the suit, and always intended to have it tried, and never directed a suspension of proceedings. Such averments are of the most trivial and useless character. They are utterly at war with the actual facts of the situation, and as against those facts they avail nothing. If he did not direct a suspension of proceedings, he certainly did suspend them, and practically abandon them, for an unprecedented period, without the slightest reason or necessity.

We come, then, to the consideration of the mere question of the power of the court below to grant the nonsuit. In view of the undoubted facts appearing of record, it seems almost absurd to enter upon the discussion of such a question. When it is considered that a delay of only six years in the bringing of such a suit gives rise to an absolute bar to its maintenance, at the mere will of the defendant, it seems useless to consider whether the court, in the exercise of its discretionary power, may not grant a nonsuit for a mere wanton delay of more than 14 years in the prosecution of the suit. When it is further considered that, by the rule of court now in force in Allegheny county, a delay of only three months in filing the declaration authorizes the defendant, upon the mere præcipe of his attorney, to have a judgment of non pros. entered by the prothonotary, without any action of the court, or notice to the plaintiff, it is an extraordinary proposition to advance that the court itself, upon unanswerable cause shown, and after full notice to the plaintiff, may not order a nonsuit for a delay of 14 years. If the court of common pleas may adopt and enforce a rule that the defendant may have a compulsory non pros. at his own instance after, and because of, a delay of three months in filing a narr., how can it be denied that the court itself may grant a nonsuit, upon motion and a hearing, for the same cause, when the delay has been protracted for 14 years? If it has not such power, it certainly has no power to make such a rule. But the power to make such a rule is not questioned, and cannot be doubted. It must be remembered that in this case the power of the court below has been exercised, and the nonsuit granted. If this authority is within the discretion of the court only, that discretion has been exercised, and the end of the discussion has been reached. It is not pretended that there has been an

abuse of discretion in granting the nonsuit. On the contrary, the plaintiffs' dereliction has been so excessively flagrant that a refusal of the nonsuit might well have been regarded as an abuse of discretion.

If we turn to the authorities, they are simply overwhelming. They are abundantly collected in the very able and exhaustive opinion of the learned court below, and need not be here repeated. Suffice it to say that it is there shown that the practice of the courts in compelling plaintiffs to proceed with their causes without unreasonable delay originated in the common law, before the passage of any statute, and that the statute of 13 Car. II. c. 2, § 3, par. 3, limiting the time within which a declaration might be filed to one year, only added legislative sanction to the already existing power of the court. In *Huffman v. Stiger*, 1 Pittsb. R. 185, Black, C. J., says: "These facts raise the question whether a suit of which no notice has been taken by either party for twenty-seven years can be revived by one of them after that time. We are clear it cannot, without violating all the analogies of the law, and giving to a false claim every advantage which it is the object of the limitations and presumptions to take from it. An unjust demand, if prosecuted while it is fresh, may easily be defeated by counter proof. But the witnesses may die, or the papers be lost, in a few years. * * * No honest man would be willing to live in a country where the law would require him to prove the actual falsehood and injustice of every stale claim which malice or cupidity might dig up against him. Hence we have statutes of limitation, and, in cases to which they do not apply, we have presumptions which are equally strong. But where is the use of these wholesome regulations, if a man may bring suit, suffer it to lie a quarter of a century, and then revive it with the same effect as if it had been prosecuted with diligence from the beginning? It cannot be done. When neither party makes any move in the suit for a long time, there is a natural, and should be a legal, presumption that the dispute has been settled to the satisfaction of both. What precise length of time is required to make this presumption full and complete, it is not now necessary to decide. Certainly it is less than twenty-seven years." The foregoing rule was made in a case in which an issue was made by the pleadings in 1825, and a rule to take depositions was entered in 1826. The plaintiff's death was subsequently suggested, but at what date does not appear. In 1853 an application was made to substitute the heirs in the court below, and this was refused, and that refusal was sustained by this court. In the case of *Biddle v. Bank*, 109 Pa. St. 349, the above-cited decision was not only quoted with approval, but its reasoning and ruling were made a part of the opinion of this court, delivered by,

Mr. Justice Clark. Following the case of *Huffman v. Stiger*, we held that although a judgment had been recovered for a large sum against the garnishee in a foreign attachment, but no further steps were taken to enforce the payment of the judgment for more than 20 years, we would presume the judgment to have been paid, and would not permit a recovery in a *scire facias* on the judgment, on the mere ground of the delay. Meeting this question in the opinion, our Brother Clark said: "It is argued, however, that the life and efficacy of the judgment could not, in this case, be impaired by mere lapse of time, owing to the continued pendency of the suit upon the *scire facias*, and that as neither party, during the intervening period of thirty years, took any active steps towards the prosecution of the suit, no presumption of payment can fairly arise. We are not inclined to favor this view of the case. * * * In an action possessing these characteristics, and exhibiting some of the qualities of an execution, the plaintiff must be regarded as the actor, and it is his plain duty to prosecute the *scire facias* with reasonable speed. If he suffer twenty years and upwards to elapse without taking any steps towards enforcement of his claim under the *scire facias*, it may well be presumed that the debt has been discharged, that all disputed matters have been adjusted, and that the proceedings are abandoned. * * * The real controversy which the record presents is whether or not, on the facts stated in the questions reserved, the proceedings upon the *scire facias* against the Girard Bank are presumed to have been abandoned, and the liability of the bank extinguished. * * * No explanation whatever was made, no excuse given, for this long delay. Under such circumstances, and in such a case, but one inference can be drawn. We cannot regard the mere prolonged pendency of the suit upon the *scire facias*, where no steps have been taken for so long a period, as a continuous assertion of claim on part of the plaintiff." If these comments are correct in a case where a judgment had actually been obtained, with how much more force do they apply in a case where there was not only no judgment obtained, but where not even a declaration or statement of the plaintiffs' claim had ever been filed! And with how much greater force still do they apply when it is now made to appear by the statement filed in October, 1894, that the cause of action was one that was subject to the bar of the statute at the end of six years from its inception! The full period of the statute had expired more than twice over before the declaration was filed, and, if such a delay in prosecuting an action may be practiced with impunity, it is not easy to see that there is any limitation of time within which a plaintiff may harass a defendant by a mere suit, without pleadings; thus clouding his title, disturbing his peace,

and damaging his business. It is no reply to say that the defendant may compel the plaintiff to declare his cause of action. It is not his duty to do so, but it is the plaintiff's duty to proceed with his cause within a reasonable time. He is the actor, and must act, or fail of his action. In *Van Loon v. Smith*, 103 Pa. St. 238, the plaintiff obtained a judgment against the defendant in August, 1855, and issued a *scire facias* to revive in July, 1860. Service was accepted and pleas entered in November, 1860, and no further proceedings were had until January, 1882, when the case was brought to trial. The delay was not accounted for. The plaintiff offered the record in evidence without explanation, and the court below directed a verdict for the plaintiff. We held that the presumption of payment is a general one, and applies as between the parties, and said: "It affords, in the absence of counter-vailing proof, an adequate and sufficient defense to the claim under the *scire facias*, and we think the learned court below erred in holding otherwise. Nor do we regard the issue and pendency of the suit upon the *scire facias*, after this lapse of time, as affecting the application of the rule. It is quite true that the defendants appeared to the *scire facias*, entered their pleas, and formally took defense, and that, at any time within the twenty-one years since elapsed, they might have ordered the cause for trial; but the plaintiff enters the suit,—it is his duty to prosecute, the defendant's duty to defend."

It is scarcely necessary to extend the discussion. The plaintiffs cite the case of *Malone v. Haman*, 5 Wkly. Notes Cas. 447, in which there was a very long delay in filing the narr., and the defendant moved for a rule to strike off a rule to plead, which motion was refused by the court below, and the judgment was affirmed by this court in a very brief per curiam opinion. There was no rule of court in the county (Lancaster) in which the suit was brought as to the time of filing narrs. The case was tried on its merits in the court below, and after verdict and judgment the defendant assigned for error, *inter alia*, the refusal to strike off the rule to plead. It does not appear that any exception was taken to the refusal to strike off the rule to plead. Very little was said as to this assignment on the argument, and the case of *Huffman v. Stiger* was not cited by the defendant, nor any other cases on this subject, nor was the subject considered in the very brief per curiam opinion filed. In such circumstances, we cannot consider the ruling in that case as authority here. The absence of a rule of court would of itself make a material difference between the cases, and the omission of any serious discussion of the question now under consideration would render it inapplicable. The cases of *Biddle v. Bank* and *Van Loon v. Smith* were both decided after *Malone v.*

Haman, and are direct and well-considered authorities upon the substantial question now involved. In *Ward v. Patterson*, 46 Pa. St. 372, we held to the same rulings, and decided that where a new trial had been granted, and the plaintiff failed to move the cause to trial for nine years, he lost his right to a new trial, and also lost his lien under the mechanics' lien law. We are not referred to any authorities where the question now at issue is clearly raised in circumstances like the present. We decide this case upon the undoubted power of the court below to make the rule of practice relating to this subject, and upon the necessarily implied power to grant the same relief upon motion and hearing which the defendant could have had by the mere act of their counsel in directing the prothonotary to enter a non pros. at any time after three months, and also upon the further consideration that in any event, and in the best aspect of the case for the plaintiffs, the matter was within the discretion of the learned court below, and in the exercise of that discretion the decision was against the plaintiffs. Judgment affirmed.

(176 Pa. St. 502)

KLEPPNER v. LEMON.

(Supreme Court of Pennsylvania. July 15, 1896.)

LANDLORD AND TENANT—LEASE OF OIL LANDS—DUTY OF LESSEE.

Plaintiff leased his lands to defendant, with the right to oil and gas, for a royalty. Defendant was also a lessee of lands adjoining plaintiff's, and was operating oil wells thereon. It appeared, from the location of these wells, that there was danger that plaintiff's land would be drained of oil through them. *Held*, that it was the duty of defendant, under the lease, to proceed to open as many wells as necessary to secure the common advantage of the lessor and lessee, and to prevent the loss of the oil under plaintiff's land by drainage into the adjoining wells, in default of which the lease may be declared forfeited. *Mitchell, J.*, dissenting.

Appeal from court of common pleas, Allegheny county.

Bill by John Kleppner against D. P. Lemon. From a decree for plaintiff, defendant appeals. Affirmed.

D. F. Patterson, for appellant. M. A. Woodward, for appellee.

WILLIAMS, J. This is, in substance, though not in form, a bill for specific execution of a contract. The defendant denies that the contract set out in the bill as the basis of the relief asked imposes any obligation, express or implied, upon him to do that which the plaintiff demands of him. The case must therefore depend upon the proper interpretation of the contract, aided by the necessities and usages of the business to which it relates. The plaintiff is the owner of a lot of land containing $7\frac{1}{2}$ acres. The adjoining lands—at least, on two

sides—were being developed as oil lands by the defendant. He applied to the plaintiff for and obtained a lease for oil and gas, covering his tract. This lay in a triangular shape, with its base, about 750 feet long, on land of Stewart; its perpendicular resting against the tract known as the "Stotler Tract"; and its hypotenuse, about 1,000 feet long, abutting on the right of way of a railroad. The lease confers on the lessee "the exclusive right of drilling and operating for petroleum and gas" on the plaintiff's land. If oil is found, the lessee covenants to pay a royalty of one-eighth of all oil produced, free of cost or expense, to the lessor. If gas is found in sufficient quantity to justify marketing it, he is to pay the sum of \$500 per annum for each well. The right to divide the leasehold, and to sublet the parts into which it is divided, for oil purposes, is distinctly reserved by the lessee. There is no distinct covenant for putting down wells on the land, except that which relates to the first or experimental well, which was to determine the value of the land for oil purposes. But, in a lease for oil purposes, a stipulation that other wells shall be put down, where the land is shown to be valuable for oil by the production of the first or test well, is not indispensable. The nature of oil and gas, the pressure of the superincumbent rocks, and the vagrant habit of both fluids under the influence of this pressure, enter into the contemplation of both parties to such an agreement. *McKnight v. Gas Co.*, 146 Pa. St. 185, 23 Atl. 164. It is an implied condition of every lease of land for the production of oil therefrom that, when the existence of oil in paying quantities is made apparent, the lessee shall put down so many wells as may be reasonably necessary to secure the oil, for the common advantage of both lessor and lessee. In determining when and where such wells shall be located, regard must be had to the operations on adjoining lands, and to the well-known fact that a well will drain a territory of much larger extent when the sand rock in which the oil or gas is found is of coarse and loose texture than when it is of fine grain and compact character. Whatever ordinary knowledge and care would dictate as the proper thing to be done for the interest of both lessor and lessee, under any given circumstances, is that which the law requires to be done as an implied stipulation of the contract. If this was not so held, it would be practicable to defeat the very purposes of the contract, and to drain from the land of the lessor the oil underlying it, and yield him nothing in return. The reason why this doctrine is modified in its application to gas territory is plainly stated in *McKnight v. Gas Co.*, supra. It is the difference in the manner of gathering and utilizing the product in gas and oil wells.

Turning now to the findings of fact made by the learned judge of the court below, we learn that the defendant has put down one well on the plaintiff's land, about midway across the base line of the triangle, and very close to the

line of the Stewart. The rock there is very compact, and the well yields but four or five barrels per day. He has put down two wells on the Garlach finding,—a loose rock, and good wells. He has finished one large well on the Stotler, quite near to the top of the triangle, and in a very porous rock. He has another in progress, on the same tract, not far from the base end of the perpendicular side of plaintiff's land. These wells show with a reasonable degree of certainty that the upper half of the Kleppner lot is over a coarse, porous rock, and is capable of furnishing one or more good wells. The location of the other wells referred to shows that this end of the Kleppner lot will, in two or three years, be completely drained by them, other persons will secure the royalties for his oil, and he will receive nothing whatever for the oil under the only valuable portion of his land. The findings further show that it is the expressed purpose of the defendant to secure Kleppner's oil through his wells on the Garlach and Stotler tracts of land. From the terms and purposes of the lease, from the nature and usages of the business to which it relates, and from the findings of fact to which we have referred, we draw the following conclusions of law: First. The lease contemplates the production of the oil underlying the Kleppner lot by means of operations conducted on its surface. Second. The number and location of the wells necessary to carry out the purposes of the contract is a subject belonging primarily to the lessee. Third. In disposing of this question, the lessee is bound to take into consideration the fact that his lessor is the owner of the oil, and to arrange and conduct his efforts to bring it to the surface in such manner as shall best protect the interests of both parties to the contract. Fourth. He is not bound to put down more wells than are reasonably necessary to obtain the oil of his lessor, nor to put down wells that will not be able to produce oil sufficient to justify the expenditure. Fifth. But that the oil may be obtained in time through other wells, on the lands of other owners, is not enough to excuse the lessee from his implied undertaking to operate the land for the best interests of both owner and operator.

In the main, the decree appealed from is justified by these legal conclusions. The operator has the right, as we have seen, to locate the well he is to put down; but we think the court below was justified in holding that the evidence afforded good ground for the belief that a paying well could be found on the upper end of the triangle, if so located as fairly to command the oil underlying the land. The defendant may think differently. If so, he may surrender all of the land covered by his lease, except that naturally tributary to the well near the Stewart line. The conclusion that this well cannot reach and bring to the surface the oil in the loose rock under the other end of the plaintiff's land, but that the wells of the defendant, now down and in

progress, on the Garlach and the Stotler lands, will do so, seems fully justified by the evidence. It is not found as a fact that these wells do now reach the plaintiff's, so as to draw from it. It is the fact that they may do so that gives the plaintiff his claim to present consideration. As bearing upon this general subject, the attention of the profession is called to *Janes v. Oil Co.*, 1 Penny. 242, and *Blair v. Peck*, Id. 247,—cases which are not to be found in the authorized reports.

We affirm the decree, with slight modifications, as follows: Upon consideration of the appeal from the decree of the court of common pleas No. 2 of Allegheny county, made on the 23d December, 1895, it is ordered, adjudged, and decreed that it is the duty of the defendant to proceed at once to drill and operate another oil well on the land of the plaintiff, described in the bill and in the lease thereto attached, near the northern end of said piece of land. It is further ordered that if the defendant does not, within 10 days after notice of this decree, file in this case a declaration setting forth that he will put down another well on said land, near the north end thereof, and begin the same within 20 days thereafter, and prosecute the same to completion with all reasonable diligence and in good faith, his leasehold estate in said land shall be deemed to be abandoned, except as to the well known as "Kleppner No. 1," and a space of 300 feet around it on all sides, and the right of way, etc., incident thereto. It is further ordered that the defendant be enjoined, from and after 10 days after notice of this decree, from exercising any authority or control over any portion of said land, except that now designated as appurtenant to Kleppner well No. 1, and that he retire from and surrender the same to the plaintiff unless the notice hereinafter provided for be filed within the said 10 days. The record is now remitted, that the court below may give such further orders as may be necessary to give full effect to above decree. The costs to be paid by the appellant.

MITCHELL, J. (dissenting). A lessee who covenants to pay royalty on production is undoubtedly bound, in good faith, to make proper effort to develop the land. But while the interests of the parties are the same, in getting the largest production, yet in some respects they differ. The lessee has to bear the cost of putting down wells, and his interest is to proceed carefully, with due regard to expense and probable returns, while the lessor's interest is to have search and experiment, without regard to present cost. The decision in regard to such matters belongs primarily to the lessee. It is a proper subject for agreement, and, when the parties have agreed what shall be done, their rights are not subject to the judgment of any court to fix a different standard. If the parties to the present controversy had expressly stipulated that one well should be sufficient for the whole tract,

no court would venture to enlarge the test by directing another to be put down at the lessee's expense; yet the covenant of the lease amounts to just that, as I understand the learned court below to admit. I would reverse this judgment, as a flagrant violation of the liberty and sanctity of contracts, by raising a purely factitious equity to enable the complainant now to make a better bargain, at the defendant's expense, than he chose or was able to make for himself at the time.

(176 Pa. St. 297)

POST v. BERWIND-WHITE COAL-MIN.
CO.

(Supreme Court of Pennsylvania. July 15, 1896.)

REPLEVIN — TITLE TO SUPPORT CLAIM — TITLE IN
THIRD PERSONS.

1. A dredging company, the title to whose property was held by plaintiff as trustee to secure a debt, transferred it to S. by a bona fide sale. Subsequently the company wrongfully and without color of right took possession of the property, which was afterwards attached by creditors for a debt of the dredging company. Held that plaintiff's title being good against all except bona fide creditors whose lien attached while the property was in the ownership and possession of the debtor, it was competent for him to plead and show title in S. to support his claim.

2. Plaintiff's claim will not be defeated by showing that the dredging company had possession when the attachment was levied, such possession being based upon a wrongful retaking of the property.

Appeal from court of common pleas, Philadelphia county.

Action in replevin by H. A. V. Post, trustee, against the Berwind-White Coal-Mining Company, to recover certain property taken by the defendant on an attachment against the Philadelphia Dredging Company. From a judgment for the plaintiff, defendant appeals. Affirmed.

On May 27, 1891, Charles O. Thompson, as receiver of the North American Dredging & Improvement Company, sold to James A. Mundy, John M. Sharp, and Clarence M. Busch, of Philadelphia, certain dredging vessels for \$35,000. Part of the purchase price was paid in cash, and, in order to secure the balance, title to the property was taken in the name of H. A. V. Post as trustee, and Post took possession of the property, and used the same under the name of the Philadelphia Dredging Company, doing work under a contract with the government. While thus engaged in the work, the dredging company sold the property to C. A. Stevens, who took possession, but did not remove the property from the place. Subsequently, without color of right, Mundy, Sharp, and Busch took forcible possession of the plant, which included the property in issue, and continued to operate it on the government contract. Several months later the property was attached in an action brought by the firm of Berwind-White Coal-

Mining Company against the Philadelphia Dredging Company. H. A. V. Post gave to the sheriff a notice that he claimed the property in dispute, and an issue under the sheriff's interpleader act was allowed on the property being delivered to the claimant.

Richard C. Dale and Henry O. Terry, for appellant. E. Cooper Sharpley, for appellee.

MITCHELL, J. The hinge of this case is the character of the sale to Stevens. It may be conceded, as it was by the learned referee, that Mundy, Sharp, and Busch were vendees in possession, and that the outstanding legal title in Post, being merely security to the vendor for the purchase money, could not prevail against an attaching creditor of the vendees. For the same reasons a bona fide purchaser for value, if without notice, would take a superior title, and, if with notice, though he would take subject to the legal title as security for the purpose named, yet his title would be good as against all others. The learned referee finds that Stevens "actually, for a valuable consideration, purchased, took possession of, and thereafter exclusively operated the plant." This puts an end to any question of constructive fraud. It is true that the location and use of the property was not changed. It could not well be, as it was employed in the work of removing the islands in the Delaware river opposite Philadelphia, under contract with the United States, and had to stay where the work was. But a change of possession may be as well by the old owner going out and the new owner coming in while the property remains in the same place, as by the new owner taking it away to a new place. The difference is not in legal effect, but in facility of proof. With this cardinal fact thus established, the solution of the three questions presented by the appellant is not difficult.

First it is argued that, even if Stevens' title is good, it cannot be set up to help the plaintiff, Post. It is true that the rule in sheriff's interpleaders is that the claimant must recover on his own title, and not on one outstanding in a third person, but it has no application here, because Post's title is good against all the world but certain excepted parties, to wit, creditors of the dredging company having a lien by levy or attachment on the property, and such lien must be acquired while the property is in the ownership or possession of the debtor. The attaching creditor here had no such lien, for both title and possession had passed out of its debtor, the dredging company, before its attachment was levied. There was no title or interest of the dredging company left for the attachment to grasp, for it had all passed to Stevens prior to the levy. The attaching creditor was, therefore, not within the excepted class; and, as already said, against all others, the legal title of Post was good and must prevail.

Secondly, the question of legal or constructive fraud in the sale to Stevens has already been disposed of. The referee finds that there was no collusion or fraud in fact. It is true, the change of ownership was not made as apparent as would have been prudent in view of the circumstances and the dealings of the parties, Mundy, Sharp, and Busch, from whom he bought, but there seems to be no doubt that Stevens paid a fair price, and thereafter operated the plant himself, with his own money, including repeated payment of this very appellant's coal bills with his own check. We think, on the evidence, that the referee was entirely correct in his view of the facts.

Thirdly, the appellant argues that even if the title and possession of Stevens were valid, yet, the dredging company having retaken the property, and being in actual possession at the time of the attachment by its creditor, the latter's lien must prevail. If this resumption of possession had been in pursuance of any contract or any right which remitted the company to its prior title, or gave it a new one, the position would be sound. But it was not. The referee finds that it was "entirely tortious," and that "without any shadow of right Mundy, Sharp, and Busch forcibly possessed themselves of the property, and were in possession simply as any other wrongdoer would be in possession of property of which he wrongfully took possession, but which really belonged to other persons." Of course, such a possession could not give an attaching creditor of the wrongdoer any more right than the wrongdoer himself. Judgment affirmed.

(177 Pa. St. 28)

BIGLER'S EX'R v. PENNSYLVANIA CANAL CO.

(Supreme Court of Pennsylvania. July 15,
1896.)

EMINENT DOMAIN—INJUNCTION.

1. Under Act 1860, authorizing canal companies to condemn land for the improvement of their canals whenever necessary for the better securing the safety of persons and property, such companies may condemn land to change the location of their canals, and allow a railroad company to use the old bed vacated by the change, which was made to enable the railroad company to bridge both the canal and railroad crossing, so as to avoid street crossings at grade, which change in the street crossing the railroad company had agreed with a city to make.

2. The fact that, pending a suit to enjoin a canal company from appropriating land, large improvements on the land to be condemned are made by the company, does not authorize the court to refuse the injunction, in case the taking was for an unauthorized purpose, merely because greater hardship will result to the canal company from granting the writ than to the landowner from refusing it.

Appeal from court of common pleas,
Dauphin county.

Suit by Sarah L. Bigler's executor against the Pennsylvania Canal Company. There was a decree for defendant, and complainant appeals. Affirmed.

L. D. Gilbert, for appellant. L. W. Hall, for appellee.

DEAN, J. The Pennsylvania Railroad and Pennsylvania Canal are located closely alongside each other, through the city of Harrisburg. The streets of the city were carried over the canal by bridges and by grade crossings over the railroad. The structures over the canal were narrow, and insufficient for the public. The crossings over the railroad were highly dangerous to both the public and the transportation company. The growth of the city in population and cumulation of traffic upon the railroad only increased the inconvenience and danger to the public. Under these circumstances, impelled by public demand, and acting under a sense of public duty, in 1887, the city councils, with a view to abolishing grade crossings, under an arrangement with the railroad company, passed an ordinance to abolish them, by overhead bridges spanning both canal and railroad at three points,—Fourth and Chestnut streets, Paxton street, and Dock street. The declared purpose of the ordinance, as embodied in it, is "to promote the safety of persons and property within the city, and is deemed expedient for the public good." The bridges were to be erected by the railroad company at its own expense, and were thereafter to be taken charge of and maintained by the city. The railroad company at once proceeded to construct the bridges. Owing to the peculiar conformation of the line of the canal, its relative location to the railroad and to the streets, as an engineering problem, the company determined that the improvement could be properly and most advantageously made by straightening, thereby moving at one point the bed of the canal about 80 feet for a distance of 2,500 feet, and permitting the removal of the railroad tracks to this vacated bed of the canal. This involved the appropriation by the canal company of a little over 1½ acres of plaintiff's land. This land, though cultivated to some extent, was not otherwise improved. The canal company, in the exercise of its alleged right of eminent domain, and with the desire to aid in the improvement of overhead crossings, after unsuccessful efforts to agree with plaintiff on compensation for damages, filed bond, with sureties in sum of \$20,000, conditioned for payment of damages. Thereafter, the work, at large outlay, was proceeded with to completion. Soon after the commencement of work, however, plaintiff filed this bill for an injunction to restrain defendant from appropriating the land. The defendant filed answer, asserting its right. The material averment of the bill is the want of authority in defendant to appropriate her land under the exercise of its

right of eminent domain. The issue was referred to George Kunkel, Esq., as master, to find facts, conclusions of law, and suggest decree. He had many sittings during the eight years the suit was pending, took much testimony, and finally, on March 29, 1895, made his report. He finds as a fact that the change of location by defendant of its canal bed was not made with a view to increase its facilities for navigation, but was done to enable the Pennsylvania Railroad Company to improve its passenger stations and track bed, and avoid grade crossings within the city of Harrisburg. Therefore its attempt to appropriate plaintiff's land was unlawful. He suggests that an injunction issue as prayed for. The learned judge of the court below declined to adopt his suggestion for a decree, because, at the date of hearing, the improvement had been made at large expense, and both the public and the two companies were then in full enjoyment of the same. Therefore to grant the injunction would cause greater damage, oppression, and inconvenience than to refuse it, and he accordingly dismissed the bill, without prejudice to plaintiff in her legal remedy. From this decree the plaintiff appeals, assigning for error the refusal of the court to adopt the report of the master, and award the injunction.

We do not concur in the legal conclusion of the master, nor do we adopt the decree suggested by him. We affirm the decree of the court below, but not the reason therefor given by him. The act of the canal company in changing the bed of its canal was under the authority of the first section of the act of 1869, as follows: "It shall and may be lawful for any railroad, canal and slack-water navigation company, now or hereafter incorporated by any law of this commonwealth, to straighten, widen, deepen, enlarge and otherwise improve the whole or portions of their lines of railroad, canal and slack-water navigations, and the approaches, crossings, sidings, aqueducts, piers and structures thereof, and make new feeders, whenever, in the opinion of the board of directors of any such company, the same may be necessary for the better securing the safety of persons and property and increasing the facilities and capacity for the transportation of traffic thereon, and for such purpose to purchase, hold, use or enter upon, take and appropriate land and material, provided, however, that before any such company shall enter upon or take possession of any such land and material, they shall make ample compensation to the owner or owners thereof, or parties interested therein, or tender adequate security therefor." The learned master, it seems to us, takes too narrow a view of the scope of this section. The purpose of it was not only to permit changes of location by straightening so as to facilitate transportation, but also to better secure the safety of the persons and property of those who had occasion to cross the

canal. The physical form of great highways of commerce, such as canals and railroads, necessarily involves the contemporaneous construction and maintenance thereafter of public crossings, for the convenience and safety of that part of the public not directly concerned in the transportation of passengers and freight. All the legislation on this subject, from the acts authorizing the construction of the Pennsylvania Canal to the general act of 1849 and its supplements, makes provision for crossing the lines of canals and railroads by the public. It was never intended that one highway should supersede or obstruct unnecessarily the other, and the rights of the public who use both were protected. It is here conceded, if defendant had taken this land for the purpose of directly facilitating navigation, the appropriation was authorized. But there is nothing in the act which limits the right to this particular purpose. "Whenever in the opinion of the board of directors, the same may be necessary for securing the safety of persons and property," there may be an appropriation. The legislature well knew that many of these improvements had been located at an early day in small towns and sparsely-settled neighborhoods; that the growth of towns into large cities, rural regions into villages and thickly-settled communities, would, in the interests of the public, often compel changes in the beds of canals and railroads; hence the enlargement of the right of eminent domain. It was not limited to the first appropriation. The purpose of this appropriation is thus stated by Thomas T. Wierman, engineer of defendant: "It was a public improvement to the city and community, and the canal as well. The straightening of the canal and railroad brought them close together, and permitted bridging them both, to avoid grade crossings at the streets, and this was the only way to effect that much-needed improvement. I consider the straightening of the canal and railroad through Harrisburg the greatest public improvement that has ever been made here for all interests,—that for the canal, railroad, and the public." There is not a word of evidence to contradict this. The master, in one part of his findings of fact, states: "The change was made, not for the purpose authorized by the statute, but for the purpose of giving to the railroad company the old bed of the canal." This is not a full statement of the facts. He should have gone further, and stated that for purpose of constructing overhead crossings for both canal and railroad, sufficient to accommodate safely the public, the canal and railroad company moved their beds further south. Defendant's purpose in moving was not to relinquish its old bed to the railroad company, although that was the effect of it; its purpose was to adopt a new bed, that the overhead crossings could, in capacity and convenience, be constructed over both. The mistake is in calling that a purpose which was a mere incident of the real

purpose,—the avoidance of grade crossings. We do not consider it material that the agreement with the city was made with the railroad company, and the change of bed was made at the suggestion of the railroad company. If the agreement had been expressly made with both companies to join in an improvement to provide overhead crossings, the right of the canal company to exercise its lawful corporate powers, as it did exercise them, would have been undoubted; but the fact that the railroad company directly made the agreement with the municipality does not render the corporate action of the canal company illegal. Defendant chose to aid the municipality and another private corporation in constructing a public improvement, which it could, in the absence of the other private corporation, have agreed with the city to construct as it was constructed. This in no sense proves it was not acting by authority of the statute from which its power was derived.

It is argued by appellee's counsel that a relocation of the canal bed was in the discretion of the board of directors, under the act, and is not reviewable by the courts. This is stating the proposition too broadly. It is a settled rule that courts of equity hesitate to, and generally will not, interfere with acts involving in their performance scientific and professional judgment. It is just as well settled, however, that they will interfere if a discretionary act involving scientific skill is arbitrarily or unnecessarily exercised, to the injury of the property of another. But it is a waste of time to discuss further this proposition, because there is no evidence tending to show the plan adopted to construct the overhead crossings was not good engineering, and was not, in the honest judgment of the directors, the best to accomplish the purpose.

The court below, on a balancing of the injuries and benefits that would result from an injunction, concluded to refuse it, because such refusal would occasion less hardship than granting it. In support of this principle, many authorities are cited. None of the cases warrant the adoption of the rule as a basis for such decree in this case. The master's findings of fact place in plaintiff a clear legal right to the property taken, and his conclusions of law are that the taking by defendant was wholly without authority. If these conclusions be correct, no injury, in the legal sense of that term, could result to defendant from restoring to plaintiff her right. The wrongdoer, although he may be inconvenienced, can never be injured by being compelled to make restitution. Where a case is doubtful on its facts, or the injured party has, in some particulars, condoned the wrong, or has not been very vigilant in asserting his right, or the injury complained of be a trifling annoyance, and such like cases, the balance of injury principle may be invoked to stay the hand of the chancellor. But all our Pennsylvania cases hold that an undoubted

substantial injury to a right of property will be redressed in equity, where there is no adequate remedy at law, without regard to the inconvenience or damage the wrongdoer may sustain. *Pennsylvania Lead Co.'s Appeal*, 96 Pa. St. 116; *Price v. Grantz*, 118 Pa. St. 402, 11 Atl. 794; *Walters v. McElroy*, 151 Pa. St. 549, 25 Atl. 125; *Evans v. Fertilizing Co.*, 160 Pa. St. 209, 28 Atl. 702. Here the defendant appropriated $1\frac{1}{2}$ acres of plaintiff's land. If this was unauthorized under its right of eminent domain, the property damage was of that character, and the wrong of that nature, that equity was bound to interfere. We do not therefore concur with the court below in its reason for dismissing the bill. We are of the opinion, however, that defendant had full power, under the authority granted it by the commonwealth, to straighten and change its canal bed, as here proven, for the purpose here clearly shown. Therefore the decree is affirmed.

(176 Pa. St. 181)

RICHARDS v. WILLARD.

(Supreme Court of Pennsylvania. July 15, 1896.)

MALPRACTICE—SUFFICIENCY OF EVIDENCE—INSTRUCTIONS—NEGLECT—PROVINCE OF JURY—STATEMENT OF TESTIMONY—CONTRIBUTORY NEGLIGENCE.

1. In an action for malpractice, where the plaintiff claimed that his leg had been fractured just above the ankle, and that defendant had treated it for sprain, the defendant and two other surgeons, who examined the injury within a few hours after it occurred, testified that there was no fracture, but sprain and concussion. Two surgeons who examined the leg some days after the injury testified that there was a fracture, but it was shown by other testimony that other known causes would have produced the appearance on which the witnesses predicated fracture. Experts, from examinations made a year or more after the injury, denied the existence of any break, and one who treated the plaintiff laid open the leg to the bone, finding no fracture, but did find tuberculosis. It also appeared that the plaintiff had left the hospital 12 days after the accident, of his own accord, and traveled several hundred miles, going without medical treatment for five days, as the result of which his injury was greatly aggravated. *Held* that, as the plaintiff's right of recovery depended on the existence of a fracture, a charge which failed to state the issue, and to call attention to the contradictions in the testimony, the nature of the expert testimony, its value and applicability, was wholly inadequate and erroneous.

2. An instruction that if the plaintiff, by his negligence in leaving the hospital, contributed to the existing injuries, his right to recovery was limited to the damage suffered before leaving the hospital, was erroneous; it being impossible to say what would have been the result of the treatment given by defendant if plaintiff had remained in the hospital.

3. Where plaintiff left the hospital without the consent of his physician, in the absence of testimony to show that the plaintiff had asked advice of the defendant as to his leaving the hospital, and as to the medical treatment necessary after leaving, it was error to charge that if the plaintiff was wrongfully advised by the defendant as to the nature of the injury, and did not know the extent of such injury, then plaintiff is not guilty of contributory negligence,

unless he knew, or had reason to know, that travel and absence of medical treatment would endanger his condition,—the defendant not being liable for plaintiff's voluntary acts in leaving the hospital.

4. In the absence of testimony tending to show that plaintiff informed the defendant he was going to leave the hospital, and that defendant had made no objections, an instruction as to the duty of defendant to advise plaintiff relative to his leaving was erroneously given.

5. It was proper to leave to the jury the question whether the nurse at the hospital informed the plaintiff what the physician had said relative to his leaving the hospital.

6. The question of negligence being properly one for the jury, instructions which tend to determine what was and what was not negligence were properly refused.

7. While it is technical error for the court to quote testimony incorrectly, it is not ground for reversal, in the absence of anything to show prejudice.

8. Where the plaintiff claimed that his leg had been fractured, and that defendant had treated it for sprain, it appeared that plaintiff had left the hospital without the consent of his physician and had traveled several hundred miles, going without medical treatment for five or six days, resulting in suppuration and tuberculosis of the bone. Experts testified that plaintiff's conduct alone was sufficient to produce the condition of the leg. *Held*, that the evidence was sufficient to warrant taking the case from the jury on the ground of contributory negligence.

Appeal from court of common pleas, Allegheny county.

Action for damages for malpractice, brought by John Richards against L. H. Willard. There was verdict for the plaintiff for \$12,000, which was reduced by the court to \$4,000, and judgment rendered for that amount. From this judgment, defendant appeals. Reversed.

W. B. Rodgers, for appellant. Wm. M. Hall, Jr., for appellee.

GREEN, J. This is a case of extraordinary and unusual character. The plaintiff claims damages against the defendant for negligent surgical treatment for an injury to his leg. He alleges that he had sustained a fracture of both bones of his leg at a short distance above the ankle joint, and was treated, not for a fracture, but for a sprain, and was thereby greatly injured. It is not claimed that the treatment he received was improper treatment for a sprain, but that it was entirely incorrect and inadequate treatment for a fracture. The defendant denies most positively that there was a fracture, and his testimony is supported by that of two other surgeons who saw and examined the plaintiff's leg on the day, and immediately after, the injury was sustained, and also a number of surgeons who examined it at subsequent times, and testified that in their opinion there never was a fracture. If there was no fracture, the plaintiff has no case. If the subsequent condition of suffering and illness of the plaintiff was produced in whole or in part by acts of contributory negligence on his part, he could not recover, and on both these points the court

so instructed the jury. The great controversy in the cause turned upon these two points, and especially upon the question whether or not there ever was a fracture. The singularity of the case arises upon the character of the testimony, and the conflict developed as to the great leading fact. The alleged fracture was declared by the plaintiff's surgical witnesses to be a compound fracture of both bones of the leg, the tibia and fibula, at a point about one and a half to two inches above the ankle joint. The fracture of the tibia, or shin bone, was by far the most important. One surgical witness for the plaintiff, Dr. Enfield, testified that he saw the plaintiff for the first time on December 23, 1890, at his office in Bedford,—the accident having occurred on December 5th, at Allegheny City,—and that he readily and in a very few minutes found a complete fracture of both bones. In the fracture of the tibia the lower portion of the bone projected up over the upper portion about half an inch, and made a distinct ridge, easily perceived by the eye, and, of course, by the touch. This was 18 days after the accident. One other surgical witness, Dr. Calhoun, was called in and saw the leg on January 23, 1891. He also testifies that he inserted his finger in a hole in the leg which had been produced by suppuration, and found the ends of broken bones overriding each other, and testified that there was a fracture of the tibia. He knew nothing about the fibula.

The foregoing was the whole of the original surgical testimony given by the plaintiff to establish the fact of fracture. Two other surgeons were examined by the plaintiff, but neither of them saw the leg until long after the accident, and they only testified as to general matters connected with or relating to fractures and treatment. Their testimony and that of Drs. Enfield and Calhoun constituted the whole of the plaintiff's surgical testimony. All of them, and all of the other surgical testimony in the case, establish that fractures of the tibia are most easily discovered. Generally they are directly visible to the eye without the help of manipulation, but by means of slight manipulation such fractures are detected without the slightest difficulty. The reason is that the tibia has very slight covering over it in the way of muscles, tissue, or flesh. The bone can be readily felt by the fingers over its whole length, and especially near the ankle. One of the surgeons, Dr. Hartmeyer, testifying upon this subject, and explaining to the jury why it would be easy to detect such a fracture, said: "Why, simply because the deformity in a fracture of that kind would be so great that to the naked eye of an experienced man the fact would reveal itself at once that the fracture existed, and by manipulating that leg I dare say that it would be impossible for any man under the sun that knows anything about anatomy in the first

place and surgery in the second place to make that mistake. It would be an utter impossibility." Dr. Enfield, the plaintiff's principal witness, was asked: "Q. Now, will you state what, in your experience, and from your knowledge of medical science, is true as to this point of the anatomy, the leg, in reference to the discovery of a fracture at this point? A. They can be discovered more readily than perhaps any other portion of the body. Q. Why is that? A. That is owing to the thin covering of the muscles over the parts, and owing to the fact that there is little swelling takes place in a fracture at this point. The tissues are compact, and not so full of cells, and you can usually by the guide of the bone,—especially the sharp spine that is along the tibia, as a guide,—you can usually discover the fracture in that bone, and there is almost always deformity at this point." There was abundant other testimony to the same effect.

Now, bearing in mind that the establishment of a fracture was an essential and fundamental condition of the plaintiff's right of recovery, it becomes necessary to recur somewhat to the testimony of the defendant. The accident happened at about noon on the 5th of December, 1890. The first surgeon who was called to see the plaintiff after the injury was Dr. McClelland. He said he made a careful examination of the leg in the usual manner,—“by manipulation and the ordinary means employed to make an examination by inspection and manipulation,”—and found that the patient was badly bruised, but there were no bones broken. Being asked, “Was there any fracture, doctor?” he replied, “There was no fracture.” He advised that the plaintiff be sent to the hospital, which was accordingly done. Dr. McClelland was recalled later, and said he had examined the plaintiff at the time of the second trial, which was in June, 1893, and had not seen him from the time of his first examination until then. He repeated that there was no fracture at the first examination, and he was then asked a long question, which described the fracture as testified to by Drs. Enfield and Calhoun, and was asked: “Q. Was there ever such a fracture as that on this man's leg? A. I would say not. Q. Will you tell the jury why you say that? A. I say that because there was no evidence of fracture when I saw him first, and I found no evidence of fracture when I examined him last.” The next surgeon who saw the plaintiff after the accident was Dr. Marshall, the resident surgeon at the hospital. He went with the ambulance and assisted to remove the patient to the hospital, first making an examination at the place where he found him. After he reached the hospital the patient was undressed and put to bed, and he then proceeded to make a full and thorough examination of the leg, by all the usual and well-known methods practiced by all surgeons in such cases. He compared the two

legs for shortness, and manipulated the limb with his hands, following the bones as far as he could. He then examined for crepitus, and then tried it for mobility, by taking hold of it by the heel and twisting it, holding the leg fixed. He was unable to find any evidence of fracture, and diagnosed the case as one of sprain and concussion, and treated it accordingly with hot compresses and hamamells extract to allay pain and reduce swelling and inflammation: About 4 o'clock the same afternoon Dr. Willard came in, and he also examined the patient, going over all the methods usual in such cases. No evidence of fracture was discovered, and the treatment for subduing inflammation was continued. The next day Dr. Willard called again, and made another and fuller examination, trying the leg in every way—by comparison for shortness, for crepitus, and mobility, and by tracing the spine of the tibia with his fingers—to see if any evidence of fracture could be discovered. No fracture was discovered, or any evidence of any, and the treatment was continued for sprain and concussion. Dr. Willard himself describes the method of his examination. He says: “The next examination was made, I think, a day or so afterwards, and then the examination was more thorough. I would take the leg in both hands, one hand at the heel and the other at the ankle joint, and make the ordinary manipulations. Q. Now, what were those? A. Well, it was from one side to the other, up and down. Those were the ordinary manipulations, in the first place to find out if there was any crepitation, and in the second place by putting it side by side we would see if there was a fracture. The portion of the bone, perhaps, could be felt by the finger. These are the manipulations,—taking this portion of the heel in my hand, and working it backward and forward in that manner, and then working it up and down so [explaining to the jury].” He had previously stated, in the other part of his examination, thus: “I then examined him by running my hands over the spine of the tibia and down the course of the fibula. Didn't make much motion. Compared one leg with the other, to see if there was any shortening. There was no apparent shortening at all.” He made several of these examinations while the patient was at the hospital,—four or five in all. He was asked: “Q. Well, doctor, what conclusion did you arrive at as regards this case? A. That there was no fracture.”

Now, there was not a particle of testimony in the case that this was not the usual, correct, proper, and sufficient method of examination, in ordinary use by all surgeons; and, so far as this subject is concerned, there was no testimony to the effect that this was incorrect practice in any degree. Three skilled, competent, and careful surgeons, in full practice, testified, after having seen and carefully examined the plaintiff, immediately after the accident and on succeeding days, that

there was no fracture of the leg. The treatment given to him was the proper and usual treatment if there was no fracture, and there was nothing in the testimony upon which a right of recovery could be based, except that there was a fracture in fact, which was not discovered by any one of these three surgeons, but was discovered by two other surgeons, the first of whom saw the patient for the first time 18 days after the accident, and the other of whom first saw him 48 days after that event.

On behalf of the defendant six other surgeons were examined, several of them of the largest and most extensive experience, thoroughly competent in every way, all of whom examined the plaintiff's leg at different times, and every one of whom testified that in his opinion the leg never was fractured, giving his reasons with much detail. Dr. Hartmeyer, one of these witnesses, was asked whether, judging from his examination of the leg, there had ever been a fracture, and he answered as follows: "A. From the evidence I find after careful examination during the last trial, I would say it never existed. Q. And, doctor, to what do you attribute the present condition of Mr. Richards' limb? A. The present condition, as I find the evidence there now, I would attribute to a high degree of inflammation, to caries, and a part of it due to the surgical interference subsequent to that; operative procedure, in other words. Q. Doctor, referring to the spine of the tibia on Mr. Richards' limb, I wish you would state whether you examined that closely. A. I did. Q. If there was a fracture of the tibia you might state whether it would be shown upon that bone. A. If there was a fracture as described, it most undoubtedly would be shown; it couldn't fail to be shown. Q. And did you make a special examination of the spine of the tibia with reference to that? A. I did. Q. Is there any evidence, doctor, that the spine of that tibia, or any portion of it, at a point about an inch and a half above the ankle joint, was ever cut off? A. No, sir; I found it intact." Dr. Hamilton, a surgeon of 40 years or more, and in the service of the Pennsylvania Railroad Company for over 30 years, and who had seen 6,000 or 7,000 cases of accidents to their men, testified that he had examined the plaintiff's leg three times, and, being asked whether there had been a fracture, said: "There is no evidence to me that he had a fracture at the time stated, nor of the kind referred to. I don't think he could have had such a fracture and have his limb present the appearance that it does at the present time." He then explained to the jury fully the reasons for his opinion,—among others, that he had followed the spine of the tibia down to the ankle bone, and it was perfect without any line of deformity, and that there was no evidence that the bone of the tibia had ever been thrown forward a quarter or a half of an inch. He also measured the legs and found them absolutely of the same length. Dr. Bu-

chanan, a surgeon of large experience, testified that he had examined the plaintiff's leg carefully, and found no evidence that there had ever been a fracture. He was asked: "Q. In your judgment was there ever such a fracture as detailed by his surgeons in his case? A. No, sir." Dr. Murdock, a surgeon for more than 40 years, with an enormous experience in the hospitals in the army all through the war, and in his private practice, testified that he had examined the plaintiff's leg very carefully, by feeling it, measuring it, and comparing it with the other leg; and, the fracture as described by the plaintiff's surgeons having been explained to him, said: "There is no evidence of there ever having been such a fracture." He said he measured the leg, and found no shortening in it; that he had run his finger down along the spine of the tibia, and found no prominence or depression at the place of the alleged fracture. Dr. King, a surgeon of 30 years' experience in the army and the hospitals and in his private practice, testified, and gave the results of his examination of the plaintiff's leg. He was asked: "Q. Well, doctor, from your examination of that wound, what is your opinion as to whether it ever was fractured or not, as described? A. I don't believe it was ever fractured." He explained the reasons for his opinion very fully to the jury. Dr. Dickson, a surgeon of 25 years' practice, very largely in the hospitals and on railroads, said he had examined the plaintiff's leg, and was asked: "Q. And I wish you would state whether there was any fracture of the tibia and fibula, as stated? A. I can see no evidence of that limb having been fractured at any time." In addition to all this, Dr. La Place, who had treated the patient's leg after Drs. Enfield and Calhoun were unable to help him, said the plaintiff had tuberculosis of the tibia, and that he treated him successfully for that disease. He also said he had found no evidence that there had been a fracture of the limb. This witness had been examined for the plaintiff; but, as his testimony was unfavorable, he was examined by the defendant on the second trial. He was asked: "Q. Did I understand that there was no evidence of a fracture? A. None. If there had been I would have seen it, if it could be seen. Q. You don't know whether there was a fracture there or not? A. I can't say with absolute certainty, but I say this: that if there had been a fracture, it surely would have shown." A vast amount of confirmatory evidence was given in the course of the very long examination of the surgical witnesses, but it is too cumbersome to repeat in detail.

It is sufficient to say the great preponderance of the testimony, and that which was best informed and most reliable, tended to show that there never was a fracture of the limb, such as was testified to by Drs. Enfield and Calhoun. The most experienced of the surgeons easily accounted for the conditions to which those witnesses testified. Dr. Ham-

Ilton said: "I think the action of the patient in leaving the hospital was very injurious to his limb, and was the cause of his condition at present." He was asked: "Q. Doctor, where there has been an injury to a leg in the region of the ankle, followed in a few days by severe inflammation, extending in and around the joint, which leg is examined by a surgeon at the end of three weeks from the accident, at which time the periosteum is carried away or roughened, and the bone roughened, and small pieces of bone having come away, would a physician be liable to be mistaken as to his diagnosis as to that being a case of fracture? A. He might be. He would be much more likely to be mistaken in his diagnosis than for the man to have gone home in that condition." Dr. Murdock, being asked whether he would not expect Drs. Enfield and Calhoun to be correct in their diagnosis, because they had examined the leg recently after the accident, replied: "I would expect them to be correct, and I would say that Dr. Enfield was correct, if I hadn't examined this limb since, and found that he was mistaken." He was asked: "Q. Well, suppose he got his finger into the wound, would the disease, tuberculosis, be likely to develop such a state of affairs as to lead him to suppose that there was a fracture, when no fracture existed? A. Yes. Q. How would that be? A. Well, if he got his finger into a bone that was denuded of its periosteum and in which caries was going on, it would convey to his finger the same sensation, or very nearly the same sensation, that the ends of the bone would after having been rounded off by some little period of time. The same sensation would be conveyed to his finger, and also, if a probe was put in, the same sensation would be conveyed to the end of the probe as in the case of fracture, and in the case of disease he wouldn't be able to tell the difference." It must be remembered that Dr. Enfield never effected any cure of the plaintiff's limb, although he treated him for fracture. He continued to treat him for about a year. He said: "Well, he failed to improve after Dr. Calhoun and I had operated on him several times. I sent him to Philadelphia to the hospital, and gave him a letter to Dr. Pancoast, describing his case." It was at this time that he came under the treatment of Dr. La Place, who said that he discovered no evidence of fracture, and treated him successfully for tuberculosis of the bone, which was the disease which he said the plaintiff really had. It must also be remembered that nobody has ever actually seen this alleged fracture. Neither Dr. Enfield nor Dr. Calhoun ever opened the leg, and obtained an actual sight of it. So far as their testimony goes, it was simply their opinion that there was a fracture. But Dr. La Place did open the leg down to the bone, and cut away a considerable quantity of decayed bone, and he said there was no evidence of fracture.

From the foregoing review of the testimony, it is perfectly manifest that, so far as the plaintiff's theory of the case is concerned, his right of recovery depended upon whether there ever was an actual fracture of the leg. If there was not, there is not a spark of testimony in the case upon which a recovery could be based. This being so, the question arises: Was the case sufficiently presented to the jury in the charge of the learned court below to enable them to appreciate the real matters of contention, and to intelligently decide the cause on its facts? In the statement of mere general principles, and of the duties of the parties, respectively, as to the burden of proof, and the rule as to contributory negligence, the charge was correct. But whether it was adequate, in view of the precise character of the controversy and of the state of the testimony, is another question. For instance, it is at once apparent that there was a very severe and fundamental contradiction in the testimony of the witnesses upon the vital question of fracture. Two surgical witnesses, testifying from actual examination, declared that there was an actual compound fracture,—one of both bones of the leg, and the other of the tibia. But, on the other hand, three surgical witnesses for the defendant, testifying, also, from an earlier and more complete and thorough examination, several times repeated, declared most positively and emphatically that there was no fracture whatever of either bone. Two experts, who examined the leg a year or more later, testified that in their opinion there had been a fracture. But, on the other hand, nine experts, who also made examinations at the later date, declared that in their opinion there was not, and never had been, a fracture. This included the defendant and Dr. McClelland. When the testimony of the latter is examined critically, it is found to be much more full, more detailed, more specific, accompanied by more comprehensive reasoning, and to have been given, at least as to some of them, by gentlemen of far greater experience and means of observation, than was possessed by any of the plaintiff's experts. And all this is followed by the testimony of one witness, who was examined at first on behalf of the plaintiff and then for the defendant, and who fully sustains the views of the defendant's experts, and testifies, also, that the plaintiff was affected by an independent disease which accounts for all the symptoms and conditions.

Upon reading the charge in its entirety, we find it does not contain a solitary reference to the fact that there was any contradiction in the testimony of the witnesses, or that there was any opposition of views among the surgical experts, nor any reference to the weight of the testimony on the two sides, nor to the character of it. There is no explanation of it as being expert testimony, nor as to what that kind of testimony is, or what effect may or should be given to

it in determining the case. Nor is there any statement or explanation as to how the jury should reconcile the contradictions if they could, or, if they could not, then how they should regard it, or act in relation to it. As the fate of the case in the hands of the jury absolutely depended upon the surgical testimony, there certainly should have been instructions upon that subject, so as to enlighten the jury as to their duty in regard to it. Then, too, there should have been a presentation of just what the issue was,—a statement of the matter of fact upon which the case turned; as, for instance, that the question of fact which they were to consider was whether there was a fracture of the leg, in point of fact, or not, and also whether the treatment administered by the defendant to the plaintiff was in accordance with the usual and ordinary treatment practiced by competent surgeons in such cases. Instead of this, the chief tenor of the charge was that the jury should determine generally whether the defendant was negligent in his treatment of the case, and, while they were told they should determine whether there was a fracture, there was no explanation as to how that question arose under the testimony, and in what way they were to consider or apply the testimony. As the actual fracture was not seen, it was only a matter of opinion whether it existed at all, and the value of the particular testimony depended upon the competency of the witness to form a reliable opinion, upon the extent and character of the examination he made, upon the reasons given by him in support of his opinion, and upon their judgment as to the weight and character of the testimony submitted on both sides in support of the respective contentions. All this should have been explained to the jury, with suitable comments, and instructions sufficient at least to get them on the right track of inquiry and deliberation. The case is peculiar. It is nothing like cases in which mere facts or events of actual occurrence are described, or even the conduct and declarations of parties, but where the opinions of witnesses as to whether a given condition or state of facts exists are very largely, almost entirely, to be depended upon. In the case of *Tietz v. Traction Co.*, 169 Pa. St. 518, 32 Atl. 583, we held that a charge is inadequate which does not fairly present the whole case to the jury, with a clear statement of the rules of law applicable to the questions involved. We think the charge was not an adequate presentation of the case to the jury, and therefore sustain the nineteenth assignment of error.

We think that the eighteenth assignment is also sustained. The part of the charge complained of here was an attempt to distinguish between the injury to the plaintiff, supposing he was negligently treated up to the time of his leaving the hospital, and the injury which resulted from his own negligence

in leaving the hospital when he did, and his subsequently going to Wilkinsburg, remaining there five days without any treatment, and then traveling to Bedford, upward of 200 miles distant, for further treatment. That the plaintiff's act of leaving the hospital, at the time he did and in the condition he was then, was an act of negligence on his part, cannot be questioned. Now, his subsequent conduct in traveling to Wilkinsburg and Bedford, if it resulted in the severe consequences that followed, was still more negligent, according to the universal testimony of all the surgeons. Whether he would have been cured if he had remained at the hospital a longer time, as Dr. Marshall testified he would have been, cannot now be known, because of his own voluntary act of leaving. It is impossible, therefore, to distinguish between the consequences which resulted from his ultimate act of leaving, and those which might have resulted if he had remained. He might have been cured if he had remained, or he might not; and it is not possible now to determine that question. But that impossibility results from his own action, and therefore no distinction can be made, as the source of a right of action, between the consequences which might have happened had he remained, and the consequences which did happen after his departure. The idea of the charge was that, if the plaintiff was negligent after leaving, and therefore could not recover, he still could recover for his suffering and pain while he was at the hospital. The answer to that is that it is not possible to determine that question, because, notwithstanding his subsequent sufferings, he might have recovered if he had remained. Now, as to his subsequent contributory negligence, the evidence is simply overwhelming, and is really not contradicted. Nearly all the surgeons were inquired of as to that, and they all concurred in their views. Even Dr. Enfield admitted that his traveling from the hospital to Wilkinsburg, and from there to Bedford, would have a very bad effect upon the patient. He was asked, after describing in the question the journey and the use of the leg, and the effect upon it: "Q. And the bones would cut through the flesh? A. They might. Q. Well, they did it, didn't they? A. Well, there was a hole there. Q. And wouldn't everything you saw in relation to that man's condition, as he came to you at Bedford, be explainable upon the idea that, in this traveling and this motion, the fragments had cut themselves through the skin? A. It might have produced the result; yes, sir. Q. And didn't you swear, on the last trial of this case: 'The bones would cut as Richards was walking around and moving the limb. The ends of the bones would cut as the muscles would contract, would draw apart and injure the soft parts, and open the skin to the outside, by which germs would get in there and produce the condition

I found him in'? A. Yes, sir; that is correct. * * * Q. Could fragments of the bone cut their way through the flesh in less than six days, and hasten blood poisoning? A. Yes, sir. Q. Was the inflamed condition of the wound, the death of the bone, and blood poisoning attributable to inflammation, caused by the moving of his limb about, laceration and abscesses, and entrance of air to the injury? A. I think so; yes, sir." Dr. Hartmeyer was asked a long question, which described the movements of the plaintiff after leaving the hospital, as testified by himself, and at the conclusion he was asked: "Did the action of the plaintiff contribute to produce his condition, as found by the doctors on his arrival at Bedford, and subsequent thereto? A. Well, most emphatically. If the man only had an injured joint, if he had an inflammatory action there at all, that would be, I consider, almost suicidal for a man to attempt anything of that kind; and, if a fracture existed, as a matter of course, it would be a great deal worse. Q. What would you say as to the possibility of a man making a trip, and making the movements as I have described them? A. What do you calculate in the possibility, fracture as described in this case? Q. Yes. A. Well, I don't know anything about a man's physical endurance, but it doesn't seem possible to me that a human being would be able to undertake an action of that kind." The witness then explained at length the reasons why it could not be done. Dr. Hamilton was asked the same long question as Dr. Hartmeyer, and his answer was: "Assuming that he had that condition of limb, and that he survived, and did all those things, it is a wonder he is alive." And again: "I think the action of the patient in leaving the hospital was very injurious to his limb, and was the cause of his condition at present. I can't think otherwise." He further testified that he did not believe the plaintiff had any fracture, because he could not possibly make such a journey if he had. Dr. McClelland was asked the same question, concluding with the inquiry whether the journey contributed to the condition in which the plaintiff was when he reached Bedford, and his reply was: "My opinion would be that that would be entirely sufficient to account for the conditions that were found by Dr. Enfield at the end of the journey." He gave his reasons in detail, and further testified that he did not believe there was any fracture, because, if there was, the plaintiff could not have made such a journey. Dr. Buchanan was asked the same question, and made a similar answer. Dr. Murdock was asked the same question, and, in reply to that part of it which inquired whether the action of the plaintiff contributed to produce the condition as found by Dr. Enfield, on the arrival of the plaintiff at Bedford, he answered, "It certainly would, sir." He also said there was no fracture,

because it would have been utterly impossible to have made the journey if the plaintiff had such a fracture at the time. Dr. King also said, in reply to the same question: "Yes, sir; the travel would do that." When asked to give his reasons, he said: "Well, if he had a fracture without a splint on, the movement of the fracture caused by his traveling would so irritate the surrounding parts that inflammation would set up, and the probability is that, owing to the proximity of the artery of the foot to these fragments, admitting that it was a fracture, the sharp edges of those fragments would probably cut off the artery, or at least endanger it. At any rate, it would get up such an inflammation that the foot would be gangrenous. It would produce gangrene of the foot, provided he went through all you detailed." Dr. Dickson was asked the same question, concluding: "Did the action of the plaintiff, as stated, contribute to produce his condition, as found by the doctor on his arrival at Bedford and subsequent thereto, assuming that the plaintiff did take this trip, and was able to take it? A. Most undoubtedly, the action of the party would be contributory to the condition." Against all this formidable array of testimony there was not a single fact or opinion given in evidence. It was entirely uncontradicted. It was manifestly impossible to set up a dividing line at the time the plaintiff left the hospital, and attempt to separate those consequences of alleged negligent treatment of the defendant, which occurred prior to the plaintiff's leaving the hospital, from the ulterior consequences resulting from the plaintiff's contributory negligence after he left. It is impossible to set up a standard, because it is impossible to know what would have been the result of the defendant's treatment if the plaintiff had remained at the hospital. The eighteenth assignment is sustained. The same reasoning applies to the fifteenth assignment, which is sustained.

The sixteenth assignment is sustained, because there is no evidence in the case which raises such a question.

The fourteenth assignment is not sustained, because the court was right in leaving the whole subject of what was said by the nurse to the jury. The nurse did not say, explicitly, that she told the plaintiff what reply the doctor had made as to the plaintiff's leaving the hospital when he did. She implied that she repeated the doctor's answer to the plaintiff, but she did not say so, and she was not asked the distinct question whether she did or not. As to the eleventh and thirteenth assignments, it is not correct to argue that the plaintiff did not say that the doctor told him he could go home, because he did so testify. In his testimony, however, he did not say that the doctor told him he was cured, and in that respect the court was in error. Technically the court was in error in not stating the language of

the witness with precision, but the more serious error was in not stating that the doctor denied having said in any manner or in any words that the plaintiff might leave. If there were no other reason for reversing, we would not reverse on this ground alone; but, as there was technical error in what the court did say, we sustain these assignments. We do not sustain the second assignment, because we think the answer of the court to the defendant's second point was substantially correct. We do not sustain the fourth assignment for the same reason. The matter of the fifth assignment was for the jury, and therefore we cannot sustain it. The defendant was not entitled to the affirmance of his sixth point, simply because Miss Blosser did not distinctly say that she repeated to the plaintiff the words of the defendant, to wit, that if he left the hospital he did so on his own responsibility. She was not asked the question distinctly whether she did or not. She did say that Dr. Willard said those words to her, but omitted to say that she repeated them to the plaintiff, and therefore the defendant's sixth point could not be affirmed. The answer to the plaintiff's third point was of no consequence, and, moreover, it was correct in law, and we cannot sustain the seventh assignment.

We think the plaintiff must be held responsible for the consequences of omitting to have medical treatment after he left the hospital, and for his travel to Wilkinsburg and Bedford. He did not advise with the defendant as to those matters, and he cannot hold the defendant responsible for his own voluntary acts in relation thereto. The answer to the plaintiff's fifth point, therefore, broadly affirming it as it stood, was erroneous, and hence we sustain the eighth assignment. The ninth and tenth assignments are not sustained, nor the twelfth, because they are without merit. We think the portion of the charge complained of in the thirteenth assignment was not erroneous, and therefore that assignment is not sustained. The seventeenth, twentieth, twenty-first, twenty-second, and twenty-third assignments are not sustained. This disposes of all the assignments except the first and third.

After a painstaking, careful, and minute study of the testimony in this case, we are constrained to say that we regard the verdict of the jury as an outrage upon the administration of justice. There was no aspect of the testimony upon which it could be justified for any such amount, in any event. The plaintiff's case, at the very best, was of the most doubtful character. No verdict could be sustained at all, except by striking down the testimony of 10 entirely competent, disinterested witnesses, and accepting in its place the testimony of two witnesses who, whatever may be their personal merits, did not possess a tithe of the

experience or means of observation enjoyed by the defendant's witnesses. As to three of these, who personally saw and carefully and frequently examined the plaintiff's leg immediately after the accident, when it could be best observed and considered, their testimony was absolute and positive that there was no fracture. They were all disinterested, entirely capable, and, two of them at least, having a very large experience in this class of cases, and there is no reason discoverable in the testimony why their judgment and their evidence should be rejected, in order to give place to the opposing testimony of two of the plaintiff's witnesses, one of whom did not see the patient until 18 days after the accident, and the other not until 48 days had elapsed. In the meantime the plaintiff's conduct and actions were such that even a fracture might have supervened on that account; but the most experienced and competent of the defendant's witnesses were of opinion, and so testified, that every condition of the leg as seen by Dr. Enfield at Bedford could easily be accounted for by the conduct of the plaintiff after he left the hospital. On the subject of the plaintiff's contributory negligence in this regard there was no disputed testimony. It was established by all the evidence in the case, including that of the plaintiff's witness, Dr. Enfield. No opinion of any witness was given to the contrary, and it was therefore an undisputed fact in the case. The learned court below very properly charged the jury that, if the plaintiff's conduct was such, after leaving the hospital, as to contribute to his condition, he could not recover for such consequences as happened after he left the hospital. But, the evidence being entirely undisputed on that subject, it must be regarded as establishing the fact of contributory negligence on the part of the plaintiff, and hence the first and third points of the defendant should have been affirmed, and the case withdrawn from the jury. The learned court showed its appreciation of the verdict by promptly striking down two-thirds of its amount, and might with still greater propriety have set the verdict aside altogether, because of its being against the law and the evidence, and grossly excessive in amount.

It must not be overlooked that the medical and surgical service rendered by the defendant to the plaintiff was entirely gratuitous, the defendant receiving therefor no compensation of any kind. For many years Dr. Willard had been rendering such service to the hospital to which the plaintiff was brought after receiving his injury. He was one of a corps of physicians who, from motives of benevolence and charity, contribute, as they do in many other cities and towns, their time, their skill, their labor, and their most valuable and humane service in relief

of the sickness and suffering of their race. If such gentlemen are to be harassed with actions for damages when they do not happen to cure a patient, and are to incur the hazard of having their estates swept away from them by the verdicts of irresponsible juries, who, caring nothing for law, nothing for evidence, nothing for justice, nothing for the plain teachings of common sense, choose to gratify their prejudices or their passions by plundering their fellow citizens in the forms of law, it may well be doubted whether our hospitals and other charitable institutions will be able to obtain the gratuitous and valuable service of these unselfish and charitable men. It is much more than probable that, if this plaintiff had been content to remain at the hospital a week or two longer, he would have been cured of his hurt. Because he would not submit to such a reasonable detention, he apparently brought upon himself all his subsequent sufferings. If he chooses to take such risks, he must take the consequences himself. The plain truth is that this plaintiff was probably afflicted with a tendency to tuberculosis, and when he received his injury that tendency became developed in the bones of his leg, and the disease called "tuberculosis of the bone" fastened upon him at the seat of the injury. Dr. La Place held to this theory, and treated him for it with success. When this witness testified for the plaintiff, he was asked: "Q. Were there any broken bones in the limb? Had there been a fracture? A. No evidence of it at the time of my examination." Continuing, he said: "No particular bone was injured, so far as was evidenced at the time of my examination. At that time I discovered a tuberculous inflammation, involving the totality of the ankle joint, extending into the substance of the lower end of the tibia and astragalus, disintegrating these, and causing small pieces of bone to drop off from them, with the rest of the products of inflammation." On the second trial he testified: "What we mean by tuberculosis arthritis is this: There is such a disease as tuberculosis that is very widely disseminated in nature. Sometime it develops in people's lungs, and that is called consumption; and when it develops in a man's ankle it is called a tuberculous arthritis. Now, in this patient's case he had all the predisposition that a patient has to develop consumption; but, inasmuch as he injured his ankle, that spot—that is, the ankle—became the weakest spot in his body, and, having the predisposition to develop tuberculosis, he developed tuberculosis of the ankle joint. * * * What I had there was tuberculous disease. There was no evidence of the fracture. There was no play of the bones at all. Everything was united and solid, and I didn't care whether he had had a fracture or not. That didn't enter into the case. He had tuberculosis of the joint.

He came there to be treated for tuberculosis of the joint, and that I did for him." The foregoing theory is the only one that will satisfy all the facts in evidence. Judgment reversed.

(176 Pa. St. 559)

PENNSYLVANIA R. CO. v. GREENSBURG,
J. & P. ST. RY. CO.

SAME v. GREENSBURG & H. E. ST.
RY. CO.

(Supreme Court of Pennsylvania. July 15,
1896.)

STREET—DEDICATION AND ACCEPTANCE—STREET
RAILWAYS—CONSTRUCTION OF COUNTRY
ROADS—WHO MAY OBJECT.

1. The owners of the fee of certain land dedicated it to a borough for an extension of a street which crossed side tracks of a railroad located on land the fee of which was in the same persons. The railroad company maintained causeways across its tracks, and acquiesced in the uninterrupted use of the land as a street by the public five or six years, during which time the public money was spent on the street, and it was kept in repair by such borough. *Held*, that such extension was a street.

2. A railroad company constructed and paid for an overhead bridge at a street crossing. The contract with the borough showed that it was constructed as a part of the public highway, and was to be maintained as such by the borough; and provided that the borough should, in consideration of such erection, cause the grade crossing over the railroad at a certain avenue to be vacated, or, failing to do so, should pay the road the cost of the bridge. *Held*, that the railroad company had no title to the bridge.

3. Acts May 14, 1889 (P. L. 211), does not limit corporations chartered under it to the right to build passenger railways on "streets" properly so called, but authorizes the building of such railways through boroughs, and over township or country roads.

4. The charter of a street passenger railway company, granted under Acts May 14, 1889 (P. L. 211), covered the route on which the road was built, and it had the consent of the local authorities, of all the owners of property along the roads occupied, and of those through whose property its line passed. *Held*, that a railroad company whose tracks were crossed by such street railway, and which owned no land abutting on the streets or roads occupied by such passenger railway, could not dispute the passenger railway company's rights to construct and operate its road over such streets and roads.

5. But where such passenger railway passed over an overhead bridge which was not built originally for use by a street passenger railway, and which passed over such railroad company's tracks, the railroad company was entitled to be protected from the danger to it and its passengers arising from the use of the bridge by the street-railroad company.

Appeals from court of common pleas, Westmoreland county.

Two actions, one by the Pennsylvania Railroad Company against the Greensburg, Jeannette & Pittsburgh Street-Railway Company, and the other by the same plaintiff against the Greensburg & Hempfield Electric Street-Railway Company, for injunctions. From judgments in favor of defendants, plaintiff appeals. Dismissed.

The opinion of the court of common pleas is as follows (McConnell, J.):

"The affidavits filed on the granting of the preliminary injunction in this case set forth, inter alia, as follows: 'That in the borough of Jeannette two branch tracks of the said Pennsylvania Railroad Company are constructed from a point west of the Seventh street overhead bridge in said borough in a southerly direction to various manufacturing industries, and that said branch tracks cross a driveway known as "Clay Avenue Extension" in said borough, the said Clay Avenue Extension never having been formally and legally opened as a street of said borough. That the said Greensburg & Hempfield Electric Street-Railway Company and the Greensburg, Jeannette & Pittsburgh Street-Railway Company, defendants herein, are about to break said tracks, with the intention of placing therein crossing frogs to be used by the said electric railway company in the movement of its cars to and fro across the said branch of the Pennsylvania Railroad Company at grade.' The contention of the complainant is that the existence of the above-recited facts demonstrates the illegality of the proposed act of the respondent, for it is said the respondent is only authorized, if it has any authority at all, to occupy the public streets, and that Clay Avenue Extension is not a public street. If the facts recited exist, the law deducible from them is as contended for by complainant. The testimony taken bears principally upon the question of whether the facts exist as above stated.

"Finding of Facts.

"Without forestating what a full hearing may ultimately show to be the facts of the case, it now fairly appears from the evidence before the court that the main line of the Pennsylvania Railroad passes through the borough of Jeannette. South of the main line of said railroad in the borough of Jeannette are located the factories, warehouses, stockhouses, etc., of the Chambers & McKee Glass Company. From a point west of the Seventh street overhead bridge spanning the main line of the railroad two sidings or branch tracks are constructed, which extend to the factories, warehouses, stockhouses, etc., of the Chambers & McKee Glass Company. These sidings are from fifteen hundred to eighteen hundred feet in length, and are used by the railroad in shipping supplies to, and conveying their product from, the works aforesaid. These sidings intersect what is called 'Clay Avenue Extension,'—the driveway, as complainant designates it; the public street of the borough of Jeannette, as the respondents designate it. On this Clay Avenue Extension the Greensburg, Jeannette & Pittsburgh Street-Railway Company has laid its track with the permission of the borough of Jeannette, and was about to break the track of the railroad company, and to place therein such frogs and

other devices as would enable it to cross at grade, when it was stopped by the service of the injunction in this case. In 1887 or 1888 the land now occupied by the Chambers & McKee Glass Company's works, together with other land, then constituting one tract with it, was bought by Capt. D. Z. Brickell, vice president of said company. He conveyed, before any work was done in the constructing of the works, to Hartuppee, who in turn divided it into three parts, and conveyed to the Chambers & McKee Company the portion on which their works are located, and which also included the land now traversed by Clay Avenue Extension. The construction of the factories commenced shortly after this, and the sidings were constructed about the same time, and were made use of during the process of construction of the works. Prior to the erection of the works, a township road (the borough of Jeannette was not then incorporated) traversed the ground now occupied by the buildings. This road was never vacated by any proceeding in court, but a part of the works was erected over it. This road ran parallel, or nearly so, with the Pennsylvania Railroad, and was the only one by which people from Penn and points west of Jeannette reached the latter point. After the township road was closed up, the public for a short time did not follow any well-defined line of travel, but traveled the vacant lots then surrounding the works in whatever way they found to be most convenient. The inconvenience resulting from the closing of the public road led certain citizens residing in the western end of the town of Jeannette to take concerted action for their relief. As a result of their negotiations with the Chambers & McKee Company, the said company agreed to dedicate to public use a thirty-foot street to supply the place of the public road which had been closed up. In order that this proposed street might reach the point aimed at, it became necessary for the citizens to supplement the right thus given by the Chambers & McKee Company by purchasing a thirty-foot lot from one Peter Gordon. This was done, and the title thereto was afterwards made to the borough of Jeannette. The two acquisitions together constitute what is called 'Clay Avenue Extension.' Chambers & McKee graded this street. It crossed the switches of the Pennsylvania Railroad Company at grade. Crossing plank were put in, and Clay Avenue Extension has been continuously used ever since as a public street. It, in fact, is the only thoroughfare through which public travel coming up the valley from Penn and points west of Jeannette reach the town last named. The exact time when Clay Avenue Extension was opened up to public use does not distinctly appear. An ordinance was passed by the council of Jeannette and signed by the burgess on the 18th of July, 1890, purporting to make Clay Avenue Extension one of the public streets of the borough. It was opened up to pub-

lic travel probably in the fall of that same year. The borough has maintained it at public expense continuously since its opening. The public user of it has been obvious and notorious, and without the let or hindrance of any one. Both sidings of the complainant company were there and in use prior to the opening of Clay Avenue Extension, and, although not distinctly appearing from the evidence, it is nevertheless fairly inferable from the testimony of one of complainant's witnesses that the crossings were put in by the railroad company. It does not appear that there were ever any viewers appointed to assess damages. It does not appear whether any damages were ever claimed by the railroad company, or whether it ever released damages for the crossing of its switches by Clay Avenue Extension. It does not appear whether or not the railroad company had any notice of the proposed adoption of the ordinance of July 18, 1890. The borough of Jeannette was incorporated on the 7th of June, 1889, pursuant to the provisions of the general borough act, and Clay Avenue Extension lies wholly within its limits. At the time of locating the switches of the Pennsylvania Railroad across the land now traversed by Clay Avenue Extension no written agreement was entered into with the Chambers & McKee Glass Company, the then owners of said land. In 1895 (September 23d) an agreement was entered into by the Chambers & McKee Glass Company of the first part, and the Pennsylvania Railroad Company of the second part, wherein the right of the railroad company to construct and maintain the western switch, and the extent of the user of it, is distinctly defined. By its terms it is provided that the railroad company has the privilege (revocable, as stated below) of constructing, maintaining, and operating said siding on the glass company's land on the location as shown on the blue print attached (on which attached blue print Clay Avenue Extension and its intersection with said siding are distinctly set out and marked), for the purpose of loading and unloading cars, and that said company will not use said siding for any other purpose, and will not permit any other person or persons to use the same for any purpose, whatsoever. This siding is to be kept in repair at the expense of the railroad company. The glass company has the right to terminate the right and privilege given to the railroad company at any time by giving it ninety days' notice of its intention so to do, and the railroad company is then forthwith to remove its property from the property of the glass company. The glass company claims that the railroad company is only entitled to a similar easement for the eastern siding, while the railroad company claims that by an oral agreement made at the time of its construction a conveyance in fee was to be given for it. That dispute is pending and undetermined by the parties to it.

"No very serious dispute is now manifest about the existence of the foregoing facts, but counsel for the railroad company contend that they show that Clay Avenue Extension is not a public street of the borough of Jeannette, and that, therefore, the attempted occupation of it by the trolley company is illegal, and without lawful warrant, while counsel for the latter company contend that they show that Clay Avenue Extension is a public street of said municipality, and that, therefore, it has the right to occupy said street, and to cross complainant's sidings laid therein, inasmuch as the act of assembly under which the trolley company is incorporated has provided that it shall have the right to use the street, with the consent of the local authorities, and 'to cross at grade, diagonally or transversely, any railroad operated by steam or otherwise.'

"Conclusions of Law and Opinion.

"For the purposes of this case as it now presents itself, we conclude that Clay Avenue Extension is a public street. The reasons and authorities which we think compel that conclusion of law, from the foregoing facts, are as follows:

"In order that a way may become a public street it must have been dedicated to public use. But this can as effectually be brought about by a common-law dedication as by the procedure under our statutes. Both forms are valid, and they may supplement each other. Dedications of lands to public uses are divisible according to the authorities into two classes: (1) Statutory dedications; (2) common-law dedications. Statutory dedications are made, and only can be made, in strict compliance with the statute, and this compliance will dispense with the necessity of any assent or acceptance on the part of the public. Such a dedication vests an estate in the public by conveyance or grant. In common-law dedication there is no express grant to a grantee upon consideration, but it operates by way of an estoppel in pais of the owner, rather than by a transfer of an interest in the land. But the application of the doctrine of estoppel in pais to the principle of dedication has been severely criticised. It does not follow, however, that an acceptance by the public will not cure an incomplete statutory dedication, or that rights acquired under it by third persons will be impaired. In such cases it may operate as a common-law dedication. 5 Am. & Eng. Enc. Law, pp. 396, 397. 'It may be remarked here that the right to make common-law dedications is not usually precluded or abridged by statutory regulations providing for dedication in certain specific ways.' Id. It is also essential to a valid common-law dedication that it be made by the owner of the fee. 'It is a primary condition of every valid dedication that it shall be made by the owner of the fee.' Ang. & D. Highw. (3d Ed.) 147;

Kerr, Inj. 283. 'The dedication, however, must have been made by the owner of the fee, or at least with his assent. The act of the tenant will not bind the landlord, though after a long lapse of time, and a frequent change of tenants, the knowledge and assent and concurrence of the landlord may be presumed from the notorious and uninterrupted use of the way by the public.' 2 Greenl. Ev. § 663.

'It is plain that at the time of the attempted dedication of the land to the use of the public the Chambers & McKee Company was the owner in fee of the land now traversed by Clay Avenue Extension, including that portion now and then covered by the west siding of the railroad. It is also true that it then and now claims to be owner in fee of that portion covered by the east siding. If the right of the railroad company is dependent on its being the owner in fee of the portion covered by the east siding, it must establish that fact at law, or at least by proof in this case. This has not been done, and we therefore act on the assumption that at the time of the attempted dedication of the land by the Chambers & McKee Glass Company that company was the owner in fee, and had the right to so dedicate it. Assuming this right to be in the Chambers & McKee Company, and for the present assuming that the railroad might have a right to compensation where its track is crossed by a public highway, it by no means follows that there is no highway by virtue of that dedication and the subsequent user by the public, because it has not been shown in this collateral proceeding that compensation was actually paid to the railroad company. If concurrence in the dedication made by a tenant, who had no right to make it, is to be presumed against the landlord (who alone had the right to dedicate), because 'of the notorious and uninterrupted use of the way by the public,' we certainly can assume the acquiescence of the railroad company in this case. This street has been notoriously and uninterruptedly used by the public for five or six years. Causeways, constituting part of the roadway, have been put in and maintained across these sidings, presumably by the railroad company itself; and it has recognized the existence of the street in the very instrument which defines its own right to maintain the west siding. There being adequate proof of dedication by the glass company and of acquiescence by the railroad company in the opening and user of the street by the public, we are next to inquire whether it has been accepted by those who had the right to bind the public by an acceptance. 'If an intention to dedicate can be clearly shown, no particular time is necessary to render the dedication valid. It may be immediate, or as soon as some act is done on the part of the public or persons claiming an interest in such dedication denoting their intention of accepting the gift. A mere ded-

ication by the owner of the soil will not of itself create a highway. There must be an acceptance by the public. Dedication by the owner, and user by the public, must concur to create a road otherwise than by statute.' Kerr, Inj. 283. The acceptance of the dedication may be established by evidence of the expenditure of public money upon it by the borough. Cemetery Co. v. Griffin, 165 Pa. St. 81, 30 Atl. 840. 'The entry upon a street or alley by the municipal authorities, by directing the proper official to expend of the public taxes and revenues thereon in order to put it in repair, is, for all purposes, when done, at the request of the owner of the land who originally opened it, a dedication by him to the public, and is also a binding acceptance thereof by the municipality for the use of the public.' 2 Dill. Mun. Corp. (2d Ed.) § 505. The public moneys have been expended on this street ever since it was thrown open to the public, and it has been kept in repair by the borough of Jeannette. This not only establishes an acceptance by the proper officials of the dedication to the public, but, these expenditures having been made with the knowledge of the railroad company, it would be inequitable, as against the public, for if to now be permitted to deny the existence of the highway. 'Parties who, possessing full knowledge of their rights, have lain by, and by their conduct have encouraged others to expend moneys or alter their condition in contravention of the rights for which they contend, cannot call upon the court for its summary interference.' Kerr, Inj. 16. The expenditure in this case was made on the street by the public, and not by the street-railway company; but the user to which it seeks to subject the street is not an additional servitude, but simply the ordinary servitude which the public is entitled to make of a highway. It is presumably for such a mode of use, with others; that the public expenditure has been made. Therefore, if the railroad is estopped, as against the public, to deny its use of Clay Avenue Extension as a highway, it is of necessity estopped as against the proposed use of it by the street-railway company. But the principle might go further, for 'the conduct and dealings of a man with others than the party with whom the contest exists may constitute a case of acquiescence, so as to preclude him from coming to the court for relief against a state of things to which his own conduct has led.' Id. 19. In the case of Kelly v. Railroad Co. (Minn.) 9 N. W. 589, the same doctrine is laid down. In the discussion of that case the court say: 'Defendant also took exception to the ruling of the court admitting evidence tending to show that the locus in quo had been opened, worked, and traveled continuously for ten years as a highway. This was competent evidence tending to prove the existence of a highway by common-law dedication. But the evidence was

admissible upon still another ground. Even if this was not a legal highway, yet it was openly and notoriously used as such by the public, and the defendant recognized it as such by permitting the public to use it, and by assuming to maintain a crossing at that point they would be bound to exercise precisely the same precautions to keep it in repair as if it was in fact a legal highway.' The same points are ruled in the case of *Railway Co. v. Jordan*, 10 Am. & Eng. R. Cas. 301, and determined in the same way. 'There was evidence that a road over a railroad had in 1856 been dedicated to public use by a landowner. In crossing the railroad on this road in 1866 his wagon was injured by the company's engine. The court charged: "If this strip of ground so thrown out was dedicated to the public use, without any intention of resuming the exclusive right to or use of the said ground, and if from that time to this the public has used this as a public road, then it has become public, with all the characteristics of a public highway, so far as that question can have any legitimate bearing on this issue." Held, not to be error.' *Railway Co. v. Dunn*, 56 Pa. St. 280. The test to determine whether or not it is a highway is whether it is used as 'such, and is open and free to every one for the purpose of transit and passage, and is controlled by the proper authorities. 3 Kent, Comm. 32; *City of Cincinnati v. White*, 6 Pet. 435. For the purposes of this case we think that the facts found above sufficiently establish that Clay Avenue Extension is a public highway, without any reference to our statutes relating to dedication. The proof of common-law dedication by the owner of the fee, the recognition and user of the street by the public and this complainant, and the control of it continuously for five or six years by the proper authorities of the borough of Jeannette, all contribute to the making of it a public street for all the practical purposes of this case.

"The assumption of complainant's counsel that the street can only be a public street by virtue of the provisions of the Acts of 1851 and 1856, regulating the dedication by the law of lands to public use in the boroughs of this commonwealth, is unwarranted. Has there been a valid statutory dedication of Clay Avenue Extension to public use also? It is plain, to make a valid statutory dedication the provisions of the statute should be closely followed. It is alleged that in this case this has not been done, (1) because there has been no notice given to the railroad company of the proposition to adopt the ordinance of July 18, 1890, whereby Clay Avenue Extension was ordained a public street of the borough of Jeannette; and (2) because no viewers have been appointed by the court of quarter sessions to assess the damages. Paragraph 8, § 3, Acts April 3, 1851 (P. L. 323; *Purd. Dig.* p. 247), makes it the duty of the corporate officers

of the borough to give due and personal notice to all persons resident in the borough directly interested therein of any proposition to fix or change the roads, streets, lanes, alleys or courts, etc. It has not been shown that this notice was given to the Pennsylvania Railroad (assuming that it is a person resident in the borough) at the time of the adoption of the aforesaid ordinance; neither has it been proven that it was not given. Counsel for complainant contended that the proceeding is therefore fatally defective, and, as to it, totally void. To sustain this proposition they cite: (1) *In re Road in Palmer Tp.*, 11 Wkly. Notes Cas. 429, 102 Pa. St. 38. In this case there was a report of viewers of damages for a road. The report did not show that there had been notice of the view given. After it was confirmed, and before the entire road was opened, the railroad company presented its petition, alleging want of notice, and praying that the decree be opened, and petitioner be given a hearing. The lower court refused the petition, and the supreme court reversed it. This proceeding was under the road law. (2) *Opening of Taylor Ave.*, 146 Pa. St. 638, 23 Atl. 392. This was a proceeding under the general borough law. The record of the proceeding to assess damages and benefits for the opening of a borough street did not show personal notice to the property owners of the passage of the ordinance laying out the street, or of the view, or that said ordinance had been published. There were also other questions in the case. On exceptions filed before final confirmation, wherein, among other things, the want of notice was alleged, the court set aside and quashed the report. This was affirmed, without opinion, by the supreme court. (3) *Parkesburg Borough Streets*, 124 Pa. St. 511, 17 Atl. 27. This was also a case upon a report of viewers,—a rule to show cause why the report of viewers should not be approved. Among other things, it was there held that under the provisions of section 27 of the act of 1851, and of section 8, art. 16, of the constitution, the streets, alleys, etc., so laid out and ordained may not be opened to public use until just compensation is made to property owners, to be ascertained upon assessment under proceedings in the court of quarter sessions.

"These cases all arose in the proceedings directly. They were all applications to the court in which the proceedings were pending. The questions there involved were not raised collaterally in the trial of another case in another court. Those cases are authority—or at least two of them are—in cases having like facts; but the facts of this case are not such as to subject it to the control of those cases. The first case is not a proceeding under the acts relating to boroughs at all. In the second case there was a proceeding to assess damages under the act of

1856, and the alleged deficiency was in what was shown or not shown in the petition for the appointment of viewers and in their report. Assume, for the present, that no viewers are needed in this case, is it essential to the validity of the ordinance that it show that notice was given before council passed and the burgess signed it? The case cited does not say so. What is the presumption of law, there being no proof on the matter? Is it not presumed that all things essential have been done until the contrary be made to appear? "The maxim, *"omnia præsuntur rite et solemniter esse acta,"* applies to inferior and special tribunals in the same manner as those which are superior and general, if the jurisdiction of the special tribunal over the subject-matter be made to appear. In the case of the superior tribunal jurisdiction is presumed, but in that of the special or inferior it must be proved. The proceedings of the road commissioners under the special laws relating to Bradford county, in cases within their jurisdiction, even though they might be subject to be examined into on certiorari, are not reviewable in a civil action *inter partes*." *Fowler v. Jenkins*, 28 Pa. St. 176. The borough council certainly had jurisdiction to pass the ordinance in question. It is presumed, therefore, that all things were done rightly. If it has not been so done that fact must be proven, or it is not in the case. It has not been proven. Even if the matter was such as could be corrected in the proceeding itself, it does not necessarily follow that it is here reviewable in a civil action *inter partes*. But the notice required by the provisions of the act of 1851 is directory only. This was decided both before and since the entry of the judgment in the Taylor Ave. Case, in 146 Pa. St. 638, 23 Atl. 392. This fully appears from the following cases: Section 3, par. 8, Act April 3, 1851 (P. L. 323), making it the duty of borough officers to give due and personal notice to all persons resident in the borough directly interested therein of any proposition to fix or change the roads, streets, lanes, etc., or in the grading or regulation thereof, and to designate a time and place when they shall be heard in relation thereto, is merely directory, and the omission of such notice does not invalidate the proceedings. *Com. v. Beaver Borough*, 171 Pa. St. 542, 562, 33 Atl. 112; *White v. McKeesport Borough*, 101 Pa. St. 400. Therefore, if it was decided in 146 Pa. St. 638, 23 Atl. 392 (and this is not entirely clear), that the notice described in the act of 1851 was essential to the validity of the ordinance, that decision has been overruled, and the decision in *White v. McKeesport Borough*, is still the law. Therefore, whether we consider the notice essential or directory only, the ordinance of July 18, 1890, making Clay Avenue Extension a public street, appears to be valid.

"Is it essential to the existence of this street as a public highway that it be declared to be such by a valid ordinance, and, in addition thereto, that viewers be appointed to assess the damages? If there are no damages to assess, it would seem to be a vain thing for the court of quarter sessions to appoint viewers. The very case that is cited to sustain the affirmative of the opposition says: 'If the owner of private property on the line of the street, either for a consideration agreed upon, or without compensation, consent that the street be opened as laid out and ordained, the corporate authorities may at once proceed to open, and thereupon the street shall become a lawful public highway; otherwise, however, the corporation is obliged to resort to the courts for an assessment of damages according to law.' *Parkesburg Borough Streets*, 124 Pa. St. 523, 17 Atl. 27. The act of 1851 as expressly notices the right to open without an assessment as to open after an assessment where it says: 'The same when duly opened according to law or by agreement of parties, are hereby declared public highways, over which the corporation shall exercise jurisdiction under the provisions of this act.' In either event, they are public highways. Therefore the appointment of viewers is only essential where consent is lacking. If the borough had attempted to open without the consent of a person entitled to damage, the court would, on application, restrain the opening, for it is provided that they shall not be opened for public use until the damages shall be liquidated. The act (paragraph 3, § 27) also provides a hearing for any one aggrieved by the laying out and opening of a street. See *Purd. Dig.* p. 253. Has there been any complaint made since the laying out or opening of this street five or six years ago? Has any injunction been asked for prior to the opening? We have already held that the opening was made with the acquiescence of the complainant, and that the knowledge of its open and notorious use and control by the municipal officers was possessed by it as well as by the public at large. If complainant is entitled to any damages, it can yet have them assessed, but, after the street has been open for five or six years, and the public moneys have been expended on it during that time, the complainant cannot be allowed to say the street is no street because no jury was appointed to assess the damage. Consent is conclusively presumed under the circumstances of this case; therefore there has been a good statutory dedication of Clay Avenue Extension to public use, as well as a good common-law dedication of it. It being a public street of the borough of Jeanette, the defendant company has the statutory right to occupy it and to cross the complainant's switches at grade.

"This would make it proper to dissolve

the temporary injunction in so far as the granting of it was based on the allegation that the locus in quo was not a public street. But there is a matter of procedure which would be sufficient in itself to dispose of this interlocutory injunction in the same way. We have treated the merits of this application as being before the court thus far. At the granting of the injunction, on an ex parte application, the court assumed that the special equity set up in the affidavits read was also set up in the bill. An inspection of the bill since discloses the fact that the bill on which the application was made was one on which a preliminary injunction had hitherto been granted by this court, and after hearing (Hon. Calvin Reyburn, P. J., of the Thirty-Third district, specially presiding) was dissolved. An appeal has been taken from that action by the court, and is still pending in the supreme court.

"It is claimed that successive writs cannot be issued on the same bill. That question may be rather an abstract one as this case is now presented. We are, however, of opinion that, where the first injunction is not as comprehensive as the prayer of the bill, and the basis laid for it in the bill itself, there is no legal objection to the application for and granting of another interlocutory injunction at a later stage in the progress of the case, if such an additional injunction is only supplementary to the one originally granted, and they together do not go beyond the basis laid on the bill and the prayer for relief. Such practice, we think, could be fully sustained by the citation of cases if the necessities of this case required it. Under our act of assembly, proceedings in the cause are not stayed by the appeal now pending in the supreme court. But we will not rehear the precise case heard by Judge Reyburn, and grant or withhold an injunction from such consideration. 'A court will not, under ordinary circumstances, hear a motion for an injunction which has been refused by another court of co-ordinate jurisdiction.' *McNair v. Cleave*, 9 Phila. 212. Neither should another judge in the same court continue an interlocutory injunction which, on an examination of the same equity, a judge has previously dissolved. Upon the agreement of a rule to show cause why an injunction should not issue in a case where an injunction had been granted in part, the question whether the existing injunction should not be removed cannot be considered. 2 Beach, Mod. Eq. Prac. § 774; *Fertilizing Co. v. Van Keuren*, 23 N. J. Eq. 251. Neither should we, under similar circumstances, practically reinstate an injunction already dissolved. If the previous action of this court was erroneous in the dissolving of that injunction, it can be corrected in the supreme court, to which appeal has been taken. We therefore will not and have not here considered anything but the special grievance that pe-

culiarly applies alone to the two crossings of the sidings of Jeannette.

"But have these special matters been brought before the court in such a way as to warrant the consideration we have given them? It is plain that an injunction of this kind can only be granted on a bill in equity praying for relief by reason of the specific equity therein set up. A court of equity will only decree on the case made by the pleadings, though the evidence may show the right to a further decree. A decree or judgment adjudicating a matter outside of the issue raised by the pleadings is an absolute nullity, and open to collateral attack. 2 Beach, Mod. Eq. Prac. § 790. Complainant is entitled to read affidavits in support of his case, although they will not be allowed to enlarge the scope of the bill, since the application must be determined upon the case as presented by the bill. High, Inj. 1576. If the affidavit in corroboration of the bill of complaint states more than the complaint, it does not lessen the force of the facts stated in the complaint, nor make the affidavit take the place of the complaint. 10 Am. & Eng. Enc. Law, p. 1004. If a man brings prominently forward and relies upon a given case, the court will not allow him, if he should fall in that case, to spell out another, and say he might have framed his case so as to show a title to the relief asked. A man who complains of an injury of a peculiar and special kind cannot be allowed to give evidence of another injury of a special and peculiar kind. Kerr, Inj. 624. 'An injunction should not be broader than the grievance complained of in the bill, or go beyond the relief demanded by the complainant.' 2 Beach, Mod. Eq. Prac. § 772.

"With the principle established by the foregoing authorities in mind, let us look on the bill upon which this injunction purports to be granted, and see what it has to stand on. We can nowhere find in the bill the special equity set up in the affidavits about which also the testimony was taken at the hearing. If the locus in quo of the affidavits is specially referred to at all in the bill, it is where it is averred that the defendant company, 'in its projective route between intended termini, traverses roads which pass over lands belonging to this plaintiff, and where-to, subject to the public easement, to which the same were originally dedicated, is vested in this plaintiff at the following points in the said county of Westmoreland, to wit, at or near Jeannette station; at or near Burrell station,' etc. The word 'roads' as there used is obviously intended to embrace streets, for the points referred to are spoken of as being in boroughs as well as townships. If Clay Avenue Extension is referred to in this averment of the bill, it is in the bill alleged that the property of the complainant is 'subject to the public easement,' the very thing which the affidavits deny, and which is

therein set up as the reason why the proposed occupation of the street by the defendant company would be illegal. We think an inspection of the bill will clearly show that the special grievance here complained of is not there set up. The case we have here is one that finds its basis alone in the affidavits. These are not a substitute for a bill. No injunction can stand without a bill for its basis. If complainant desired to do so, it could have amended or supplemented the bill filed so as to bring into the case the special facts here pressed on the attention of the court. We have already considered those facts as if they had been brought into the case, but the preliminary injunction might well have been refused, because the grievance on account of which the injunction was asked was not set up in the bill. The grievance of the complainant of the bill as filed was considered by Judge Reyburn, and in the exercise of the discretion with which he was invested he dissolved a preliminary injunction. We will not reconsider the same matter on the same bill and make a different ruling. The final disposition of the case will be made on the equity set up in the bill, and that will not involve the consideration of the special state of facts now pressed on the consideration of the court. *Pennsylvania, S. L. V. R. Co. v. Philadelphia & R. R. Co.*, 160 Pa. St. 292, 293, 28 Atl. 784; *Thompson's Appeal*, 126 Pa. St., at pages 371, 372, 17 Atl. 643. And now, April 10, 1896, after hearing the evidences and the arguments of counsel in support of and against the continuing of the preliminary injunction granted by this court on the 4th of March, 1896, and upon a full consideration thereof, it is hereby ordered, adjudged, and decreed that the same be now dissolved."

Cyrus E. Woods and John G. Johnson, for appellant. W. F. Sadler, Gregg & Potts, and Moorhead & Head, for appellees.

MITCHELL, J. These cases, depending upon substantially the same facts and the same principles of law, and having been argued together, may be treated practically as one case for the purposes of this opinion. The Pennsylvania Railroad Company, complainant and appellant, has failed to make out title to the bridge in question over its right of way. Though constructed and paid for by it, the contract with the borough of Greensburg shows that it was so constructed as a part of the public highway Pennsylvania avenue, and to be maintained as such by the borough. The only open point in the contract was the alternative to the borough that it should in consideration of such erection cause the grade crossing over the railroad at Harrison avenue to be vacated, or, failing to do so, should pay the railroad the cost of the bridge. To which alternative the borough is liable does not concern this litigation. In either case the bridge became part

of Pennsylvania avenue, and the title is in the borough.

The next question is whether Clay Avenue Extension is a public highway, in such sense as to permit the defendants, in the absence of any right of eminent domain, to cross the sidings of appellant thereon. This is a question mainly of fact, and has been so fully examined by the learned judge below that nothing more need be said than that we see no reason to question the correctness of the conclusion reached by him.

There remain the two really important questions in the case: First, whether the defendant companies have any right to construct or operate railways along the routes or portions of routes in controversy; and, secondly, whether the appellant is in position to raise the question of such right. It is strenuously contended on the part of appellant that the act of May 14, 1889 (P. L. 211), under which the defendants were chartered, gives no authority for the building of a passenger railway through boroughs, or over township or country roads, and especially through private property, but only upon "streets," properly and strictly so called. Much reliance is placed upon *Pennsylvania R. Co. v. Montgomery Co. Pass. Ry. Co.*, 167 Pa. St. 62, 31 Atl. 468, to sustain this contention. But no such point was involved, nor any such decision made, in that case. On the contrary, while that proposition, if sustained, would at once and finally have disposed of the claims of the defendant passenger railway company to its asserted franchise, the decision was pointedly rested upon other grounds. The same may be said of the group of cases decided at the same time, — *Lehigh Coal & Nav. Co. v. Inter-County St. Ry. Co.*, 167 Pa. St. 75, 31 Atl. 471; *Rahn Tp. v. Tamaqua & L. St. Ry. Co.*, 167 Pa. St. 84, 31 Atl. 472; and *Tamaqua & L. St. Ry. Co. v. Inter-County St. Ry. Co.*, 167 Pa. St. 91, 31 Atl. 473; and of *Homestead St. Ry. Co. v. Pittsburgh & H. E. St. Ry. Co.*, 166 Pa. St. 162, 30 Atl. 950; and some other cases not necessary to refer to in detail. What *Pennsylvania R. Co. v. Montgomery Co. Pass. Ry. Co.* really decides and is authority for is: First, that the laying of railway tracks on a suburban road is an additional servitude, which cannot be imposed upon the owner of the fee against his will by the mere consent of the township authorities; and, secondly, that the franchise of a street railway passing through several localities is an entirety, and the necessary local or municipal consent for the whole route must be obtained before it has a right to build any part. In the opinion in that case, and again in *Rahn Tp. v. Tamaqua & L. St. Ry. Co.*, supra, our Brother Williams reviewed the legislation on street passenger railways, and gave some timely warnings to investors and to the departments of the government as to the dangers of the in-

vestment of capital in lines not within the express authorization of the act of 1889, and the necessity of further legislation on the subject, in view of the numerous and extended enterprises of the kind in operation or in progress. But the decisions were rested on the propositions above set forth. While no case has yet called for an exact definition of the words "street or highway" in the act of 1889, or of the limitations in that respect on railways incorporated under that act, it is manifest that the narrow interpretation contended for by appellant cannot be sustained.

It is not necessary to go further in this case, as upon the next question we are of opinion that the appellant is not in position to dispute appellee's rights. The charter covers the route upon which the road is built, and the learned judge below has found that the appellee has the consent of the local authorities, of all the owners of property along the roads occupied, and of those through whose property its line passes. To entitle appellant to question the *prima facie* right thus appearing, it must show some interest in or damage to itself different from that of the general public. It has failed to do so. It is not the owner of the bridge, and the crossing over its right of way is upon a public highway, to all the rightful uses of which its property is subject. The bridge is part of the highway, and the consent of the borough authorities for the laying of the rails must be as effective on it as on any other part, or the borough would hold its municipal power to consent only in subordination to the will of every railroad which the highway happened to cross. The eighteenth section of the act of 1889 gives in express terms the right to cross railroads at grade, and, a fortiori, to cross overhead. In respect to a mere crossing, a railroad is not an abutting landholder to the passenger railway, as the plaintiff was in *Pennsylvania R. Co. v. Montgomery Co. Pass. Ry. Co.*, *supra*.

As to the objections to the appellee's route at other points, including the right to occupy township roads, and to buy or secure with the owner's consent a way through private property, the appellant's rights are no different in kind, whatever they may be in degree, from those of the general public. In regard to the latter objection, it is conceded, as was said in *Rahn Tp. v. Tamaqua & L. St. Ry. Co.*, 167 Pa. St. 84, 90, 31 Atl. 472, that passenger railways, under the act of 1889, "may diverge for a short distance where the conformation of the surface or the positions of streams make it necessary in order to avoid discomfort or danger to the traveling public." and, it may be added, to avoid grade crossings, or for any other reason amounting to necessity, or,

what is the same thing in such matters, great public convenience. The occasion for such divergence and its extent are questions of location, and the decision of them primarily is within the discretion of the railway company. If the variance from the charter route is greater than is necessary, or the charter route itself is open to objection, the commonwealth alone can be heard to make it in the interest of the general public.

The act of June 19, 1871 (P. L. 1361), affords appellant no standing. No rights of appellant are violated or infringed upon. It is not prevented or interfered with in doing any act that its charter permits. That its interests are affected by a diminution of its passenger traffic is a different thing. It has no monopoly of that traffic, which it holds only by force of superior facilities and convenience to the public, and, like any other business, it must take the chances of rivalry and change of methods and customs of travel. The act of 1871 applies to direct interference with rights, not consequential injury to interests, and the inquiry under it is limited in suits by private parties to the question of the charter right to do the act complained of. *West Pennsylvania R. Co.'s Appeal*, 104 Pa. St. 399. In *Germanatown Pass. Ry. Co. v. Citizens' Pass. Ry. Co.*, 151 Pa. St. 138, 24 Atl. 1108, cited by appellant, the complainant had a track on German-town avenue, and its claim to relief was based on the fact that another track on the same street would interfere with its operations. The appellant did establish one point in which its rights were different from those of the public. The special danger to it and its passengers arising from the use of the bridge for a purpose for which it was not originally built gave appellant a standing to object to such use. It has a clear right to be protected from that danger. When this case was before some of the justices of this court at chambers on motion for special supersedeas, it was said, in denying the motion, that the language of the decree below was not as precise as was desirable, and, while it did not probably mean to leave the proper strengthening of the bridge to the uncontrolled discretion of the appellee, it was open to that construction. It was accordingly recommended to the court to amend it so as to leave no doubt that the court's approval should be obtained before cars were actually run. So far as appears, this suggestion was not noticed or acted on in any way, and what was then recommended we must now direct. Appeals dismissed, with costs, but the court below is directed to reinstate the injunction unless within 60 days it shall be made to appear affirmatively, to the satisfaction of the court, that the bridge has been made safe for continued use by the cars of the respondents.

(176 Pa. St. 306)

McKENNA v. MARTIN & WILLIAM H. NIXON PAPER CO.

(Supreme Court of Pennsylvania. July 15, 1896.)

INJURY TO EMPLOYE—DEFECTIVE BUILDING—NEGLIGENCE—NOTICE TO FOREMAN.

1. A corporation which rents and uses a building as a paper warehouse cannot, on its collapsing and killing an employe, be charged with negligence by reason of a defect in the building; no one connected with the corporation having any notice of the defect, except, perhaps, a mere foreman.

2. The mere fact that a building built and used as a paper warehouse collapses is not proof that the lessee negligently overloaded it, the lessee having no notice of any defect in it.

Appeal from court of common pleas, Philadelphia county.

Action by Mary McKenna against the Martin & William H. Nixon Paper Company, a corporation. Judgment for plaintiff, and defendant appeals. Reversed.

Gavin W. Hart and Theodore F. Jenkins, for appellant. Charles A. Chase and William W. Wiltbank, for appellee.

MITCHELL, J. We fail to find any evidence of negligence on the part of defendants. The building was rented by them as a paper warehouse, for which purpose it had been built and used for more than 20 years. It was not shown that they had any reason to suppose it was not suitable to the purpose, and they cannot be chargeable, therefore, with negligence, without notice of defect, or affirmative evidence of overloading. The only testimony even tending to show notice was that of Beetem, the builder, who in the summer of 1892 was sent for to examine the front wall. He found that there was a break in the front pier, where the weight above had cracked the wall away from the end of the iron girder. Acting for the owner, not the defendants, he tore down the pier, and rebuilt it so that it was stronger than before. While doing this work, he says, he noticed some small cracks in the bricks under the iron pillars resting on the division wall between the two houses. This was the wall which subsequently gave way and caused the accident. But Beetem, though an experienced builder, does not seem to have considered the cracks any indication of danger; for he did not look at the other side of the wall to see if the cracks went through it, and he made no report, either to his employers or to defendants, that the division wall needed strengthening. He testifies that the break in the front pier had "no material effect" on the columns which afterwards gave way. All that he says about notice is that he told Marker, the defendant's foreman, that "he had the building overloaded, and would have to stop it." He does not say that he referred to the division wall, or that he even told Marker about the cracks in it, and his remark appears to have been quite as much an ex-

planation of the break in the front pier as a caution in regard to the rest of the building. But, even if it were the latter, Marker was a mere foreman, and there is nothing to make notice to him a substitute for notice to the officers of defendant who were in personal charge and direction of the place. Nor is there any evidence of negligent overloading. Of course, the building was loaded beyond its real capacity, as the collapse showed, but that is not of itself proof of negligence. As already said, the building was erected or altered in 1870 for use as a paper warehouse, and had been in use as such from that date. There was not only no evidence that it was loaded by defendant beyond the customary and expected capacity of a paper warehouse, but it was shown that defendant's stock, which was paper bags, was not so heavy as ordinary paper stock; and the testimony of Bayle, the bookkeeper, called by plaintiff, showed affirmatively that the load on the day of the accident was materially less than it had been at other times for a year previous. On the whole case there was no sufficient evidence of negligence, and the jury should have been directed to find for the defendant. Judgment reversed.

(176 Pa. St. 414)

TIGUE v. BANTA et al.

(Supreme Court of Pennsylvania. July 15, 1896.)

JUDGMENTS AGAINST GRANTOR AND GRANTEE—EXECUTION SALE—CONTEST.

Persons having a lien on land as judgment creditors of the grantee may maintain a petition to set aside an execution sale of it under a judgment against the grantor, on the ground that such judgment was without consideration, and fraudulent.

Appeal from court of common pleas, Luzerne county.

Patrick Tigue obtained judgment against Henry Banta, and execution sale was had thereon, to satisfy that and other judgments against Banta. Land thus being sold, which had been conveyed by Banta to Stephen Matchack, petition was filed by Hart, Lee, and Strome, judgment creditors of Matchack, to have the execution sale as to such land set aside, on the ground that one of the judgments against Banta was without consideration and fraudulent, and that but for it the sale of such land was unnecessary to satisfy the valid judgments against Banta. Rule to show why the sale should not be set aside was discharged, and petitioners appeal. Reversed.

Edmund G. Butler, for appellants. J. R. Sconton, O. El. Keck, and E. V. Jackson, for appellee.

GREEN, J. The prayer of the petition filed by the appellants is that the sheriff's sale of Banta's interest in lot No. 1 should be set aside. The ground upon which this

relief was claimed was that enough money was realized by the sale of the two other Banta lots (Nos. 2 and 3) to pay off all the valid liens against Banta's title, and therefore there was no necessity for the sale of lot No. 1. There was no impeachment of the right of the plaintiff in the executions to levy and sell the other lots, nor were any irregularities in the sale alleged. The money realized at the sale of lots Nos. 2 and 3 was not enough to extinguish all the liens against the Banta title, except upon the allegation that one of the judgments, to wit, *C. R. Green v. Henry Banta*, No. 162, June term, 1893, for \$1,100, was a void judgment, because it was given without consideration, and for the purpose of hindering, delaying, and defrauding the creditors of Banta. If that judgment was not a fraudulent and void judgment, the appellants have no case, because, in that event, all the proceeds of the sales, including lot No. 1, would be necessary to discharge the liens of record against Banta, and therefore the judgment creditor of Banta, prior to the sale of lot No. 1 to Matchack, would have the lawful right to sell that lot to satisfy his judgment. Now these appellants were not judgment creditors of Banta, but of Matchack, who purchased lot No. 1 from Banta. As mere judgment creditors of Matchack, they would have no standing to contest the validity of the judgment of *Green v. Banta*. But they were judgment creditors of Matchack, who purchased lot No. 1 from Banta, and that lot was one of three lots owned by Banta at the time of the sale to Matchack. Banta remained the owner of the other two lots, and, after the sale to Matchack, other judgments were entered against Banta, and these became liens against lots Nos. 2 and 3, but not against No. 1. Now it is very clear that Matchack had the right to insist, at the time of the sheriff's sale, that lots Nos. 2 and 3 should be first sold, and, if the proceeds were enough to pay all the liens against Banta, he had the further right to insist that there should be no sale of lot No. 1. Upon the appellants' application for an order of court to that effect, counsel for the judgment and execution creditor, who was selling the land, agreed that lots Nos. 2 and 3 should be first sold, and the sale was conducted in that way. The proceeds of the sale of lots Nos. 2 and 3 were enough to pay all the liens against Banta except the *Green* judgment, but they were not enough to pay that judgment also; but, as that judgment was open, and unsatisfied of record, the sheriff proceeded to sell lot No. 1 also, and it required the proceeds of the sale of all three of the lots to pay all the liens against Banta. This being so, the sale of lot No. 1 could not be impeached, and therefore would not be set aside, unless the allegations that the *Green* judgment was fraudulent and void were correct in fact, and duly estab-

lished in an adversary proceeding. Now these appellants had become judgment creditors of Matchack, and thereby had acquired a lien against the land purchased from Banta by Matchack, being the lot No. 1 before mentioned. If the *Green* judgment was fraudulent, the sale of that lot was unnecessary to pay the judgments against Banta, and the title to the lot would then remain in Matchack, and therefore subject to the lien of the petitioners' judgment against him. This being so, the petitioners had a direct interest in the Matchack lot, and this, we think, gave them a right to be heard on the question of the validity of the *Green* judgment. Matchack undoubtedly had the right, and, as it was a question of lien upon property of which he held the title, his judgment creditors were necessarily directly interested in the question of preserving the title, as a means of satisfaction of their judgment.

It must be confessed that the averments of the petition against the validity of the *Green* judgment are meager and unsatisfactory in character, and without detail or specific statement. But there is a distinct and positive allegation that it was given without consideration, and for the purpose of hindering, delaying, and defrauding creditors. The denial of the charge of fraud in the answer is much more specific, definite, and positive. It is supported by the affidavits both of Banta, the borrower, and *Green*, the lender, that the full amount of \$1,000 was loaned by *Green* to Banta, and that the whole of the sum was actually paid in cash at the time the judgment note was given. As against this distinct and absolute averment in the answer and supporting affidavits, the mere general averment in the petition goes for nothing more than the basis of an application for a hearing. As a matter of course, it furnishes no ground for a decree setting aside the sheriff's sale. Such a decree could only be made after a judicial finding of the disputed fact of fraud, either by the verdict of a jury, the report of an auditor or master, or by the court, upon a hearing of testimony upon both sides, taken directly before the court. We are disposed to think that such a hearing should be had; and, as the appellants declare their willingness to have the matter heard in open court, we think it would be well that such an order should be made. We will not, however, interfere with the discretion of the court below on that subject further than to direct that a hearing shall be had on the question of the validity of the *Green* judgment.

The order of the court below is reversed, and the rule to show cause why the sheriff's sale should not be set aside is reinstated, and continued until final adjudication is made as to the validity of the *Green* judgment; all proceedings to stay in the meantime; all costs to abide the event; record remitted.

(176 Pa. St. 246)

HANDLEY et al. v. BARRETT et al.

(Supreme Court of Pennsylvania. July 15, 1896.)

ADVERSE POSSESSION.

The taking of a deed for land which is part of a larger tract belonging to the vendor does not prevent the acquiring by the vendee, by adverse possession, of land outside the deed, within such tract.

Appeal from court of common pleas, Lackawanna county.

Ejectment by Michael F. Handley and another against Mary Barrett and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

John P. Kelley, Joseph O'Brien, and S. B. Price, for appellants. John F. Scragg and Lemuel Amerman, for appellees.

GREEN, J. When the plaintiffs took their deed, in September, 1891, from the Lackawanna Coal & Iron Company, for the tract of land which embraces, as a part of it, the land in dispute in this action, it was with the stipulation contained in the deed that it was made expressly subject to all claims on the part of the defendants by reason of occupancy and adverse possession. Further, the plaintiffs expressly released their grantor "from any and all claims, of every kind and nature, whatsoever, on account of any such encroachments upon the land hereby conveyed, or any claims of the aforesaid J. J. Gordon, Catherine Blomitt, and Ellen Barrett, and those claiming under them, or the claims of any other persons with reference to a right of property in and to any portion of said land." The claims of the defendants by adverse occupancy and possession of the land in dispute were also expressly excepted from the operation of the warranty clause of the deed. It thus appears, not only that the plaintiffs took their deed with express notice of the claim of title by the defendants to a part of the land conveyed to the plaintiffs, but also with express notice that this claim of adverse possession was fully known to their grantor, the iron and coal company, and that the company refused to include it within the operation of their deed, or to warrant any title to it on their part. In view of this positive recognition of the adverse title of the defendants, and their very long acquiescence in it, and of their never having brought any action of ejectment to recover it, it is difficult to perceive any ground for the assertion that the title of the defendants was held by the permission of the coal and iron company, and not adversely to them. Nor did the testimony show any such state of facts. An effort was made to prove that there was, by a legal implication, such a permissive occupancy, having the force of subvency to the title of the coal and iron company, as to the land in dispute; but it was entirely abortive, and the offer of the testimony was properly rejected by the court below. It was

an offer to prove that there was a memorandum on the coal and iron company's sales book, followed by an account on their ledger, to the effect that there was a sale on September 1, 1851, to Barrett and Gordon, of a lot 50 feet on Carbon street, and 15 feet on the rear. Of course, a contract for the sale of land cannot be proved in any such manner as that; but, even if the evidence had been admitted, it could not possibly have justified any inference that the defendants took title to the land in dispute here, which was no part of the land referred to in the memorandum, in subvency to the title of the coal and iron company. Moreover the contract, whatever it was, became merged in the deed which was subsequently made, and which was given in evidence on the trial. Hence the plaintiffs had all the benefit they could have had if the memorandum on the sales book had been received in evidence. We cannot, however, accept the proposition that where a deed is taken for land which is part of a larger tract belonging to the vendor, the vendee cannot acquire by adverse possession land outside of his deed, which was a part of the tract from which his purchase was made. Granting that he knew that such outside land belonged to his grantor, we cannot understand why he might not occupy it adversely; and if such occupation was permanent, continuous, visible, and notorious; and was at all times in hostility to the right of the owner, and was maintained during the full period of 21 years, we know of no reason why such a possession will not confer a good title. The learned court below, in the charge to the jury, explained this entire subject carefully, minutely, and with entire correctness; and the jury found by their verdict that a good title to the land in question was acquired by the defendants, by adverse possession. That the whole matter was exclusively for the jury is too plain for argument. The testimony to a continuous occupation of the land in question by the defendants and those under whom they claimed, for purposes of residence in part, and for domestic uses, for a period of nearly or quite 40 years, without interruption, was voluminous, precise, definite, and positive. It was amply sufficient, not only to warrant its submission, but to justify the verdict. It would have been most serious error to withdraw it from the jury, and we can see no reason to question the propriety of the verdict. We cannot sustain any of the assignments of error. Judgment affirmed.

(176 Pa. St. 235)

REILLY v. PHILADELPHIA TRACTION CO.

(Supreme Court of Pennsylvania. July 15, 1896.)

STREET RAILWAY—ACCIDENT TO CHILD ON TRACK — NEGLIGENCE.

Under evidence that at the time a child two years old, wandering on a street, was struck by a horse car, the driver was not looking at the

track, but had allowed his attention to be diverted by a party of men who were shouting at the corner of the street just passed by the car, the question of negligence is for the jury.

Appeal from court of common pleas, Philadelphia county.

Action by Mary Reilly, by her next friend, against the Philadelphia Traction Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Dallas Sanders and J. Howard Gendell, for appellant. H. Homer Dalbey and Louis Bregy, for appellee.

MITCHELL, J. It must be conceded that the plaintiff had crossed the street in front of the car, and then unexpectedly turned to recross, and was struck by the car under such circumstances of contributory negligence as would have prevented a recovery by an adult. But the learned judge below left the case to the jury on evidence that at the time of the accident the driver was not looking at the track in front of him, but had allowed his attention to be diverted by a party of men or boys who were shouting at the corner of the street just passed by the car. It is the duty of the driver to watch his horses carefully (and the rule is equally applicable to other motive powers), and to have them at all times under as complete control as the necessary motion of the car will permit; and his attention should be directed steadily to the track ahead of him, to observe its condition and any danger that may threaten the safety of either his car or the public. It is true that he is entitled to take notice of intending passengers, and especially to watch the motions of those entering or leaving the car, though this belongs more particularly to the duty of the conductor. In *Johnson v. Railway Co.*, 160 Pa. St. 647, 28 Atl. 1001, it is said by our Brother Dean: "We decline to say, as urged by appellee, that a street-car driver may not, under any circumstances, turn his head to observe the movements or signals of those who desire to get on the car. His duty is to drive the horses with care; to be on the lookout for obstructions, whether persons or vehicles, on the track. He may, in the performance of this duty, ascertain from a person on the side of a street, by looking at him, whether he desires to take passage. In doing this he may, for an instant, turn his face to the sidewalk." But it was said in that case that "at what distance the driver might have seen the child, had his attention been directed to the track, does not clearly appear," and the question was therefore for the jury. So, also, it was said in *Railway Co. v. Foxley*, 107 Pa. St. 537, that "whether, if his attention had been wholly given to his business, he might have seen the child in time to avert the injury, was under all the circumstances, clearly for the consideration of the jury." To the same effect is *Harkins v. Traction Co.*, 173 Pa. St. 149, 33 Atl. 1045. The cases of *Chilton v. Traction Co.*, 152 Pa. St. 425, 25 Atl. 606, and *Flanagan*

v. Railway Co., 163 Pa. St. 102, 29 Atl. 743, cited by appellant, belong to a different class, as in them it was undisputed that the driver was paying attention to his duty, and the child unexpectedly ran in front of the car. Judgment affirmed.

(176 Pa. St. 231)

MILLER v. SEAMAN et al.
(Supreme Court of Pennsylvania. July 15, 1896.)

SALE—CONSTRUCTION OF CONTRACT.

By contract plaintiff agreed to sell to defendants a certain amount of lumber, more or less, being certain 11 piles of lumber on a yard at D., for \$8.25 per 1,000 feet, shipped "f. o. b. cars Williamsport," to be loaded, inspected, and measured, as ordered by the purchasers, by A. for the seller; the same to be paid for by the purchasers within 30 days after dates of bills, to be dated on the day of loading. All lumber on the yard June 1st, not loaded on cars before that date, to be inspected and measured, or estimated, and paid for on that date; all prior unpaid bills to be paid within 30 days from their date, as above provided. *Held*, that title did not pass till measurement, inspection, and actual shipment, and then only as to the amount shipped, and that plaintiff had to bear the loss of such part of the lumber as, not having been measured, inspected, and shipped, was, prior to June 1st, carried away by flood.

Appeal from court of common pleas, Lycoming county.

Action by Albert G. Miller, for use of the Second National Bank of Elmira, N. Y., against Sidney A. Seaman and another, trading under the firm name of S. A. Seaman & Co., and another. Judgment for defendants. Plaintiff appeals. Affirmed.

The contract between the parties was as follows: "By this agreement, made this twenty-first day of February, 1894, A. G. Miller, of Elmira, N. Y., agrees to sell to S. A. Seaman & Co. and J. A. Smyth, of Williamsport, Pa., the 406,000 feet of hemlock lumber, more or less, belonging to the said A. G. Miller, now piled on the yard of the Dent Lumber Company at Dubolstown, Lycoming county, Pa., being the eleven piles of lumber designated with the mark 'A. G. M.' and numbered and mentioned in Schedule A, hereunto annexed, at and for the price of eight dollars and twenty-five cents per thousand, shipping count, f. o. b. cars Williamsport, to be loaded, inspected, and measured, as ordered by said purchasers, by Mr. Sam. Aurand for the seller, the same to be paid for by said purchasers within thirty days after dates of bills, to be dated on the day of loading, in cash, less a discount of two per cent. All lumber on the yard June 1, 1894, not loaded on cars before that date, to be inspected and measured, or estimated, by S. V. Van Fleet, and the same to be paid for in cash on that date at the rate of eight dollars per thousand, less said two per cent. discount, and all prior unpaid bills to be paid in cash within thirty days from their dates, as above provided. The expense of said inspection and measurement or estimate

of lumber on yard June 1, 1894, to be borne and paid by said purchasers."

Addison Candor and C. La Rue Munson, for appellant. B. S. Bentley, Henry C. McCormick, and Seth T. McCormick, for appellees.

WILLIAMS, J. In the spring of 1894 a quantity of sawed hemlock lumber was swept from the yard of the Dent Lumber Company at Dubolstown, near Williamsport, by flood, and lost. The object of this action is to determine whether the plaintiff or the defendant must bear the loss so occasioned, and this must depend on which of them held the title at the time the flood came. The hemlock had been sawed by the Dent Lumber Company in 1893, and at that time belonged to it. On the 8th day of November of that year the Dent Lumber Company sold to A. G. Miller, the legal plaintiff, 11 piles of hemlock lumber for the lump sum of \$3,250. The piles were estimated to contain 406,000 feet, more or less. Possession was delivered to the purchaser in the pile, and he at once caused each pile to be distinctly marked with his initials. This was a present sale by the vendor, and, as between it and the vendee, it passed the title to all the lumber in the piles to the vendee absolutely. On the 21st day of February, 1894, Miller made a contract for the sale of the same 11 piles of lumber to the defendants, and it is under that contract that the question on which this case depends is raised. The provisions of the contract are quite unlike those of the contract under which Miller bought. They amount to an agreement to sell all the lumber in the 11 piles, not in a lump, or for a gross price, but by the 1,000 feet, at the price of \$8.25 per 1,000 feet. The quantity is not to be estimated or to be ascertained at once in any other manner, but is to be obtained by actual measurement, when, and as often "as, the lumber is loaded, measured, and inspected by Mr. Sam. Aurand, upon the order of the purchaser." The actual delivery is not made when the lumber is loaded in the yard, but the seller delivers it to the purchaser "f. o. b. cars Williamsport." The price is to be paid on the quantity contained in each shipment ordered within 30 days after shipment, and shipments are to be made only as ordered by the purchaser until June 1, 1894. At that time all the lumber remaining on the yard belonging to these 11 piles was to be inspected and measured or estimated by Mr. S. V. Van Fleet, and paid for in cash at the rate of \$8 per 1,000. Some shipments had been made and paid for according to the contract, but, before the first day of June arrived, the flood came, and the lumber was lost.

The learned judge of the court below held at the trial that the title did not pass out of Miller, under the terms of this contract, until the amount to be shipped at any particular time had been measured, inspected, and loaded, at the expense of the seller, and delivered

f. o. b. cars Williamsport to the purchaser; and that the right to demand payment did not arise until such measurement, inspection, and actual shipment had taken place, and then only for so much as was actually contained in the shipment, and at the end of 30 days after it was made. This was a holding that the contract was not an executed, but an executory sale. The right of the buyer to demand the lumber, and the right of the seller to demand payment, were conditional upon acts to be done by the seller on the order of the buyer, and were limited to such quantities as the buyer should order, and the seller deliver, after a count and inspection, free on board of cars at Williamsport. So, when the first day of June should arrive, the right of the buyer to demand lumber, and of the seller to demand payment, were limited by the amount then inspected, measured, or estimated as actually on the ground; in other words, the sale was by the 1,000 feet, to be paid for after inspection and measurement. The buyer was liable for nothing that was not actually delivered to him after an inspection. He had a right to demand no more than the piles would furnish by actual measurement when the time came for the measurement to take place under the terms of the contract.

But it is urged that the learned judge was mistaken in his exposition of the word "inspected," found in the contract, and that he should have submitted the question of its meaning, as used, to the jury. If the word had been ambiguous or doubtful, the question of its meaning should have been referred to the jury; but, upon the evidence, it was neither ambiguous nor of doubtful meaning. The parties had, moreover, put a construction upon it. In the first order sent by the buyers for a shipment under this contract, they say: "Please load the following, and consign to us at P. R. R. yard, this city (then follow items amounting to 18,000 feet), from the A. G. Miller stock; hemlock scantling, C. O. (meaning culls out); boards, M. C. O." (meaning mill culls out). This showed the inspection to which they thought themselves entitled, and the sellers acquiesced in this construction by filling the order, and others following, to the number of 16 in all, and making out their bills for each shipment on this basis. It is clear that the defendants had no right to take possession of these piles as piles of lumber. If they had attempted it, Miller could have proceeded, either by replevin or trespass, against them. They could not have sold the lumber in a lump, and delivered it to a purchaser. They could only take or sell in accordance with their contract. Their title to each shipment rested on its delivery f. o. b. to them at Williamsport. The lumber swept away by the flood had not been ordered by the purchaser; it had not been inspected, measured, or loaded by the seller, and delivered at Williamsport for the buyer. When the time came for ascertaining its quantity,

it was not in the yard of the Dent Lumber Company to be inspected and measured or estimated, and delivery was therefore impossible. The title had left the plaintiff only as orders had been filled and shipped, and, as to all that remained on the yard, it had never left him.

The judgment of nonsuit was properly entered. The assignments of error are overruled, and the judgment is affirmed.

(176 Pa. St. 616)

COMMONWEALTH, to Use of MENTZER, v. SIDES, Sheriff.

(Supreme Court of Pennsylvania. July 15, 1896.)

ASSIGNMENT OF CLAIM—PAYMENT WITHOUT NOTICE.

Where defendant, having money in his possession which had been earned by J., paid it on the order of J. to a third person, without notice of an assignment thereof by J. to A., he is not liable therefor to A.

Appeal from court of common pleas, Lancaster county.

Action by the commonwealth, for the use of John W. Mentzer, now to use of Allen W. Mentzer, against John Sides, sheriff of Lancaster county. Judgment for plaintiff. Defendant appeals. Reversed.

J. W. Johnson, Geo. Nauman, and John E. Malone, for appellant. Brown & Hensel and Thomas Whitson, for appellee.

GREEN, J. Whatever may be the effect of the paper signed by John W. Mentzer, dated September 8, 1890, it was certainly of no binding force as to the defendant, Sides, until he had notice of it and of its contents. The paper purports to be an agreement on the part of John W. Mentzer that his income as prothonotary should be paid over to Allen W. Mentzer, and that he, John W. Mentzer, would keep a strict account of the daily income of the office, and would deposit the same in bank to his own credit as prothonotary, and pay it over to Allen W. Mentzer, "from time to time, as he may require it." The literal meaning of this paper is that John W. Mentzer should himself collect the income, deposit it in bank to his own credit, and then pay it over himself to Allen W. Mentzer. If John W. Mentzer was to collect the income, he must necessarily have control of it, in order to obtain it from those from whom it had to be collected, and the duty of paying it over to Allen W. Mentzer was a personal duty to be performed by himself. This feature of the instrument does not bear the character of an absolute assignment of the income, at least as far as third persons were concerned. Such persons having any part of the income in their hands would still be bound to pay it to John W. Mentzer upon his demand. So far as the assignments of error in this case are concerned, however, it is not of much importance how that question is considered, because, in any event, the defendant,

Sides, unless he had notice of the paper, was in no degree bound by it. So long as he was in ignorance of it, any payment he would make, either to John W. Mentzer, or to any person to whom he directed it to be paid, was a perfectly good payment, which would relieve him from any liability to Allen W. Mentzer. If this were not so, A. W. Mentzer might keep the paper in his pocket until all the income of John W. Mentzer in the hands of Sides had been paid over to John W. Mentzer, or other persons upon his order, and then come upon Sides, and compel him to pay it all over again. As a matter of course, this could not be done. Upon the trial the defendant offered to prove that he had paid out a part of the fees in his hands belonging to John W. Mentzer to A. S. Bard, and to other persons not named, at the instance and request of John W. Mentzer, and before he (Sides) had any notice of any assignment or transfer to A. W. Mentzer. This offer was rejected on the theory that the paper of 1890 was an absolute transfer of all of John W. Mentzer's interest in the moneys in the hands of Sides, and that John W. Mentzer's right to any of the money had ceased. It is extremely doubtful, to say the least, whether this would be so on the fair construction of the paper, when the rights of third persons were sought to be affected; but it was grave error to reject this offer of proof in any event, for the simple reason that the payments were made without any knowledge of the paper on the part of Sides. Most assuredly he was not bound by it unless he was notified of its existence, and it was a part of the offer of proof which must be accepted as verity that he had no such notice. This view of the case disposes of all the assignments of error, and they are all sustained. Judgment reversed, and new venire awarded.

(176 Pa. St. 478)

CITY OF ERIE v. LAND ON EIGHT-EENTH STREET et al.

(Supreme Court of Pennsylvania. July 15, 1896.)

STREET PAVING—CONTRACT OF CITY.

Under Act May 23, 1889 (P. L. 303) art. 9, § 5, providing that every contract involving an appropriation of money shall designate the item of appropriation on which it is founded, and the estimated amount of the expenditure thereunder shall be charged against such item, and so "certified by the controller on the contract before it shall take effect as a contract," failure of a contract by a city with a company for paying to certify that the controller has charged the amount of expenditure for the paving against the appropriation made for its payment renders the contract inoperative, and prevents recovery against adjacent property owners for work done under it.

Appeal from court of common pleas, Erie county.

Scire facias sur municipal lien by the city of Erie, to the use of Erie Paving Company, against a piece of land fronting on Eight-

eenth street in the city of Erie, and Mary E. Moody, owner, or reputed owner. Judgment of nonsuit, and plaintiff appeals. Affirmed.

Griffith & Crosby and Theo. A. Lamb, for appellant. Joseph M. Force, for appellees.

GREEN, J. The portion of the statute upon which the defense in this case is founded (Act May 23, 1889 [P. L. 303] art. 9, § 5) is in the following words: "Every contract involving an appropriation of money, shall designate the item of appropriation on which it is founded, and the estimated amount of the expenditure thereunder shall be charged against such item and so certified by the controller on the contract before it shall take effect as a contract, and the payments required by such contract shall be made from the fund appropriated therefor." The city controller certified the contract as follows: "I hereby certify that councils have appropriated, by bill No. 492, approved March 18th, 1890, the sum of forty-one thousand five hundred dollars for the construction of an asphalt pavement on Eighteenth street, extending from the west line of Peach street to the east line of Liberty street, and that I have credited, in accordance with bill No. 495, approved April 7th, 1890, a fund for paving street intersections, etc., on Eighteenth street, from the west line of Peach street to the east line of Liberty street, with the sum of four thousand seven hundred and sixty dollars (\$4,760)." It is certainly the fact, and is conceded by the learned counsel for the plaintiff, that the certificate of the controller is not in compliance with the provisions of the law as to what the certificate should contain. It does not certify that the controller has charged the amount of expenditure for this pavement against the appropriation which was made for its payment, and the statutory consequence of such omission is that the contract between the city of Erie and the Erie Paving Company cannot "take effect as a contract." It results that the paving company has no contract upon which it can recover, and it is therefore to be regarded as a mere volunteer, having no lawful claim against this defendant. In *Reilly v. City of Philadelphia*, 60 Pa. St. 467, we held that where councils, by resolution, authorized a department to contract for paving, with the condition that the contractor should be selected by a majority of the owners of the front to be paved,—the cost of paving, etc., to be collected from the owners on whose front the work should be done,—the claimant could not recover unless he first proved that he had been selected by a majority of the owners, and that the contractor doing the work without such selection was a mere volunteer, and could not recover from the city, or from the owners. Williams, J., delivering the opinion, said: "But under the provisions of

the ordinance a contract with the department of highways would give him no authority to pave the street, and to collect the cost thereof from the adjacent lot owners, unless he was selected by them to do the work. The department had no authority to enter into a contract with him unless he was selected by a majority of the lot owners. * * * Having submitted the selection of the paver to the lot holders, the city could not adopt the work of one not chosen by them, and impose on them the obligation of paying for its cost. The choice of the paver belonged exclusively to the lot holders, and his selection by them was a condition precedent to the right to do the work and make it a lien on the property fronting on the street." So in the present case the contract of the city with the paving company must be certified in a certain manner by the controller, "before it shall take effect as a contract." This requirement is a condition precedent to the legal efficacy of the contract, and without it there is no efficacious force in the attempted contract as to any one. As this requirement is entirely absent from the controller's certificate, the conclusion follows that there never was a lawful contract for the paving in question, and hence there can be no recovery. In the case last cited the paving was all done by the contractor under a contract with the highway department; but because the condition precedent was not performed, to wit, a selection of the paver by a majority of the lot owners, the contractor could recover nothing from the owner. We said, "If he [the paver] was not selected by the lot owners, and if he did not contract with the department of highways, to do the paving, he was a mere volunteer, and is not entitled to recover from the city or the lot holders the cost of the paving."

The same principle was enforced in *Olds v. Erie City*, 79 Pa. St. 380, where we held that there could be no recovery of a paving bill against the owner, because notice of the ordinance, under authority of which the paving was done, was not given as required by law. Gordon, J., said, in the opinion: "There is, however, this important proviso, to wit, that no ordinance for any of the above-named purposes shall be passed until — days' notice of the improvement prayed for has been given in the official paper of the city." We thus observe that inquiry into the character of the petition is barred, but this second condition, to wit, publication, becomes material and necessary to the jurisdiction of the councils, inasmuch as it is substituted for that which, but for the preceding part of the second section of the act, would be material and necessary. * * * The action of the councils under this act was quasi judicial in its character, and it is a fundamental rule that all such proceedings, where they affect the rights or property of the citizen, are nugatory, if unaccompanied

by reasonable notice. In the case in hand no such notice as that required by the statute was given. The imperative requisition is publication in the official paper of the city for — — days." For these reasons the judgment in favor of the plaintiff was reversed without a venire. In *Erie City v. Brady*, 127 Pa. St. 169, 17 Atl. 885, the same doctrine was applied. In *Fell v. Philadelphia*, 81 Pa. St. 58, the distinction between mere irregularities and formal details in the execution and performance of agreements between the city and its contractor, and other objections which affect the jurisdiction or power over the subject-matter, is carefully pointed out. In the one class, recovery may be had; and in the other, not. There were numerous objections made by the lot owner in the last case to a recovery by the contractor for the paving claim, some of which raise questions of irregularities in the execution and performance of the contract between the city and the contractor, and as to these we held that the owner could not make defense. But there was also a defense grounded upon the omission of the contractor to give notice, by publication in two daily papers, of certain specific matters mentioned in the ordinance. Woodward, J., delivering the opinion, said: "It has been uniformly held that it is not competent for a defendant to raise questions relating to the formal details of agreements between the city and its contractors, and to their execution and performance, where the acts of the municipal officers have been ratified, and the work done by the contractors has been accepted. * * * Other deficiencies, however, are developed in this record which have more significance. The ordinance of 31st of December, 1862, is in these words: 'Hereafter before any contract for paving any street or streets, shall be entered into by the highway department, the person or persons applying for such contracts shall give notice of such application, such notice to set forth: (1) The name of the contractor,' etc. [in all, four distinct matters]. No evidence was given by either party on the trial, on the subject of notice by these contractors. * * * The facts prove affirmatively that the legal requisites of such a contract between the city and the contractors as would create an obligation on the defendant to pay were not fulfilled. There is no room for the application of the maxim, 'Omnia præsumuntur rite esse acta,' for that principle heals only apparent irregularities or omissions where jurisdiction or power over the subject-matter is clearly vested. Sharswood, J., in *Pittsburgh v. Walter*, 69 Pa. St. 365. The irregularities here upturn the very foundation of the jurisdiction. In view of the good faith in which the contract was entered into, and with which the work has been done by the contractors, it has been with reluctance that this conclusion has been reached. But this is not a ques-

tion between the city and the contractors, nor between the contractors and the property owners who employed them. It arises between the city and the defendant. The latter had assumed no duty, expressly or by implication. He can be made subject to a legal obligation only where the power conferred on the municipal authorities has been legally exercised. Like *City v. Lea*, 5 Phila. 77, this is 'a case depending wholly on the forms and requisitions of law, and in no degree on consent or contract, in which one of the forms, one of the conditions, which the law itself has imposed, is wholly wanting.' It is within the principle of *Reilly v. Philadelphia*, 60 Pa. St. 467; of *City v. Stewart*, 1 Wkly. Notes Cas. 242; and of *Pittsburgh v. Walter*, supra. The city could have waived irregularities and defects of form. * * * But jurisdiction over the defendant and his property could be obtained only by pursuing rules prescribed by law, and the record proves that these rules could not possibly have been observed." It will be noticed that the prohibitive words of the ordinance in the above case are of a quite similar character to those in the case at bar. They are, "Hereafter, before any contracts for paving any street or streets, shall be entered into by the highway department, the person or persons applying for such contracts shall give notice," etc. Here the words are, "And the estimated amount of the expenditure thereunder shall be charged against such item, and so certified by the controller on the contract before it shall take effect as a contract." In either case there shall be no contract unless the thing directed to be done shall actually be done. The foregoing principles and authorities cited dispose of the present contentions, and they constitute a bar to any recovery by the plaintiff in this case. Judgment affirmed.

(176 Pa. St. 246)

RAUSCHER v. PHILADELPHIA TRACTION CO.

(Supreme Court of Pennsylvania. July 15, 1896.)

**STREET RAILWAY—ACCIDENT AT CROSSING—NEG-
LIGENCE.**

1. In an action for injury to plaintiff, who was struck by a west-bound car and thrown in front of an east-bound car,—he having testified that before he attempted to cross he saw the cars, and that they were coming slow, and that he could not see the slightest danger; that after he crossed the first track he heard a noise behind him, and as he turned he was struck by the car; and that at this time both cars were running at a furious rate without giving signals; and his testimony as to signals and speed being contradicted by a number of defendant's witnesses,—it was proper to submit to the jury the questions of negligence and contributory negligence.

2. Where plaintiff, having crossed a track on which was a west-bound street car, was struck by such car, and thrown on the next track, in front of an east-bound car, an instruction that plaintiff "says he stopped, looked,

and listened,—a precaution which a man is bound to exercise before crossing a crowded thoroughfare, and after he does that he does his whole duty. * * * The defendant denies he was guilty of any negligence, * * * and that raises the question, * * * who do you believe was in the wrong? * * * Do you believe the plaintiff was remiss in his duty? If you do, your verdict should be for the defendant. Do you believe he was exercising due care? * * * Then they would be responsible for his injury,"—is misleading, because open to the construction that plaintiff had no duty to exercise care after commencing to cross.

Appeal from court of common pleas, Philadelphia county.

Action by Frank Rauscher against the Philadelphia Traction Company. Judgment for plaintiff. Defendant appeals. Reversed.

The charge to the jury was as follows:

"Mr. Rauscher, the plaintiff, has brought suit against the traction company to recover damages at your hands for the injury he has sustained, as he alleges, by the negligence and want of proper care on the part of the defendant. As you probably heard me say on another occasion, negligence is the foundation of these suits, and it must be established to your satisfaction that the defendant's negligence was the cause of the accident; and, unless you think that, he is not entitled to any damage. Under the laws of the commonwealth, the foot passenger has as much right on the crossing as any wagon or car, or any other conveyance, and both must use their right with ordinary and reasonable care; and, if he did not do that, he is responsible if he inflicts injuries upon anybody else. Now, this gentleman was waiting at the side of the street crossing indicated by the flagstones, which is the place where the crossing is most properly to be made, and he alleges when he was crossing there this car came without notice—this western car came without notice—and with great speed, struck him, and threw him over onto the track, under another car, going in a different direction; and there he suffered the injury which you have heard him detail to you, which resulted, as you have heard, in the painful injury of the loss of an arm. Now, in his testimony he says he stopped, looked, and listened,—a precaution which a man is bound to exercise before crossing a crowded thoroughfare, and after he does that he does his whole duty, and that is all he can be expected to do,—to see the streets are in such a condition to make him believe he can safely cross them, assuming that these vehicles were using the ordinary and proper care; and especially are they bound to use this care when they come to these places where they are to expect foot passengers to cross. The defendant denies he was guilty of any negligence, and says he was going at the ordinary rate of speed, with all precaution; and that raises the question, on the evidence, who do you believe was in the wrong in this case? Do you believe the plaintiff was remiss in his duty? If you do, your verdict should be for the defendant. Do you believe that he was

exercising due care in his rights as a citizen? Then they would be responsible for his injury. If you should consider he is entitled to damages, then the question for you to consider is a question of damages; and that, in all these cases, is a very important question, and should not lightly be considered. In all cases of this character it is very natural for a man to feel somewhat sympathetic towards the person who is injured, and people are often swayed by feelings of enmity towards the person who has committed the injury, and they are urged by the eloquence of counsel to give generous allowance. Gentlemen, you are not here to be generous. You are here to be just, not generous. You should disregard any feeling of generosity. When you are spending your own money, you can be generous, but when you are spending other people's money the question is one of justice; and it is necessary that the verdict should be found on the testimony, and upon the state of affairs which induce you to arrive at a reasonable and proper conclusion. Verdicts of the courts are no good to anybody if they are not just verdicts, because, if they are not considered proper decisions, they may be set aside. It is a matter for you, as business men, to consider; and it is also well for you to recollect that, in giving the gross amount, you not only give the interest of that sum, but the sum itself, in addition. For instance, if a man is making fifty dollars a year, you not only give him fifty dollars during his life, but you are giving him the principal which produces that interest. This is a matter for your consideration in this case. This man has suffered a very serious injury, and has suffered a great deal of pain. All of these things are for your consideration, and, if he is entitled, under your views, to a consideration, I trust you will find such a verdict, for such an amount, as just men should do. The defendant's point I refuse."

Defendant's point was, "There is not sufficient evidence in this case to charge the defendant with negligence, and the verdict should be for the defendant."

Henry C. McDevitt and J. Howard Gendell, for appellant. John F. Keator, J. S. Freemann, and Owen B. Jenkins, for appellee.

McCOLLUM, J. According to the plaintiff's description of the occurrence in question, he had crossed the west-bound tracks, when he heard a noise back of him, and, as he turned around to ascertain the cause of it, he was struck by the west-bound car, and thrown upon the east-bound tracks, where he was run over by the east-bound car, and seriously injured. Why he wanted to cross to the south side of Market street, when he expected to take a west-bound car, does not distinctly appear. If it was his purpose to learn from the policeman what west-bound car he should take in order to reach his destination, there was no

occasion to cross to the south side of Market street to accomplish it. As the policeman stood near the crossing, and between the east and west bound tracks, he was as accessible from the north side of Market street as from the south side of it. The plaintiff, before he attempted to cross Market street, saw the car that struck him and the car that ran over him, and that they were approaching Seventh street from opposite directions. He said they were going very slow, that he could not see the slightest danger, and that he went over with the rest of the people until he "got across the first tracks." He also said that when he was struck, and when he was run over, "both were running at a furious rate, without gonging." There was no positive corroboration of his statement in regard to the speed of the cars, and the failure of the motorman to give the usual signals on approaching a crossing. Douglas was the only witness called by the plaintiff who was questioned as to the speed of the cars and the absence of signals, and he was standing at the southwest corner of Seventh and Market streets, conversing with somebody, when he heard that there was a man under the car. This was his first notice of the occurrence. Previous to it, he was not paying any attention to the cars. He could not say whether the car under which the plaintiff was caught was going slow or fast. He did "not hear a gong sounded," but it might have been rung without his hearing it. The testimony of the plaintiff in regard to speed and signals was flatly contradicted by a number of the defendant's witnesses. While we think that in this state of the evidence it was not the province of the court to acquit the defendant of negligence in running its cars, or to convict the plaintiff of contributory negligence in connection with the occurrence, we also think that the attention of the jury should have been particularly directed to the evidence on which these questions were to be determined by them. The instruction that if the plaintiff "was remiss in his duty" the verdict should be for the defendant was inadequate, and, considered in connection with the previous definition of "his whole duty," it was misleading. Under the instruction in regard to his duty, the jury might have understood, without any misconstruction of the language of it, that, although the plaintiff's negligence after he crossed the west-bound tracks was the cause of the injury he received, he was still entitled to compensation for it from the defendant, if he stopped, looked, and listened before he started across the street. At all events, the jury could not justly be charged with stupidity in so construing it. If the plaintiff had attempted to cross the street without looking to see whether a car was approaching, his act would have constituted negligence per se, but the fact that he looked and listened before doing so would not ex-

cuse his want of ordinary care while he was crossing it.

It was not claimed by the defendant that the plaintiff was negligent before he crossed the west-bound tracks, and it was conceded by the plaintiff that the defendant's cars were running very slowly when he first saw them approaching the crossing. Was there negligence on the part of the plaintiff after he crossed the west-bound tracks? And, if so, was it the cause of, or contributory to, the accident? Was the speed of the cars increased, and were the usual signals omitted, as they neared the crossing? These were the questions to be considered and passed upon by the jury, upon the evidence in the case, and under instructions which clearly brought them to their attention. We have already seen that the plaintiff based his claim on the alleged extraordinary speed of the cars, and the absence of the usual signals announcing their approach, and have referred to the evidence relied on by him to sustain his claim, and to the evidence submitted by the defendant in denial of it. The defendant's further contention was that the plaintiff, having safely crossed the west-bound tracks, stopped in the center of the space between them and the east-bound tracks, and that, while backing or turning towards the former, he was struck by the west-bound car. In other words, the defendant alleged that the plaintiff's own negligence was the cause of the injury he received. As the court was not requested to call the attention of the jury to this particular contention of the defendant, the failure to do so cannot be regarded as reversible error. But we think that the instruction in regard to the duty of the plaintiff in crossing the street was inadequate and misleading, and because it was so we are constrained to reverse the judgment. We sustain the third specification of error, and overrule the first, second, and fourth. Judgment reversed and venire facias de novo awarded.

(176 Pa. St. 376)

EVERS et ux. v. PHILADELPHIA TRACTION CO.

(Supreme Court of Pennsylvania. July 15, 1896.)

**STREET RAILWAY—INJURY TO CHILD ON TRACK—
NEGLECTANCE—CONTRIBUTORY NEGLIGENCE
OF PARENTS.**

1. Under testimony that when a child started from the curb, which was about seven feet from the rail, to cross a street in the middle of a block, the motorman was looking to the side of the street, and that, after being hallooed to twice, he looked in front of him just as the child was struck, the question of negligence is for the jury.

2. Where a child 4½ years old was killed by a street car, the question of contributory negligence of the parents was for the jury, under evidence that the family, consisting of the parents and eight children, was in moderate circumstances; that the mother had only such aid

in caring for the younger children as those older could give; that after washing and dressing deceased she permitted him to go with his brother, eight years old, to a coal box on a street where there was no railway track; that when she had washed and dressed another child, one of the daughters returned from church, and was sent for both children: that, on deceased refusing, she immediately sent again for him, but he had gone onto a street having a car line, and been killed.

Appeal from court of common pleas, Philadelphia county.

Action by Michael Evers and wife against the Philadelphia Traction Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

J. L. Vanderslice and J. Howard Gendell, for appellant. Wendell P. Bowman, for appellees.

DEAN, J. On Sunday forenoon, the 17th of September, 1893, Michael Evers, 4½ years old, the son of plaintiffs, was run over and killed by defendant's street car on Front street, between Bainbridge and Catherine, in the city of Philadelphia. The plaintiffs lived at the corner of Meade and Swanson streets; the latter being parallel with Front, and near to it. Meade is a narrow street or alley, running from Front to the river. The family of plaintiffs was made up of the parents and eight children. The mother had washed and dressed Michael, the deceased child, and then had permitted him to go with his elder brother, Thomas, to a coal box on the lower side of Meade street, while she proceeded to wash and dress another of her children. About the time she had finished this one, two other of her children, girls, returned from church. On inquiry of them, she was told the two boys were still by the coal box. She then directed one of these to tell the boys to come home. One of the sisters immediately did as directed by the mother. The elder boy obeyed, but the younger refused. The sister, on reporting to the mother, was immediately sent to bring him home. In this interval, however, the boy had left the coal box, and crossed over to the west side of Front street, a half square distant, and then started to run across again to the east side, when he was run over by defendant's car. The father peddled brooms with a horse and wagon, and at times manufactured them himself in the house where he lived. Two of his daughters had employment, and earned a living, but the family was in moderate circumstances. The parents brought suit against the defendant for damages, alleging the death was caused by its negligence in running the car at an unusual speed. Further, that when the child started from the west side of Front street to run across the track to the east side, he was in plain view of the motorman for a distance of 60 feet; that although witnesses on the sidewalk saw the danger, and screamed to him, the motorman made no effort to stop

the car, and appeared to be looking westward, in another direction. There was much negative evidence that no warning of the approaching car was given. The motorman himself admitted he was a new hand on city streets, having been in employ of defendant only four days, and that this was his first trip without an instructor. At the trial the court below submitted the evidence to the jury to find (1) whether defendant was negligent; (2) whether the parents were guilty of contributory negligence in not exercising proper watchfulness over their child. The verdict was for plaintiffs, and we have this appeal by defendant, in which there is the single assignment of error that the court should have peremptorily directed a verdict for defendant on two grounds: (1) Because there was no evidence of negligence on part of defendant; and (2) because the evidence necessarily warrants no other inference than that of negligence on part of the parents.

As to the first proposition, it is based on the incorrect assumption that there was no evidence tending to show the motorman failed to fully perform his duty. Eight witnesses testify this child, in broad day, started from the curb, which is about 7 feet from the rail, to cross the street, when the car was 50 to 60 feet distant. Eugene O'Neill, an intelligent witness, a foreman of stevedores, testified he was sitting at a side window of a house, looking towards the west side of Front street, and about 30 to 40 feet distant; saw the child start from the curb to cross; then the car came into view, running rapidly towards the child; the witness hallooed to the motorman, who had been looking to the west, and not in front of him, and who then turned his head to look in front, when he hallooed the second time, and just then the child was run over. This is, in substance, the testimony of several other witnesses who saw the child attempting to cross, and who saw the car when it approached him. Whether, under the circumstances, the motorman failed to exercise care, was a pure question of fact to be determined by the jury. That the car moved rapidly between crossings was not of itself evidence of negligence, but, clearly, rapid movement of a car on the street of a city requires a vigilant lookout by those in charge of it. The cars have the right to expeditiously transport passengers on the surface of the streets, but that gives them no exclusive right to the surface occupied by their tracks. Neither at crossings nor between them is the public right relinquished. It is only subordinate to that of the railway company. The fact that more caution should be exercised in running over crossings than on the streets between them warrants no inference that the car can be run without caution except on approaching crossings. In the one case, rapid running is of itself evidence of negligence; in the other, it is not. Assume, then, although running with comparative rapidity, the car was not running at a negligent, and therefore

unlawful speed, the question still recurs, did the motorman exercise care according to the circumstances? If the witnesses be believed, he could, by merely looking in front of him, have seen the peril of the child, and could have saved its life by stopping the car. The case, on its facts, is almost the same as *Schnur v. Traction Co.*, 153 Pa. St. 29, 25 Atl. 650, where we held the question of negligence was for the jury. In that case the boy run over was six years old, and it was alleged the gripman did not see him; but there was evidence by a number of witnesses that they saw him when the car was 60 to 70 feet off. There was no reason why the gripman, whose special duty it was to see the track in front of him, should not have seen what those on the street saw. The cases cited by appellant are not applicable to the evidence, as here offered. In *Chilton v. Traction Co.*, 152 Pa. St. 425, 25 Atl. 606, the child unexpectedly turned and ran into the car. In *Flanagan v. Railway Co.*, 163 Pa. St. 102, 29 Atl. 743, the driver of a horse car was attending strictly to his duty, when a little girl, seven years of age, ran in front of the car, when he was doing his best to stop it, and did stop it but an instant too late to avoid the accident. As we have already noticed, the simple question here was whether this motorman, by the exercise of care under the circumstances testified to, could have avoided this accident. That was fully and carefully submitted to the jury, and they have found defendant was negligent, and we must adopt that as the truth. This being a child, contributory negligence cannot be imputed to him. If an adult had been injured in the attempt to cross a street-railway track in front of a rapidly moving car, 50 to 60 feet distant, in charge of a negligent motorman, quite another question would have been raised. As to the alleged negligence of the parents, we are of opinion the court committed no error in also submitting that question to the jury. Clearly, if the evidence were undisputed, that these parents had habitually permitted a child of this age to play on the street on which ran the trolley car, there could have been no recovery; or, if the evidence had shown they did not, on that day, under the circumstances, exercise the care which a child of such tender years demanded, there could have been no recovery. But it will be noticed the family was a large one, and not in affluent circumstances. The mother had only such aid in caring for the younger children as those older could give. She washed and dressed this one, and permitted him, with his brother, eight years old, to go to the coal box on Meade street, where there was no railway track. When she had completed her motherly duty to the second child, and one of the daughters had returned from church, she sent for both children. The oldest returned; the deceased one refused. She immediately sent again for him, but before he was reached the caprice and heedlessness of childhood had led him

to Front street, where he was killed. It was not for the court to say, from this evidence, the parents were negligent. We think the following instruction of the learned judge of the court below on this evidence was all that defendant had the right to ask: "It is the duty of parents to look after their children of tender years, and not to turn them out amid the dangers from accidents which occur upon crowded streets, and where trolley cars are running about, filled with the suggestions of danger to the lives and limbs of children. They ought to exercise reasonable and proper care, and one of the questions you are called upon to determine is as to whether or not these parents did exercise such due care in looking after this child." The assignment of error is overruled, and judgment affirmed.

(33 Md. 505)

MUNROE et al., Supervisors of Election, v. WELLS, Clerk of Circuit Court.

(Court of Appeals of Maryland. June 18, 1896.)

ANNE ARUNDEL COUNTY — SUPERVISORS OF ELECTION — APPOINTMENT — VACANCY IN OFFICE — SPECIAL ELECTION — STATUTES — REPEAL — EFFECT.

1. Acts 1896, c. 202, taking effect on April 2d of that year, repealed absolutely Code, art. 33, entitled "Elections," but provided, in section 2, that supervisors of election appointed before its passage, under the Code, should hold office as if appointed under its provisions. Under Const. art. 2, § 13, however, supervisors of election cannot enter upon their duties until May 1, 1896. *Held*, that no vacancy in the offices of supervisors of election occurred between April 2d and May 1st, which the governor was authorized to fill by appointment.

2. Prior to the passage of Act 1896, the house of delegates had ordered a special election to be held April 21st. *Held*, that the order not being self-executing, and the legislature having provided no means for executing it, either through Act 1896 or otherwise, the election cannot be held.

3. The effect of the repeal of Code, art. 33, entitled "Elections," by Acts 1896, c. 202, and the adoption by the latter of new methods for holding elections and for registration of voters, was to nullify the former law, and render it totally inoperative; hence the registration lists and ballot boxes prepared for use under the old law are not available for use under the repealing act.

Appeal from circuit court, Anne Arundel county.

Petition by Frank A. Munroe and others, constituting the board of supervisors of elections, for mandamus to compel George Wells, clerk of court, to deliver possession of registry books of qualified voters, and of ballot boxes. From an order dismissing the petition, petitioners appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

James M. Munroe, for appellants. Robert Moss, James W. Owens, and John P. Poe, for appellee.

FOWLER, J. This appeal presents a question growing out of the repeal of article 33 of

the Code, tit. "Elections," and the re-enactment of said article with amendments. At the November election of 1895, George Wells and Washington G. Tuck were candidates for the office of clerk of the circuit court of Anne Arundel county. Wells was declared elected, was commissioned, took possession of the office, the duties of which he has since performed. His election was contested by Tuck before the house of delegates, which declared that Wells had not been duly elected, and thereupon ordered a new election to be held on the 21st of last April. The act of 1896, repealing article 33 of the Code, took effect from the day of its passage, namely the 2d day of April. On the 8th of April, the appellants were appointed by the governor to be supervisors of elections of Anne Arundel county, upon the theory that, the provisions of the Code relating to elections and registration having been repealed by chapter 202, the supervisors who had been acting thereunder had been legislated out of office, and that, therefore, a vacancy existed, which it was the duty of the governor to fill. It appears, however, that, just before the passage of the act of 1896, the governor had appointed these very appellants as supervisors for Anne Arundel county, under the existing law; and it is provided by the second section of that act that, although so appointed before its passage, yet they should hold, and their appointments so made should to all intents and purposes be as if made, under the said act of 1896, by which their duties, term of office, and mode of appointment are prescribed. But under the provision of Const. art. 2, § 13, the appellants, as supervisors of election under the act of 1896, could not enter upon the discharge of their duties until the 1st day of May, which was after the time fixed for the special election ordered to be held by the house of delegates. It was therefore to fill a supposed vacancy between the 2d of April, when the old law was repealed, and the first Monday of May, when the officers under the new law could enter upon their duties, that the appellants were, as we have said, again appointed by the governor, on the 8th of April.

At the hearing on this case, counsel for both parties united in a request that, because of the public importance of the issue involved, we would as soon as possible announce our conclusions upon the questions involved. This we did immediately after the argument, and we will now briefly state the grounds upon which that conclusion is based.

The controlling question is whether there was such a vacancy when the appellants were appointed by the governor, on the 8th day of April, as, under the constitution and laws of the state, he was authorized to fill. If there was such a vacancy, it must have been a vacancy in the office under the previous law, or under the act of 1896. It seems obvious there was no vacancy under the former, for it is conceded that it was swept out of existence by the present law, by which an entirely different

method of appointment was provided. This being so, it follows that the previous law, from the 2d of April, when it was repealed, became absolutely inoperative for any purpose whatever. *Wade's Case*, 43 Md. 178; *Dashiell's Case*, 45 Md. 615. Hence the offices under the previous law have no existence after the 2d of April, and, of necessity, there could be no vacancy in them. Was there a vacancy under the act of 1896? Confessedly not, for, as we have seen, the governor had already appointed these appellants, and, by section 2 of the act of 1896, they were holding under it.

It was urged, however, with much earnestness, that inasmuch as the house of delegates had ordered a special election to be held on the 21st day of April, unless we should hold that the appellants could act, the mandates of the house could not be obeyed. But it is for the legislature, and not the judiciary, to provide means for executing the order of the house; and having failed to do this, the order not being self-executing, although in accordance with the provisions of the constitution, the special election cannot be held (*Groome v. Gwinn*, 43 Md. 572), in the absence of affirmative legislation for that purpose. But in answer to this view it was argued that the special election could be held under the act of 1896, notwithstanding the admission that by the terms of the constitution, the appellants cannot qualify or perform any duties under that act until the first Monday of May. It seems, however, too clear for controversy, that the act of 1896 makes no provision whatever for holding the special election on the 21st of April. This is apparent from the consideration that, after its passage, a new and general registration was to be had, by and under which all elections were thereafter to be held, and by which the right to vote was to be determined. But it was not contemplated that the registration under the act of 1896 was to be had until long after the time fixed for holding the special election; and therefore it was not supposed, nor is it now claimed, that the registration lists to be made under this act could have possibly been available at that election. The prayer of the petition of the appellants is that the appellee be required to deliver to them the registry books of the qualified voters of Anne Arundel county, etc., as well as the ballot boxes; and the allegation is that without these the said election could not be held. But as we have held in the case of *Meloy v. Scott* (decided at this term) 35 Atl. 20, that the effect of the repeal of the previous registration law by Act 1896, c. 202, and the adoption by the latter of new methods for holding elections and for registration of voters, was to nullify the former law, and make it as inoperative and void as though it had never been in existence, it follows that the lists and ballot boxes prepared for use under and according to the provisions of the old law cannot be available under the repealing law, unless the latter makes some provision for such a contingency. There being no such pro-

vision in the act of 1896, the special election cannot be held, unless, as suggested, such election can be held without any registration.

The contention is that if an election has been duly ordered, and there has been a failure to provide for a registration of voters to be had before such election is to be held, the election must proceed without registration. But the difficulty, as we have already pointed out, is that the officers (judges of election included) under the old law can no longer act, and there is no power given, even if the supervisors could otherwise act, to appoint judges of election under the new law until long after the special election is to be held. Unless, therefore, such election could be held without judges, without registration lists or ballot boxes, except such as may be agreed upon by the voters, it cannot be held at all. It is enough to say that such election has never been known to the constitution and laws of this state, either before or since the passage of the first registration law. Order affirmed.

(83 Md. 385)

MYERS et al. v. COMMISSIONERS OF BALTIMORE COUNTY et al.¹

(Court of Appeals of Maryland. June 17, 1896.)

TAXATION—TAXABLE PROPERTY—NOTICE OF ASSESSMENT—CONSTITUTIONAL LAW—TAXATION OF EXPORTS—PROPERTY IN TRANSIT.

1. Plaintiffs, as dealers in cattle, were accustomed to receive shipments of cattle every Wednesday, which on the following day were sold to local buyers, or exported, as the case might be. Held, that the average weekly shipment, though held but one day, constituted plaintiff's stock in trade within the state, under Code, art. 81, § 2, providing for the taxation of certain kinds of property within the state.

2. The fact that a portion of the cattle so received were purchased for the purpose of being exported does not constitute them exports, within the meaning of Const. U. S. art. 1, § 9, cl. 5, forbidding the laying of taxes upon exports.

3. The cattle so purchased with intent to export the same to another state or to foreign countries are not property in transit, within the provisions of Const. U. S. art. 1, § 8, cl. 3, limiting to congress the power to regulate commerce with foreign nations and among the several states.

4. Under Code, art. 81, § 145, providing that when new property, not valued and returned by the assessor, is to be added to the assessment roll, the county commissioners must first notify the owner by summons, appointing a day for him to appear and answer, a new assessment, added to the roll without notice to the owner, is absolutely void.

Appeal from circuit court, Baltimore county, in equity.

Bill by Myers & Houseman against the county commissioners of Baltimore county and others to enjoin the collection of certain taxes. There was a decree for defendants, and plaintiffs appeal. Reversed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, FOWLER, ROBERTS, and PAGE, JJ.

¹ For opinion on reargument, see 85 Atl. 963.

S. S. Field, for appellants. D. G. McIntosh and Jefferson D. Morris, for appellees.

PAGE, J. The bill in this case was filed by the appellants to restrain the collection of certain taxes alleged to be due from them to the appellees. The assessment upon which these taxes were levied is \$20,000 on the "stock in trade, capital stock" of the appellants. Myers & Houseman are cattle dealers. Their principal office is at the Union Stockyards in Baltimore county. Their gross annual sales amount to about two millions of dollars. Their cattle are mostly purchased in the Western states, thence shipped to Baltimore, and there disposed of by the firm. Some are shipped to Europe, and others are disposed of at home. They also receive and sell cattle on commission. The market days at the Union Stockyards are Wednesday and Thursday. On the first-named day the original owners sell to the dealers; and on the next the dealers retail to the butchers and others, and ship the remainder. On other days there is no dealing, except when an occasional load arrives from shippers who are ignorant of the custom of the trade. Of the cattle handled by the firm one-third are exported, one-sixth sold to butchers, and the residue are on commission. Of those exported, some are purchased in this state, but the large majority of them come from Western states. The course of business is as follows: The cattle are expected to and generally arrive on Wednesday. They are then placed in the pens of the Union Stockyards. There they remain rarely longer than one day; so that by Thursday evening the pens are empty, and so remain until the following Wednesday. Those intended for export are fed, watered, and rested at the yards, and then placed on the ship. Those fit for export are not of such a class as are offered in the Baltimore market, and none of these are sold there, except when there are more than are wanted for shipment. The appellants contend this stock was not liable to taxation, because it cannot be considered as property "within this state," as the words are employed in the second section of article 81 of the Code. That provision is as follows: "All other property of every kind, value and description, within this state, shall be valued to the respective owners thereof in the manner prescribed by this Code, and shall be assessed and taxed as the property of such respective owners according to such prescribed methods of valuation," etc. In *Hopkins v. Baker*, 78 Md. 363, 28 Atl. 284, it was held that a stock of goods is to be regarded as "permanently located" (within the meaning of the words as used in article 3 of section 51 of the constitution) at the place where they are to remain until sold. The separate articles, the court says, constituting the stock, may continue the property of the appellees for a day, a week, a month, a year, or longer;

but until they are sold they remain permanently in Baltimore, and are not moved from place to place. The stock in trade of the appellants consisted of cattle, and the evidence shows that, while they kept this stock on an average of but one day in the week, they did have, sometimes, every week at least \$20,000 worth of cattle on hand; so that, if the week be regarded as the unit of time, and not the day, they may be said to keep on hand all the time an average of \$20,000 worth of cattle. They keep them there for sale, and as they sell, according to the custom and exigencies of the trade, they replenish with other stock. Suppose, instead of not being fortunate enough to sell each week's receipts in one day, it took them ten days to close them out, so that the second week's consignment would be received before the first could all be disposed of, this case would then be substantially like that in 78 Md., 28 Atl., and no sufficient reason could be assigned for holding that the cattle, "stock in trade," "so held for sale," would not be "within the state" for the purposes of taxation. These cattle are disposed of rapidly, for the simple reason that the expense of keeping them on hand would in a short time destroy the profits of the business. It is an exigency of the trade. Ordinary goods may be kept on the shelf for a considerable period of time without loss, but cattle must be sold. The power of the state to tax an ordinary stock in trade is unquestionable. Can it be that the power is lost by any sort of an exigency that the special trade or class of goods may impose upon the trader? When received by the appellees in Baltimore they are to be kept an indefinite time until sold. The only disposition to be made of them is to be sold; and that this takes but one day is due to the course of trade, and not to the specific purpose of the firm. They buy and bring them to Baltimore, not for the temporary purpose of holding them in Baltimore county one day, but until they are sold, whether it be one day or one year. Therefore they are not temporarily there, but permanently, for sale; or, in other words, to remain there permanently until sold. There seems to be no reason for holding that these cattle, brought into the state by the appellants, residents of the state, for the purpose of supplying their trade, do not have, for the purposes of taxation, the same status as the goods of a merchant who buys in other status merchandise for the purpose of replenishing his stock. When here, they may fairly be "considered as constituting a part of the mass of the property of the state." *Appeal Tax Court of Baltimore City v. Patterson*, 50 Md. 367.

It is said, however, that the assessment is bad, because it includes the cattle exported. This class comprised two-thirds of the cattle handled. It is well settled now by the decisions of the supreme court of the United States that property in transit

through the state, or from a point in the state to a point outside, is not within the taxing power of the state. That power lies with congress, under that provision of the federal constitution (article 1, § 8, cl. 3) which declares that it shall have power "to regulate commerce with foreign nations, and among the several states and with Indian tribes, and it is exclusive in all matters which require or only admit of general and uniform rules." *Cooley v. Board*, 12 How. 299; *Brown v. Maryland*, 12 Wheat. 419; *Walling v. People of Michigan*, 116 U. S. 446, 6 Sup. Ct. 454. But this provision does not prohibit a state from taxing articles brought from another state, so long as there is no discrimination against the product of other states or the rights of its citizens. *Woodruff v. Parham*, 8 Wall. 123, 147; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1001. The mere fact, therefore, that these cattle were purchased in other states, and brought to this state, is per se no reason why they cannot be taxed in the usual manner in which such property is taxed in the state, as a part of the general mass of the property of the state. In *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 477, the supreme court said: "They cannot be taxed as exports,—that is to say, by reason or because of their exportation,—for that would amount to laying a duty on exports, and would be a plain infraction of the constitution, which prohibits any state, without consent of congress, from laying any imports or duties on imports or exports; and, although it has been decided that this clause relates to imports from and exports to foreign countries, yet, when such imports or duties are laid on imports or exports from one state to another, it cannot be doubted that such an imposition would be a regulation of commerce among the states, and therefore void as an invasion of the exclusive power of congress. * * *

But if such goods are not taxed as exports, nor by reason of their exportation or intended exportation, but are taxed as part of the general mass of property in the state, at the regular period of assessment for such property, and in the usual manner, they not being in course of transportation at the time, is there any valid reason why they should not be taxed?" *State Freight Tax Case*, 15 Wall. 232. We cannot hold in this case that at the period of assessment any of these cattle were in course of transportation. In the regular course of business the cattle purchased by the appellants are shipped to themselves at Baltimore, to be there disposed of as they may deem most advantageous to their own interests. Once at the Union Stockyards, the transportation ceases, until, at the pleasure of the appellants, they are again shipped. They are not held there to await a steamer or a train, but for the convenience of the owners, in order that they may determine which of them they will sell in the home market and which they will

ship to the foreign, or any other disposition they may choose. After this determination is reached, some are disposed of at home to the butchers, and those destined for other markets are delivered to the carrier for their final journey. Now, it is proposed to tax them here, not because they come from another state, nor as exports, but in the same manner, and for the same objects, as all other property in the state is taxed. The case of *State v. Engle*, 34 N. J. Law, 425, is not such a one as this. There the coal was mined on their own land by a company in Pennsylvania, and sent by rail to Elizabethport, to be there shipped by water to other markets for sale. The court says: "The power of the state to tax the subjects of commerce when their transit for the purposes of commerce has ceased, and they have become incorporated and mixed up with the property of the community, is well settled. But that a tax on property belonging to a citizen of another state in its transit to market in another state, which is delayed within the state, not for the purposes of sale, but merely for separation and assortment for the convenience of shipment to its destination, is a tax on commerce among states, is too plain to require argument." In this case the place of destination, upon their shipment from the West, is Baltimore county; and in the latter place the owners keep them until they shall have determined what disposition shall be made of them. The property, then, not being in transit, either through the state, or from a point in the state to a point outside, is "property within the state," within the meaning of the statute. But it is contended that, even if this be true, the property is not properly taxed, because the appellants purchased the cattle with the intention to export them; and, therefore, to tax them while in Baltimore county would be within the provision of the constitution of the United States prohibiting the state from laying imports or duties on imports or exports. This question was raised in the supreme court in the case of *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, but not decided. Judge Bradley, speaking for the court, said: "A duty on exports must either be a duty levied on goods as a condition or by reason of their exportation, or at least a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports is not necessary to determine." The subject came up again for consideration in the case of *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 478. The court, after referring to what had been previously held, proceeded: "But no definite rule has been adopted with regard to the point of time at which the taxing power of a state ceases as to goods exported to a foreign country, or to another state. What we have already said * * * will indicate the view which seems to us the sound one on that subject, namely, that such goods do not

cease to be part of the general mass of the property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have started upon such transportation in a continuous route or journey." "Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state." This decision was based on the provisions relating to commerce between the states. But in *Turpin v. Burgess*, 117 U. S. 504, 6 Sup. Ct. 836, the court declared the same rule applicable where the goods are to be exported to foreign countries. They say: "A general tax laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition." In *Carrier v. Gordon*, 21 Ohio St. 608, the rule is stated as follows: "To say that the simple purchase of the property with an intention to remove it would relieve it from taxation would be to make its liability depend upon the mere intention of the owner. * * * The safer rule is * * * to consider property actually in transit as belonging to the place of its destination, and property not in transit, as property in the place of its situs, without regard to the intention of the owner, or his residence in or out of the state."

It is also objected that cattle sold on commission are included in this assessment. The evidence does not support this contention. It is true that Mr. Myers testified that one-sixth of the cattle sold by the appellants were commission cattle, but it does not appear that these were included in the assessment. On the contrary, Myers, and also Houseman, expressly affirm that the statement which places his stock in trade—"capital stock"—at \$20,000, is a true return of all the property owned by them. And nowhere in the record is there a word that tends to show that in making up the assessment the commission cattle were taken into account. Myers testified that the valuation was of the capital stock or stock in trade. Some criticism was made upon the words "capital stock" as not referring to the amount of stock kept on hand. As used here, we think the words "capital stock" are intended to refer to the stock of the concern, and not its money. *Corson v. State*, 57 Md. 288.

There is, however, a fatal omission in the method by which this assessment was made. We do not think it can be regarded as a transfer from the tax books of Baltimore city. It was a new assessment, so far as it affected the taxable basis of Baltimore county, and was, therefore, within the provisions of section 145 of article 81 of the

Code. By that section, where new property, not valued and returned by the proper assessor or collector, is to be added, the county commissioners must first notify the owner by "written or printed summons, containing" interrogatories, etc., and appointing a certain day "for him to appear and answer; and, secondly, such notice, is to be served at least five days before the day of hearing." On that day the owner may appear and answer, and present such testimony as he desires or the commissioners deem necessary to be heard. It is only after the owner has been thus summoned, and has failed to answer in writing on oath, or has appeared and answered orally, and the return day has passed, that the county commissioners can add such new property. The section excepts from these provisions such assessments as are made by the proper collector or assessor whose duty it is to assess and return the same; but this exception does not apply in this case, inasmuch as Van Meeter was merely an agent, with no power to do more than report newly-discovered and mixed properties to the commissioners. In this case a memorandum was made by this agent, and the entry of this upon the tax books, by the direction of the county commissioners, constituted the only assessment. This court has said: "Until the property owner is duly notified, and given an opportunity to come in and answer as to the valuation of the property proposed to be affected, or had failed to come in after receiving such notice, the commissioners have no authority or power either to increase the valuation of property already valued and assessed, or to add thereto other property, not valued and returned to them by the proper assessors or collectors, as provided in the statute." "The statute law of the state applicable to the case," the court proceeds to say, "should have been complied with, and the notice given as required." *County Com'rs of Alleghany County v. New York Min. Co.*, 76 Md. 557, 25 Atl. 865. This notice not having been given as required by the statute, this assessment cannot be upheld. Decree reversed, and the cause remanded.

(19 R. I. 614)

IN RE QUALIFICATION OF VOTERS.

(Supreme Court of Rhode Island. July 23, 1896.)

ELECTORS—QUALIFICATIONS—REGISTRY VOTERS—EXTENT OF RIGHTS.

1. A person qualified to vote only under the provisions of Const. R. I. art. 2, § 1, who alienates all his real estate, is no longer so qualified, and his name should be removed immediately from the voting list. But if such person is also qualified to vote as a registry voter, and has resided in the state two years, and has paid a tax in a preceding year upon property assessed at \$134 or more, his name should be added to the list prescribed in the second clause of Gen. Laws, c. 8, § 3.

2. Const. R. I. art. 2, § 1, declares that one who votes upon certificate "shall have a right to vote in elections of all general officers and members of the general assembly." *Held*, that as Const. U. S. art. 2, § 1, provides that "each state shall appoint in such manner as the legislature thereof may direct a number of electors," etc., and as Gen. Laws, c. 13, § 1, provides that those who are qualified to vote for general officers shall choose the electors of president and vice president of the United States to which the state is entitled, one who votes upon certificate is qualified to vote for presidential electors; and as Const. U. S. art. 1, § 2, provides that electors for members of the house of representatives in congress shall have the qualifications requisite for electors of the most numerous branch of the state legislature such voter can vote also for representatives in congress.

In re qualification of voters. Opinion of the supreme court in response to the governor's request for an opinion upon certain questions propounded by the board of canvassers and registration of the city of Providence.

To his Excellency, Charles Warren Lippitt, Governor of the State of Rhode Island and Providence Plantations.

In response to your excellency's request for our opinion upon certain questions propounded by the board of canvassers and registration of the city of Providence, we have the honor to submit our opinion as follows:

In construing the laws in relation to the elective franchise, it must be borne in mind that the rights of voters of the several classes known to our laws are defined and secured by the constitution. Our statutes are not intended to enlarge or diminish these rights, but to provide modes in which they may be claimed and exercised. We say, then, in answer to the first question: That a person qualified to vote only under the provisions of section 1 of article 2 of the constitution, who alienates all his real estate, is no longer so qualified, and his name should be removed immediately from the voting list. It may happen, however, that such person is also qualified to vote as a registry voter; and if so, and he has resided in the state two years, and has, as the question supposes, paid a tax in the preceding year upon property, real or personal, assessed at \$134 or more, his name, if not already there, should be added to the list prescribed in the second clause of section 3 of chapter 8 of the General Laws. The tax specified in article 7 of the amendments to the constitution is one levied upon property without discrimination as to its kind. We find no provision in the constitution disfranchising such a voter when he loses his personal property or alienates his real estate. In other words, as there are two kinds of qualification, one by ownership of real estate, and the other by registration, or, in the case supposed, by registration and the payment of a tax, if the person possesses either qualification, and the requirements of age and residence are satisfied, his name should be borne on the list of persons similarly qualified.

The second question, so far as it relates to state and town or city officers, is answered by the constitution. One who votes upon certificate can only vote for such officers as the constitution specifies; that is to say, he "shall have a right to vote in the election of all general officers and members of the general assembly." Const. art. 2, § 1. Under the provisions of the constitution of the United States (article 2, § 1), he is qualified to vote for electors for president and vice president of the United States, for the provision reads: "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors," etc. And the legislature of Rhode Island has directed (Gen. Laws, c. 13, § 1) that the people of this state who are qualified to vote for general officers shall choose the electors of president and vice president of the United States to which the state is entitled. Such person is also qualified to vote for representatives in congress, because he is qualified to vote for members of the general assembly by our constitution; and by the constitution of the United States (article 1, § 2) it is provided that the electors for members of the house of representatives in congress "shall have the qualifications requisite for electors of the most numerous branch of the state legislature."

CHARLES MATTESON.

JOHN H. STINESS.

P. E. TILLINGHAST.

GEORGE A. WILBUR.

HORATIO ROGERS.

WM. W. DOUGLAS.

(19 R. I. 558)

SMITH v. GREENE et al.

(Supreme Court of Rhode Island. July 17, 1896.)

WILLS—CONSTRUCTION—AMBIGUITIES.

Testator directed that after his wife's death his executor should pay to his children, in equal shares, the income of his estate during their joint lives; and on the death of either, before or after the death of his wife, leaving children, he should convey to such grandchildren the share testator's child would have inherited "had I died then intestate," and pay the income of the remainder to his remaining child or children; and on the death of either, leaving children, he should convey to testator's grandchildren the share of the remainder which his children would have inherited had he died at the time of the decease of his wife intestate. *Held*, that the quoted words related to the death of testator's wife, and not to the date of the death of each child, which would result in an unequal division of the estate, and in intestacy as to fractions of it.

Bill by Charles H. Smith against Henry A. Greene and others for construction of the will of Horace Learned, deceased.

Arnold Green, for complainant. Oscar Lapham, for respondents.

MATTESON, C. J. This is a bill to obtain a construction of a clause in the will of Horace Learned (formerly of Providence),

deceased, which clause is as follows: "From and after the decease of my said wife, my said executor or administrator shall pay over to my children, in equal shares, the whole of the income or interest of my said estate (deducting therefrom all necessary expenses attending the repairs, insurance, and other expenses thereof) during their joint lives; and upon the decease of either, whether the same shall have occurred before or after the decease of my said wife, leaving children, then and in such case he or they shall convey to such my grandchildren the share or proportion in my real and personal property as my said child would have inherited had I died then intestate, and shall pay the income or interest, as above stated, of the remaining part of my estate to my remaining child or children; and on the death of either, leaving children, then he or they shall convey to such my grandchildren the share or proportion of the remaining part of my said estate which my said children would have inherited had I deceased at the time of the decease of my wife, intestate." The ambiguity which it is claimed exists arises on the words, "had I died then intestate." The complainant construes these as relating to the date of the decease of each child, as the date when the division was to be made among the children of such child, and therefore contends that the conveyance to the children of such deceased child is of the share which the deceased child would have inherited if the testator had died intestate on the day of the death of such deceased child. The objections to this construction are that it would result in an unequal division of the testator's estate, and also in intestacy as to fractions of the estate. There is nothing in the will to indicate that the testator intended such unequal division, but, on the contrary, an intention to make an equal division is manifested by the direction to pay over the net income in equal shares to his children during their joint lives. Intestacy may occur by the happening of events not foreseen by the testator, and therefore not provided for in the will, as in the present instance by the death of Mrs. Kibble without children. But it is not to be presumed that a testator intends to leave portions of his estate not disposed of, and, therefore, that portions of the estate would not be disposed of if a particular construction were adopted is a strong argument against such construction. We think that the words in question are to be construed as relating to the date of the death of his wife, and that the share directed to be conveyed to the children of the deceased child is the share which the child, if living at that time, would have inherited if the testator had died intestate on the day of the death of his wife. The event which was uppermost in the mind of the testator when he framed the clause, evidently, was the decease of his wife. By the earlier clauses of his will he had provided for the

disposition of the income of his estate till the happening of that event. With the event of his wife's death before him, he goes on to provide for the disposition of his estate thereafter. In the first place he provides for the payment of the net income to his children during their joint lives, in equal shares, and then directs that on the decease of either child, leaving children, whether the decease shall have occurred before or after the death of his wife, the share which such deceased child would have inherited, supposing the child to have been living at the decease of his wife, and himself to have died intestate on the same day, shall be conveyed to his grandchildren, the children of such deceased child. This seems to us the natural and reasonable construction to be given to the clause. It renders the clause consistent throughout, by fixing the same day, viz the date of his wife's decease, as the time for the division of his estate, and the shares which his children would have taken if he had died intestate on that day as the shares to be taken by his grandchildren on the decease of their respective parents. As no provision is contained in the will for the disposition of the share of a child dying without children, the share of Elizabeth K. Learned, a daughter of the testator, who married Orcino W. Kibble, survived her husband, and died childless and without issue, became, on her decease, intestate estate. Paragraphs 7 and 8 of the bill set forth that on the death of Anna Learned Greene the trustee, in 1882, conveyed to the complainant, as the grantee of George F. Learned, one-sixth of the estate, and to the children of said Anna also one-sixth of the estate, these two-sixths constituting the one-third which Elizabeth would have inherited if the testator had died intestate at the decease of his wife. The construction which we have given to the clause was that adopted by the trustee in conveying the trust estate to the parties in interest, and is the one which has been acquiesced in by such parties since 1882. Even if we did not altogether approve of it, as in our opinion conformable to the testator's intention, we should hesitate to change it after the acquiescence in it of the parties interested for so long a period.

(19 R. L. 571)

QUIMBY v. WOOD.

(Supreme Court of Rhode Island. July 20, 1896.)

TAXATION — ASSESSMENT — OFFICERS — QUALIFICATION.

1. Action of the assessors of a fire district, in reducing the valuation of property assessed after the assessment roll had been delivered to the collector with a warrant to collect the tax, though unauthorized, does not invalidate the entire assessment.

2. Gen. Laws, c. 39, § 17, requires every town collector of taxes to give bond in an amount to be fixed by the town. The charter of the Apponaug fire district (section 4) pro-

vides that the "powers and duties" of the collectors of such district are such as appertain to like officers in towns. *Held*, that a collector of the fire district was not required to give bond, as the words "powers and duties" did not include "election and qualification."

3. Taxes are not liens on the property on which they are assessed, unless expressly made so by statute.

4. The charter of the Apponaug fire district (sections 4, 5) provides that, in assessing and collecting the taxes, such proceedings shall be had by the officers of the district, as near as may be, as are had by corresponding officers of towns in assessing and collecting town taxes. Pub. St. c. 44, § 2, provides that all town taxes shall be liens on the property against which they are assessed, and section 10 authorizes a town collector to levy on and sell land "liable" for payment of taxes. *Held*, that fire-district taxes were not liens on the land against which they were assessed, and therefore collectors were not authorized to levy on and sell the same for the collection of such taxes.

Bill by Smith 'Quimby against Jason T. Wood to enjoin the sale of land for the collection of a fire-district tax. Injunction granted.

Edwards & Angell, for complainant.
Frank S. Arnold and Dexter B. Potter, for respondent.

TILLINGHAST, J. This is a bill in equity brought against the respondent, who claims to be the collector of the Apponaug fire district, to enjoin him from selling certain real estate of the complainant under a levy of a tax assessed against the complainant by said fire district. The suit is brought by the complainant in his own behalf, and in behalf of all other taxpayers of said district. The answer denies the material allegations of the bill. There is a general replication, and testimony has been taken by a commissioner. The relief is asked on the grounds: (1) that there were willful and intentional irregularities on the part of the assessors in the assessment of the tax, which render the whole assessment void; (2) that the respondent is not, and never was, a collector of said fire district, because he never properly qualified as such; (3) that the tax, even if properly assessed, is not a lien upon real estate, and that the proposed sale would therefore be illegal; (4) that a penalty, in the form of interest, has been added, without authority, to the tax originally assessed, and included in the amount for which the levy has been made upon the complainant's property; and (5) that the levy, even if originally good, has been lost by a lapse of the advertisement since said levy was made.

It appears from the testimony that the property of the New York, New Haven & Hartford Railroad Company was first regularly assessed by the assessors of the fire district for \$150,000, making its tax \$300; that after the assessment roll had been delivered to the respondent, together with a warrant for the collection of the tax, this valuation was reduced to \$100,000, and the tax to \$200, which latter sum is all that was collected.

The circumstances in which this was done were as follows: After the making of said assessment, said railroad company complained that its tax was excessive, whereupon a meeting of said fire district was called to consider the matter of abating said tax, which meeting was held on May 10, 1894. Said railroad company was represented at said meeting by its agent, who complained, in behalf of said railroad company, that it had been taxed for \$200,000, that this sum was too high, and he asked to have it reduced, whereupon, after some discussion, a motion was made and carried that the valuation be reduced to \$100,000. It was also voted that the amount of the tax assessed against said railroad company, of \$300, be reduced to \$200. That is to say, said district voted to abate \$100 of said original assessment. After said district had taken the action aforesaid, the respondent changed the assessment roll in his possession in conformity therewith. The testimony further shows that, after the assessment roll had been completed and delivered to the collector as aforesaid, a number of other alterations were made therein by the assessors. For instance, John H. Northup had been taxed for real estate valued at \$100. It was afterwards ascertained that said real estate was not located in said district, and hence the assessors abated the tax thereon. J. H. Northup and others (the Brayton property), by mistake of the assessors, had all been taxed in said fire district, while \$1,000 worth thereof was located outside of said district. The assessors therefore abated \$1,000 on the valuation thereof, and reduced the tax accordingly. William Henry Harrison was taxed, according to the town valuation, for real estate, \$23,000, and for personal estate, \$35,000. He had refused to pay his town tax, and a lawsuit was had concerning it by the town of Warwick, whereupon said town made a compromise reducing the amount of personal property assessed to him in the sum of \$15,000, and said fire district made the same reduction. This reduction was made after the district tax had been assessed as aforesaid. Caroline Smith was taxed in said town for \$12,000 real estate, and the district assessors taxed her for the same amount. But, upon subsequently ascertaining that a part of said real estate was not in the district, the assessors abated \$2,000 on the valuation thereof, and abated the tax accordingly. Harvey E. Wellman, trustee, was taxed for \$4,200 real estate, and \$2,200 personal property. The tax on the personal property was abated by the assessors because they found out that there was no personal property of his in the district, and because said Wellman refused to pay the tax thereon. Josiah Westcott was taxed for real estate valued at \$100. It was afterwards ascertained that this land was not in the district, and hence the tax was abated. None of the persons

above named had filed any sworn statement with the assessors as to the amount of their real or personal estate, for the purpose of taxation, as required by law; nor had they filed any such statement with the town assessors, in connection with the assessment of the town tax.

The question which arises, in view of the facts above set out, is whether the irregularities mentioned rendered the entire tax illegal and void, as alleged in the bill. We do not think they did. The tax had been regularly assessed before said alterations were made, except as to the taxing of that part of the real estate aforesaid that was situated outside the district limits; and a warrant, duly issued, had been placed in the hands of the respondent for the collection thereof. And while it is doubtless true that both the fire district and the assessors acted entirely without legal authority, in making most, if not all, of the alterations aforesaid in the assessment roll, yet we fail to see how this could invalidate the tax. Moreover, there is no proof whatsoever that said changes were made fraudulently, as alleged in the bill. On the contrary, we think it is fairly to be inferred that the alterations were made in pursuance of an honest, though misguided, attempt to correct certain errors which had been made in the assessment of the tax, and also to so adjust the claims of certain dissatisfied taxpayers, growing out of the assessment in question, as to render the tax collectible without resort to legal process. Of course, we do not wish for a moment to be understood as approving of, or even excusing, the methods employed. After the tax had been assessed, and the assessment roll delivered to the collector, with a warrant to collect the tax, neither the fire district nor the assessors had any authority to change the valuation, or abate the tax assessed against any individual or corporation. At the most, they could only correct a manifest mistake therein. But they had no right to revalue the property, or abate any one's tax. The tax had been duly ordered and laid by the district; the time within which it was to be assessed had expired; the assessment roll, with the accompanying warrant, had been delivered to the collector; and hence the authority, both of the district, and of the assessors as well, over those matters, had become exhausted, and it only remained for the collector to proceed with the collection of the tax according to law. Indeed, there is no authority, short of the general assembly, at any rate, to abate a tax which has once been legally assessed. And there may be grave doubt as to whether the general assembly, even, can do it, in view of the constitutional provision that the public burdens ought to be fairly distributed. *Mc-Twiggan v. Hunter*, 18 R. I. 778, 80 Atl. 962. If a true and exact account of one's ratable estate, both real and personal, is made to the assessors, as required by stat-

ute, and the person rendering such account is afterwards overtaxed or aggrieved by the assessment, he has a remedy. Gen. Laws R. I. c. 46, §§ 14-19. But, in case of neglect or refusal to render such an account, the person so neglecting or refusing is without remedy if overtaxed. *Greene v. Mumford*, 4 R. I. 321; *Bank v. Mumford*, Id. 479; *Tripp v. Insurance Co.*, 12 R. I. 436; *Hopkins v. Young*, 15 R. I. 49, 22 Atl. 926; *Coventry Co. v. Assessors of Tax of Coventry*, 16 R. I. 240, 14 Atl. 877; *Tripp v. Torrey*, 17 R. I. 859, 22 Atl. 278. We are therefore of the opinion that for the purposes of this case, at any rate, all of said irregular and unlawful proceedings may properly be treated as null and void and of no importance, and hence as not having the effect to invalidate the tax originally assessed.

The second point made by the complainant is that the respondent has never qualified as collector of said fire district, because he has never given bond for the faithful discharge of his duties. And he refers to Pub. St. R. I. c. 37, § 20 (now Gen. Laws, c. 39, § 17), which provides that "every collector of taxes shall give bond, with sufficient surety, for the faithful performance of such trust, to the town treasurer of the town for which he is chosen, in such sum as the said town or the town council of said town shall appoint, not exceeding double the amount of the tax with the collection of which he shall be charged," etc., and urges that as, under section 4 of said charter, the "duties and powers" of the assessors and collector are such as appertain to like officers in towns, it was therefore obligatory upon the respondent to give bond before he could proceed with the collection of the tax. We do not agree to this construction. The "duties and powers" mentioned in said section of the charter do not relate to the election and qualification of the collector, but to those things which he has authority and is required by law to do subsequently thereto. The charter of said fire district nowhere requires the collector to give bond. No amount has been fixed by the district, nor has he been required by it to give any bond. However desirable it may be, therefore, that a collector should give bond for the faithful performance of his duties, yet, in the circumstances aforesaid, the mere fact that the respondent has not given bond does not render his official acts void.

The third point made by the complainant is that the tax in question, even if legally assessed, is not a lien upon real estate, and hence cannot be collected by levy on and sale of the real estate of the complainant. It is well settled that municipal or corporation taxes are not liens against the property on which they are assessed, unless made so by the charter, or unless the corporation is authorized by the legislature to declare them to be liens. 2 Dill. Mun. Corp. (4th Ed.) § 821; 2 Desty, Tax'n, p. 743, and cases cited;

Heine v. Commissioners, 19 Wall. 655; *City of Jefferson v. Whipple*, 71 Mo. 519; 25 Am. & Eng. Enc. Law, 267-272, and cases cited; *Ham v. Miller*, 20 Iowa, 453; *Blackw. Tax Titles* (4th Ed.) p. 516. Under the caption, "Foundations of the Power to Sell Land," Mr. Black, in his excellent work on Tax Titles, says: "By what power and authority does a public officer assume to seize and sell my land after my neglect or refusal to discharge the taxes upon it? To this we answer, he acts exclusively under statutory authority. The officer is a stranger to the title; he sells that which he does not own; and he can have no right to make any such sale, except in so far as he is constituted the agent of the law for that purpose. The power to assess and levy taxes, and to demand payment, does not carry with it the right to make sale of lands for the purpose of collection, but that right must be expressly given by statute." Judge Cooley, in his excellent work on Taxation (page 470), says, "The power which the state confers to assess and levy taxes does not of itself include a power to sell lands, in enforcing collection, but the power to sell must be expressly given." In *Ham v. Miller*, supra, the court, in speaking of the power to sell real estate for nonpayment of taxes, uses the following language: "We need not say that this power, sovereign in its nature, must not depend for its existence upon mere inference, but must always be created by express grant. * * * In most of the city charters the power to thus sell and convey is given in express words. To all such this act would apply, but not to a corporation like Dubuque, possessing no such power." See, also, 25 Am. & Eng. Enc. Law, pp. 368, 369, and cases cited. There is clearly no lien for taxes expressly granted by the charter of said fire district. Nor is there any express grant of authority to sell property for nonpayment of taxes. Neither is there any language in the charter from which such a power could be implied, if implication were permissible, unless it is the latter part of section 4, and the closing paragraph of section 5, as follows: "And in the assessing and collecting of said taxes, such proceedings shall be had by the officers of said district as near as may be had" (probably, this should read, "as near as may be, as are had") "by the corresponding officers of towns in assessing and collecting town taxes other than is hereinbefore provided." As argued by counsel for the complainant however, it is only in cases where "any parcel of real estate is liable for the payment of taxes" (Pub. St. R. I. c. 44, § 10)—i. e. where the taxes are a lien on the real estate—that a town collector may levy upon and sell it. In the absence, therefore, of any authority to create a lien upon real estate for district taxes, no power of sale can be even inferred from the language of the charter above quoted. It is significant, in this connection, that by Pub. St. R. I. c. 46, § 5, the provisions of the statutes relative to taxation by the towns (including,

of course, the provisions of Pub. St. R. I. c. 44, §§ 2, 3, which make such taxes a lien upon real estate) are made applicable to all highway and school district taxes, while said statute is silent as to fire-district taxes. If it be argued that section 2 of said chapter 44, which provides that "all taxes assessed against any person in any town, for either personal or real estate, shall constitute a lien on his real estate therein," is broad enough to include fire-district taxes, we think it is sufficient to reply that said chapter relates solely to the collection of town taxes, and therefore to extend its provisions to the collection of district taxes would be giving to it an unwarrantable interpretation. It is to be observed that, in regard to town taxes, Pub. St. R. I. c. 44, not only makes all town taxes a lien on the real estate of the taxpayer, but expressly provides for the enforcement of such lien by sale and conveyance of the property. Section 10 provides that, "in all cases where any parcel of real estate is 'liable' for the payment of taxes, so much thereof as is necessary to pay the tax, interest, costs and expenses, shall be sold by the collector at public auction, to the highest bidder, after notice has been given of the levy," etc. This statute evidently means that in order to warrant the collector in proceeding to levy upon and sell the property itself, instead of proceeding against the person taxed therefor, to recover the tax, the property itself must be "liable" for the payment of the tax by reason of a lien thereon. And hence it follows that, in the absence of such lien, no authority exists to proceed against the property in this way. Again, the levy by the collector, in the case at bar, did not have the effect to create a lien on the property, as he had no authority to make such levy. It is true, the charter confers upon him, within the district, the same duties and powers as town collectors have in their respective towns. But town collectors have no power to create a lien on real estate. They only have power to enforce the lien which the statute gives. They have power to advertise and sell property for the payment of taxes, only because the statute expressly confers it upon them. It has even been held that where the charter of a city conferred upon it the power "to levy and collect" a special tax for local improvements, and declared such tax to be "a lien" upon the real estate upon which it should be assessed, and no mode of collection was prescribed, this did not carry with it the power to collect such tax by a sale of the property upon which it was assessed. See opinion of Dillon, J., in *McInerney v. Reed*, 23 Iowa, 412. The case at bar is distinguishable from that of *Greene v. Mumford*, 5 R. I. 472, in that the complainant here shows special equities as ground of relief, and particularly in that no power to sell real estate is conferred upon the collector of said fire district.

Having thus arrived at the conclusion that the respondent has no authority to sell the property in question for the nonpayment of

the tax assessed against the complainant, it becomes unnecessary to consider the other subsidiary questions raised in the case. Injunction granted.

(39 R. I. 561)

PROVIDENCE ALBERTYPE CO. v. KENT & STANLEY CO., Limited.

(Supreme Court of Rhode Island. July 17, 1896.)

CONTRACTS — REVOCABILITY — FAILURE OF CONSIDERATION.

Defendant, an insolvent corporation, agreed to pay part of its indebtedness with stock in a proposed new corporation, and the balance in cash and the notes of the new corporation; plaintiff agreeing to subscribe for its proportion of the stock, and to accept the same, with the cash and notes, in full satisfaction of its claim. Held that, defendant having no power to bind the new corporation, there was failure of consideration, and the contract was revocable at any time before actual performance.

Assumpsit by the Providence Albertype Company against the Kent & Stanley Company. The defendant filed a cross bill asking for specific performance. Bill dismissed.

John T. Blodgett, for plaintiff. Wilson & Jenekes, for defendant.

STINESS, J. The plaintiff brought this suit in assumpsit December 9, 1895. The defendant pleads that in October, 1895, it agreed with the plaintiff and other creditors to deliver shares of the preferred stock of the Kent & Stanley Company, Limited, to an amount equal to 25 per cent. of its indebtedness to the plaintiff, to pay 25 per cent. in cash, and to deliver notes of said last-named company for the remaining 50 per cent., payable two years after the date of the tender of said shares and payment in cash; that the plaintiff thereupon agreed, in writing, to subscribe for the required number of shares, at the rate of \$85 per share, and to accept the cash and notes as stated above in full satisfaction of all claims against the defendant; that in pursuance of said agreement, on December 27, 1895, it was ready and willing and offered to pay the cash and to deliver the stock and notes as above provided; and that all the creditors signed the same agreement. A copy of the agreement is produced, as a part of the pleading, from which it appears that it was signed by creditors only, and not by the defendant. To these pleas the plaintiff demurs.

The main question is whether, assuming the agreements to be as stated, there is such a consideration for them as to bind the plaintiff, or whether the agreement is revocable. The defendant company was financially embarrassed, and a new company was to be organized to carry on the business and plant of the old company. Of course, this could not be safely done until the debts of the old company were released. This is evident from the pleading, and is also stated in a bill filed by the defendant against the plaintiff to compel

a specific performance of the agreement, which is heard with this case. It also appears, both from the pleading and the bill, that the defendant was not "ready and willing" to perform its part of the contract, and could not be, until December 27, 1895,—after this action had been commenced,—because the last agreement of creditors was not obtained, and the new company organized, until that time. At the time of the contract, therefore, the defendant had no power to do what it is alleged it agreed to do. The new company was not in existence, and could not be, until its stock had been taken. After its formation, even, the old company had not the power, in law, to promise the notes of the new company in payment of the plaintiff's claim against the former. Such a promise is no consideration for a contract. 3 Am. & Eng. Enc. Law, pp. 897, 898, and notes. This was the decision in *Anthony v. Machine Co.*, 16 R. I. 571, 18 Atl. 176,—a case similar to this. It was there held that an agreement to pay a loan in stock which the company had no power at the time to issue was void, even though the power was obtained after the bringing of the plaintiff's suit, as in this case. When there is a lack of power in law to make the promise on one side, there is no legal promise, and so no consideration for a collateral promise. This lack of power must be manifestly ultra vires, as, in this case, to deliver stock which did not exist, and to give the note of a company which had not been formed. One may agree to convey stock which he does not own, because it is both legally and naturally possible for him to purchase it in time for delivery under his contract. But an agreement based upon a legal impossibility is a nullity, and it is to be determined according to the situation of the parties at the time it is made. No doubt, there might be cases where the conduct of the parties would imply a continuing offer to be held open until the contract could be fulfilled, and so it is urged in this case. But even in this light an offer may be withdrawn before acceptance, and there can be no acceptance until there is ability to perform. The cases relied upon by the defendant show an open offer, or that there had been an executed contract by a present consideration or assumption of liability, e. g. of the former class, *Bank v. Sablin*, 48 Vt. 239; *Marie v. Garrison*, 83 N. Y. 15; *Institute v. Haskell*, 73 Me. 140; *Institute v. French*, 16 Gray, 196; and of the latter class, *Coleman v. Eyre*, 45 N. Y. 38; *Jaffray v. Davis*, 124 N. Y. 164, 26 N. E. 351; *Aldrich v. Lyman*, 6 R. I. 98. If we could treat the agreement as an offer, it was withdrawn by the bringing of the suit before the defendant was able to comply with its terms. The defendant also cites cases of composition with creditors, where the mutuality of promises is held to be a consideration; but they do not apply to this case, because, as we have shown, there was

no legal promise on one side, and also because the case as stated does not set forth any mutual promises of forbearance between the creditors. These, doubtless, may be implied where the facts are such as to raise the implication, but no such facts appear in this case. The contract pleaded is simply the contract of individual creditors to settle in the way set forth, and no actual consideration moved from the defendant or other creditors at the time, as in *Good v. Cheesman*, 2 Barn. & Adol. 328. The demurrer to the pleas for want of consideration must be sustained, and it follows that the defendant's bill in equity cannot be sustained, and that other points argued need not be determined.

(54 N. J. E. 361)

TROUT v. LUCAS et al.

(Court of Chancery of New Jersey. June 29, 1896.)

EQUITY—COVENANT IN DEED IN RESTRICTION OF BUILDING—WHEN ENFORCED—
WAIVER—LACHES.

1. Where a tract of land is laid out into lots and blocks by the owner for sale in accordance with a general scheme, by which restrictions as to building are imposed on each purchaser, for the benefit of all the land, such restrictions being embodied in the conveyances, the right of one lot owner to enforce the covenant against another is not a legal, but a purely equitable, one; and, being such, the restriction will only be enforced where it would be equitable in the particular case.

2. A court of equity will not require the removal of a building, on the ground that it is in violation of a covenant in the deed of the owner, where his grantor and the owners of other lots permitted its erection without objection; and subsequent purchasers are bound by the acquiescence or laches of their grantors.

3. The deeds to lots in a tract of land contained covenants that the grantees should not build thereon nearer than 25 feet to certain streets, but a purchaser erected a building less than 22 feet distant from the street, and six years later added a tower to the building, extending to within about 11 feet of the street. No objection was made by the grantor or other owners when the building or tower was erected. *Held*, that a purchaser who bought other lots about the time the tower was built, and who made no objection to the encroachment at the time, could not maintain an action three years afterwards for a mandatory injunction requiring the removal of so much of the building as stood within 25 feet of the street.

4. Even in case of the existence of a legal right or easement over the grounds of another, which is interfered with by a building erected by the owner of the grounds, acquiescence in its erection, or delay in taking action, will bar the owner of the easement of a right to equitable relief by the removal of the building, leaving him to his remedy at law.

Bill by William W. Trout against Margaret E. Lucas and others, to which defendants demur. Demurrer sustained.

Hawkins & Durand, for complainant. F. P. McDermott, for demurrants.

EMERY, V. C. The object of this bill is to enforce a covenant relating to building

restrictions contained in a conveyance of lands made to one John C. Lucas by the Spring Lake Beach Improvement Company, and to compel the removal of a portion of an hotel building which has been erected beyond the limits fixed by the covenant. The case is heard on demurrer to the bill, which discloses the following facts as the basis for relief: The Spring Lake Beach Improvement Company, which was incorporated for the purpose of developing and improving real estate, and the erection of buildings thereon, purchased for these objects a tract of about 600 acres, adjoining the Atlantic Ocean, and situate in Wall township, Monmouth county, which it laid out into squares and lots, or building sites, designating the tract by the name of "Spring Lake." A map of the tract, showing the streets, avenues, and the lots, by numbers, was made in 1876, and filed in the office of the clerk of the county. Nearly three years after the purchase, and on January 20, 1878, the company conveyed to one John C. Lucas lots Nos. 19 and 20 in block No. 21, as shown on the map or plan of lots, being lots adjoining each other, fronting on Atlantic avenue, and one of the lots (No. 20) being a corner lot fronting also on First avenue. The two lots together constituted one tract fronting 100 feet on Atlantic avenue and 150 feet on First avenue, and being at the northwest corner of said avenues. The deed contained the following condition on the part of the grantee, viz: "That the party of the second part, for himself, his heirs, executors, administrators, and assigns, covenants that he and they shall never build on the said premises within 25 feet of the front line thereof, on avenues running east and west, and also on Ocean avenue." Atlantic avenue, on which these Lucas lots front, runs east and west. In the same year (1878) in which he received his deed, John C. Lucas erected a large frame hotel building on these lots; the building being three stories high, about 100 feet long, and 35 feet deep; the front of the building (100 feet) fronting on First avenue, and the south end (35 feet) fronting on Atlantic avenue. The south line of the building was only 21 feet and 7 inches from the front line of Atlantic avenue, instead of 25 feet, as required by the covenant; being thus 3 feet and 5 inches over the line. On March 9, 1878, about two months after the above conveyance to Lucas, the Spring Lake Company conveyed to one David C. Spooner lot No. 11 of the same block (21); this latter lot, being on the northeast corner of Atlantic avenue and Second avenue, fronting 50 feet on Atlantic avenue, and adjoining lot 12, which was on the east. This deed was, so far as appears by the bill, the first conveyance, after the Lucas deed, of any lots on block 21 on Atlantic avenue, and this deed contained a condition or covenant similar to that contained in the Lucas deed. The

title to this lot No. 11 remained in Spooner, or his devisees, for nearly 8 years, and until August 16, 1886, when it was conveyed by the executor of Spooner to one Thomas A. Ward; and Ward and his wife on January 9, 1888, conveyed it to the complainant. The deeds to Ward and the complainant contained the same form of restriction. On February 1, 1886, and nearly two years before his purchase of lot No. 11 from Ward, the complainant purchased of the company lots 12, 13, 14, and 15 in block 21, together fronting 200 feet on the north side of Atlantic avenue, and 150 feet deep, and his deed for these lots contained the same restriction on his part. In the winter of 1885 and 1886 the defendant Lucas, as the bill alleges, reconstructed his hotel building, and made additions thereto; one of the additions being an octagon tower, forming part of the building on the south end of said building, commencing at the second floor, and extending above the roof, and extending outward, southward, from the line of the said building. This tower extends, as the bill states, 10 feet south from the line of the building, and is only about 11 feet from the front line of Atlantic avenue. In the following year (1887) the complainant erected houses on two of his lots, 25 feet from the front line of the avenue, at a cost of \$10,000; and, as the bill says, it was while building his cottages that he discovered the hotel building encroached on the 25 feet reserved.

The additional facts alleged in the bill, upon which is based complainant's equity to require a removal of the portion of the Lucas buildings in question, are that the restrictions in the several deeds were created by the company, and authorized in the conveyances, for the benefit of all the lots and lot owners on said Atlantic avenue, in block No. 21; that Spring Lake is a summer resort, sought principally because of its bordering on the ocean; that the lots of complainant are just west of the Lucas lots, which lie between complainant's lots and the ocean; and that it is necessary to the complainant, for the full use and enjoyment by him of his said premises, that the condition should be observed and kept by all owners owning lots between complainant's premises and the ocean; and that all buildings erected on their lots should be at least 25 feet back from the front line of Atlantic avenue. The complainant claims the right of enforcing this condition in equity against the owners who violated it before his purchase, and to have the portion of the buildings encroaching on the 25 feet removed. John C. Lucas having died in August, 1888, his widow and infant heirs are made parties defendant to the bill, which was filed on June 17, 1889. A general demurrer for want of equity was filed on behalf of all of the defendants, with additional specifications of acquiescence, laches, and want of parties.

Under the above facts, it seems to me that

the whole basis of complainant's right to relief rests upon a right which is, in its nature, purely equitable. The defendants, so far as relates to the condition in question, are not under any legal liability to the complainant, for the reason that there is no privity between them, either of contract or estate. But courts of equity, in relation to restrictions of this character, which contemplate a general plan of building for the common benefit of purchasers of lots, recognize the right to enforce them in equity, at the instance of the original grantor or subsequent purchasers of lots, on grounds independent of legal liability. Vice Chancellor Green, in *De Gray v. Clubhouse Co.* (1892) 50 N. J. Eq. 329, 24 Atl. 388, after a very exhaustive and learned review of the cases, states, on page 340, 50 N. J. Eq., page 392, 24 Atl., the principles governing this class of cases where a general plan or scheme is relied on, as follows: "The law deducible from these principles and the authorities applicable to this case is that where there is a general scheme or plan, adopted and made public by the owner of a tract, for the development and improvement of the property, by which it is divided into streets, avenues, and lots, and contemplating a restriction as to the uses to which buildings or lots may be put, to be secured by a covenant embodying the restriction, to be inserted in each deed to a purchaser, and it appears, by writings or by the circumstances, that such covenants are intended for the benefit of all the lands, and that each purchaser is to be subject to and to have the benefit thereof, and the covenants are actually inserted in all deeds for lots sold in pursuance of the plan, one purchaser and his assigns may enforce the covenant against any other purchaser and his assigns, if he has bought with knowledge of the scheme, and the covenant has been part of the subject-matter of his purchase." The learned vice chancellor also says (page 340, 50 N. J. Eq., page 392, 24 Atl.) "that the equitable right of action seems to be dependent as much on the fact of the general scheme as on the covenant." This case was approved by Chancellor McGill in *Hayes v. Railroad Co.* (1893) 51 N. J. Eq. 345, 349, 27 Atl. 648; and the complainant's case is, by the allegations in his bill relating to the object of the restriction, brought within the application of the general rule recognized in these cases. But, if the right of the complainant be in its nature a purely equitable right, it is, of course, subject to the application of the general equitable rule that the remedy applied for in the particular case cannot be granted unless it appears to be equitable to grant it. The remedy now sought is the extraordinary one of a mandatory injunction for the removal of a portion of a building, and the vital question in the case, as I look at it, is whether, on the bill as it now stands, the complainant can now equitably require this removal. A court of equity does not invariably enforce such covenants, and there are several classes of cases in which the remedy by in-

junction is refused. Two of these classes may be specially mentioned, as claimed to be applicable here: First, where the person imposing the restriction has allowed or acquiesced in material violations of the covenant or restriction, thus waiving the covenant *pro tanto*; and, second, where the party injured has not made prompt application for the relief, and has permitted money to be expended. In these cases the party otherwise entitled to the benefit of the covenant cannot apply for an injunction, and whether there has been such waiver or laches depends upon the circumstances of the particular case. These rules are illustrated in the following leading English cases: *Roper v. Williams*, 1 Turn. & R. (12 Eng. Ch.) 18; *Peck v. Matthews* (1867) L. R. 3 Eq. 515; and *German v. Chapman* (1877) 7 Ch. Div. 271. In *Roper v. Williams* an injunction to restrain the breach of a covenant that buildings should be erected upon a general plan was refused by Lord Eldon upon the ground that the covenantee had acquiesced in a partial deviation from the plan, and had not made immediate application to the court for an injunction. On the first point the lord chancellor says (page 22): "It is not a question of mere acquiescence, but, in every instance in which the grantor suffers grantees to deviate from a general plan intended for the benefit of all, he deprives others of the right which he had given them, to have the general plan enforced for the benefit of all. In such cases, I have always understood, this court will leave the parties to their remedy at law. There is another view in which the case may be considered. Every relaxation which the plaintiff has permitted, in allowing houses to be built in violation of the covenant, amounts, *pro tanto*, to a dispensation of the obligation intended to be contracted by it. Very little, in cases of this nature, is sufficient to show acquiescence, and courts of equity will not interfere unless the most active diligence has been exerted throughout the whole proceeding. In every case of this sort the party injured is bound to make immediate application to the court in the first instance and cannot permit money to be expended by a person, even though he has notice of a covenant, and then apply for an injunction. Taking all the circumstances together,—the permission to build contrary to the covenant, and the laying by four or five months before filing the bill,—this is not a case in which a court of equity has the right to interfere by injunction, but the plaintiff must be left to his remedy at law." In *Peck v. Matthews* the same rule as to acquiescence in violations of the general plan, and as to delay, was applied to a vendor, and in favor of a vendee who had received his deed after the violations by other grantees had been allowed, and even in the face of the express covenant with the vendor made in his deed. The vendor was left to his remedy at law, on the covenant, and was denied the relief which a court of equity grants, as based on the continuance of a common

benefit. In *German v. Chapman*, *supra*, it was held that the violation must be material, and such as to prevent the general plan from being carried out, and that the materiality of the violation was to be determined by the circumstances of each case. See, also, 2 Pom. Eq. Jur. par. 817, and cases cited, as to the effect of delay and estoppel by acquiescence in cases where injunctions, either preliminary or final, are applied for to enforce rights which are purely equitable.

The facts in the present case, material to this question of waiver or laches, are these: It appears by the bill that John Lucas erected his hotel, and encroached on the building line, while the company and ward, the grantors of complainant, were the owners of the remaining land in block 21, which was intended to be benefited; and, so far as appears by the bill, no objection was made by either of these then owners, nor is any explanation given in the bill of their failure to object. Those who are the owners of the remaining lands benefited by the restriction must be the persons who, at the time of the violation of the restriction, are entitled to call upon the court of equity to enforce the covenant, and must have, as such owners, the right to waive, acquiesce in, or object to the violation. And they must, on the other hand, be subject to the liabilities or penalties resulting to owners, or parties injured, who acquiesce in a violation. One of these penalties has been declared to be that, after such acquiescence in a material violation by one or more of the grantees, the court of equity will not enforce the restriction, even against a subsequent purchaser who has entered into a direct covenant therefor with the grantor. This was the decision in *Peek v. Matthews*, *supra*, where a vendor inserted covenants in the deed of each purchaser of lots for building only in a specified manner, and permitted, without interference, material breaches of the covenant to be committed by some of the purchasers. It was held that the vendor was not entitled to an injunction against violation of the covenant by a purchaser who had taken his deed for his lot after the breaches had been committed on the others. In this case, also, the covenant in the deed was not only with the grantor, but was expressly declared to be a covenant between all the purchasers inter sese; but the court declared that, so far as the right to invoke the aid of a court of equity by injunction was concerned, this made no difference. "The vendor, in such cases, stipulating for the benefit of himself and others," says Vice Chancellor Wood (page 518), "as a quasi trustee for them, is bound to enforce the covenant as much against one as against the other." "The court will not," he further says, "grant specific performance of an arrangement which can only be carried out in part. The thing must be enforced in toto, or not at all." In *German v. Chapman*, *supra*, the correctness of the principle stated in *Peek v. Matthews* was recognized; but it was held that the al-

leged violation must be in fact an interference with the general scheme, and that the rule would not be applied to the facts in that case.

The materiality of the violation by Lucas is not only admitted, but its materiality constitutes the basis of the bill; and, as to the hotel building proper, the erection has been allowed to stand, without objection by the complainant's grantors, who were owners, and persons entitled to object, for eight years from 1878 to 1886, and by the complainant himself from February, 1886, to June, 1889. And when complainant purchased his first lots, in February, 1886, the tower was completed, either before his purchase, or shortly after, and no objection appears to have been made by him to the erection. The allegation in the bill, "that it was while he was building his said cottages [in 1887] the complainant discovered the said hotel building encroached on the said twenty-five feet," must be considered as applying to the hotel building, and not to the "octagon tower." As to the tower, the projection is so evident and notorious that it is doubtful whether the above allegation, if intended to apply to this, could be considered as any foundation for relief, even on a demurrer. The complainant therefore, in this case, took title to four of his lots from the company with actual notice of the erection of the hotel building for years prior to that time, and must be held chargeable with the laches of the company up to that time, and for his own laches for three years longer. And in the absence of any allegations in the bill sufficient to overcome the effect of the delay of the company and of the complainant in attempting to enforce the covenant, and their apparent acquiescence, there can be no relief. Laches, lapse of time, or acquiescence, appearing upon the face of the bill itself, are grounds of demurrer, and a bar to relief. 1 *Daniell*, Ch. Prac. (6th Ed.) 560, note a, and cases cited. As to the octagon tower, the bill does not show clearly whether this was erected before or after complainant's first purchase of the four lots from the company, on February 1, 1886. The allegation is that, "in the winter of 1885 and 1886," Lucas made this addition. If the company owned the lots, they had the right to object to the erection and apply at once to the court for an injunction restraining it. If the complainant then owned it, he had the same right; and, in the absence of any allegations in the bill sufficiently explaining this apparent acquiescence in the erection for over three years, and his laches in filing his bill, relief must also be denied as to the removal of this portion of the building. The complainant's counsel, in answer to the effect of laches and acquiescence on the right to enforce complainant's rights by mandatory injunction, insists that the rights of the complainant over the Lucas lot are not merely equitable rights, but that the lots of complain-

ant are to be treated as dominant tenements having strictly legal easements of prospect over the Lucas lot as servient tenements, and that the rights of complainant, therefore, are not destroyed by mere acquiescence, or by any delay short of the time necessary to acquire an estate by prescription. If this be the true nature of complainant's rights, then they may not be barred by mere delay or acquiescence short of 20 years; but, even admitting this, the granting of the equitable remedy now applied for does not follow, for the equitable remedy of injunction or removal may be denied by reason of delay or acquiescence, even though the legal right to proceed for breach of the covenant is admitted. This was the situation in *Roper v. Williams* and *Peek v. Matthews*, supra, where the legal right was admitted, relief was denied in equity, and the complainant left to his remedy at law. And, where the legal right of the complainant in such cases is doubtful, an additional objection to granting the extraordinary equitable relief arises, and the right must be first settled at law. The easement here is claimed to arise in favor of the complainant's lots, and as appurtenant thereto, either by virtue of the covenant in the Lucas deed from the complainant's grantor, or by this covenant, supplemented by proof, showing the general building plan adopted for all the lots in block 21 on Atlantic avenue. This covenant in the Lucas deed does not refer to the complainant's lots, or any other lands than those conveyed, and, read by itself alone, it is, to say the least, very doubtful whether it has any such scope or effect as complainant claims. And it is also doubtful whether, for the purpose of establishing a legal easement in favor of the complainant's lots over the Lucas lots, by reason of the existence of a general plan, parol evidence, or any evidence dehors the deed, is admissible. The cases which have enforced obligations restricting buildings, as between different purchasers of a tract embraced in a general scheme, proceed, as Chief Justice Beasley points out in *Brewer v. Marshall* (Err. & App., 1868) 10 N. J. Eq. 537, 543, "upon the principle of preventing a party having knowledge of the just rights of another from defeating such rights, and not upon the idea that the engagements enforced create easements, or are of a nature to run with the land." In this state of doubt as to complainant's legal title, certainly no injunction could be granted without the previous establishment of this legal right in a court of law, if his case is one of strictly legal right. If the complainant has an easement or other legal rights derived from the covenant, he still has his remedy at law, and, whether they are purely equitable or legal, enforcement of them by injunction, on the present bill, is barred by delay and acquiescence apparent on the bill, and not suffi-

ciently explained or accounted for. The demurrer will therefore be sustained on these grounds.

(54 N. J. H. 309)

CONSOLIDATED COAL CO. v. KEYSTONE CHEMICAL CO.

(Court of Chancery of New Jersey. June 29, 1896.)

CORPORATION—INSOLVENCY—PREFERRED CLAIM OF EMPLOYE.

A bookkeeper of a corporation having no pecuniary interest therein, though elected to a vacancy in the board of directors, and for that purpose made a nominal holder of stock, is entitled to preference on the corporation becoming insolvent, under Act 1892 (P. L. p. 426), providing that "the laborers and workmen and all persons doing labor or service of whatever character in the regular employ of such corporation, shall have a first and prior lien."

On suit by the Consolidated Coal Company against the Keystone Chemical Company, a receiver in insolvency was appointed for defendant. Frank P. Bailey, an employé, seeks a preferential payment of his claim.

James F. Hays, for receiver. Howard Carrow, for claimant. C. V. D. Joline and Norman Grey, for creditors.

PITNEY, V. C. The claimant was an employé of the insolvent company, in the capacity of bookkeeper. He entered the employ of the company on the 1st of January, 1895, at a salary of \$2,000 a year. A receiver of the company was appointed, upon a decree of insolvency, on the 12th of March, 1896. At that time there was due to the claimant \$225.76, which amount he asked to be paid in full, under the act of 1892 (P. L. p. 426). The claim is resisted on the ground that the claimant was, during the time the amount was being earned, a director of the company. It appears that in the latter part of 1895 there was a vacancy in the board of directors, and the other directors, for the purpose of filling it, transferred to Mr. Bailey sufficient shares of stock to make him competent for that purpose, and elected him a director; and he served as such from that time forward. He had no pecuniary interest in the concern, and paid nothing for his stock. The claim is resisted on the authority of *England v. Organ Co.*, 41 N. J. Eq. 471, 4 Atl. 307. In that case Vice Chancellor Bird rejected a claim for preference in favor of the president of the corporation, on the ground that he was not within the purview of the act giving such preference. The act then in force is found on page 188 of the Revision (section 63 of the corporation act). The learned vice chancellor based his opinion upon the ground that the president was not a "laborer in the employ of the corporation." The act of 1892 is a little broader in its language than that of the original section 63 of the corporation act. Instead of the words "the laborers in the employ thereof," we have in the later act the words "the labor-

ery and workmen, and all persons doing labor or service of whatever character in the regular employ of such corporation, shall have a first and prior lien," etc. Now, I can very well see how a president of a corporation under the old act could not be held to be a "laborer in the employ of the corporation." His work might be merely supervisory in its character, and not include any service involving labor. But a bookkeeper's services do involve "labor," in the strict sense of that word; hence a bookkeeper is a laborer. Besides, the language of the later act says "labor or service of whatever character in the regular employ," etc. So that I think that the claimant in this case comes strictly within the language of the act; and I further think that the fact that he was a director, under the circumstances, does not alter the case so far as to bring it within the spirit of the judgment of Vice Chancellor Bird just cited. He was not an "employer" of himself, in any proper sense of that word. I think he is entitled to preference, and will so advise.

(59 N. J. L. 109)

STATE (NEW YORK & G. L. R. CO., Prosecutor) v. COMMITTEE OF TOWNSHIP OF BLOOMFIELD.

(Supreme Court of New Jersey. June 19, 1896.)

RAILROADS—PROTECTION OF CROSSINGS—VALIDITY OF TOWNSHIP ORDINANCE.

A township ordinance passed in pursuance of the power conferred by Act April 1, 1895 (P. L. 1895, p. 765), requiring a railroad company to maintain gates and flagmen at crossings that are not in fact dangerous, is unreasonable and invalid.

Certiorari prosecuted by the New York & Greenwood Lake Railroad Company against the township committee of the township of Bloomfield to review a township ordinance. Ordinance set aside.

Argued February term, 1896, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Cortlandt, Parker & Son, for prosecutor. Charles H. Halfpenny, for defendants.

GUMMERE, J. The ordinance brought up by this writ is similar in all respects to that which was under consideration in the case of McCullough v. Committee of Township of Franklin (decided at the present term of this court) 34 Atl. 1088, and should be set aside for the reason stated in the opinion in that case. There is an additional reason for holding the ordinance now before us to be void, and that is that the proofs produced by the prosecutor, and which were not controverted on the part of the defendant, show that none of the crossings which, by the ordinance, the prosecutor is required to protect by gates and flagmen, are in fact dangerous. An ordinance which requires gates and flagmen to be placed at such crossings by the prosecutor is unreasonable; and for this reason, also, the ordinance brought up by this writ should be set aside. The prosecutor is entitled to costs.

(88 Md. 648)

SANNER v. STATE.

(Court of Appeals of Maryland. June 17, 1896.)

FINES AND PENALTIES—INTEREST OF STATE.

Code Pub. Gen. Laws, art. 38, § 2, provides that all fines and penalties, when recovered, shall be paid to the county or city where the same may be imposed, unless directed to be paid otherwise by the law imposing them, but if there be an informer he shall have half, unless otherwise provided. Held, that the state had no interest in, and could not maintain, an action against a sheriff to recover fines which he collected and claimed as informer's fees.

Appeal from court of common pleas.

Action by the state of Maryland against Isaac S. Sanner to recover certain moneys alleged to have been collected by defendant for fines. There was a judgment for the state, and defendant appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, FOWLER, ROBERTS, and BOYD, JJ.

W. Pinkney Whyte and Wm. S. Bryan, Jr., for appellant. J. Alex. Preston, Alexander Preston, and R. Ludlow Preston, for the State.

ROBERTS, J. This action was brought in the court below to determine the right of Isaac S. Sanner, one of the appellants, to receive and retain the sum of \$4,214.29, received by him in his individual capacity from himself in his official character as sheriff. The amount thus received is for informer's fees in cases of fines imposed on persons convicted of keeping bawdyhouses, or houses of ill fame, between November 23, 1892, and November 23, 1893, upon charges made and information given by the appellant. To determine this question, suit against the bond of the appellant as sheriff was docketed by consent. The facts of this case will not justify us in giving attention to the matters in dispute, for the reason that the state of Maryland has no interest in the controversy, and is in no sense a proper party to the cause. Section 2, art. 38, Code Pub. Gen. Laws, tit. "Fines and Forfeitures," reads as follows: "All fines, penalties and forfeitures, when recovered, shall be paid to the county or city where the same may be imposed, unless directed to be paid otherwise by the law imposing them; but if there be an informer, he shall have half unless otherwise provided; this section not to apply to fines or forfeitures for offences at common law." The act of 1892, c. 522, does not repeal, or in any manner interfere with the force and effect of, article 38, § 2, just quoted. It is no part of the duty of this court to decide questions not properly before it. The only question to be determined here is the right of the state to maintain this action, and we are clearly of the opinion that it has no such right. It follows that the judgment below must be reversed. Judgment reversed, with costs, and without a new trial.

(83 Md. 490)

CREAGER v. HOOPER, Mayor.

(Court of Appeals of Maryland. June 18, 1896.)

APPEAL — PRACTICE — IMMEDIATE HEARING — APPEALABLE ORDER — DECISION — WHEN CASE REMANDED AFTER AFFIRMANCE — MANDAMUS — PLEADING — SUFFICIENCY OF ANSWER.

1. A petition for mandamus alleged that relator was elected city collector; that he presented himself to the mayor, who was authorized to administer the oath of office; and that his request to be sworn in was refused. The prayer was for a writ to compel respondent to administer such oath. Respondent's answer denied petitioner's election, and admitted that the ground of his refusal was that he did not regard petitioner as legally elected. *Held*, that under Code Pub. Gen. Laws, art. 70, § 5, making the taking of the oath of office a qualification precedent, without which an individual cannot assume the duties, the title to an office was involved, within article 5, § 42, providing that in such cases the court of appeals shall immediately determine the case.

2. Where petitioner for a writ of mandamus refuses to plead or traverse after his demurrer to respondent's answer is overruled, an order dismissing the petition is appealable.

3. A petition for mandamus alleged that relator was elected city collector; that he presented himself to respondent, as mayor, and requested that he be sworn in; and that his request was refused. It set forth the passage of an ordinance, the veto of it by the mayor, and the passage of it over the veto, "receiving the affirmative vote of three-fourths of the members of each branch of city council." Following was a *videlicet* giving the vote, which in the first branch was 15 votes in the affirmative, and 4 in the negative, 3 members being absent. The petition prayed for a writ to compel the mayor to administer said oath. The answer denied petitioner's election, and, with respect to the facts alleged as to such ordinance, "neither admits nor denies" the same. *Held* that, though the answer was uncertain and evasive, a demurrer thereto was properly overruled, since the petition, on its face, was defective, in that the *videlicet* showed that the ordinance was not passed over the veto by an affirmative vote of three-fourths of the members, as alleged.

4. A petition for mandamus was dismissed without a trial on the merits, and an appeal presented only technical questions of pleading. The case involved the title to a public office. *Held* that, though the judgment was affirmed, it was a proper case for the exercise of the discretion given the court of appeals by Code, art. 5, § 20, when in its judgment the ends of justice will be promoted, to remand a cause to the lower court for trial on its merits.

Appeal from superior court of Baltimore city.

Petition by Noble H. Creager for a writ of mandamus directed to Alceus Hooper, mayor of Baltimore city, to compel him to administer to petitioner the oath of office as city collector, to which he claimed he was elected. From an order dismissing the petition, on petitioner declining to plead or traverse after his demurrer to the answer was overruled, petitioner appeals. Affirmed and remanded.

Argued before McSHERRY, C. J., and FOWLER, BOYD, ROBERTS, BRISCOE, and RUSSUM, JJ.

Henry Stockbridge and Wm. S. Bryan, Jr., for appellant. Thos. I. Elliott and Thos. G. Hayes, for appellee.

RUSSUM, J. On the 16th day of March, 1896, the appellant filed his petition in the superior court of Baltimore city for a mandamus directed to the Honorable Alceus Hooper, mayor of Baltimore, to compel him to administer to the petitioner the oath of office as city collector; setting up the passage of an ordinance over the veto of the mayor, and the election of the petitioner to said position by the city council in pursuance of the provisions of such ordinance. To that petition an answer was filed by the mayor, in which he neither admitted nor denied some of the material averments of the petition, and denying the legality of the attempted action of the council. To this answer the petitioner demurred, and after argument the demurrer was overruled, and leave given to the petitioner to plead or traverse; and upon his declining to do this the court dismissed his petition, and from that order this appeal was taken. As it comes before this court, the case does not in any way involve the merits of the controversy, but only technical questions of pleading. It is most unfortunate that in a case of this character, in which important public interests are involved, this turn has been given to it, and the final determination of the cause upon its merits thereby delayed.

The appellee first asks that this case be not heard at this term, and contends that the appellant has no right to ask that it be so heard, claiming that the petitioner seeks to compel the performance of a mere ministerial duty, and that the title to an office is not involved. The Code (section 42, art. 5, Pub. Gen. Laws) provides for the hearing of appeals by this court, and, in terms, declares that, in all cases where the title or right to a public office is involved, the clerk of the court in which it was heard shall forthwith transmit the original papers, and that this court "shall immediately hear and determine the case." If, then, the right or title to a public office is involved in this proceeding, it is obligatory on this court to hear and determine the cause without delay. The petition alleges that the relator was elected to the office of city collector, and that he presented himself to the respondent, as mayor of Baltimore, who alone was authorized, under the law, to administer the oath of office, and requested to be sworn in, but that his request was denied. The respondent denies the election of the petitioner, and that the council which attempted to elect him had any power so to do, and admits the allegation of the petition that the ground of the refusal to administer the oath was that he (the mayor) did not regard the petitioner as legally elected. The real issue, therefore, is the legality of the election under which the relator claims. The Code of Public General Laws (section 5, art. 70) makes the taking of the oath of office a qualification precedent, without which an individual cannot assume the duties; and while the act of administering the oath is a ministerial one, so far as the mayor is concerned, involving no exercise of discretion,

It is essential to the induction into office. If the petitioner was duly elected, it was the duty of the mayor to have administered the oath, and his refusal so to do would have inevitably raised the question of the right of the petitioner to the office of city collector. This case, therefore, does involve the right or title to a public office, and is entitled to an immediate hearing and determination by this court. Code, art. 5, § 42.

The appellee further asks that the appeal be dismissed upon the ground that the order from which the appeal was taken was not a final order. But this motion must be overruled. While it is true that no bill of exceptions was taken at the hearing of the cause below, yet the test to be applied in a case like this is whether the order of the court from which the appeal was taken was in the nature of a final order. Much of the former strictness which applied to mandamus proceedings has been done away with, and they have been made to approach more nearly to other forms of actions. Mandamus, it is true, is a legal remedy, yet there has been a growing disposition to invest it with many of the rights and forms which apply to equitable actions; the intent and purpose of the courts being to get at the real issue or merits of the controversy, rather than to deal with the particular form in which they were raised. Had the case been that of a bill in equity, with demurrer to the answer overruled, and the bill dismissed, or of a declaration in an action at law, with a judgment for defendant after demurrer to the pleas, there could be no question as to the right of the plaintiff to appeal. So in this case. The dismissal of the petition was necessarily a termination of the case, unless the right of appeal existed, and an appeal was taken. No judgment that the court could have rendered could have more effectually disposed of the case, and the order of dismissal was therefore a final order, from which the appeal could be taken, and the motion to dismiss is therefore overruled.

In the lower court the case was tried on demurrer to the answer. The demurrer was overruled because, in the opinion of the learned judge, "there are no admissions in the answer which show the facts in regard to the alleged passage" of the ordinance. It is undoubtedly true, as argued by the counsel for the appellant, that the answer is uncertain and evasive. While, in a proceeding by way of mandamus, against an individual, he may aver that he has no personal knowledge of the facts alleged, and can therefore neither admit nor deny, as in the case of *People v. Ryan*, 17 Mich. 159, yet, in the case of a public officer, and that officer the chief executive of a state or municipality, he is, and ought to be, officially chargeable with knowledge of the acts of the legislative branch of the government. It is a part of his duty to have such knowledge. His personal presence in the halls of legislation is not the sole means of acquiring knowledge, nor, indeed, is it the ordi-

nary means of acquiring it. It is his bounden duty to know the acts of the co-ordinate branch of government,—acts which will come before him for approval,—and to know the disposition of them when they have failed to receive his approval, in order that he may, in obedience to his oath, properly discharge the duties of his office. In this respect the answer of the respondent in this case is uncandid and equivocal. It is argumentative where it should contain statements of facts, and is not such a full setting forth of the defenses upon which he intends to rely as is required by section 3 of article 80 of the Code. But, the case being heard upon demurrer, the petition as well as the answer must be carefully scrutinized, and if any error is contained therein the effect of the demurrer to the answer is to mount up to the petition itself. *Commercial Bank of Albany v. Canal Com'rs of State of New York*, 10 Wend. 26; *Poe*, Pl. & Prac. § 706, and cases cited in note 1. The petition sets forth the passage of an ordinance, the veto of it by the mayor, and the passage of the same over his veto, "receiving the affirmative vote of three-fourths of the members of each branch of the city council." Then follows a videlict giving the vote, which in the first branch was 15 members in the affirmative, and 4 votes in the negative, and 3 members of said branch being absent. It is not necessary now to discuss what constitutes a branch, but it is clear that if, as recited, the affirmative vote of three-fourths "of the members" was necessary for the passage over the veto, then the ordinance did not receive such vote; or, if it did receive the vote of three-fourths of the members, then the statement of the vote as contained in the videlict clause is wrong. The two are inconsistent, and cannot be harmonized, nor can either be treated as surplusage. The petition was therefore defective on its face. In addition to this, the petition makes certain allegations of fact with respect to the passage of an ordinance of the mayor and city council of Baltimore. Facts thus alleged should have been either admitted or denied. The answer with respect thereto was evasive, it is true, and to that extent was open to a motion to quash; but its language, "neither admits nor denies," is far from being an admission of the allegations of the petition, and therefore affirmative proof must be taken to support the allegations of the petition. *Legg v. Mayor, etc.*, 42 Md. 222. The learned judge below was therefore correct in overruling the demurrer, and his order must be affirmed. But, though the ruling of the lower court is affirmed, by section 20 of article 5 of the Code this court is vested with the discretionary power, when, in its judgment, the ends of justice will be promoted, to remand a cause to the lower court for trial upon its merits. This is manifestly a case for the exercise of that discretion. The merits of the controversy have never been passed upon by the court, nor has the cause ever been in a condition that they could be passed upon,

and not to remand it would be neither more nor less than a denial of justice. But, in remanding the cause, it is proper to say that the questions involved are either those touching the passage or existence of an ordinance, or questions resulting directly therefrom, and therefore are questions which should be tried by the court without the intervention of a jury. It is not every question of fact that is a question for the intervention of a jury. The passage and existence, or nonexistence, of a statute or ordinance, is a question of law, and though framed, in form, as an issue of fact, must, when it arises in the courts, be decided by them on the evidence legally applicable thereto, without taking the advice of a jury on the subject. *Town of South Ottawa v. Perkins*, 94 U. S. 261; *Berry v. Railroad Co.*, 41 Md. 464; *Legg v. Mayor, etc.*, 42 Md. 224. For these reasons the case will be remanded, in order that it may be tried on its merits.

(33 Md. 549)

STATE v. COWEN et al.¹

(Court of Appeals of Maryland. June 17, 1896.)

CHESAPEAKE AND OHIO CANAL — CONTROL BY TRUSTEES—CONTRACT.

1. In a controversy between the state and various creditors having liens against the Chesapeake and Ohio Canal, it was decided by the court of appeals that trustees representing bonds whose liens extended only to the net revenue of the canal should take control of and operate the canal; that if at the end of four years from May 1, 1891, the revenues should not have paid operating and other necessary expenses, such failure was to be regarded as conclusive evidence, "unless the time be extended by the court, for good and sufficient cause shown," that the canal could not be operated by the trustees so as to produce a net revenue; and power was reserved to direct a sale of the canal. It appeared that the trustees expended almost \$500,000 in restoring the canal to a condition for earning revenue; that they had to build up the business; that, notwithstanding these difficulties and a scarcity of boats, the business had greatly increased; and that, by a proposed contract with the Chesapeake & Ohio Transportation Company, the canal would secure a guaranteed fixed income, and increased facilities for earning revenue. *Held*, that it did not clearly appear that the canal could not be operated so as to earn a net revenue, and hence an extension of time from May 1, 1895, was properly granted to the trustees.

2. The lien of the holders of bonds of the Chesapeake and Ohio Canal, issued under Act 1845, c. 281, is limited to the net revenue and tolls of the canal.

3. The trustees in control of and operating the canal, in the interest of the beneficiaries whose lien extends only to the net revenue, may contract with other transportation companies for the use of the canal, where the rights of both parties, as well as those of the public, in relation to the canal, are carefully and sufficiently guarded.

Briscoe, Bryan, and Page, JJ., dissenting.

Appeal from circuit court, Washington county.

Petition by John K. Cowen, Joseph Bryan, and Hugh L. Band, Jr., trustees, etc., against the state of Maryland, for an extension of time during which the petitioners were to possess and operate the Chesapeake and Ohio Canal, in the interest of bondholders,

under Act 1844. From a decree in favor of petitioners, the state appeals. Affirmed.

Argued before McSHERRY, O. J., and BRYAN, BRISCOE, ROBERTS, PAGE, RUS-SUM, and FOWLER, JJ.

Atty. Gen. Claiborn, for the State. J. Clarence Lane, for appellees.

FOWLER, J. This appeal presents questions growing out of the controversy between the state of Maryland and various classes of creditors having liens against the Chesapeake and Ohio Canal, its property, franchises, revenues, and tolls. The state is the largest creditor, and next to it stand the appellees, who represent the bonds issued under Act 1845, c. 281, as well as those of Act 1878, c. 58, generally known as "Repair Bonds," which latter are conceded to be a prior lien on the canal, its property and revenues, so far, at least, as concerns the claim of either the state under its mortgages or of the appellees under Act 1845, c. 281. While the history of the canal, and the relation of the state to it, as creditor, and the legislation which from time to time has been adopted by the state for the purpose of waiving its liens in favor of others, are so well known that it would be useless to refer to it here, it will be necessary, in order to have an intelligent understanding of the questions before us, to examine the decree in this case, which we affirmed on the former appeal, and which is reported in 73 Md. 503, 21 Atl. 374, as well as to refer somewhat fully to the opinion of this court in that case, which was delivered by the late Chief Justice Robinson.

The decree, which, we have said, was affirmed in 73 Md. 503, 21 Atl. 374, provided that, upon certain conditions therein prescribed, the appellees should take possession and control of the canal, together with its rights and property, with power and authority to use and exercise the franchises of said company, and operate the said canal, to the same extent that said company could do. Provision was made for the disposition of the net revenue, and, in the sixth section of the decree, it was provided that if, at the end of four years from the 1st day of May, 1891, there should not be tolls and revenue over and above the amount necessary to pay current operative expenses, and to keep the canal in repair, sufficient to liquidate and discharge the amount of repairing and restoring the canal to a working condition from its then broken condition, and the amount necessary to pay expenses and compensation to the receivers, and also certain other expenses not necessary now to mention, "such failure in the tolls and revenues was to be regarded as evidence conclusive (unless the time be extended by the court, for good and sufficient cause shown) that the said canal cannot be operated so as to produce revenue with which to pay the bonded indebtedness of the said canal company." It was also

¹ For concurring opinion, see 85 Atl. 354.

one of the provisions of that decree that, "whenever it shall clearly appear that the said canal cannot be operated by the said trustees so as to produce revenue with which to pay the bonded indebtedness of said company," the right and power was reserved to the court to order and direct a sale, as provided by that decree. Prior to the expiration of the four years mentioned in the decree, during which the appellees were to possess and operate the canal, they applied by petition to the circuit court for Washington county for the extension of time they were authorized to ask for by said decree, for the purpose, as they allege, that they might have an opportunity, under better auspices, to demonstrate that the canal would, with proper management, pay annually, out of its net tolls and revenues, something on account of and in reduction of its bonded indebtedness. The state, through its attorney general, resisted this application—First, upon the ground that it was premature; and, secondly, because, assuming that the court below had the power, upon a proper case, to grant the extension, the appellees had failed to make out such a case as called for the further interposition of the powers of a court of equity. But the circuit court, having come to the conclusion that the appellees had shown good and sufficient cause, on the 15th February, 1896, passed an order so declaring, and directing that the said period of four years fixed by the decree should be extended to the end of six years from the 1st day of May, 1896. From this order the state has appealed.

It was not seriously contended in argument that, if a proper case was made, the court did not have power to pass the order appealed from, and we shall therefore proceed at once to consider the question presented. But, before doing so, it is proper to mention the fact that, after the question as to the extension of time (which was regarded as the only one directly presented by this appeal) was argued in this court, we acquiesced in the request expressed at the hearing that, before passing upon the question of sale *vel non*, the question as to the priority of liens as between the state and the appellees should be fully presented, so that, in case this court should come to the conclusion that a sale should be had, there need be no further delay caused by reason of the uncertainty of the rights of the state or of the appellees in respect to their respective liens; it being apparent, as we said in 73 Md. 503, 21 Atl. 378, that the question as to the priority of liens is one "which the parties are entitled, as matter of right, to have decided before a sale is made."

The principal question with which we are confronted at the very outset is whether the canal shall be sold. In order to solve this question in a satisfactory manner, it will be necessary to point out the relations of the parties to each other and to the incumbered

property, and thus to ascertain their respective rights in and to said property. There can be, we think, no difficulty in so doing, for these rights and relations, with one exception, have been so clearly and fully fixed by what we said on the former appeal (73 Md. 503, 21 Atl. 374) that we need only refer to and cite portions of that opinion to show what these rights and relations are. What, then, was decided on the former appeal? We affirmed the decree of the circuit court for Washington county, holding—First, that these appellees were, by virtue of their rights under the act of 1845 and the mortgage of June 6, 1848, which was executed in pursuance of said act, as well as because of their rights as trustees for the holders of the bonds issued under the act of 1878 (chapter 58), entitled to take possession of the canal upon the terms prescribed by the decree; second, that, the appellees being lawfully entitled to the possession of the canal under the decree, they must "be allowed to put it in a condition to produce revenue; otherwise its possession would be without benefit to them." It was, however, contended on the former appeals, as now, by the state, that whatever may be the rights of the appellees as against the mortgagor, the canal company, the state has superior rights under its long-overdue mortgage, and especially the right thereby to demand an immediate sale of the entire canal and its franchises, free from any claim of the appellees, trustees, under the act of 1845. The attempt to enforce this right was thus commented on in 73 Md. 503, 21 Atl. 377: "Now, upon what grounds can this right be supported? To induce the bondholders of 1844 to furnish the money necessary to complete the canal, the state not only agreed to waive its own liens upon its revenues, but agreed also that the company should pledge them by mortgage, as security for the payment of these bonds. And now, when the state and the company have operated the canal till they are no longer able to operate it, and when the canal itself is no longer in a condition to earn revenue, and the company, during all these 40 years, has been in default in the payment of its indebtedness, according to the terms of the mortgage, and when the bondholders ask to be allowed to take possession of the canal, and to repair and operate it for the purpose of ascertaining whether it can be made to produce any revenue applicable to the payment of the mortgage, the state interposes, and insists that it shall be sold, clear of the liens of these bondholders, which the state agreed should be preferred liens upon its revenues; and, when it is sold, the state further claims, as against them, the entire proceeds of sale, because their liens, it is said, extend to the revenues only, and not to the property of the canal. In other words, the state insists that they shall be deprived of the only remedy open to them by which they may have the opportunity, at least, of reimbursing themselves for the mon-

ey which they, at the instance of the state, furnished to finish the canal. So it is not the case even of a junior incumbrancer, asking for the sale of mortgaged property, and the proceeds of sale to be applied to the payment of the several liens upon it according to their priority; but it is one in which the state, holding liens upon the revenues and property of an unfinished canal, in order to induce others to furnish the money necessary to finish it, waives its own liens upon the revenues in favor of such persons, and then insists that the canal shall be sold, whereby these liens are destroyed. We do not see on what ground, legal or equitable, such a contention as this can be supported." Such being the rights of the parties, and the appellees having been in possession of the canal for the past four years, and the right of the state to demand a sale having been thus denied by us in 1891, when the canal was in a broken and useless condition, what has happened since that time which would justify us in now ordering a sale?

This brings us to the consideration of the direct question presented by this appeal, namely, should the application for an extension of time be favorably considered? The answer to this question depends upon the terms and conditions of the decree, which, as we have seen, has already been affirmed, and the facts relied on by the appellees, which we do not understand to have been seriously denied, to show that, as matter of justice and equity, the extension of time asked for should be allowed. As we have seen, we held on the former appeal (73 Md. 508, 21 Atl. 374) that not to have granted the appellees' possession of and time to operate the canal for the benefit of their cestuis que trustent would have been inequitable, as well as illegal, under the then-existing circumstances. Then the canal was a wreck, useless for any of the purposes for which it was intended. Now it has been restored. Then the appellees had not expended nearly half a million dollars, which they have since done, in restoring it to its unprecedented good condition. It is apparent, also, that it was impossible then to know definitely what would be the effect upon the future business of the canal of the conditions under which the appellees took possession. The amount of money, as well as the length of time required to repair the canal, could only be estimated; and the many difficulties encountered by the appellees, as set forth in their petition and brief, could not possibly have been foreseen, nor could they have been provided for, except by the wise provision, which was inserted in the decree, providing for an extension of time upon showing good and sufficient cause. If it was inequitable to deny the appellees possession of the canal in 1891, we think it would be even more so now, when, in addition to the loss they would then have sustained by a sale, they would, according to the state's contention, now lose also the large amount they were

authorized under the decree to spend in repairs and restoration.

But irrespective of the right of the appellees to possession upon equitable grounds, based on the facts set forth in their petition, and the conditions upon which they took possession, we do not think that the state can maintain its right to a sale upon any fair or reasonable construction of the act of 1845, c. 281, its mortgage of January 8, 1846, and that of the appellees of June 5, 1848, which together contain the contract between the canal company, the state, and the bondholders of 1844. Certainly, no right to such a sale can be enforced until it appears that the cestuis que trustent can derive nothing on account of their claims from the operation of the canal by the appellees. It is manifest that, under the decree we affirmed, no sale of the canal by the state, under the terms demanded by it, can be decreed until "it shall clearly appear that the said canal cannot be operated by the said trustees so as to produce revenue with which to pay the bonded indebtedness." But the rights of the bondholders of 1844 are still more emphatically recognized in the mortgage which the state accepted from the canal company, for we find in that instrument the following provision: "Subject, nevertheless, to all and singular the liens and pledges created by the provisions of the act of 1845, * * * which said liens and pledges are in no wise to be lessened, impaired, or interfered with by this deed or by anything herein contained." Assuming, then, that the contention of the state is correct, namely, that the appellees, representing the bonds of 1844, have a lien only on the net revenue, and tolls, and have no claim whatever by virtue of said bonds on the proceeds of sale of the canal, its property and franchises, it would necessarily follow, unless the canal is worthless, and cannot be operated to any advantage for said bondholders, that a sale would not only impair and lessen their lien, but would absolutely destroy it. But, so far from the canal being in such a hopeless condition, we think enough can be found in the record before us to demonstrate that under its present management by the officers appointed by the court, and who are under its control and supervision, the business, as well as the earning capacity, of the property, has been largely increased. Notwithstanding the fact that the appellees, after restoring the property to a condition for earning revenue, had to build up the business, and win back the traffic which had been diverted to other routes of transportation, they appear to have met with success; for, during the few months of the year 1891 during which the canal was in working condition, there were carried by it 50,533.14 tons. The next year, although there was a scarcity of boats, over 250,000 tons were carried. And in 1893 the tonnage arose to 336,295, which has not been equaled during the past 10 years. Under these conditions and circumstances, we are not disposed, even if we had the pow-

er, to decree a sale at this time, and thereby destroy the only source from which, as contended, the bonds of 1844, or any part of them, can ever be paid, and at the same time, perhaps, deprive the public of one of the means of cheap transportation of coal and farm products, which the canal now affords; for it will be remembered that the state had been careful, in order to protect itself and its citizens, as well as those who should advance their money to complete the work, to provide, in the charter granted to the company, "that the said canal, and the works to be erected thereon, in virtue of this act, when completed, shall forever thereafter be esteemed and taken to be navigable as a public highway." When, therefore, it appears, and not till then, that the property cannot be operated so as to produce revenue applicable to the payment of the bonded indebtedness of the company, then, under the provisions of the decree affirmed by this court, the court may be asked to decree a sale under the state's mortgage. Until that time, in other words, until it "clearly appears" that the liens of the appellees are valueless, and can therefore neither be lessened nor impaired, a sale under the conditions demanded by the state, as was said in *State v. Brown*, 73 Md. 503, 21 Atl. 374, can be supported upon no ground, either legal or equitable. We have already indicated our opinion that it has not yet been made clearly to appear that the said lien of appellees has become valueless; and therefore it would follow that no such decree of sale would be valid, because the state, acting by its officers, the courts, or through the legislature, cannot destroy or impair liens which exist by virtue of contract.

We have thus far assumed, as contended by the state, that the appellees have no claim upon the corpus of the canal, or the proceeds of its sale, in case a sale should be ordered, but that the only source from which they can look for repayment of the bonds of 1844 is from net revenue and tolls. This question has been during this term most ably and elaborately argued. But inasmuch as we have come to the conclusion that there can be no sale at present, under existing circumstances, the question as to the distribution of the proceeds of such sale ceases to have that commanding importance which would otherwise attach to it. We think, however, there cannot be any doubt as to the correctness of the views upon this question expressed by Judge Alvey (former chief justice of this court), while presiding in the circuit court for Washington county, in the former trial of this case. We can add nothing to the force and fullness of the convincing arguments so cogently presented by him in that able opinion, and, upon the views therein expressed, we are content to rest our conclusion that the lien of the bondholders of 1844 is limited to the net revenue and tolls of the canal. Opinion of Alvey, C. J., *Append. to 73 Md. 590, 600 (Brown v. Canal*

Co.) According to the provisions of the decree, the amount expended by the appellees in restoring the canal, to wit, the sum of \$430,764, with interest, is to be paid from the tolls and revenue, after paying certain other expenses, as set forth in the decree. This decree stands affirmed by this court, and is the law of this case, so far as applicable. If we had come to the conclusion to decree a sale upon the conditions asked by the state, and the source—namely, the revenue,—from which this sum is decreed to be paid had been thus destroyed, another question, not now before us, might be presented.

During the argument at this term in reference to the question of priority of liens, some reference was made to what are known as the "labor claims" for labor and supplies furnished the company before the freshet of 1889, to keep the canal in repair and operation. These claims, however, were not before the circuit court for Washington county at the time of the former appeal, and they are not before us now. Hence no definite determination can be made in regard to them.

To a contract such as that proposed to be made by the appellees with the Chesapeake & Ohio Transportation Company, and approved by the court below, we can see no valid objection. The rights of both parties, as well as those of the public, in relation to the canal, appear to be carefully guarded. By means of this contract, the appellees will secure a guaranteed fixed income, of not less than \$100,000, and an increased number of boats, thus increasing facilities for transportation, and providing means for increasing the revenue and tolls. Without further reciting the various provisions of the contract, we agree with the learned judge below that there is no good reason why a contract similar to the one proposed should not be authorized by the court. It provides that nothing therein shall be taken to give the transportation company any exclusive rights whatever on the said canal, or to prevent the appellees from making with any other person or corporation a contract or contracts similar to the one proposed in whole or in part, or that the use of electrical power, if it be found practicable, shall interfere with the use of animals or steam by individual boat owners.

It will be seen that we are of opinion—First, that, under the circumstances disclosed by the record, the appellant is not now entitled to a decree for sale of the canal, its property and franchises, and that, therefore, the order of the court below extending the time for operating the canal by the appellees, under the order and control of that court, should be affirmed; second, that the bondholders of 1844 are entitled to payment out of, and have a lien only on, the net revenue and tolls; third, that although the state has waived its lien on the canal and its revenue and tolls in favor of the labor claims, as they

were not before the circuit court for Washington county, nor in manner passed upon by the order appealed from, we cannot on this appeal dispose of them; and, fourth, that the contract proposed to be made between the appellees and the transportation company is proper and appropriate to enable the former to operate the canal advantageously. And, in conclusion, we may say, as we substantially said in the opinion from which we have already quoted (*State v. Brown*, 73 Md. 503, 21 Atl. 374), that we have nothing to do with the alleged ulterior purposes of any of the parties to this controversy. We have endeavored to dispose of the questions considered in accordance with what appear to us to be the clearest principles of law, equity, and justice; but if, by reason of the conclusion we have reached, the appellant shall be prevented from enforcing its claims by a sale, and, if it is thus prevented from destroying the canal as a waterway, it may be some satisfaction to remember that the view we have expressed is in strict accordance with the solemn declaration the state has made, that the canal shall forever be taken and esteemed as a navigable highway. It has, however, been doubted whether the property in question could under any circumstances be sold for enough so that, after the payment of all claims which are conceded to have legal priority over that of the state, there would be anything left to go towards a reduction of its claim of many millions. But whether this be so or not, whether the sale would produce much or nothing towards the paying of the state's claim, her contract that the liens of the appellees, created by the act of 1844, should not be lessened, impaired, or interfered with by her under her mortgage, must be recognized and enforced, and her good faith, impliedly, at least, pledged for the maintenance of the canal as a water way, by the declaration in the charter she granted that the canal should forever thereafter be esteemed and taken to be a navigable highway, must be maintained at any cost. Order affirmed.

BRISCOE, BRYAN, and PAGE, JJ., dissent.

BRYAN, J. (dissenting). The questions which we are called upon to decide cannot be clearly understood without some statement of the previous proceedings in this case: On the 2d day of October 1890, the circuit court for Washington county, sitting in equity, passed a decree for the sale of the Chesapeake & Ohio Canal. It was decreed that the sale should embrace all the rights, title, and interest of the corporation to the entire line of the canal; all its lands, tenements, and estates, works and appurtenances, tools, implements, and boats, water rights, and franchises. All the parties in interest were before the court, and the decree bound all their rights in the subject-matter of litigation. It was provided

in the decree that its execution should be stayed and suspended on certain conditions, which will hereafter be more particularly considered. The parties to the suit in which the decree was passed were the trustees of the holders of the bonds issued under the act of 1844; the trustees of the bonds issued under the act of 1878; the state of Maryland; the Chesapeake & Ohio Canal Company; Bernard Carter, executor of the last will and testament of Charles H. Carter, deceased; and certain bondholders whose rights are not now in question. Appeals were taken from the decree, severally, by the state of Maryland, the canal company, and Mr. Carter, but by none of the other parties to the suit. The decree of the circuit court was affirmed by this court. The case is reported in 73 Md. 484, 21 Atl. 374. The clauses in the decree suspending its execution authorized the delivery of the canal and all its property to trustees of the bonds issued under the act of 1844, provided that they should take up, and bring into court, all the outstanding bonds issued under the act of 1878, and that they should put the canal in good repair and condition throughout its entire length, and do certain other things which it is not important now to mention. Upon the performance of these conditions the trustees of the bonds of 1844 were to be subrogated to the place of the trustees of the bonds of 1878, with all their rights and remedies, and were to have full possession and control of the canal, and to exercise all the franchises of the corporation. It was further decreed as follows: "Sixth. That if at the end of four years from the 1st day of May, next, there shall not have been tolls and revenues derived from the said canal, and the property and rights appurtenant thereto (over and above the amount necessary to pay current operative expenses and to keep the canal in repair), to liquidate and discharge the amount of the cost of repairing and restoring the canal to a working condition from its present broken condition, and the amount of money required to pay expenses and compensation to the receivers, and to pay any amount that may be determined to be a preferred lien on such tolls and revenues for labor and supplies furnished to the canal company, such failure in the tolls and revenues shall be regarded as evidence conclusive (unless the time be extended by the court for good and sufficient cause shown) that the said canal cannot be operated so as to produce revenue with which to pay the bonded indebtedness of the said canal company, and, further, whenever it shall clearly appear that the said canal cannot be operated by the said trustees so as to produce revenue with which to pay the bonded indebtedness of said company, the right and power is hereby reserved to this court to order and direct the execution of the foregoing decree of sale." The 1844 trustees complied with the required conditions, and entered into possession of the canal, made the necessary repairs, and have operated it

ever since. In January, 1894, these trustees filed a petition in the circuit court for Washington county, praying that the period for which the execution of the decree was stayed should be extended for an additional term of ten years. After answer by the state in opposition to the proposed extension, the court ordered that the execution of the decree should be stayed for a period of six years from the 1st day of May, 1895. The state appealed from this order, and the case was argued at the last October term of this court. It was considered that, before a sale was made, it was proper to settle the priorities of the different parties in the distribution of the proceeds. And, as some of the counsel in the cause desired to argue this question more fully, the court granted the request, and ordered it to be reargued at the present term. The argument took a much wider range than we anticipated, tending, if we correctly understood the counsel for the appellees, to impeach the validity of the decree for the sale. This decree was passed by a court of competent jurisdiction, with all the parties in interest represented by counsel before it, and was affirmed by this court after full and elaborate argument, and upon great deliberation. It has all the sanction which the law can give to any decree, and it cannot now be disturbed. But, as the matters involved are of great public interest, we have thought it well to give our views upon the whole question.

In April, 1835, the canal corporation executed a mortgage to the state of Maryland. It embraced the following property: "All and singular the lands and tenements, capital stock, estates and securities, goods and chattels, property and rights, now or at any time hereafter to be acquired, and the net tolls and revenues of said company." In May, 1839, it executed another mortgage, and described the mortgaged property in the same terms. By the act of 1844, c. 281, the canal company was authorized and empowered to borrow a sum of money not exceeding \$1,700,000, and to execute preferred liens on its revenues, in the manner mentioned in the act, for the purpose of securing the loan with interest. The lien on the revenues was limited by the second section of the act, wherein it was enacted "that the president and directors of said company shall from time to time, and at all times hereafter, have the privilege and authority to use and apply such portion of said revenues and tolls as in their opinion may be necessary to put and keep the said canal in good condition and repair for transportation, provide the requisite supply of water, and pay the salaries of officers and agents, and the current expenses of the said company." By the fourth section the liens of the state on the revenues were "waived, deferred and postponed" in favor of the bonds to be issued, so as to make them preferred liens on the revenues, according to the provisions of the second section. By the sixth section the canal com-

pany was authorized to execute any deed, mortgage, or other instrument of writing necessary or expedient to give the fullest effect to these provisions. And by the seventh section the canal company was required to execute to the state a further mortgage on the said canal, its lands, tolls, and revenues, subject to the liens above mentioned. Mortgages were executed according to the tenor and effect of the requirements of the act. The difference is very striking between the mortgages to the state, and the mortgage to secure the bonds of 1844. The canal itself, and all its property, as well as its tolls and revenues, had been previously mortgaged to the state, while the lien of the bondholders is only on the revenues, subject to deductions from them for repairs, supply of water, salaries, and current expenses; in other words, only on the "surplus net revenues aforesaid," as they are styled in the fifth section of the act. And the revenue was liable to be still further reduced upon other contingencies which were altogether probable. The act of 1844, c. 124, gave the canal company power to borrow money for the objects of its charter, and to pledge its property and revenues for the payment of the loan, provided that the prior rights and liens of the state should not be impaired, which had been acquired under mortgages previously executed. This court, in the Canal Case (*Com. of Virginia v. Chesapeake & O. Canal Co.*, 32 Md. 501), decided that this grant embraced the power to construct the canal, repair it, and keep it in order, and that, before the liens of the bondholders of 1844 should be paid, the canal company had "power to use and apply its revenues in such way as to preserve the existence of the canal, and keep it a living, operative work, capable of earning tolls and revenues, and subserving the great public purposes for which its charter was granted." We quote the language of the court on page 535. And, in speaking further of the position that the lien of these bondholders was prior to the claims for repairs, they say, on pages 538 and 539: "They took security only upon expected tolls and revenues, and only on so much of them as might remain after repairs and other expenses were first provided for. There is certainly no equity in the pretensions they now assert. But the conclusive answer to their whole complaint is that by the face of their bonds they were referred to the act of assembly (a public statute of a state) under which they professed to be issued, and are in law chargeable with knowledge of all its provisions, and of the true construction to be placed upon them by the courts. And, besides this, the mortgage taken for their benefit recites the proviso in the second section of this act, as well as all its other provisions, and devotes the mortgaged tolls and revenues to their security only 'after payment of the debts now existing and that may hereafter be contracted and in

arrears for repairs on the canal and officers' salaries." It was in that case clearly decided that, if the receipts from tolls and revenues should be insufficient to make repairs, the canal company had the right to issue bonds for the purpose of obtaining the necessary funds, and to pledge its after-accruing revenues in preference to a pre-existing lien upon them. Now, a lien on revenues subject to regular and stated deductions of large amounts, and liable to others, of an indefinite aggregate, on contingencies which would probably occur, cannot be put in the same category with a fixed and definite mortgage on the canal and all its property. The difference between the interests conveyed is enormous. The meaning of the fourth section of the act was that the state should not take the revenues so as to defeat the limited right to them which was pledged to these bondholders, but nothing is said about waiving its lien on the lands and other property of the canal. It was intended that the state should agree that these bondholders should have these net revenues as far as they might have them under the law, but its agreement extended no further. The language of the seventh section, requiring a mortgage to the state "of the canal, its lands, tolls and revenues," shows that the legislature, by using a distinctly different phraseology, intended to designate a distinctly different interest from that conveyed to these bondholders. By the act of 1878, c. 58, the legislature authorized the issue of bonds which were intended to have priority over the liens of the state. It was enacted that they should be secured by a mortgage of the "tolls and revenues and other property, land, water rights and franchises" of the canal company. By the third section of the act it is declared that the said bonds and the mortgage are "liens upon the property, tolls and revenues of the Chesapeake and Ohio Canal Company, to be held and enjoyed in preference to any rights or liens which the state of Maryland may have in or upon the said property, tolls and revenues of the said Chesapeake and Ohio Canal Company, until the said bonds, provided to be issued under this act, and coupons thereon, according to the legal obligations thereof against said company, are wholly paid and satisfied." The language is in strong contrast with that used in the act of 1844. It is morally impossible to suppose that the legislature did not intend to convey totally different meanings by expressions so widely dissimilar. When this case was in the circuit court before the decree for sale of the canal was passed, the trustees for the bondholders under the act of 1844 filed a petition praying that there should be a reference to an auditor to report on the priority of the liens on the canal. The case was not so referred, but the learned judge who was presiding delivered a most able and exhaustive opinion, in which he held that these trustees had no lien on the corpus of the canal. This opinion

is published in the appendix to 73 Md. 567. It was because the only security for the payment of the bonds of 1844 depended on the condition of the canal to earn revenue that the court inserted in the decree for sale the provisions for suspending its execution.

It is stated in the appellees' brief that the grant of all the tolls and revenues carries the entire beneficial ownership. It is also stated "that the right to all the rents and profits of land, or the right to the whole revenue from it, or the right to the whole interest or dividends derivable from personal property, necessarily includes all beneficial interest of every kind which can exist in such property, and for the same reason that, when to one has been granted the right to have all the revenues derivable from an estate or property, there is no beneficial interest left in that property for any one else." The authorities cited to sustain these positions will not be questioned. But there is a vast difference between a grant of all the revenues, and a grant of the kind authorized by the act of 1844,—a grant of revenues from which the grantor makes great deductions, some of them occurring at stated intervals, and others liable to occur, in not improbable contingencies, to such an amount as might extinguish them altogether. In the most favorable view which can be taken of these revenues, they are merely "surplus net revenues," and they are so styled in the act of assembly. It is not held anywhere that a grant of net revenue is a grant of the property itself. A conveyance of land to a trustee in trust to permit some other person to take the rents and profits vests the entire legal estate in the person of the profits; but a conveyance to a trustee to pay to some other person the net rents and profits leaves the entire legal estate in the trustee, and imposes on him the duty to collect the rents and profits, and pay over the net amount after deducting expenses. The reason is that in the first instance the *cestui que trust* (the beneficiary) has the entire interest, while in the second he is entitled only to the profits after the trustee has deducted the expenditures which he has made.

Much reliance was placed on *Railway Co. v. Jortin*, 6 H. L. Cas. 425. The decision in that case depended on the construction of a number of acts of parliament. The Folkstone Harbor Company obtained a loan of £10,000 from the exchequer loan commissioners, and executed an indenture, which, after reciting certain acts of parliament, declared that the company, "in pursuance of the provisions of the Folkstone Harbor acts, assigned all and singular the rates, duties, and receipts whatsoever, then or hereafter to become payable by virtue of the said acts, and the right, title, and interest of the company in and to the same, and all freehold and leasehold messuages, lands, tenements, and hereditaments belonging to the said company, according to the nature and

quality of the same premises, respectively, but subject to the proviso for redemption hereinafter contained." Before the making of this loan the previous creditors and mortgagees of the harbor company had executed an agreement in writing that any mortgage or other security which should be taken by the loan commissioners on the rates, duties, and receipts of the harbor company to secure the payment of the loan of £10,000 should have priority over the respective securities then held, or thereafter to be held, by them, the said creditors and mortgagees, in the following manner: That is to say, that in the first place the commissioners should be paid annually, out of the rates, duties, and receipts, interest on the loan; in the next place, that the said creditors should be paid their interest out of such rates, duties, and receipts; and after such payment of interest the surplus of said rates, duties, and receipts should be applied to the payment of the £10,000, in preference to, and with priority over, all claims and demands whatsoever which the said creditors and mortgagees, or either of them, might have on the said rates, duties, and receipts. The interest on the loan having fallen many years in arrear, the commissioners sold the tolls, rates, receipts, freehold, hereditaments, etc., to trustees for the Southeastern Railway Company. Mrs. Jortin, one of the creditors, claimed that she was entitled to a charge on the Folkstone harbor, and the buildings belonging to it. The principal question was whether the commissioners had power to sell the property. The house of lords decided that, by virtue of numerous acts of parliament (especially 1 and 2 Wm. IV. c. 24, § 21), the commissioners had the power to sell, and convey an unincumbered title to the purchaser. They decided further that Mrs. Jortin and the other creditors must assert their claims against the proceeds in the hands of the commissioners, and not against the property which had been sold. The lord chancellor said in his opinion: "The other mortgagees will still have all which they contracted for; that is, a right to be paid their interest before anything is paid to the commissioners in discharge of their principal. This right, however, is one which they can enforce only against the commissioners who have in their hands the proceeds of the sale." We do not find anything in this decision contrary to what we have said.

The appellees also cited *Ketchum v. St. Louis*, 101 U. S. 306. The state of Missouri had the first mortgage on the property, franchises, and income of the Pacific Railroad Company of Missouri. By the act of 1865 the legislature of Missouri authorized the county court of St. Louis county to issue 700 county bonds, of \$1,000 each, and loan them to the Pacific Railroad Company for the completion of its road. The second section of the act was as follows: "Sec. 2. The

fund commissioner of the Pacific Railroad, or such person as may at any time hereafter have the custody of the funds of said railroad company, shall, every month after said bonds are issued, pay into the county treasury of St. Louis county, out of the earnings of said Pacific Railroad, \$4000, and \$1000, additional in each month of December, to meet the interest on the said seven hundred bonds; said payments to continue until said bonds are paid off by the Pacific Railroad." The property and franchises of the road were sold under a subsequent mortgage without prejudice to the lien claim of St. Louis county. It was held that the county of St. Louis had an equitable lien on the earnings of the railroad, which was enforceable on the railroad property and franchises, and was paramount to any mortgage or lien thereon. We must take notice of the fact that the office of fund commissioner was established by statute, and that it was the duty of this officer to take possession of the gross earnings of the road, from every source. 101 U. S. 306. The statute of 1865 was therefore a specific appropriation of these gross earnings to the payment of these bonds. This appropriation was made upon valuable consideration, by the contract of all parties who were at the time interested in the property. We think that nothing more need be said to show the great difference between gross earnings, and surplus net earnings; between the whole beneficial interest, and the fractional part of such interest pledged by the act of 1844. The Central Ohio Railroad Company issued its bonds, containing this stipulation: "For the punctual payment of the interest and principal of this obligation, and others of like tenor, issued or to be issued, in preference to the payment of the dividends on the capital stock of said Central Ohio Railroad Company, the income arising from their road and its appurtenances is hereby specifically pledged." It was argued in this court that these bonds were, as between the railroad company and the holders, "an equitable lien on the whole income or revenues of the road," and "that it was a pledge of all the income or revenues of the road, amounting in equity to a pledge of the road itself, and creating, therefore, an equitable mortgage on the road, its franchises and revenues." Appellee's argument in *Garrett v. May*, 19 Md. 185, 186. The appellant argued that "the word 'income,' here, means net income from the road and its appurtenances." *Id.* p. 194. The question was whether the railroad company could execute its third mortgage, which would have priority over these income bonds. This court held that it had such right. It will be seen that the execution of this mortgage conferred a power to sell the railroad, and in this way entirely defeat the income bonds. It was shown in the *Canal Case*, 32 Md. 501, that the bondholders of 1844 took security only on "expected tolls and

revenues, and only on so much of them as might remain after repairs and other expenses were first provided for." And even this security was subject to the right of the canal company to create other debts for repairs, and make pledges of its future revenues which would have priority over it. It was also taken in subordination to the existing rights of the state upon all the property of the canal company, secured by mortgages, under which, in case of default, it might be sold, and an unincumbered title conveyed to the purchaser. And the lien of the state on the canal, its lands and chattels, has never been waived in favor of these bondholders.

After the court had delivered an opinion stating that a decree for sale would be passed, these trustees filed a petition praying that possession of the canal should be delivered to them, and stating that if it was delivered to them they could restore it as a water way, and operate it so as to derive tolls and revenues sufficient to pay the principal and interest of the bonds of 1878 and of 1844, and they prayed that in the decree for sale there might be a provision for a postponement of it. This petition was vigorously resisted by the state. As has been already stated, the court granted a suspension of the sale, on certain terms. The opinion of the learned court shows very distinctly the grounds of its action. We quote a passage from it: "To prevent this sale, and to preserve the only security to which the bondholders, under the act of 1844, are entitled, their trustees under the mortgage come in, and pray to be allowed to take possession of the canal, and to repair and operate it at their own costs, depending alone for reimbursement of the outlay upon such revenues as they may be able to realize from the operation of the work; and to that end they pray that they may be allowed to redeem the bonds issued under the act of 1878, and be subrogated to the rights of the holders thereof under that act. Can they be denied this right? I think not." The court had already stated in its opinion of September 1, 1890, that, on account of the ruinous condition of the canal, it could not be restored with any reasonable prospect that it could be made to produce revenue applicable to its large bonded indebtedness, and saying: "But all must concede that, if the canal is to be sold, no possible good can result from delay. The condition of the work is constantly growing worse, and there is no reasonable prospect of an enhanced price being obtained by any delay that may occur. On the contrary, any considerable delay will most certainly depreciate the salable value of the work." Among the conditions on which the sale was postponed are the following: "Third. That the said trustees, acting under the said mortgage of the 5th of June, 1848, shall by the 1st day of May next, 1891, at their own cost and expense, to be reimbursed to them as hereinafter directed, have put in good repair and condition the entire canal

from one terminus thereof to the other, so that it be fit for, and capable of, safe transportation thereon; and that upon so restoring said canal to a state of good repair and condition the said trustees shall proceed to operate the same as a public water way, with all the rights, and subject to all the conditions and limitations, granted and prescribed by the charter of the said company; and the said trustees shall keep said canal in good repair and condition, and continue to operate the same, save and except when such operation may be suspended by the action of causes against the effect of which prudence and due care in management will not provide. And the tolls and revenues received or derived from the use and operation of said canal as a public water way, and from the property and rights of the canal company, shall be applied by the said trustees as follows: First, to pay all current and ordinary expenses incurred in operating the said canal, and for keeping the same in good working repair; second, to pay and reimburse the said trustees the amount of money brought in by them, with which to pay the expenses incurred by the receivers, and their compensation, with interest thereon; third, to pay and reimburse to said trustees the amount expended by them in restoring the said canal to good working order, from its present waste and broken condition, with interest thereon; fourth, to pay and reimburse said trustees any amount that they may be required to pay, as constituting a superior lien on the tolls and revenues of said canal company to that of the bonds issued under said act of 1844, c. 281, for labor and supplies furnished to the said canal company while said canal was operated and controlled by said company, with interest on the amount so paid; fifth, to pay the interest that has accrued and may accrue, due on the bonds issued under the act of 1878, c. 58, and then the principal of said bonds; and, sixth, to pay the interest that has accrued and that may accrue, due on the bonds issued under the act of 1844, c. 281, and then the principal of said bonds. And upon the full payment of these last-mentioned bonds the possession and control of said trustees shall cease and terminate." The postponement was to continue until the 1st day of May, 1895. That time has long since passed, and the experiment which the court considered a hazardous one has utterly failed. The petition by the trustees now before us, filed in January, 1894, for the purpose of obtaining a further postponement of the sale, contains the following statement: "These trustees have borrowed, for the purposes of making said repairs, \$435,163.84. Their receipts from net toll rents, and other sources, to December 1, 1893, have been \$270,970.78. Their expenditures have been, for the repair of the canal and its works, under the orders of the courts, \$430,764.43; for other accounts, \$250,327.17. This statement does not include \$15,000 borrowed and paid as the compensation of the

receivers of this court and the supreme court of the District of Columbia." There are hopes and expectations on the part of the trustees for greater success in the future. But these hopes have signally failed in the past. The projected enterprise will be subject to all the uncertainties of the future. The adjudicated right of the state for a sale has already been postponed for nearly six years. During this interval large arrears of interest have accumulated, which will never be paid. For a long series of years the canal company has been unable to produce more than a small amount of revenue. In the meantime the bonded debt of the state is accumulating, with the prospect of payment becoming more unfavorable every year. Unless its rights are to be entirely sacrificed, there ought to be some definite limit to the delay in obtaining the remedy which the law has given it. The bondholders of 1844 have made the experiment which they desired to make, upon conditions offered to them by the court, and made a part of its solemn judgment. By the sixth article of the suspending provision, it was decreed that if by the 1st day of May, 1895, the tolls and revenues should not be sufficient to pay the amounts mentioned in the article, "such failure in the tolls and revenues shall be regarded as evidence conclusive (unless the time be extended by the court for good and sufficient cause shown) that the said canal cannot be operated so as to produce revenue with which to pay the bonded indebtedness of the said canal company." This failure has occurred in the tolls and revenues, and the result stipulated and decreed ought now to follow. The right of a mortgagee to sell the mortgagor's property on default is obtained by a solemn contract, which the law is bound to protect. If the enjoyment of this right is delayed now, it may be delayed again and again. Repeated delays will greatly impair, and may destroy, its value. And the right of precedence belonging to a prior mortgagee will be subordinated to the inferior right of a subsequent lienor.

The result of our opinion is that the decree for sale passed by the circuit court, and affirmed by this court, ought to be executed without further delay, and that the bonds of 1878 have the first lien on the proceeds of sale; the claims of the state under its mortgages have the second, and the bonds of 1844 have the third. As the legislature, at its last session, enacted that certain labor claims should be paid out of the amount coming to the state, these claims will be paid according to the directions of these statutes. As it was distinctly decreed that the trustees should repair the canal at their own cost and expense, and look to the tolls and revenues for repayment of the amount expended, and as the trustees prosecuted the work on this understanding, the expenses which they have incurred will not be paid out of the proceeds of sale.

PAGE, J., concurs in this opinion.

(34 Md. 95)

BARRY v. EDLAVITCH.

(Court of Appeals of Maryland. June 18, 1896.)

PARTY WALL—ALTERATION—ADVERSE POSSESSION—EASEMENT BY—RIGHTS OF ADJOINING OWNERS.

1. Where an adjoining owner and his predecessors in title had used for 20 years a wall, part of which was wholly situated on the land of their neighbor, for the support of their building, an easement in such land for such purpose was created by prescription.

2. An adjoining owner, who for 20 years had used for the support of his building a wall, part of which rested wholly on land of his neighbor, cannot complain that such neighbor built the wall up higher, and placed windows therein, since the right to use the wall was limited to the use enjoyed during the period of prescription.

3. The easement of an adjoining owner acquired by 20 years' adverse possession, to use, for the support of his building, a wall which, for part of its length, rested wholly on his neighbor's land, cannot be interfered with by such neighbor to the extent of cutting off the floor beams and a portion of the building, though it was done for the purpose of straightening the wall.

4. Where an adjoining owner obtains by prescription an easement for the support of his building on his neighbor's wall, such easement becomes appurtenant to his estate, and passes to his grantee.

Appeal from superior court of Baltimore city.

Action by Simon Edlavitch against John Marshall Barry. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BOYD, and PAGE, JJ.

H. C. Kennard, for appellant. William L. Marbury, J. G. H. Mitnick, and J. M. Marshall, for appellee.

PAGE, J. Simon Edlavitch, the appellee, brought this action against John M. Barry, the appellant, to recover certain damages alleged to have been committed to the property of the former by the latter. The narr. alleges that the defendant broke and entered the plaintiff's premises, and "tore down a portion of the front wall" and "a large portion of the southernmost wall of said improvement," and other wrongs, etc. It appears that the parties are respectively the owners of adjacent houses of Center Market space, in Baltimore city. The entire wall between the lots has been used for the support of both houses for 50 years. From Center Market space eastwardly for 36 feet, it is built one-half on each lot; but the remainder—being 9 inches in thickness, and extending eastwardly 54 feet to an alley in the rear—stood entirely on the lot of the appellant. Barry, desiring to improve his lot, obtained from the appellee an agreement to allow him "to remove party wall, providing he replaces same in twenty-one working days, weather permitting, the said wall beginning 36 ft., more or less, from the front building line, and extending back to the alley." He then tore down this part of the wall, and, in its place, built a new 14-inch wall wholly with-

in the metes and bounds of his own deed, and raised it some 15 or 20 feet higher than the height of the old wall. Four feet above the plaintiff's roof, he left openings in the new wall for windows, and inserted frames therein. The plaintiff offered evidence to show that in building this portion of the wall the defendant had moved it from 4 to 8 inches over towards the plaintiff's lot, and in order to so move it the ends of the beams and joists and steps of Edlavitch's house were cut off. This the defendant denied, and offered evidence to prove that the new wall was not moved, but built on the line of the old wall, the additional width being on his own premises; also, that the old wall leaned to the south, and that the cutting of the beams and steps in the plaintiff's house was necessitated by reason of the new wall being made straight; that these beams were inserted at the same height in the new wall and gave the plaintiff's house the same support that it had in the old. Subsequently the plaintiff built his own house one story higher, and, in so doing, closed in the window openings, and sought to use the new wall for his upper story, by inserting beams in that part of it which was above the top of the old wall as it stood originally. Both parties offered evidence,—the one to show the work was not carefully and properly done, and that the old wall was sufficient for the uses to which it had been applied; the other, that every possible care was observed in tearing down the old wall and in erecting the new, and that the old was unsafe to build on it the structure he proposed to erect.

The controversies now to be considered relate to the respective rights of the parties to the use and enjoyment of the easternmost portion of the wall. This, as has been stated, stands entirely upon the land of the defendant, and has been used for more than 20 years for the common support of the house of the plaintiff as well as of the defendant. The plaintiff contends that under these circumstances it became, by prescription, a "party wall," in the fullest meaning to be attached to such words. "The term 'party wall' is usually applied to such walls as are built partly on the land of another, for the common benefit of both, in supporting timbers used in the construction of contiguous buildings. * * * And a division wall may become a party wall by agreement, either actual or presumed; and although such wall may have been built exclusively upon the land of one, if it has been used and enjoyed in common by the owners of both houses for a period of 20 years, the law will presume, in the absence of evidence showing that such use and enjoyment were permissive, that the wall is a party wall. In such cases the law presumes an agreement between the adjacent owners that the wall shall be held and enjoyed as the common property of both." *Brown v. Werner*, 40 Md. 21. The case just cited was an action to recover damages for injuries occasioned by the careless manner in which the adjoining house

was improved, and the decision must be regarded in the light of its particular facts. The scope of the court's rulings was that the user therein shown was sufficient to enable the jury to find the wall to be a party wall, and that neither party had authority to interfere with it without the consent of the other, unless he could do so without injury to that other's possession. But it in no wise impeaches the general doctrine that in cases of prescription the terms of the presumed grant are fixed and determined by the user in which it originated.

Possession per se can never afford the presumption of a grant, so as to conclude the real owner. The possession must be open, known to that other party, and adverse to some right in the owner. It is only from the fact that such possession, amounting as it does to a continuous claim of title, has been acquiesced in for 20 years, that the presumption of a grant is afforded. So that, from the very statement of the nature of title by prescription, it is obvious that the presumed grant can never extend further than the user in which the other party has acquiesced. These principles are so well established as to require no citation to support them. They are applicable to the acquisition of easements (*Washb. Easem.* [3d Ed.] 74; *Parker v. Foote*, 19 Wend. 313), and, we think, are fully sustained by the decisions of this court. In *Dowling v. Hennings*, 20 Md. 183, the court said that the manner of the construction of the buildings implied an agreement between the builders that each should have a right of support or easement in the ground of the other, so far as necessary to maintain the alley for mutual use, and the partition wall for the common support of the two houses; and, while no other inference would seem possible, yet "the right claimed by the appellee could not be sustained by the simple implication of such an agreement. The right of support or easement, etc., is of such a character that it must have originated in a grant, either actual, or presumed, as matter of law, from the facts shown by the evidence in the case." The court, then, after having shown that the mutual use of the alley and wall was adverse to and inconsistent with the separate rights of the parties, proceeded to state that the use of the alley and walls raises the presumption of "mutual grants for such enjoyment for the time the two houses should be capable of safe and beneficial occupation." So, also, in *Putzel v. Bank*, 78 Md. 360, 23 Atl. 278, this court uses language entirely in accordance with the view above expressed. They say: "Under these circumstances the law considers that he had a prescriptive title to the use of it [the division wall] in the manner in which he had enjoyed it. * * * To the extent of such use, his title is clearly established. * * * The bank retained all its rights in the division wall which are not inconsistent with the enjoyment of the easement. It was bound to per-

mit it to be used as a support for Putzel's house in the accustomed manner, but this is the limit of its obligations." The cases cited by the appellee in no wise are in conflict with these views. In *Graves v. Smith*, 87 Ala. 451, 6 South. 308, there was an agreement which, in terms, created a party wall, with the right to the appellant to use the same "in the erection of any building which he may wish to build on his own lot." The court held, under these circumstances, that the cross easement of appellee was "violated by the attempt of the defendant to create openings for the windows." So, in *Brooks v. Curtis*, 50 N. Y. 642, the language of the deeds and the acts of the parties show that it was their intention that the wall, which stood one-half on each lot, should be a party wall for the common use of both lots, and that such an easement included the right to increase the height of the wall, provided it be done without detriment to the strength of the wall, or to the property of the adjacent owner. And in *Fleld v. Leiter*, 118 Ill. 23, 6 N. E. 877, the character and scope of the cross easement was made to depend upon the construction of the agreement between the parties. On the other hand, in *McLaughlin v. Ceconi*, 141 Mass. 254, 5 N. E. 262, where the party claimed by adverse user, the court held that the defendant could continue to burden the wall to the extent of her use, "but she cannot enlarge or add to the rights acquired by adverse occupation, except by some other title." *Matthews v. Dixey*, 149 Mass. 597, 22 N. E. 61; *Everett v. Edwards*, 149 Mass. 591, 22 N. E. 52. Now, in this case the wall in question stands wholly on the land of Barry, and there is nothing in the case, beyond this fact, to explain the use of the wall by Edivitch. Such use it is not perceived could be of benefit to Barry. It was a mere burden upon his property, open, adverse, and acquiesced in by him. No other inference whatever can be drawn from its existence, except that which the law implies, viz. a grant to do the things that had been done for so long a time. There is nothing in the case from which it can be presumed that either party intended that the wall should be a party wall, except to the extent and for the purpose of supporting the appellee's building as it had been supported for so many years. That was therefore the extent of the appellee's right, namely, to enjoy the use of the wall for the support of his house as it then existed. The wall being the property of the appellant, and on his own lot, there can be no reason assigned why he could not strengthen it, and add to its height, if he chose to do so, provided it was done without detriment to the other party's right. And it follows, also, necessarily, that the appellee has no rights in or to that part of the new wall which is above the height of the old, and which is not required for the support of the timbers of his house, as it formerly stood; and, if this be so, there was no invasion of his rights, by

the placing of openings for windows in such part of the wall. *Weston v. Arnold*, 43 Law J. Ch. 123. The right of the appellee was to maintain the support of his house as it had been for 20 years or longer, and therefore if, in the rebuilding of the new wall, his house was, without his consent, detrimentally affected by injuries occasioned either by careless construction, or by cutting his joists and steps so that now they are no longer as they were, or the rooms were narrowed, the appellant would be responsible, although such cutting was rendered necessary by the straightening of the new wall. In a word, the appellee had a full right to maintain his easement to the extent of the ancient user, and any encroachment thereon by the appellant was an invasion of his rights.

The record shows that, by the description contained in his deeds, the appellee's lot does not include a strip of land, between four and eight inches wide, to the north of the wall; and if this be so, it is contended, the appellee is not entitled to tack his possession to that of his predecessors, and his case must fail for want of title to that portion of the building and lot which lies between his south line and the wall in question. But we do not think this case raises such a question. It is conceded that John Braunt, under whom the appellant claims, occupied the lot for more than 20 years, and, during the whole of his possession, used the wall for the support of his house, in the same manner and to the same extent as did those (including the appellee) who afterwards owned and occupied it. Such possession, therefore, undoubtedly was sufficient to and did confer upon him a title to the easement, whatever its nature was. Now, what was the full extent of his easement? He not only acquired a right to the use of the wall to support his house, but also to do that which was obviously necessary to the enjoyment of that right; that is, to occupy the space intervening between the wall and his own line. The easement which the adverse possession conferred upon him included an easement to use the soil that intervened between his property and the wall. The grant of an easement carries with it all that is absolutely necessary to the enjoyment of it. *Wms. Saund*. 323, note 6; *Washb. Easem.* 25 (star paging). He acquired no title to the soil. His right was merely an easement over it,—to use it, as appendent to the principal easement of a right of support, in the wall of the adjoining proprietor, and necessary to its enjoyment. *Leonard v. White*, 7 Mass. 6; *Nicodemus v. Nicodemus*, 41 Md. 536. In *Dowling v. Hennings*, 20 Md. 182, the party wall was constructed on an arch supported by walls built on each lot. Dowling proposed to take down such parts of the arch as were on his own lot, and improve to the line of the adjoining lot. It was held that the parties had the use of the alley and alley walls for the time the two houses should be capable of safe and beneficial occupation.

It was not contended that title to the soil of the alley was affected by the adverse user, and the court did not so decide. What it did hold was that each party had an easement in the walls, and over the alley, so long as the two houses should be capable of beneficial occupation. Such was the nature of the easement Braunt acquired by his possession. It became consummate in his lifetime, and thereby also became appurtenant to his estate. It therefore passed by the several conveyances to the successive owners, and is now in the appellee. Each deed in the chain of title conveys the building and rights and appurtenances thereto belonging, and, even if this were not so, the easement, being in fact appurtenant, would pass without the word "appurtenant" being used in the deed. *Ritger v. Parker*, 8 Cush. 145; *Barnes v. Lloyd*, 112 Mass. 224; *Coolidge v. Hager*, 43 Vt. 9; *Wetherell v. Brobst*, 23 Iowa, 591.

It only remains to apply these principles to the instructions asked for by the parties, and allowed or rejected by the court. The first prayer of the plaintiff denies the right of the appellant to the exclusive use of that part of the new wall which is above the height of the old, and for that reason should not have been granted. The same objection lies to the second. The converse of this proposition is stated in the appellant's twelfth prayer, which should have been granted. The appellee's fourth and sixth prayers were not objected to at the argument, nor was the rejection of the first, second, and eleventh instructions asked for by the appellant. The appellant's eighth, thirteenth, fourteenth, fifteenth, and sixteenth prayers, we think, were properly rejected. The eighth and thirteenth ignore all the rights of the appellee, and are defective for that reason. For error in granting the plaintiff's first and second prayers, and in rejecting the defendant's twelfth, the judgment must be reversed. Judgment reversed and new trial awarded.

(22 Md. 421)

STATE v. BENZINGER et al.

(Court of Appeals of Maryland. June 19, 1896.)

INSURANCE BROKERS—LICENSES—STATUTES—CONSTRUCTION—REPEAL.

Act 1896, c. 263,—whose title states that its sole object was to repeal Act 1894, c. 377, requiring insurance brokers to take out licenses, but which contains new and affirmative legislation, not referred to in its title, in violation of Const. art. 3, § 29, providing that every law must have but one subject, which must be expressed in its title,—being void as to the affirmative legislation, is void also as to the repealing clause.

Appeal from criminal court of Baltimore city.

Aloysius T. Benzinger and J. D. Moulton were indicted for failure to take out licenses as insurance brokers, as required by law. From an order sustaining a demurrer to the indictment, the state appeals. Reversed.

Argued before McSHERRY, C. J., and PAGE, BRISCOE, BRYAN, BOYD, and FOWLER, JJ.

Atty. Gen. Clabangh, for the State. George Whitelock, for appellees.

FOWLER, J. The appellees were indicted in the criminal court of Baltimore city for failure to take out licenses as insurance brokers, as required by the law of this state. The controlling—indeed, the only—question to be considered on this appeal is as to the effect of the act of 1896, c. 263. It appears from the title of this act that its sole object was to repeal the act of 1894, c. 377, but upon examination of the body of the act we find therein new and affirmative legislation. It was contended by the traversers that while the act of 1896, c. 263, is clearly void as being in violation of section 29, art. 3, of the constitution,¹ so far as the new and affirmative legislation is concerned, yet the effect of the act was, as set forth in its title, to repeal the act of 1894, c. 377. The result of upholding this view would be to strike down all statutes requiring insurance brokers to take out licenses to carry on their business in this state. We cannot suppose that such was the intention of the legislature. On the contrary, it is apparent from the face of the act itself that the intention was to compel the payment of the same license fee theretofore exacted, namely, the sum of \$100. Inasmuch, therefore, as it would clearly thwart the intention of the lawmakers, and at the same time strike down an important branch of the revenue law of the state, we should not, unless required so to do by some unbending rule of construction, give this repealing law the effect imputed to it by the traversers. It has been repeatedly held that where a prior law is inserted in an act in order to secure the unobstructed operation of such act, and the repealing law is itself held to be void, the provision for the repeal of prior laws will fall with it, and the whole law will be declared inoperative and void. In the case of *Campau v. Detroit*, 14 Mich. 276, it was held by the supreme court of that state (Judge Cooley delivering the opinion) that whether one part of the repealing law would be allowed to stand, while others were declared void, must depend upon whether, by the amendatory law, it is apparent that the legislature intended them as inseparable parts of the same system, mutually dependent upon each other. By the repealing law under consideration in *Campau v. Detroit*, it was attempted to amend three sections of a former law; and it was contended that two of the amended sections could stand, notwithstanding the other failed. But Judge Cooley said, "We

¹ The section referred to requires every law to have but one subject, which must be expressed in its title.

know of no principle which would warrant us in selecting out portions of the section to stand unaffected by the constitutional infirmity of the remainder." And especially should this not be done when to hold the repealing part of the law valid and the remainder void would be obviously contrary to the intention of the legislature. In support of their position the traversers relied strongly upon the case of *Stiefel v. Institution*, 61 Md. 144. In that case it was held that the first section of the act of 1880, c. 403, was operative, and repealed the act of 1872, c. 363, and that the second section, which attempted to enact affirmative legislation, was void. In the first place it will be noticed that the act of 1880 contains two sections, the first of which contains only the repealing clause, and the second, the additional legislation, which it was held was not covered by the title. Nor does it appear by the act of 1880 that the legislature intended the first and second sections thereof to be inseparable, and mutually dependent upon each other, so that if one should be held void the other must fall also. On the contrary, the first section, the effect of which, it was held, was to repeal the act of 1872, and thereby withdraw from the trustees of the Blind Asylum the right to divert a public highway, may well stand alone. It is in no manner necessarily connected with or dependent upon the second section, nor would its operation in any way conflict with the intention of the legislature as expressed in the whole act. It would appear that the object of the legislature in passing the act of 1880 was to restore North street to the location it had before the act of 1872 was passed, and to provide for its opening. The accomplishment of this intention was secured by the decision in *Stiefel's Case*, for by the first section the act of 1872 was repealed, thus taking from the trustees the right to change the location of North street when extended, and leaving it where it had been located before the act of 1872 was passed. And although the second section was declared void, and therefore the particular mode thereby provided for opening North street could not be availed of, yet there was ample provision made in their existing laws for that purpose. By the decision in *Stiefel's Case*, therefore, the object of the legislature was accomplished, while, as we have shown, the application of the same rule which was applied in that case to the act of 1880 would, if applied here to the act of 1896, produce directly the contrary result. We find nothing in conflict with this view in *Scharf v. Tasker*, 73 Md. 385, 21 Atl. 56, *Whitman v. State*, 80 Md. 410, 31 Atl. 325, nor in *State v. Schultz Gas-Fixture & Art-Metal Co. (Md.)* 84 Atl. 243. The demurrer to the indictment should have been overruled, and the judgment appealed from must therefore be reversed. Judgment reversed and cause remanded.

(68 Vt. 273)

FISH v. THOMPSON et al.

(Supreme Court of Vermont. Rutland. Dec. 5, 1895.)

PARTNERSHIP—ASSIGNMENT OF PART INTEREST—DISSOLUTION—JOINT OWNERS—ADVANCES—SETTLEMENT—LIABILITIES.

1. T. and F. were partners. O. signed with F. for money that went into the concern, and, feeling insecure, procured an assignment from F. of his interest in the firm, as security, with T.'s consent. It was understood between T. and O. that the business should be sold as soon as possible, the debts paid, and the remainder divided according to their several interests. Between F. and O. it was understood that anything in O.'s hands after such division and his indemnity should belong to F. The firm was dissolved, F. retiring, and the business continued as T. & Co. until closed out, O.'s name not appearing as a member of the firm. *Held*, that T. and O. were not partners, but joint owners, O. remaining a mere security holder throughout.

2. After the dissolution of the firm, T. informed O. that creditors were pressing, and that he must furnish more money for the business, to equalize what he himself had advanced. O. thereupon advanced \$600, which amount was credited on the books of the concern in his regular account. *Held*, that the transaction was not a loan to T., but an advancement, for the repayment of which he had a lien on the assets, subject to the rights of partnership creditors, and the equal lien of T. for his like advancement.

3. O. was not liable for the debts and expenses necessarily incurred in the management of the business after the dissolution of T. and F.'s partnership, since T., as liquidating partner, was entitled to the exclusive possession of the firm property, and the exclusive management of the business for the purpose of winding it up.

Appeal in chancery, Rutland county; Thompson, Chancellor.

Bill by Enos C. Fish against Charles A. Thompson and others for an injunction. Heard upon a master's report and the pleadings at the March term, 1895. From a decree in favor of the orator, defendants appeal. Reversed.

The orator alleged, in substance, that the defendant Thompson and one Freeman were partners in a mercantile business, and that he had become liable for Freeman, to a considerable amount, on account of the capital which Freeman originally had in the business; that, for the purpose of securing him, Freeman executed in April, 1892, to the orator, a chattel mortgage of his interest in the partnership stock; that this mortgage was not at first delivered, and that about May 1, 1892, Freeman assigned to the orator, absolutely, his entire interest in all the partnership assets, and also delivered to him the chattel mortgage; that the orator thereby became the joint owner of Freeman's interest in the partnership property and assets, and that it was understood between him and Thompson that the goods should be converted into money, and the accounts collected, the assets used first for paying the indebtedness of the partnership, and the balance divided between Thompson

and the orator; that, instead of disposing of the goods, Thompson had continued to run the business, had bought new goods, had collected money due on account, had failed to pay the debts of Thompson & Freeman, and appropriated to his own use the assets of the company; that the orator had loaned Thompson \$600 for use in the business; that after continuing the business for some months the defendant Thompson became sick, and turned the business over to the orator, and that the orator had disposed of the same to a considerable extent; that soon after the transfer to the orator the said Thompson began to transact business under the firm name of C. A. Thompson & Co.; that the defendant Tuttle had a note in the sum of more than \$1,000, signed by the firm name of C. A. Thompson & Co., and that the defendant Slason held a note for more than \$1,500, also signed by the said firm name of C. A. Thompson & Co.; that both these persons were relatives of the defendant Thompson; that the notes were fraudulent, and given without consideration, and ought not to be a lien upon said assets; that the defendants were about to attach said partnership assets and apply them in payment of said notes, whereas such assets ought to be applied in payment of the indebtedness of Thompson & Freeman, then amounting to about \$1,300, and the payment of said \$600 loaned by the orator to Thompson. The orator prayed for and obtained an injunction restraining the defendant Thompson from intermeddling with the assets of the partnership, and the defendants Slason and Tuttle from attaching such assets upon their notes. The defendant Thompson filed an answer, and also a cross bill, claiming that after receiving the assignment from Freeman the orator took Freeman's place, and became a partner in the business; that as such he was responsible for the indebtedness of the firm of C. A. Thompson & Co., incurred in conducting that business, and also for the payment of the original indebtedness of Thompson & Freeman; that the \$600 advanced was not a loan to Thompson, or to the partnership, but was for the purpose of equalizing the interests of the two in the concern. The defendant Thompson prayed that the orator might be compelled to account as a partner. The master found that after the transfer Freeman retired from the business as a partner, although he remained in the store for a time as a clerk; that the sole object of the orator in taking the assignment from Freeman was to obtain security for his obligations on account of Freeman, and that both he and Freeman expected, if any balance remained after satisfying these obligations, that it would be passed over to Freeman; that both parties endeavored to dispose of the entire stock, but were unable to do so; that it was thought best to continue the business until the stock could be

disposed of, and that Thompson remained in charge of the store, and in the management of the business, in that view; that, as the stock ran low in a given part, he replenished it with new goods, and that in so doing he exercised good judgment and good faith; that with the money he received he paid indiscriminately bills due from the old firm of Thompson & Freeman, and bills contracted by the new firm of C. A. Thompson & Co.; that the new firm title was adopted shortly after the orator took Freeman's interest, with the knowledge and consent of the orator; that some time after the orator obtained this assignment the defendant Thompson applied to him, saying that there were debts then pressing the company, that the company owed him (Thompson) some \$600, and that the orator must contribute a like amount, whereupon the orator did so; that this was not a loan to Thompson, or to the company, C. A. Thompson & Co., but was a contribution by the orator for the purpose of equalizing the amount which Thompson then had in the business; Thompson continued the business in this way from March 1, 1892, until January 1, 1893, when he was taken sick and became unable to go on with it, and that in consequence he turned it over to the orator, who took charge of it, sold the goods, collected the sums due the concern, deposited money in the name of C. A. Thompson & Co., and drew checks by that name, and paid indiscriminately debts of Thompson & Freeman and C. A. Thompson & Co.; that the orator finally disposed of all the goods; that he had remaining in his hands at the time of the hearing \$294.29; and that his services in connection with the business were reasonably worth \$150.. It was further found that the Slason note was for an indebtedness of the firm of Thompson & Freeman; that the Tuttle note was for \$1,000 loaned Thompson by Mrs. Tuttle, and used by him in the business of C. A. Thompson & Co.; that both these notes were bona fide, and that the orator had no reasonable cause to believe otherwise when he brought his suit and obtained his injunction; that subsequently to the service of said injunction the orator paid notes of C. A. Thompson & Co., upon which he was personally liable as indorser to the amount of \$1,300. It further appeared that substantially all the assets were represented by the amount left remaining in the orator's hands.

J. C. Baker, for orator. C. A. Prouty, for defendants.

ROWELL, J. It is manifest that the bill cannot be maintained against the defendants Tuttle and Slason, for the allegations relied upon for relief against them are negatived by the findings of the master. Nor do those findings show that the orator and the defendant Thompson were partners, as the latter claims. Thompson and Freeman were partners in busi-

ness. The orator signed with Freeman for money that went into the concern, and, becoming alarmed lest he should lose thereby, he consulted Thompson about the matter, and thereupon procured a chattel mortgage and an assignment from Freeman of his entire interest in the partnership, for the sole purpose of security against such loss. At the time of the assignment it was understood between Thompson and the orator that the business should be closed out and sold as a whole as soon as possible, the debts paid, and the remainder divided between them according to their several interests. Freeman and the orator understood that, if anything remained in the orator's hands after such division and his indemnity, it should belong to Freeman. Freeman did not continue with the firm as an active member, but only as a clerk, for wages; and the partnership was soon dissolved by mutual consent, for prudential reasons, and the firm name of C. A. Thompson & Co. adopted, the orator objecting to have his name appear in connection therewith. The business was thereafter carried on in the new name, Thompson being the managing man until his health failed, when he turned the business over to the orator, who took charge and proceeded to dispose of the property, buying no more goods, and closed out the stock in about two months. The relation that the orator originally sustained to Thompson and to the property and the business was never changed, and was never, so far as appears, understood by them to be changed; and Thompson knew what that relation was from the first, as the orator consulted him about the matter before he took his assignment. The orator was a mere security holder throughout, and therefore, as matter of law, any residue in his hands would belong to Freeman, as they understood it would. He could in no event participate in the profits as a principal trader in the management of the business, which is essential to a partnership, but does not of itself, as matter of law, constitute a partnership, though a most important element in determining whether one exists or not. Hence, as the orator had no community of interest in the profits as such principal, there was no partnership between him and Thompson. A community of interest by way of security for the payment of money by Freeman is not enough. Thus, in *Mollwo v. Court of Wards*, L. R. 4 P. C. 419, the person sought to be charged as a partner advanced large sums of money to a firm of merchants, and took as a security a charge of 20 per cent. commission on all the profits made by the firm until the whole amount of the debt due him should be paid off, with 12 per cent. interest on all cash advances that had been, or might be thereafter, made by him to the firm; and large powers of control were conferred upon him, but he had no initiative power. The court held that the contract was really and in substance what it purported to be, namely, one of loan and security between debtors and their creditor, and not one of

partnership, and said that if cases should arise where persons, under the guise of such an arrangement, were really trading as principals, and putting forward as ostensible traders others who were really their agents, the law would look to the body and substance of the arrangement, and fasten responsibility on the parties according to their true and real character. The case stands for disposition, therefore, between Thompson and the orator, on the basis of a joint ownership between them of the character shown, and not on the basis that they were partners; and, as no question is made as to the sufficiency of the pleadings for such relief as they may be entitled to, the case stands for consideration in this behalf on its merits, leaving the parties to apply below for such amendments, if any, as they may deem necessary.

It makes no practical difference whether the firm was dissolved by Freeman's assignment to the orator, or by mutual consent soon after; for, if by the former, the rights and powers of the firm rested wholly in Thompson, as far as necessary to enable him to properly administer his quasi trust of settling the business, and accounting to the orator for Freeman's share of the residue remaining for distribution; and, if by the latter, Thompson was, as the case shows, the liquidating partner, and as such he was the agent of the late firm to collect and adjust its bills receivable, to convert its assets into money, to discharge its outstanding liabilities, and to pay over to the orator Freeman's share of the surplus. And in either view he has the right that partners generally have in respect of being reimbursed for advances, which is to have a lien on the assets, and, after the partnership debts are satisfied, to be paid before the surplus is divided. The master finds that the orator has in his hands a balance of \$294.29, derived from the business while he had charge of it. This he must account for. It is conceded, however, that he may deduct therefrom the sum of \$150 due him for services in closing out the business, which leaves \$144.29 to be accounted for.

The orator claims a personal decree against Thompson for \$600 that he put into the concern in the manner following: Thompson applied to him, and said that the debts were pressing, and that he must furnish more money on that account, and to equalize what he himself had advanced; and thereupon the orator advanced \$600, taking no evidence of indebtedness, and the amount was credited to him on the books of the concern, in his regular account. He claimed before the master that this was a loan to Thompson, but the master finds that he advanced the money for the purpose claimed by Thompson, namely, to pay the pressing debts of the concern, and that Thompson advanced a like amount for the same purpose. On this finding, the orator cannot have a personal decree against Thompson for this money. He must be taken to have assumed the risk of getting his pay out of the

assets, the same as Thompson did; and this is the fair intendment of the finding, as his claim of a loan to Thompson is negatived. But he has a lien on the assets for reimbursement, subject, however, to the rights of partnership creditors; for in the bill he expressly subordinates his rights to theirs, and the law does the same. Nor are his rights in this behalf superior to Thompson's rights, for they appear by the finding to have intended to put themselves on an equality in this matter, as one object of the orator's advance was to equal Thompson's advance. The orator claims no other allowances.

The defendant Thompson claims, under his cross bill, that, if there was no partnership between him and the orator, their joint ownership of the property was such as to make the orator liable for one-half of all the debts and expenses necessarily incurred in the management of the business, of which there are outstanding and unpaid the sum of \$173.21; that in addition thereto he is liable for one-half of the \$1,000 for which the Tuttle note was given by C. A. Thompson & Co., as the master has found that that money was used by Thompson in paying debts of Thompson & Freeman that were a lien on the goods, and in managing the business; and that the orator should pay to him one-half of these sums, aggregating \$1,173.21, less what may be realized on the \$320 of accounts due to Thompson & Co., although he is not liable on the Tuttle note, nor to the creditors to whom the other bills are due. But this claim cannot be maintained. Although by his assignment the orator became a joint owner with Thompson, yet he did not thereby acquire a right to joint possession of the partnership property, nor to a joint management and control of the business. On dissolution by death, the surviving partner settles the partnership affairs. So, on dissolution by the sale of one partner of his interest, or by his being adjudged bankrupt or insolvent, the other partner is entitled to the exclusive possession of the partnership property, and the exclusive management and control of the business for the purpose of winding it up. *Harvey v. Crickett*, 5 Maule & S. 336; *Renton v. Chaplain*, 9 N. J. Eq. 62; note to *Gilmore v. Ham* (N. Y. App.) 40 Am. St. Rep. 571, 36 N. E. 826. And if the dissolution in this case is regarded as having been by mutual consent, and not by the assignment to the orator, Thompson's rights and authority in the premises would be practically the same, as against the orator, as he was the liquidating partner. So, in either view, he had no authority in law to charge the orator in this behalf, and no authority in fact appears; and there is no principle of equity on which the orator can be charged, as he had no right to participate in the management of the business, nor any power of control over Thompson in respect of it, except through the medium of the court of chancery, which, for cause shown, would interfere by appointing a receiver. The other claims made by the de-

fendant Thompson are based upon the idea of a partnership between him and the orator, and as none existed they cannot be maintained.

The defendants Tuttle and Slason claim that the case shows that the orator wantonly obtained the injunction against their enforcing their notes against the partnership property, and against Thompson's paying the same thereout, and that, under the protection of the injunction, he disposed of the property, and used the avails thereof for his own benefit; and they insist that he should, in this suit, make good to them the loss they have thereby sustained. But, if their claim is well founded, it is more a matter of injunction damages than for relief otherwise in this proceeding. An account has been taken that may be sufficient for the purpose of a final decree, but, if not, such further accounting should be had as may be found necessary. The assets not realized upon should be converted into money, as far as possible, and the firm debts paid, after which the orator and the defendant Thompson will be equally entitled to be reimbursed their advances, and any residue remaining will be equally distributed between them. Whether the Tuttle note is to stand on the footing of a firm debt, or not, or whether the money obtained thereon is to be regarded as an advance by Thompson, or how otherwise the matter should be treated, is not decided, as the question, if any there is, was not raised in argument; and we are disinclined to consider it, when the parties have not been heard upon it, and when it can be raised, if it becomes important, at a later stage of the case. Reversed and remanded.

TAFT and MUNSON, JJ., being engaged in county court, did not sit.

(68 Vt. 259)

STATE TRUST CO. v. SHELDON et al.
(Supreme Court of Vermont. Rutland. April 25, 1896.)

LIMITATION OF ACTIONS—WAIVER.

An agreement by the maker of a note, at the time of its execution, to waive the statute of limitations in regard thereto, is valid, and estops the maker from defending an action thereon as barred by limitations.

Exceptions from Rutland county court; Thompson, Judge.

Assumpsit on a note by the State Trust Company against John A. Sheldon and others. From a judgment for plaintiff on demurrer to rejoinder being sustained, defendants except. Affirmed.

F. D. White and C. A. Prouty, for plaintiff.
J. C. Baker and Edward Dana, for defendants.

THOMPSON, J. As a part of the promises and undertaking in the declaration mentioned, and at the time of making the same, the defendants agreed, in writing, to waive the statute of limitations in respect to such promises

and undertaking. Relying upon this agreement, the plaintiff did not bring its action until more than six years from the time that it accrued. The question presented by the pleadings is whether the defendants are estopped by their agreement from pleading the statute of limitations in bar of plaintiff's action. It is urged that the agreement to waive the statute is void because, by private agreement, it seeks to avoid a statute, and is against public policy. The general rule is that no contract or agreement can modify a law, but the exception is that, where no principle of public policy is violated, parties are at liberty to forego the protection of the law. Statutory provisions designed for the benefit of individuals may be waived, but, where the enactment is to secure general objects of policy or morals, no consent will render a noncompliance with the statute effectual. The statute limiting the time within which action shall be brought is for the benefit and repose of individuals, and not to secure general objects of policy or morals. Its protection may therefore be waived, in legal form, by those who are entitled to it; and such waiver, when acted upon, becomes an estoppel to plead the statute. Sedg. St. & Const. Law (2d Ed.) 86, 87; Quick v. Corlies, 39 N. J. Law, 11; Burton v. Stevens, 24 Vt. 131; Gay's Estate v. Hassom, 64 Vt. 495, 24 Atl. 715; Random v. Toby, 11 How. 493. When such waiver is made, it is continuous, unless by its terms it is limited to a specified time. There was no such limitation in the waiver of the defendants. We therefore hold that they are estopped from pleading the statute of limitations in bar of plaintiff's action. Judgment affirmed, and cause remanded for assessment of damages.

(68 Vt. 263)

STATE v. FOURNIER et al.

(Supreme Court of Vermont. Chittenden.
March 14, 1896.)

CRIMINAL LAW — GRANTING SEPARATE TRIALS —
CHALLENGES TO JURORS — EVIDENCE — MURDER —
IMPEACHMENT OF WITNESSES — INSTRUCTIONS.

1. The granting of separate trials to defendants jointly indicted rests in the discretion of the trial court.

2. Under V. S. § 1914, providing that in criminal prosecutions one-third the number of peremptory challenges to jurors shall be allowed to the state which are by law allowed to respondent, where two or more respondents are tried together the state is entitled to one-third the number of challenges allowed by law to all the respondents.

3. On the trial of two defendants together, it is not error to receive evidence which is admissible against one defendant only, though it may be of a character prejudicial to the other, where the jury is properly instructed.

4. In a trial for murder by means of poison, while statements made by the deceased as to the condition of his health at the time the statements were made are admissible, statements as to what his health had been in the past are hearsay and inadmissible.

5. Statements made by a deceased, charged to have been poisoned, that he was sick of living, and did not care whether he lived or not,

are inadmissible, no claim that he committed suicide being made.

6. It is not competent, for the purpose of general impeachment, to show that a witness had formerly kept a house of ill fame.

7. It being provided by statute that if a witness willfully and corruptly bears false testimony, with intent to take away the life of a person, and thereby causes the life of such person to be taken, the witness so testifying shall suffer the punishment of death, it is not error for the court to state to the jury, in instructing them in a trial for murder, that such is the law.

8. It having been claimed on behalf of a defendant charged with the murder of her husband that the fact that she had been advised by a lawyer that she had good ground for divorce and alimony tended to show an absence of motive for the murder, it was not error for the court to charge the jury that if they found that defendant had committed adultery such fact would bar a divorce, such being the law of the state.

Exceptions from Chittenden county court; Thompson, Judge.

Rose Fournier was convicted, jointly with Effie Cox, alias Effie Whalen, of manslaughter, for the killing of Alfred Fournier, her husband, and excepts. Exceptions overruled.

Charles T. Barney, for respondent. R. E. Brown, State's Atty.

TAFIT, J. The respondent was indicted jointly with Effie Cox, alias Effie Whalen, for the murder of Alfred Fournier, and was convicted of manslaughter. Ten exceptions to the ruling of the county court were taken during the trial, and have been argued in behalf of the respondent.

1. Before the jury were impaneled the respondent moved for a separate trial, and urged, in support of the motion, that upon trial she would be prejudiced by the introduction of testimony, admissible against her co-respondent, tending to show certain acts and declarations of the latter, that would not be admissible against this respondent, were she tried separately, and the only certain way to avoid such prejudice was for the court to order separate trials. The motion was denied, and it is now argued that such denial was error. In State v. Stoughton, 51 Vt. 362, the question arose as to how many peremptory challenges each respondent in a joint trial was entitled to; and in the discussion of the question the court, per Royce, J., said: "The respondents were not entitled to separate trials as a legal right. It was discretionary with the court whether to grant them separate trials or not." In State v. Meaker, 54 Vt. 112, the question was raised, and it was held by the court that granting separate trials to respondents jointly indicted was a matter of discretion. After the jury was impaneled in that case one of the respondents withdrew his plea of not guilty, pleaded guilty, and the other respondent was tried alone. When the jury were being impaneled three jurors were peremptorily challenged by the

respondent, who subsequently pleaded guilty, and the other respondent objected to the discharge of the three so peremptorily challenged. The objection was overruled, the three jurors discharged, and an exception taken. This was the only question as to separate trials that remained, and it was ruled against the respondent. To this extent the question has been adjudicated by this court. It is now fairly before us, and we hold that, when two or more persons are jointly charged in the same indictment with a criminal offense, they have no right by law to be tried separately, but such separate trial is within the discretion of the trial court. This was so held, and the reasons therefor fully stated and considered by Mr. Justice Story, in *U. S. v. Marchant*, 12 Wheat. 480. And see the *Anarchists' Case* (*Spies v. People*) 122 Ill. 265, 12 N. E. 865, and 17 N. E. 898. Nothing is disclosed by the record in this case to indicate that the discretion of the county court in denying the motion was not wisely exercised. If it is not in any case, what remedy is available to the respondent we are not called upon to discuss.

2. When the jurors were being impaneled the court ruled that each respondent was entitled to exercise six peremptory challenges, following *State v. Stoughton*, 51 Vt. 364, and that the state was entitled to exercise two such challenges as to each respondent, under V. S. § 1914, which reads: "In criminal prosecutions one-third the number of peremptory challenges to the jurors shall be allowed to the state which are by law allowed the respondent," etc. The above ruling, which was excepted to, was in accord with the words and spirit of the statute. The state, in fact, challenged but two jurors peremptorily, and the respondent but three. Therefore the latter was not harmed by the ruling, if erroneous. All that a party is entitled to is to be tried by an impartial jury. The right of challenge is not the right to select, but to exclude. It does not enable the prisoner to say who shall try him, but to say who shall not. The accused does not complain that she was not tried by an impartial jury. It is not even suggested that any one juror serving upon the panel was not competent and impartial. She has no reason to complain of any ruling made by the court in regard to the selection of the panel.

3. Certain testimony was received in evidence which was admitted against the respondent Cox only, and the jury were instructed at the time that it was not admissible against this respondent. The testimony was objected to, and it was admitted under exception taken by the respondent Fournier, and this was the only exception taken during the trial in respect to such testimony. This question appears in *State v. Fuller*, 39 Vt. 74. In detailing the confessions of Fuller, a witness was allowed, against the re-

spondent Willey, to repeat portions of the confession which tended to implicate Willey; and the court ruled that the whole confession must be received, as Fuller made it, but that it would be evidence only against him, and so instructed the jury, and the defendant Willey excepted. After discussing another question, which required a reversal of the judgment, the court said, "In other respects, we think the county court committed no error." The same question was made in the homicide case of *State v. Cram*, 67 Vt. 650, 32 Atl. 502. The state offered in evidence the declarations of Bow, made after the alleged killing, and not in the presence of the respondent. The respondent objected and excepted for that they were not admissible as against him. The evidence was admitted as against Bow, and the jury were instructed that they must consider it only as against him. This point was strongly urged by the respondent's counsel. Munson, J., in the opinion, said: "Whatever was admissible against one was admissible on the trial of both, under proper restrictions as to its effect. This included evidence of any statements of Bow which had a legitimate tendency to incriminate him, even though of a character prejudicial to Cram." It may be noted that in this case neither of the respondents asked for a separate trial, and the two were tried together, but this fact does not affect the rule under consideration.

4. Dr. Linsley, conceded to be an expert, was impleaded as a witness for the state. He testified that he had made a microscopical examination of the stomach and intestines, and the contents thereof; and his testimony tended to show that the examination was minute, and much in detail. He testified as to the condition of the stomach and intestines, and the different portions thereof, and was asked his opinion, based upon his examination, and assuming that certain quantities of tartar emetic were found after death in the stomach and in the intestines of Alfred Fournier, as to what caused his death. He answered, "The presence of tartar emetic." This testimony was objected to generally, and it is now insisted that the question was not properly limited. This exception is not well taken. His opinion was limited to his examination as testified to by him. The question was a direct one, "Have you an opinion, based upon your examination?" with the assumption, as above stated, as to the quantity of tartar emetic so found in the stomach, etc. The question was based strictly upon the facts which his testimony tended to show, in connection with the assumed quantity of poison which the other testimony in the case tended to establish.

5. It was proposed to show by the witness Dodds what the deceased said about his sickness one week prior to the time he was taken ill, the Tuesday preceding his death. The nature, character, and extent of the sick-

of the deceased for some time prior to his death were material questions upon the trial. Whatever the deceased said about his health at the time he said it was admissible, and it is not claimed that any error was committed in the exclusion of such testimony. The court admitted testimony tending to show the deceased's statements as to his condition at the time such statements were made, when it was offered by the state, and, upon objection by the respondent, excluded the narration of what his past health had been. The respondent's counsel now insists that, while this was a correct ruling when the testimony was offered by the state, it was admissible when offered by the defendants, on the ground that the respondent had a right to have stated all the statements which the deceased made. The respondent did have the right to have given in evidence all the statements made by the deceased upon the subject upon which the witness testified, i. e. the then present condition of the deceased, but had no right to have stated what he said as to what his health had been in the past. The narration by the deceased of what his health had been in the past, what it was the week before, or morning before, was hearsay and inadmissible. Neither was it legitimate as a part of the *res gestæ*.

6. The witness Guyette testified that he saw the deceased; that the deceased did not feel well,—had trouble with his stomach and bowels. It was proposed to show by him that all this time the deceased said "he was sick of living; didn't care whether he lived or not." This was excluded, and, under the circumstances, properly. A witness not a physician may testify as to the physical condition of a person,—how the person appeared. *Knight v. Smythe*, 57 Vt. 529. It is the present state of a person's health which can be thus proved. *State v. Howard*, 32 Vt. 380. Such declarations, when made in the line of inquiry that a physician would naturally be making to ascertain the then present condition of the patient, might be material and have an important bearing upon the point, as tending to show the nature and extent of the disease from which the physician was called upon to relieve his patient. This was the principle which governed the admission of such testimony in *Hathaway v. Insurance Co.*, 48 Vt. 335; but the evidence detailed in the bill of exceptions, as the witness was not a physician, is not within that rule. It does not appear that it was claimed that the deceased committed suicide, and we cannot presume that that question was in the case, in order to find error in excluding the testimony. We are not called upon to consider its admissibility upon that question, as it is not before us.

7 and 8. For the purpose of impeaching the state witnesses Edward Howe and his wife, Fannie, formerly Fannie Borette, the respondent offered to show that prior to their marriage Fannie kept a house of ill fame;

the witness Howe lived in it, knew its character, and acted in its behalf; that subsequently Fannie was held to bail upon a charge of keeping the house, forfeited her bonds, and paid them. This offer was for the purpose of a general impeachment of the witnesses. The test of impeachment is, what is the character or general reputation of the witness for truth and veracity? And this rule has been universally adhered to in this state. It has been held incompetent, upon that question, to show that a witness was a common prostitute. *Morse v. Pineo*, 4 Vt. 281; *State v. Smith*, 7 Vt. 141. And again in *Spears v. Forrest*, 15 Vt. 435, in which case Bennett, J., said, "The question cannot be considered with us as an open one." In *Crane v. Thayer*, 18 Vt. 162, it was proposed to impeach a witness by showing that he had the reputation of being a counterfeiter, and it was argued that a "notorious counterfeiter is, *ex vi termini*, a notorious liar." The testimony was excluded, and it was held properly so. Much latitude is allowed counsel in cross-examination of witnesses in regard to the facts which bear directly upon their present character and moral principles, and therefore essential to the due estimation of their testimony by the jury. Questions like whether the witness has ever been confined in state prison, and similar ones, are often allowed, although collateral to the main issue, but relevant to the character of the witness. But such cross-examination is, to a great extent, within the discretion of the trial court, and it is for that court to say how far such cross-examination shall proceed. We do not consider that this is the question before us, but that the facts proposed to be shown were for the purpose of the general impeachment of the witnesses' characters, the test of which, as we have before said, is, what is the witness' reputation for truth and veracity?

9. The ninth exception related to the charge of the court in reference to the testimony of certain witnesses. V. S. § 4894. provides that if a person willfully and corruptly bears false testimony, with intent to take away the life of a person, and thereby causes the life of such person to be taken, the person so testifying shall suffer the punishment of death. This statute had been called to the attention of the jury by the counsel for the state, and the court stated to the jury that such was the law. It is not claimed that the court stated the law inaccurately, but it is insisted that such instruction was erroneous unless it appeared that the witnesses knew what the statute was in that respect. If the witnesses lacked such knowledge, that fact might have been urged before the jury with great force, but there was no error in that instruction. Nothing was said to the jury that the testimony of such witnesses should be received with greater consideration, or that more credit should be given to it, than to that of other witnesses. The

credit to be given to the witnesses was left wholly to the jury, and it was proper for the court to call attention to the statute in the respect named.

10. The tenth exception is analogous to the preceding one. It was argued in behalf of the respondent that she had a good cause for divorce against her husband; that she had consulted a lawyer upon that subject, and had so learned from him; and that she would be entitled, in case of divorce, to \$1,000 alimony, and therefore it was improbable that she would resort to murder to rid herself of her husband. In answer to this argument it was claimed by the state that after she had learned her rights as to a divorce she had committed adultery, which would be a bar to divorce. The charge of the court was that, if the jury found that she had committed adultery, that fact would bar a divorce. There was no error in so stating to the jury, there was no claim that it is not the law of this state, and there was no error in so stating to the jury, whether the fact appeared that she was cognizant of this legal principle or not. In respect to the last two exceptions, it might as well be claimed that the respondent could not be convicted unless she knew what the law was in respect to murder; that she was cognizant of the statute in that respect. The judgment of the court is that there is no error in the proceedings, and the respondent takes nothing by her exceptions.

(58 VT. 285)

CLEMENT'S ADM'RS v. PUTNAM et al.
(Supreme Court of Vermont. Rutland. March 14, 1896.)

DEEDS—INTERPRETATION—EASEMENT.

1. The owner of a lot, the level of which was below that of the sidewalk, conveyed a portion to plaintiff, covenanting in his deed never to build any "structure or building" on the adjacent premises within four feet of the west line, and afterwards conveyed the balance of the lot to defendant, subject to the restrictions in the deed to plaintiff. *Held*, that defendant could not fill the four-foot strip with earth to the level of the sidewalk, so as to shut off the light and air from the basement of a building erected by plaintiff, and extending to the west line of the portion of the lot conveyed to him, to protect the wall of a building subsequently erected by defendant.

2. In a suit to enjoin the filling of land adjacent to plaintiff's building, the fact that plaintiff, in his complaint, in addition to his claim to have the space kept open for light and air, claims also to have an easement over the land for access to his building, does not deprive him of the right to the injunction on the first claim, though the second claim is unfounded.

Appeal in chancery, Rutland county; Ross, Chancellor.

Bill by Charles Clement's administrators against Sarah A. Putnam and another. From a decree for orators, defendants appeal. Affirmed.

Joel C. Baker, for orators. Edward Dana and H. A. Harman, for defendants.

ROWELL, J. Crampton, grantor of the parties, owned a vacant lot, the building formerly standing thereon having been burned, and the surface of the land, which was the bottom of the cellar of the building, was six or eight feet below the level of the sidewalk. On June 20, 1881, by his deed of that date, duly executed and recorded, Crampton conveyed the southerly end of said lot to Clement, the plaintiff's intestate, and therein agreed and bound himself, his heirs, executors, and assignees, never to build any "structure or building" on his premises adjacent to the premises thereby conveyed within four feet of the west line thereof. Clement soon erected a building on his lot, and extended it to the west line thereof next to the four-foot strip. He put a boiler into the basement for heating the building, and made a door opening from the basement onto said strip, and built a pair of stairs down which he went from the sidewalk to get into the boiler room, which was the only way he provided for access thereto, and which he continued to use till the modification of the injunction herein granted. On August 14, 1891, by his deed of that date, duly executed and recorded, Crampton conveyed to the defendants the remainder of said lot, "subject to the condition and restriction" contained in his deed to Clement, and referred to said deed, and to the record thereof, for a "full and particular description of restriction as to building referred to above." Soon after the defendants bought, they built a block on their land, but not within four feet of the orator's west line. They make no question but that they are bound by their grantor's covenant in the orator's deed, and therefore we do not consider the question, and they expressly concede in argument that they have no right to fill said space to the level of the sidewalk with a building or a structure of any kind, but they claim a right to fill it with earth to that level, and to concrete the top, in order to protect their basement wall from injury by the elements, and to make the space look better, because they say that an earth filling is not a building nor a structure, within the meaning of said deed; and whether it is or not is the question they present. The orators do not now claim a right of access to their basement over said strip, but only a right to have the space left vacant for light and air. The defendants concede by their position that the deed is operative from the surface of the land, and not alone from the level of the sidewalk. On this basis there would seem to be no well-grounded distinction between the right of filling below or above the sidewalk; and, if an earth filling below the walk is permissible, it is equally so above it, and this would nullify the restriction. But the fair construction of the deed is that, from the lowest level to which it applies, the space shall be kept vacant, and not that it shall not be filled in a certain manner; and hence an earth filling may well be deemed a structure, within the meaning of the deed. Any other

construction would frustrate the manifest intention of the parties to the instrument.

The defendants claim that the preliminary injunction should be dissolved or modified, with costs, for that its basis was the unfounded claim in the bill of a right of passage over said strip. But that was not its sole basis, but the orator's claim to have the space kept vacant for light and air was also a ground, and that claim is sustained. As to the passageway, the injunction was long since modified; and since then the parties have occupied the strip in a manner satisfactory to both, pending the litigation. If the defendants have suffered damages by reason of the injunction covering too much, they have the ordinary remedy in such cases. Nor can the bill be dismissed because it claimed too much. It is sustainable to the extent of the right established. Decree affirmed, and cause remanded.

(176 Pa. St. 461)

WOECKNER v. ERIE ELECTRIC MOTOR CO.

(Supreme Court of Pennsylvania. July 15, 1896.)

STREET RAILWAY—INJURY TO CHILD ON TRACK—NEGLIGENCE.

A motorman, seeing a child under four years old running diagonally across a street on which was a car track, brought the car nearly to a stop, when the child was about five feet from the track and ten feet in front of the car, and then, when the child turned from the track, looking at her brother, who was following, and not at the car, he released the brakes, and let the car go forward on a down grade, whereupon the child suddenly turned, and ran in front of the car. *Held*, that the question of the motorman's negligence was for the jury.

Appeal from court of common pleas, Erie county.

Action by Lizzie A. Woeckner, by her next friend, against the Erie Electric Motor Company. Judgment for plaintiff. Defendant appeals. Affirmed.

S. A. Davenport and J. M. Sherwin, for appellant. S. M. Brainerd, Geo. H. Higgins, T. A. Lamb, and E. A. Walling, for appellee.

FELL, J. The plaintiff was 3 years and 10 months of age at the time of her injury. Accompanied by her brother, who was 10 years old, she attempted to cross a street on which the cars of the defendant were running. The street was 100 feet wide, with a roadway 64 feet in width. The car tracks were 25 feet from the curb, and the street was at the time clear of obstructions. The plaintiff crossed the street diagonally from the curb to the tracks, in the direction in which the car was running. She was seen by the motorman when she started to cross, and when the car was 100 feet from the point where she reached the tracks. The electric current had been turned off, and the car was running slowly, on a slightly de-

clining grade. The testimony in the plaintiff's behalf was that she had not changed her course or stopped from the time she left the curb until she was struck by the car, and that no effort was made by the motorman to stop the car until she was within a few feet of the tracks. The testimony produced by the defendant tended to show that the plaintiff, when within five or six feet of the tracks, and eight or ten feet from the car, turned towards the sidewalk; that the motorman had brought the car nearly to a full stop, and then, assuming that there was no danger of an accident, released the brakes; and that, as the car moved forward, the plaintiff suddenly turned, and ran in front of it.

Because of her age, contributory negligence could not be imputed to the plaintiff. If her witnesses were correct in their statements, the motorman was guilty of negligence in not attempting to stop the car until the moment of the accident. If the defendant's witnesses were correct, the only debatable ground now presented by the record is whether the plaintiff, by changing her course after having turned towards the sidewalk, came so suddenly and unexpectedly upon the track as to relieve the motorman from the charge of negligence, and the company from liability. The case is not that of a child coming suddenly in front of a moving car at a place where its presence on the street was not to be expected. This child was seen by the motorman approaching the tracks in front of his car. He knew of the danger in time to guard against it. In a measure he did so. According to his own testimony, he had full control of the movements of the car. He brought it almost to a stop, and could readily have stopped it entirely before the child reached the track. Thus far he was careful. But, when he saw the child turn from the tracks, he released the brakes, and let the car go forward on a down grade. She was then within ten feet of the front of the car, and within five feet of the tracks. She was running thoughtlessly and playfully in front of her brother, looking back over her shoulder towards him, and away from the direction in which the car was coming. Her brother, understanding the danger of which she was unconscious, was running after her, and was within a very few feet of her. If the motorman had held the car a moment, or taken the brakes partly off, and allowed it to move forward slowly, the accident would have been avoided. When asked, "Why did you not wait until she got back a safe distance from the track?" he replied: "She was going on. We don't have time to stand around. When she started back from the curb, I took it for granted she was going back." Whether he took too much for granted, and acted imprudently, was for the jury. If the jury accepted the statements of the defendant's witness, this was the turning point of the case; and it was submitted

by the learned judge with great care and ability, and with entire fairness to both parties. The judgment is affirmed.

(176 Pa. St. 446)

CURTIS v. DE COURSEY.

(Supreme Court of Pennsylvania. July 15, 1896.)

CARRIERS—WAGONWAY IN FREIGHT YARD—NEGLIGENCE.

A railroad company owes the duty to persons delivering and receiving freight to and from its freight yard to keep the passageway for wagons therein in a reasonably safe condition.

Appeal from court of common pleas, Crawford county.

Action by Laura M. Curtis against Samuel G. De Coursey, receiver of the Western New York & Pennsylvania Railroad Company, for death of plaintiff's husband. Judgment for plaintiff. Defendant appeals. Affirmed.

Pearson Church, for appellant. Julius Byles and Eugene Mackey, for appellee.

FELL, J. The controlling question in this case relates to the duty of the railroad company to keep in reasonably safe condition a passageway for wagons which led from the public highway to its freight yard. The yard was inclosed on two sides by board fences, was bounded on the third by the railroad track, and on the fourth by a public street. The plank footwalk at the side of the street was two feet higher than the surface of the yard, except at one end, where, in order to make a passageway for wagons, the walk had for a short distance been lowered to the grade of the yard. This was the way provided, and the only way, by which freight could be hauled to and from the cars. The defect complained of was at the inner edge of the walk, and wholly on the defendant's ground.

Persons delivering or receiving freight did not enter and use the yard by the mere permission or passive acquiescence of the company. They were not strangers or mere licensees, as to whom no duty in regard to the safety of the premises, except as to unexpected or secret dangers, arose. They were there by invitation, in its technical sense, and by right. Their use of the yard was for the mutual interest of both parties in carrying on their business arrangements, and there was an implied undertaking by the company that it should be reasonably safe. The duty of the company did not differ in kind from that which it owed to passengers in the care of its platforms and stations. "Invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the party using it." Camp. Neg. § 44; *Bennett v. Railroad Co.*, 102 U. S. 580.

In the charge, to which no exception was taken, the instruction was carefully given by the learned judge that no high degree of care was necessary in the maintenance of the defendant's freight yard and the approach thereto; that the duty in that regard was to be determined by the use to which it was put, and the nature of the business conducted there; and that the defendant was not liable unless the condition was so dangerous that an accident such as that which caused the death of the plaintiff's husband would, by the exercise of ordinary care and prudence, have been foreseen and guarded against. What was said in the charge clearly defined the duties of the defendant, and fully covered the question of contributory negligence. The judgment is affirmed.

(176 Pa. St. 444)

MARTIN v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. July 15, 1896.)

ACCIDENT AT RAILROAD CROSSING—CONTRIBUTORY NEGLIGENCE.

Two girls, familiar with the locality, and with nothing in the surroundings to mislead them, approached a railroad crossing where an engine with one car was standing to their left on the first track, and an engine with a train of box cars was standing to their right on the third track. After discussion as to the chance of crossing before the engines moved, they ran rapidly forward, with their heads down, and stepped in front of a moving train on the fourth track, not having at any time looked or listened for an approaching train, and without heed to the warning given them as they ran. *Held* contributory negligence.

Appeal from court of common pleas, Huntingdon county.

Action by Logan Martin against the Pennsylvania Railroad Company for death of plaintiff's daughter, aged 22 years, killed by a train while crossing defendant's tracks, with another girl. From a judgment of nonsuit, plaintiff appeals. Affirmed.

J. R. & W. B. Simpson, for appellant. W. & J. D. Dorris, for appellee.

FELL, J. When the plaintiff's daughter and her companion approached the crossing of the defendant's road, an engine with one car was standing to their left on the first track, an engine with a train of box cars was standing to their right on the third track, and a passenger train was approaching on the fourth track. Their whole attention was given to the standing engines. They considered and discussed the chance of crossing in safety before these engines would move, and decided to attempt to cross. They ran rapidly with their heads down, looking at the ground, and stepped directly in front of a moving train on the fourth track. They did not at any time before crossing, or while in the act of crossing, look or listen for an approaching train. Before they had crossed the first track, they

were twice warned by men who saw the danger into which they were rushing, to look out for the train on the fourth track. This warning was unheeded, probably because they thought it related to the danger from the standing engines. They were familiar with the locality. There was nothing in the surroundings to mislead them, or to relax their vigilance. All of the dangers of the situation were apparent. They considered the least only, and gave no attention to the greater. Whether they stopped at the crossing or before reaching it, or only slackened their pace when they heard the warning, is left in doubt by the testimony; but it was established that they did not at any time look or listen for an approaching train. Their failure to do so defeats the right of the plaintiff to recover.

The nonsuit might well be sustained for the additional reason that it did not appear that there had been any negligence on the part of the defendant. The passenger train was running at a moderate rate of speed; notice of its approach had been given by the blowing of the whistle and the ringing of the bell; and actual notice of the danger was given to the persons injured by an employé of the company, who was between the tracks at the crossing. The judgment is affirmed.

(176 Pa. St. 233)

LEE et al. v. SPRINGFIELD WATER CO.
(Supreme Court of Pennsylvania. July 15, 1896.)

EMINENT DOMAIN — APPROPRIATION OF WATER — DAMAGES—EVIDENCE—INSTRUCTIONS.

1. The measure of damages to a riparian owner by the appropriation and withdrawal of water above him by a water company is the depreciation in value of the property affected by the taking.

2. Plaintiffs had a mill at which a water wheel of 45 horse power was in use, the remainder of the power required being supplied by a steam engine. Above the mill, defendant water company appropriated 2,000,000 gallons of water per day, so that in the dry season there was not left enough water, by $2\frac{1}{2}$ horse power, to drive the wheel at its full capacity. Held, that plaintiffs' damages were to be assessed, not on what might have been, but on what really was, the value of the water to them, and their loss in consequence of its withdrawal, and it was therefore error to instruct: "Now, it may be there are other uses to which the water can be applied. * * * For instance, if they [plaintiffs] had seen proper to erect waterworks there, and used the water by distributing it among the neighbors, they had the right to use it, and then it would be wrong to take it away from plaintiffs. While it flowed through their property, they had the same right to pump it, and distribute it among their neighbors, as * * * [plaintiff] has. * * * I only say that in order to call your attention to the fact that there are other uses to which they could apply this water. Whatsoever they are, you may consider, but they are not to be speculative."

3. In an action for damages for appropriation and withdrawal of water in the exercise of the right of eminent domain, it is error to instruct that the verdict should not be less than

the smallest amount defendant has expressed itself willing to pay; the amount one may be willing to pay to avoid or end litigation not being controlling.

4. One may testify to the value of plaintiff's riparian property after the appropriation and withdrawal of water above it by defendant water company in the exercise of the right of eminent domain, though he has not made a "special examination" of the water power at plaintiff's mill; he having made a general examination, and knowing the amount of water withdrawn from the stream, and the fact that in the dry season it would take about $2\frac{1}{2}$ horse power from the available power of plaintiff's water wheel, and having formed and expressed a judgment as to the amount of plaintiff's damages, as a viewer in the proceeding to assess damages.

5. Where defendant water company appropriated and withdrew from a stream above plaintiff's property 2,000,000 gallons of water per day, so that in the dry season there was not left enough water, by $2\frac{1}{2}$ horse power, to drive at its full capacity the water wheel at plaintiff's mill, it was proper to refuse to allow a witness to answer a question asking him to give his opinion on the depreciation of plaintiff's property by reason of the taking complained of, based on his estimate of what it would cost to supply by steam the $2\frac{1}{2}$ horse power during the season, as it excluded all other elements of loss from the consideration of the witness, and assumed that the loss was confined to that single item.

6. Where, however, a witness was asked generally to give his opinion as to the damage to plaintiff's property by the withdrawal of the 2,000,000 gallons of water per day, it was error to exclude his answer because he told the court that he believed the value of the property was diminished only to the extent of the cost of supplying the lost water power, as whether this was the correct basis on which an opinion should be formed was for the jury.

Appeal from court of common pleas, Delaware county.

Petition by the Springfield Water Company for assessment of damages to lands of Thomas Lee and Smith Longbottom, trading as Lee & Longbottom, by reason of petitioner's appropriation and withdrawal of water, in the exercise of the right of eminent domain, in and from the stream above the lands of Lee & Longbottom, through which the stream flowed. From the award of viewers, an appeal was had to the court of common pleas, where issue was framed and trial had, with Lee & Longbottom as plaintiffs and the water company as defendant. There was verdict and judgment for plaintiffs, and defendant appeals. Reversed.

Isaac Johnson, William B. Broomall, and Edward H. Hall, for appellant. V. Gilpin Robinson, and George E. Darlington, for appellees.

WILLIAMS, J. The defendant had seized a part of the waters of Crum creek for the supply of its waterworks. The plaintiffs are mill owners on the same stream, and below the point at which the water is taken. The object of this proceeding is to ascertain the damages sustained by the plaintiffs by reason of the appropriation of a portion of the water of the stream that had previously flowed through their property, and been used by them to aid in propelling their ma-

chinery. The true measure of damages to be applied in all cases of a taking by virtue of eminent domain is involved in no doubt. It is easy of application. It is the depreciation in value of the property affected by the taking. Where land is taken, this has been said so frequently that it would be a work of supererogation to cite the cases in which the doctrine has been stated and applied. It was applied in *Miller v. Water Co.*, 148 Pa. St. 429, 23 Atl. 1132, where, as in this case, a water company had appropriated water, and a lower riparian owner complained that he was injured by the appropriation. It is the proper measure of the plaintiff's damage in this case. The jury should inquire what the property affected was fairly worth immediately before the water was appropriated, and what it was worth as affected by the appropriation. The difference, if any, is the loss actually sustained, and therefore the measure of the plaintiff's right to recover damages. In this case the water company has limited its appropriation of water from Crum creek to 2,000,000 of gallons each day. This is relatively but a small portion of the water of the stream, and, during a portion of the year, produces no appreciable effect upon the plaintiff's water power. The water wheel in use at their mill has a capacity of about 45 horse power. The steam engine which supplies the remainder of the power required has a capacity nearly four times as great. During eight months of the year the stream still furnishes water sufficient to drive the water wheel to its full capacity; but during the dry season the withdrawal of 2,000,000 of gallons per day is a withdrawal of about $2\frac{1}{2}$ horse power from the water wheel, and during much of that time reduces the power of the wheel correspondingly. How much did this loss of water during the dry season depreciate the value of the plaintiff's property? The defendant contended on the trial that this question was best answered by ascertaining the cost of replacing the lost water power by steam, and directed its testimony largely to this question. This was a competent line of proof for the defendant by way of reply to the exaggerated estimates of some of the witnesses called by the plaintiff, but, standing alone, it did not furnish the correct measure of damages. The attention of the jury should have been drawn strictly to the question, how much has this property been reduced in value by reason of the appropriation and withdrawal from the stream of the 2,000,000 of gallons of water? Anything tending to obscure, or to divert attention from, this well-settled measure of damages, should have been avoided. The ninth assignment of error complains of the following instruction in the charge of the learned judge. He said: "Now, it may be there are other uses to which the water can be applied. * * * For instance, if they had

seen proper to erect waterworks there, and used the water by distributing it among the neighbors, they had the right to use it, and then it would be wrong to take it away from the plaintiffs. While it flowed through their property, they had the same right to pump it, and distribute it among their neighbors, as the Springfield Water Company has. * * * I only say that in order to call your attention to the fact that there are other uses to which they could apply this water. Whatsoever they are, you may consider, but they are not to be speculative." This was probably intended as an illustration tending to simplify the work of the jury, but it had an entirely different effect. The water had been taken as a supply for the water company by a corporation standing in the place of the commonwealth, and in the exercise of the right of eminent domain. The question for the jury was, what injury have the plaintiffs sustained? If they had been using the water for other purposes, the injury might have been greater than it was. If they had not used it at all, it would have been less. Their damages were not to be assessed upon what might have been, but upon what really was, the value of the water to them, and their loss in consequence of its withdrawal. How much less was the plaintiff's property worth to the owner, or to a bona fide purchaser, after the appropriation of 2,000,000 of gallons of water daily from the stream, than it was worth with the stream flowing in undiminished volume? The direction in regard to the amount of the verdict is also objectionable. The learned judge told the jury that their verdict "should not be less than the slightest amount the defendants have expressed themselves willing to pay. It ought not to be much higher than the lowest estimate put upon it by the plaintiffs' witnesses." A party may be willing to pay more than he should in order to avoid or to end litigation. The duty of the jury is to fix the true sum necessary to compensate the plaintiff. In doing this they are helped, but not controlled, by the estimates of witnesses, or the efforts of parties to buy their peace. All these considerations may be taken into account, but they are in no sense controlling.

Another subject of complaint is the refusal to permit Col. Gray, a witness, to speak of the value of the plaintiffs' property after the appropriation of water made by the defendant. He testified that he had lived in Chester, not far from the plaintiffs' property, for 40 years, and that he had examined the property on several occasions with some care. On two of these occasions his examinations of both the real and personal property had been made for the purpose of fixing its value as an appraiser. He had been one of the viewers by whom the damages had been assessed in this case. He had some general knowledge of the sales of mill properties, and the prices at which they

had changed hands, along this stream. He testified to the value of this property before the taking of the water, but, when he was asked to give its value as it was affected by the taking, he was held incompetent to answer. So far as we can gather from the record, this ruling rested on the fact that he had never gauged the flow of the stream, and had made no "special examination" of the water power at the plaintiffs' mill. But he had made a general examination, knew the amount of water withdrawn from the stream, the fact that in the dry season it would take about $2\frac{1}{2}$ horse power from the available power of the water wheel, and had formed and expressed a judgment as to the amount of the plaintiffs' damages, as a viewer in this proceeding. He was certainly qualified to express an opinion about the effect of the withdrawal of the water upon the value of the plaintiffs' property, and should have been permitted to answer the question. On the other hand, the refusal to permit Howard Widener to answer, which forms the burden of the fourth assignment, seems to us to have been entirely proper. He was asked to give his opinion upon the depreciation in value of plaintiffs' property by reason of the taking complained of, based on his estimate of what it would cost to supply the $2\frac{1}{2}$ horse power during the dry season by steam. We have no doubt that the reason for excluding the answer was that the form of the question excluded all other elements of loss from the consideration of the witness, and really asked only after the cost of the additional steam power, and arbitrarily assumed that the loss was confined to this single item.

The seventh assignment presents a different question. The witness Greenwood was a real-estate agent in the city of Chester, and had been such for many years. He testified that he knew the value of property on Crum creek, and could form a "reliable judgment as to the value of the plaintiff's property." He was asked if he could form "a reliable judgment as to how that value is affected by the abstraction of two millions of gallons of water daily and uniformly from the creek," and he replied, "I think so." The court then interposed the following question: "Well, upon what formula would you base your estimate of that?" He replied that in his belief the value of the property was diminished only to the extent of the cost of supplying the lost water power. The court thereupon excluded the question. The difference between the position of this witness and that of Widener consisted in this: In Widener's case the question limited the view of the witness, and in this case it did not. The question was proper. It reached after the judgment of the witness upon the extent of the depreciation of the plaintiff's property. If he believed that depreciation was fairly measured by the cost of supplying the lost water power, the de-

fendant had a right to his answer. Its value was, of course, for the jury; but it was competent, because it was an expression of the judgment of the witness. Widener was not permitted to answer because the question was improperly framed for the purpose of getting an opinion about the extent of depreciation, from a witness competent to form one. Greenwood was not permitted to answer, not because of any trouble with the question, but because the court had learned what his answer would be, and objected to the expression of an opinion, for the reason that he did not agree with the witness as to the basis on which the opinion should be formed. Whether the basis was correct was not for the court, but for the jury, to determine. The judgment is reversed, and a venire facias de novo awarded.

(176 Pa. St. 230)

LEWIS v. SPRINGFIELD WATER CO.

(Supreme Court of Pennsylvania. July 15, 1896.)

OPINION EVIDENCE — COMPETENCY — PROCEEDING TO ASSESS DAMAGES FOR APPROPRIATION OF WATER—INSTRUCTIONS.

1. In proceedings to ascertain damages to mill property propelled in part by water power, caused by the appropriation by a water company of sufficient water to reduce the capacity of the mill materially, witnesses having some knowledge of the value of property in the neighborhood were competent to testify to the value of the mill property immediately before and after the appropriation.

2. In proceedings to ascertain damages to mill property operated in part by water power, by the appropriation by a water company of part of the water, it was urged as one element of damage that the company stored the water in the daytime, and used it at night. A point by the company asked an instruction that, if this was so, such user of the water was either a lawful exercise of its franchise, or it was an unlawful use of the stream, and that in neither case could it be considered. *Held*, that it was a correct answer to the point to state that if a proper exercise of the company's franchise required the storing of the water during the day, and its use at night, and such storing was injurious to the mill property, the manner as well as the fact of the taking of the water should be considered in estimating the owner's injury.

Appeal from court of common pleas, Delaware county.

Petition by the Springfield Water Company for a jury to assess damages to the property of Albert P. Lewis, consisting of a mill situated on a certain creek, and operated in part by water power, caused by the appropriation of part of the water of such creek by the petitioner. The latter appealed from the award of the jury to the court of common pleas, by which an issue was framed between Albert P. Lewis, as plaintiff, and the Springfield Water Company, as defendant. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Isaac Johnson, William B. Broomall, and Edward H. Hall, for appellant. V. Gilpin Robinson and George Darlington, for appellee.

WILLIAMS, J. This case, in its facts, is practically identical with the case of *Lee v. Water Co.*, 35 Atl. 184, in which an opinion has just been filed, but the questions raised are by no means the same. The plaintiff is the owner of a cotton mill situated on Crum creek, and employs both water and steam power to propel his machinery. These are used in about the same proportions as in the mill of *Lee et al.*, which was about 45 horse power from his water wheel, and three or four times as much power from his steam engine. The water company, by taking 2,000,000 of gallons of water from Crum creek daily, reduces its capacity to the extent of $2\frac{1}{2}$ horse power; and this, during the dry season, or much of it, reduces to that extent the effective power of the plaintiff's water wheel. This is a proceeding to ascertain the damages which the appropriation of this water inflicts upon the plaintiff. The proper measure of damages is the actual depreciation in the value of the plaintiff's property caused by the loss of water. This is ascertained by finding out its value before the water was taken, and its value after it was taken, and as affected by such taking. When a witness is called to express an opinion upon this subject, it is entirely proper, in a preliminary or upon cross examination, to explore the extent of his knowledge, and to test his judgment by requiring him to particularize and state the elements of his calculation. His examination should show that he has some knowledge of the value of property in that neighborhood. The value of his opinions will be likely to depend, in the minds of jurors, upon the extent and thoroughness of the knowledge he is shown to possess, and for this reason such a line of examination is entirely proper. The several assignments of error relating to the admission of the testimony of witnesses called to testify as to the value of the plaintiff's property before and after the taking of the water by the defendant are not sustained. The reasons urged in support of them go rather to the value or credibility of the testimony, than to its admissibility. The testimony was, as it looks on this record, extravagant, and some of it seems quite incredible, but that was for the jury. No injury was alleged, except that resulting from the loss of power, and that the loss of $2\frac{1}{2}$ horse power from the efficiency of the water wheel during the dry weather of summer could have taken from twenty to thirty-five thousand dollars from the value of this property is a statement that neither the court nor jury could believe. But a witness cannot be excluded from the witness stand because his testimony is absurd or contradictory or false. If he is competent, his evidence goes to the jury, to be considered and weighed with the other evidence in the case. Nor do we see anything in the answer of the learned judge to the defendant's sixth point that requires the reversal of this judgment. It seems to have been urged as one element of damage that the water company stored the water of the

stream, to some extent, in the daytime, and used it at night. The point asked an instruction that, if this was found to be so, such user of the water was either a lawful exercise of its franchise by the defendant, or it was an unlawful use of the stream, and that in neither case could it be considered in this proceeding. The answer was a practical affirmation of the point. The learned judge said that if the proper exercise of the franchise of the defendant required the storing of the water during the day, and its use during the night, and if such storing was injurious to the plaintiff's property, then they should consider the manner, as well as the fact, of the taking of the water, in making up their estimate of the plaintiff's injury; if the proper exercise of the franchise did not require this, then the subject was not to be considered in this proceeding. This was a correct instruction. The jury was not left to treat this element of damage, if they found it to exist, as a separate item, to be estimated by itself, but were carefully instructed that the plaintiff should recover only for the actual difference in value of his property caused by the appropriation of the water. This question, which was apparently lost sight of in *Lee v. Water Co.*, 35 Atl. 184, was, on the trial of this case, kept prominently before the jury. Their verdict may have done the defendant injustice, but if so the remedy was in the court below. On the whole case, we see no sufficient reason for disturbing the judgment. The assignments of error are overruled, and the judgment affirmed.

(176 Pa. St. 237)

LEWIS v. SPRINGFIELD WATER CO.

(Supreme Court of Pennsylvania. July 15, 1896.)

PROCEEDINGS TO ASSESS DAMAGES FOR APPROPRIATION OF WATER—INSTRUCTIONS.

In proceedings to ascertain the damages to property consisting of a mill operated partly by water and partly by steam power, caused by the appropriation by a water company of part of the water of the stream on which the mill is located, the court properly instructed the jury to ascertain the difference in value of such property, considering it first as it was before the appropriation, and then considering as it was affected by the appropriation.

Appeal from court of common pleas, Delaware county.

Petition by the Springfield Water Company for a jury to assess damages to the property of Samuel C. Lewis, consisting of a mill situated on a certain creek, and operated partly by steam power and partly by water power, caused by the appropriation of part of the water of such creek by the petitioner. The latter appealed from the award of the jury to the court of common pleas, by which an issue was formed between Samuel C. Lewis, as plaintiff, and the Springfield Water Company, as defendant. From a judgment for plaintiff, defendant appeals. Affirmed.

Isaac Johnson, William B. Broomall, and Edward H. Hall, for appellant. V. Gilpin Robinson and George E. Darlington, for appellee.

WILLIAMS, J. The fourth, fifth, sixth, and seventh assignments of error relate to the action of the court in permitting certain witnesses to express an opinion upon the value of the property of the plaintiff as it was before and after the appropriation by the defendant of water from Crum creek. The defendant had seized, under the right of eminent domain, 2,000,000 of gallons per day of the water, which was not returned again to the stream. The plaintiff used the stream to aid in propelling its machinery, and the withdrawal of 2,000,000 of gallons had the effect of reducing the value of the stream, as a water power, by about $2\frac{1}{2}$ horse power. The question before the jury was the extent to which this action of the water company had reduced the actual value of the plaintiff's property. The evidence offered bore directly upon that question, and we think the witnesses were properly admitted. They showed, upon the examination to which they were severally subjected, a sufficient knowledge of the subject to which their attention was called to qualify them to speak upon it. The value of their testimony was for the jury to determine. The eighth assignment of error complains of the answer of the learned judge to the defendant's first point. It is contended that the answer was calculated to leave the jury under the impression that the plaintiff's damages were simply so much money as would replace with steam the $2\frac{1}{2}$ horse power previously furnished by the water taken by the defendant company. We do not think the answer justifies the criticism thus made upon it. On the other hand, the learned judge instructed the jury to ascertain the difference in value of plaintiff's property, considering it first as it was before the appropriation of the water by the defendant, and then considering it as it was affected by that appropriation. This is the true rule to apply. It fixes the loss of the party affected by the exercise of the right of eminent domain, and for that reason correctly measures the damages to which he is entitled. The ninth, tenth, and eleventh assignments are directed to certain portions of the charge which it was alleged were harmful to the plaintiff. They contain statements, explanations, and remarks that were not necessary, and that it might have been in better form to omit; but we are unable to see that they could have misled the jury, or been injurious to the case of the plaintiff. These assignments are not sustained. We see no other subject raised by the assignments not already referred to that requires discussion. The judgment is therefore affirmed.

(176 Pa. St. 271)

POTTER v. SCRANTON TRACTION CO.

(Supreme Court of Pennsylvania. July 15, 1893.)

STREET RAILWAYS — RIGHT TO CHANGE MOTIVE POWER — CONSENT OF MUNICIPALITY — PRESUMPTION — NEGLIGENCE — RIGHTS OF TRAVELERS — PARAMOUNT RIGHT OF RAILWAY COMPANY.

1. The consent of the borough, if necessary to enable a street-railway company to change from horse power to an electric trolley system, will be presumed from the acquiescence of the borough in such change for five years, so far as to preclude an individual, in a suit against the company for personal injuries, from claiming that the maintenance of such system is negligence per se.

2. Though the right of a street-railway company, even to that part of the street occupied by its rails, is only in common with that of other travelers, its right to use an ordinary and usual appliance upon the track to repair the overhead wire is, for a reasonable time, paramount.

Appeal from court of common pleas, Lackawanna county.

Action by George W. Potter against the Scranton Traction Company to recover for personal injuries. Judgment for defendant, and plaintiff appeals. Affirmed.

Ward & Horn and I. H. Burns, for appellant. W. H. Jessup, Everett Warren, Horace E. Hand, and W. H. Jessup, Jr., for appellee.

MITCHELL, J. The main contention in this case is that the railway company, not having the express consent of the borough to use the trolley system on its road, was so far a trespasser ab initio that its appliances both for running and repairing were nuisances, and, as against the appellant, constituted negligence in law. The discussion of this proposition would require the consideration of two questions—First, the right of the People's Street-Railway Company to use the trolley system on its road; and, secondly, the additional right, if any, acquired by its lessee, the traction company, under its own charter. The People's Company was chartered by special act (P. L. 1866, p. 1199) as a street passenger railway, without mention of motive power. The road was operated by horse power until 1888, when the company, without express consent of the borough, but without objection either from the borough or any abutting property owner, changed its motive power to the electric trolley system. The Scranton Traction Company was incorporated under the act of March 22, 1887 (P. L. p. 8), with an express right to use "electrical or other appliances," but subject to the consent of the borough. In 1892 it leased the People's line, and continued to operate it by the trolley system without express consent, but without objection by the borough. How far the franchise for a passenger railway, without specific limitations or prohibitions as to motive power, carries with it the right from

time to time to operate it by new methods, developed in the progress of invention and experience, is an important question, which was referred to but not decided in *Reeves v. Traction Co.*, 152 Pa. St. 153, 163, 25 Atl. 516; and in this case it is complicated by the fact that the change was not made until after the adoption of the present constitution. It is clear that the traction company, chartered since the constitution, could not, of its own authority, make any change of motor power which would increase the servitude on the street without the municipal consent. Whether the People's Company could do so, after 1874, by virtue of implied but unused powers under a charter previously granted, is a matter of very serious doubt. But we do not think the appellant is in position to raise the question. The change from horse power to trolley was made in 1888, and the new motor continued in use, first by one company and then by the other, without objection, for five years before this accident occurred. Whether the consent of the borough was necessary or not, it must be presumed in this action by a private citizen. Consent may be by ratification, as well as by previous permission; and it was held, in *Pennsylvania S. V. R. Co. v. Philadelphia & R. R. Co.*, 160 Pa. St. 277, 28 Atl. 784, that, at least as to private parties, if not as to the municipality itself, consent may be waived by acquiescence without objection in a long-continued act. We are of opinion that, under the facts of the present case, the trolley line must be presumed to have been rightfully on the street, and therefore not a public nuisance, which entitles appellant to ask a ruling that its maintenance is negligence per se.

Having the right to maintain its line, the appellee of course had the right to repair it from time to time, and to use all necessary and ordinary appliances in doing so. The learned judge so charged, and, though his use of the word "paramount," in reference to such right, is assigned for error, yet it is only made such by separation from its context. The jury were told the company "had not a paramount right, an exclusive right, to the use of the street, but they had an equal right with other travelers on the highway. They had an equal right with Mr. Potter upon the street; no greater, no less. They had the right * * * to use this appliance, if it were an usual and ordinary one, upon the track, for a reasonable time, to repair the overhead wire. Their right for a reasonable time was paramount and greater than the right of Mr. Potter." This was a correct statement of the law. It was no more than an illustration of the general rule that, although the right of a street railway, even to that part of the street occupied by its rails, is only in common with that of other travelers, yet where its right, to be available at all, must be exclusive,—as, for example, for unobstructed passage,—

it is of necessity for the time being superior or paramount. *Ehrisman v. Railway Co.*, 150 Pa. St. 180, 24 Atl. 596.

The remaining assignments do not require further discussion. Taken in their connection, as they occurred in the charge, the expressions of the learned judge were substantially correct, and could not have misled the jury to appellant's injury. Judgment affirmed.

(178 Pa. St. 222)

McCARTHY v. SCANLON.

(Supreme Court of Pennsylvania. July 15, 1896.)

EVIDENCE—SUFFICIENCY—SPECIAL FINDINGS.

1. In an action on a note, defendant offered to show that the note was given without consideration, and to defraud creditors of the maker. Defendant was permitted to show lack of consideration, but not that the note was given to defraud creditors. *Held* that, in the absence of any testimony that there were any creditors to defraud, it was error to permit the jury to find that the note was given in fraud of creditors, and to enter judgment for plaintiff in the face of the finding.

2. Plaintiff was permitted without objection to testify at length as to a certain check and notes relating to transactions with the defendant, entirely foreign to the matter in dispute. *Held*, that it was not reversible error to admit the check and notes in evidence.

Appeal from court of common pleas, Lackawanna county.

Action by M. A. McCarthy against Margaret Scanlon, administratrix of the estate of Martin Scanlon. There was judgment for plaintiff, and defendant appeals. Reversed.

R. A. Zimmerman, Geo. M. Watson, and F. J. Fitzsimmons, for appellant. John P. Kelly and Joseph O'Brien, for appellee.

MITCHELL, J. This case was very loosely tried by both sides, the witnesses apparently being allowed to tell whatever they thought bore on the dispute, without reference to its relevancy or their own legal competency. Although, therefore, the check and judgment notes (Exhibits B, C, and D) had no apparent connection with the note in suit, yet the assignments of error to their admission cannot be sustained, because the plaintiff had been allowed to testify all about them, and had been cross-examined on them without regard to their relevancy, or to the fact that Scanlon, by whom they were given, was dead. Though their admission was not strictly regular, yet the objection came so late that we would not reverse for that cause.

But there was substantial error in permitting the jury to find a verdict on a ground of which there was no sufficient evidence. The defendant's counsel offered to prove that the note in suit was given without consideration, and "to protect Scanlon [the maker] from any creditors he might have, especially from a judgment he expected to

be obtained against him by one Ryan." But this part of the offer, whatever might have been the effect of such evidence on the defendant's case, was excluded, and the testimony confined to the question of consideration. The defendant, in testifying, did give a conversation in which she alleged that the plaintiff had said that there "was nothing in it [the note]. It was simply given for the protection of Martin and his children in this case of Ryan's." This, however, was not her own testimony to the fact, but to an admission of plaintiff against his present claim, and, at the most, does not show that Ryan had anything more than a claim. There is no evidence in the case what the nature of his claim was, or that he was, or ever became, a creditor; and there is not a suggestion that there was any other creditor that Scanlon was seeking to hinder or delay. It was clearly apparent that the transactions between the parties were not the ordinary dealings of borrower and lender, and it is equally manifest that the witnesses on neither side were telling the entire truth. The jury seem to have been convinced that there was no consideration for the note, and therefore decided against the plaintiff on his claim. In the absence, however, of any explanation why the note was given at all when no money passed, they found an easy solution in the suggestion that it was to defraud Scanlon's creditors. Perhaps they were right in fact, but we cannot say so, or permit them to say so without evidence. It would be, at best, only a good guess. The result is that plaintiff has a judgment on a ground that he expressly repudiated, and in the face of an explicit finding by the jury against his claim, while the defendant has a judgment against her, notwithstanding a finding of the main fact of the defense in her favor.

It was error to permit the jury to find that the note was given to defraud creditors, in the absence of evidence that there were any creditors to defraud, and to enter judgment on such finding. Judgment reversed, and venire de novo awarded.

(176 Pa. St. 354)

HUGHES v. DELAWARE & H. CANAL CO.

(Supreme Court of Pennsylvania. July 15, 1896.)

RAILROAD COMPANIES—ACCIDENT AT CROSSING—EVIDENCE—DECLARATIONS—CONTRIBUTORY NEGLIGENCE.

1. In an action for death at a crossing, where one who was riding with decedent at the time of the accident testified as to the manner in which it occurred, it was proper to contradict his testimony by a statement in writing, signed by him, though the body of the instrument was written by another.

2. In an action by a widow for injuries received by her husband at a railroad crossing, and which resulted in his death, the exclusion of declarations made by decedent after the accident, though not part of the *res gestæ*, on the ground that they were not made by a party to

the suit, was error, since plaintiff derived her cause of action from decedent.

3. Decedent drove on a track at a railroad crossing, when the view of such track was cut off by a train passing on another track, without waiting to see if any other train was coming, and could have seen the train which struck him if he had waited but a short time after the receding train had cleared the view. *Held*, that he was guilty of contributory negligence.

Appeal from court of common pleas, Lackawanna county.

Action by Margaret Hughes against the Delaware & Hudson Canal Company for damages for injuries resulting in the death of plaintiff's husband. Judgment for plaintiff, and defendant appeals. Reversed.

W. H. Jessup, Horace C. Hand, and W. H. Jessup, Jr., for appellant. Everett Warren and Henry A. Knapp, for appellee.

MITCHELL, J. It is difficult to see upon what ground the declaration of Jones was excluded. He had testified at the trial as to the manner in which the accident occurred, and the defense offered to contradict him by a statement in writing, signed by him while at the hospital. The witness who took down the statement was allowed to refresh his memory from it, and repeat what Jones had said; but the writing itself was excluded. This was clear error. If it had been a letter from Jones, there could have been no question about its admissibility, and the only difference was that, being in another hand, and only signed by him, it would have gone to the jury with the necessary explanation of the circumstances under which it was made. The error was not cured by the witness having in effect got the exact language of the statement before the jury. One of the objections made to the paper was that Jones was at the time lying on a cot at the hospital, with his head bandaged, and in no condition to make a statement, and on this subject his signature alone was an important item of evidence. The defendant was entitled to have the paper itself put before the jury.

For the same reason it was also error to exclude the statement by Hughes, the plaintiff's husband. It should have gone to the jury, in connection with the circumstances under which it was made. This was excluded, also on the ground that it was not made by a party to the suit, and was not, therefore, admissible against the plaintiff. This, however, is no more tenable than the other. At the time his statement was made, the only right of action there was at all was in Hughes. Plaintiff had no claim until he died, and then the foundation of her claim was the injury to him, for which he might have sued in his lifetime. If the defendant would not have been liable to him in the first instance, it was not made liable to her by his death. We are not aware of any case, and certainly our attention has not been called to any, in which a widow has recovered

for injuries to her husband, where he could not have done so himself if he had survived; and, on principle, it is perfectly clear that she never can do so, for the original right of action is in him, and hers is but in succession or substitution for his, where he has not asserted it himself. If he has done so, his action survives; if he has not, then by virtue of the statute she brings hers, in its place, but for the same cause. *Birch v. Railroad Co.*, 165 Pa. St. 339, 30 Atl. 826. In this connection appellee cites the remarks in *Bradford City v. Downs*, 126 Pa. St. 622, 17 Atl. 884, as to the declarations of an infant, who was injured, not being admissible against the father, in an action for loss of services, unless they were part of the *res gestæ*. The cases might easily be distinguished, on the ground that the father's action is in his own right, and not derived through the infant. A much closer analogy may be found in the declarations of a predecessor in title while in possession, which have always been held admissible. *Weidman v. Kohr*, 4 Serg. & R. 174. But the point in *Bradford City v. Downs* was comparatively unimportant, and in *Ogden v. Railroad Co.* (Pa. Sup.) 16 Atl. 353, the court distinctly declined to include it in the affirmation of the judgment. We entertain so strong a doubt of its soundness that we should be unwilling to extend the rule to the present case, even if the analogy were closer than it is.

It is not worth while to discuss the minor assignments of error, or the evidence relative to the place where the deceased stopped to look and listen, because, on the whole case, his contributory negligence was so unquestionable that the court should have pronounced upon it as a matter of law. The plaintiff's case, as to the manner in which the accident occurred, rests on the testimony of Jones, who was in the wagon with deceased at the time. Jones says that, when they reached the crossing, they waited for a coal train on the north-bound track to pass, and, as soon as it got about 20 feet past, they drove slowly on the track, looking and listening, and were almost immediately struck by a train on the other track. The engine, he says, "was on our buggy without almost our knowing anything about it." It is plain that the accident arose from that fruitful source of danger, fixing attention so exclusively on one track as to divert it from necessary care in regard to the other. The questions of the proper place to stop, look, and listen, and the action of the party in regard to it, are usually for the jury, and have been so declared in a long line of cases cited by the appellee, of which, perhaps, the closest to the present is *Whitman v. Railroad Co.*, 156 Pa. St. 175, 27 Atl. 290. But there are exceptions where the inference from admitted facts is clear, and it becomes the duty of the court to declare the law as a result. The element which distinguishes this case

from those relied upon by appellee is the temporary nature of the obstruction to the view. The deceased drove on the south-bound track when the view of it was cut off by the rear end of the passing train on the other track, and was struck so immediately that it is beyond all possible doubt that the coming train which struck him could have been seen, and the accident escaped, had he waited but a single instant, until the receding train on the north-bound track had cleared the view. Under such circumstances it was held, in *Kraus v. Railroad Co.*, 139 Pa. St. 272, 20 Atl. 993, that a nonsuit was properly entered. This case belongs to the same class, and, the question having been reserved, judgment should have been entered non obstante veredicto for the defendant. Judgment reversed, and judgment directed to be entered for the defendant on the point reserved.

(177 Pa. St. 1)

GOODHART v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. July 15, 1896.)

DAMAGES—EVIDENCE—PHYSICAL PAIN—EARNING POWER—EXPERT TESTIMONY.

1. In an action for personal injuries, the fact that the examination of plaintiff by physicians employed by defendant to ascertain the extent of the injuries was unnecessarily harsh and annoying cannot be considered on the question of damages.

2. In an action for personal injuries, plaintiff cannot recover, as expenses incurred, the value of services of members of his family in nursing him, in the absence of an express agreement on his part to pay therefor.

3. An instruction in regard to the damages recoverable for physical suffering, which leaves the jury to regard it as an independent item of damages, to be compensated by a sum of money that may be regarded as a pecuniary equivalent, is erroneous.

4. The profits of a business of which plaintiff was manager cannot be shown as a measure of his earning powers before the injury.

5. The question of the earning power of an injured person is not one for expert testimony.

6. The fact that plaintiff had, after the injury, received a salary as postmaster, is to be considered on the question of damages.

7. Where future payments for the loss of earning power are to be anticipated and capitalized in a verdict, the plaintiff is entitled only to their present worth.

Sterrett, C. J., dissenting.

Appeal from court of common pleas, Mifflin county.

Action by James M. Goodhart against the Pennsylvania Railroad Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

Rufus C. Elder and George W. Elder, for appellant. D. W. Woods & Son, for appellee.

WILLIAMS, J. The plaintiff received the injury complained of while a passenger on one of the trains of the defendant company. The train was being moved in two sections. The first section, on which the plaintiff was riding,

had stopped to repair a break in one of its air pipes, and had sent its flagman back to warn approaching trains. The second section, having been misled by the signal displayed by an operator at a signal tower, came along at full speed; and, its engineer failing to notice the flagman and his efforts to warn him of the position of the first section, the accident resulted, and the plaintiff was thrown from his seat, and injured. At the trial but two questions were raised: First. Was the accident and the consequent injury to the plaintiff due to the negligence of the employes of the defendant? If so, then, second, what was the proper measure of damages to be applied by the jury? It does not appear that any contest was made over the first of these questions. The only real ground for controversy was over the measure of damages, and the evidence should have been confined to the issues of fact that related to this controversy. The evidence in regard to the examination made by Dr. Morton was not directed to the extent of the plaintiff's injuries, but to the severity of the examination. Its evident object was to persuade the jury that the character of the examination and the conduct of Dr. Morton and his assistants was unnecessarily harsh and annoying, and was a proper subject to be considered in assessing the plaintiff's damages. But it must be borne in mind that a claim was being made against the railroad company for damages based upon an alleged injury received in consequence of the accident already referred to. In order to determine intelligently the extent of its liability, it was important for the defendant to know the nature of the injury, and the extent to which the plaintiff was affected by it. This could only be known as the result of a medical examination made by competent and experienced physicians. Dr. Morton and his assistants were selected as proper persons to make the examination, and advise the defendant company of their estimate of the plaintiff's condition, and its consequent liability. If, in the discharge of their professional duty to their employer, they went beyond what was reasonably necessary and employed methods and tests that were cruel, and such as the judgment of the medical profession does not approve, and thereby inflicted injury on the plaintiff, they are liable for their own trespass, whether committed with malice or through ignorance. But rudeness and incivility in the manner in which the examination was conducted, if rudeness or incivility can be affirmed of anything that was said or done in that connection, could throw no light on the extent of the injury actually suffered by the plaintiff, and the evidence referred to in the first and second assignments of error should have been rejected.

The remaining sixteen assignments of error relate, more or less directly, to the single question the case presented, viz. the measure of damages, and can be most conveniently considered together. Damages for a personal injury consist of three principal items: First, the

expenses to which the injured person is subjected by reason of the injury complained of; second, the inconvenience and suffering naturally resulting from it; third, the loss of earning power, if any, and whether temporary or permanent, consequent upon the character of the injury. *Owens v. Railway Co.*, 155 Pa. St. 334, 26 Atl. 748. The expenses for which a plaintiff may recover must be such as have been actually paid, or such as, in the judgment of the jury, are reasonably necessary to be incurred. The plaintiff cannot recover for the nursing and attendance of the members of his own household, unless they are hired servants. The care of his wife and minor children in ministering to his needs involves the performance of the ordinary offices of affection, which is their duty; but it involves no legal liability on his part, and therefore affords no basis for a claim against a defendant for expenses incurred. A man may hire his own adult children to work for him in the same manner and with same effect that he may hire other persons, but, in the absence of an express contract, the law will not presume one, so long as the family relation continues. Pain and suffering are not capable of being exactly measured by an equivalent in money, and we have repeatedly said that they have no market price. The question in any given case is not what it would cost to hire some one to undergo the measure of pain alleged to have been suffered by the plaintiff, but what, under all the circumstances, should be allowed the plaintiff in addition to the other items of damage to which he is entitled, in consideration of suffering necessarily endured. *Baker v. Pennsylvania Co.*, 142 Pa. St. 503, 21 Atl. 979. This should not be estimated by a sentimental or fanciful standard, but in a reasonable manner, as it is wholly additional to a pecuniary compensation afforded by the first and third items that enter into the amount of the verdict in such cases. By way of illustration, let us assume that a plaintiff has been wholly disabled from labor for a period of 20 days in consequence of an injury resulting from the negligence of another. This lost time is capable of exact compensation. It will require so much money as the injured man might have reasonably earned in the same time by the pursuit of his ordinary calling. But let us further assume that these days of enforced idleness have been days of severe bodily suffering. The question then presented for the consideration of the jury would be: What is it reasonable to add to the value of the lost time in view of the fact that the days were filled with pain, instead of being devoted to labor? Some allowance has been held to be proper; but, in answer to the question, "How much?" the only reply yet made is that it should be reasonable in amount. Pain cannot be measured in money. It is a circumstance, however, that may be taken into the account in fixing the allowance that should be made to an injured party by way of dam-

ages. An instruction that leaves the jury to regard it as an independent item of damages, to be compensated by a sum of money that may be regarded as a pecuniary equivalent, is not only inexact, but it is erroneous. The word "compensation," in the phrase "compensation for pain and suffering," is not to be understood as meaning price or value, but as describing an allowance looking towards recompense for or made because of the suffering consequent upon the injury. In computing the damages sustained by an injured person, therefore, the calculation may include not only loss of time and loss of earning power, but, in a proper case, an allowance because of suffering. The third item, the loss of earning power, is not always easy of calculation. It involves an inquiry into the value of the labor, physical or intellectual, of the person injured, before the accident happened to him, and the ability of the same person to earn money by labor, physical or intellectual, after the injury was received. Profits derived from an investment or the management of a business enterprise are not earnings. The deduction from such profits of the legal rate of interest on the money employed does not give to the balance of the profits the character of earnings. The word "earnings" means the fruit or reward of labor; the price of services performed. And, Law Dict. 390. Profits represent the net gain made from an investment, or from the prosecution of some business, after the payment of all expenses incurred. The net gain depends largely on other circumstances than the earning capacity of the persons managing the business. The size and location of the town selected, the character of the commodities dealt in, the degree of competition encountered, the measure of prosperity enjoyed by the community, may make an enterprise a decided success, which under less favorable circumstances, in the hands of the same persons, might turn out a failure. The profits of a business with which one is connected cannot therefore be made use of as a measure of his earning power. Such evidence may tend to show the possession of business qualities, but it does not fix their value. Its admission for that purpose was error. It was also error to treat this subject of the value of earning power as one to be settled by expert testimony. An expert in banking or merchandizing might form an opinion about what a man possessing given business qualifications ought to be able to earn, but this is not the question the jury is to determine. They are interested only in knowing what he did actually earn, or what his services were reasonably worth, prior to the time of his injury. In settling this question, they should consider not only his past earnings, or the fair value of services such as he was able to render, but his age, state of health, business habits, and manner of living. *McHugh v. Schlosser*, 159 Pa. St. 480, 28 Atl. 291. The basis on which this calculation must rest is not the possibility, as judged of by the expert witness, but the

cold, commonplace facts as proved by those who knew them. It does not follow, as a necessary conclusion, that the services of the plaintiff were worth no more at the time of his injury than the \$90 per month he was receiving from the company in whose service he was; but the fact that he accepted service at that price was an important one, and was persuasive, though not conclusive, evidence, that the price was considered by himself a fair one.

We think the twelfth assignment also points out a substantial error. The plaintiff was hurt on the 20th day of September, 1893. In May, 1894, he was appointed postmaster at Lewistown, Pa., at a salary which leaves him a net balance of \$540 per year after the payment of all expenses. He is still holding the office and in receipt of the salary. Notwithstanding this fact, the learned judge said to the jury: "It seems to the court—and we do not understand that it is denied by the defendant—that, since the accident, he has been totally disabled and utterly unable to do anything." For 18 months before this instruction was given, the plaintiff had been receiving the salary attached to the office of postmaster at Lewistown, and had been giving sufficient attention to the duties of the office to see that they were properly performed by his clerks and deputies. In other words, he had been earning \$540 per year, and was still earning it at the time the trial took place.

Another subject requires consideration. The verdict rendered by the jury gives the calculation upon which the enormous sum awarded to the plaintiff was based. From this it appears that the sum of \$19,526.50 was given as the cost of an annuity of \$1,750 per annum for 19 years. This calculation assumes (1) that the plaintiff's earning power was nearly twice as great as he had himself offered it for to the company whose president and manager he was. It assumes (2) that he had a reasonable expectation of life for 19 years, being at the time of the trial about 53 years old. It assumes (3) that his earning power, instead of steadily decreasing with increasing years, would hold up at its maximum to the very end of life. It assumes, in the fourth place, that he is entitled to recover, not only the present worth of his future earnings, as the jury has estimated them, but a sufficient sum to enable him to go out into the market, and purchase an annuity now, equal to his estimated earnings. The first, second, and third of these are assumptions of fact. The fourth is an assumption of law, and is clearly wrong. When future payments are to be anticipated and capitalized in a verdict, the plaintiff is entitled only to their present worth. This is the exact equivalent of the anticipated sums.

From what has been now said, it follows that substantially all of the assignments of error are sustained. The judgment is reversed, and a venire facias de novo awarded.

STERRETT, C. J., dissents.

(176 Pa. St. 488)

ANDERSON v. BEST.

(Supreme Court of Pennsylvania. July 15, 1896.)

JUDGMENT—OPENING—PETITION—SUMMARY PROCEEDING TO SATISFY—BONDS—CONSIDERATIONS—STATUTE OF FRAUDS—ACCOUNT STATED.

1. There is no authority for a summary order of satisfaction of a judgment entered on a bond and warrant of attorney, regular on their face, except under Act March 14, 1876 (P. L. p. 7), which is confined to clear cases of actual payment.

2. A petition to open judgment, setting up that it was given to secure or perfect the title to an interest in lands which plaintiff was negotiating to purchase from defendant, and that said negotiations "were never consummated, but entirely abandoned," treated as based on failure of consideration, is defective, in omitting to aver that the abandonment of negotiations was through no fault of petitioner.

3. Want of consideration is not a defense to a bond executed and delivered, though failure of consideration is a defense thereto.

4. Though an agreement by defendant to sell to plaintiff an interest in land be within the statute of frauds, and likewise an agreement by defendant, when unable to carry out a purchase of land he had made, that if plaintiff would buy in his place he would take the property off his hands, and treat the money advanced as a loan to him, still, defendant having broken his agreement to sell the first tract to plaintiff, and sold it to another at a profit, and plaintiff having bought the second tract, and subsequently demanded a fulfillment of defendant's promise, defendant's agreement in writing to pay plaintiff a certain amount to cover his damages in the first matter, and to reimburse him in the second matter, is supported by a sufficient moral consideration, and is unaffected by the statute of frauds.

5. Defendant agreed to give plaintiff a mortgage to cover everything he owed her, and told her to take down the figures, and they would see how much it was. They went over the several business transactions they had had, and, as he called the amounts, she put them down, figured them up, and told him the amount. He said "Very well; make out your bond and mortgage." And this was done. *Held*, the result was an account stated, which could not be opened except for fraud or plain mistake.

6. A 5 per cent. collection fee, authorized by a bond, can be computed only on the amount of the debt left due when judgment is entered on it.

Appeal from court of common pleas, Warren county.

S. P. Anderson had judgment by confession against John A. Best. On defendant's petition to open judgment, there was a decree that the judgment be satisfied of record. Plaintiff appeals. Reversed.

Samuel T. Neill, for appellant. Wilbur & Schunur, for appellee.

MITCHELL, J. The appellant had a judgment entered upon a bond and warrant of attorney, and both were regular on their face. There was, therefore, no jurisdiction for a summary order of satisfaction, except under the act of March 14, 1876 (P. L. p. 7), which is confined to clear cases of actual payment. *Atkinson v. Harrison*, 153 Pa. St. 472, 26 Atl. 294. The bond was an absolute obligation for the payment of money, but

the defendant filed a petition to open the judgment, nominally on the ground that the bond was without consideration, but really setting up that it was given "for the purpose of securing or perfecting the title to an interest in certain oil lands which plaintiff's agent was negotiating to purchase from defendant," and that said negotiations "were never consummated, but entirely abandoned." This petition, treating it as based on failure of consideration, was defective, in omitting to aver that the abandonment of the negotiations was not through the fault of petitioner. This point, however, became unimportant, as, on the hearing of the rule, the court found that petitioner had failed to establish his case. It appeared, however, that payments on account had been made, and the whole sum named in the bond was not due. The learned judge, therefore, filed an opinion declaring there was no cause shown for opening the judgment, but directing an issue to determine how much was due upon it. This was the correct practice, if the amount actually due was in doubt. A reargument being asked for, however, the court granted it, and thereon determined that the bond was without consideration, inasmuch as the two items of debt remaining due under it were within the statute of frauds. He therefore ordered an entry of satisfaction to be made on the record of the judgment.

In reaching his conclusion, the learned judge overlooked the plaintiff's position. The latter had a regular judgment, entered on a regular bond, to which there was no legal defense. Want of consideration is not a defense to a bond executed and delivered. *Burkholder's Ex'r v. Plank*, 69 Pa. St. 225; *Rishel v. Crouse*, 162 Pa. St. 3, 29 Atl. 123. Failure of consideration, however, is a ground of defense, because it raises an equity for relief which will be enforced in Pennsylvania even by courts of law. But no failure of consideration was shown by defendant. The debt represented by the bond is paid, except as to two items, and a receipt has been entered by plaintiff on the record for all the judgment over the amount of those two. As to those the undisputed facts were: First, that defendant sold to plaintiff a one-eighth interest in certain oil lands, but before any deed was made sold his whole interest in the land to another party at an advanced price. On plaintiff's making complaint, defendant promised to pay her one-eighth of the advance he had realized, and this, liquidated by the parties at \$1,250, was part of the debt represented by the bond. The second item was somewhat similar in legal aspect. Defendant, not having money enough to carry out a purchase he had made of certain oil lands, agreed with plaintiff that, if she would buy in his place, he would take the property off her hands, and treat the money advanced as a loan to him. The plaintiff did so buy, and subsequently hav-

ing demanded a fulfillment of the promise, a computation was made of what plaintiff had paid for the land, and what she had received as royalty from it, the difference was liquidated by the parties, and the sum so agreed upon made the second item in the amount of the bond.

On these facts it is perfectly clear that defendant has no defense, either in law or equity. In the first place, it was not noticed by the court below, nor by counsel here, that the bond was an account stated. Plaintiff's attorney, Schofield, as quoted by the learned judge below, testified that, after considerable talk on the subject, defendant said, "I will give you a mortgage to secure your aunt for everything I may in any way owe her. Take down the figures, and we will see how much it can possibly be." There had been several business transactions between the parties, and they were gone over. "As he called these amounts off, I put them down, figured them up, and told him the amount was \$21,000. He says, 'Very well; make out your bond and mortgage.'" This was done, and the result was an account stated, which could not be opened except for fraud or plain mistake, neither of which is shown in this case. This view was not brought to the attention of the learned judge below, and he was of opinion that there was no consideration for the bond, because the items of the original debt were within the statute of frauds. As already said, want of consideration is no defense to a bond. But there was consideration. Defendant has made a profit by breaking a contract of sale to plaintiff, and promised to pay her a due share of such profit; and, as to the second item, he had secured the continued control of oil territory by his promise to take it off plaintiff's hands and account to her for the purchase money as for a loan. Both these promises were such as honesty required him to keep, and would have supported an action of assumpsit, except for the technical objection that they were not in writing. But it is definitively settled in this state that a moral obligation is a sufficient consideration to support an express promise. *Bailey v. City of Philadelphia*, 167 Pa. St. 569, 31 Atl. 925. The distinction sought to be made between considerations formerly good but now barred by statute, and those barred by statute in the first instance, is not substantial, and is not sustained by the cases.

The statute of frauds has no application to the case. As already said the promises of defendant to plaintiff would have been enforceable at law, except for the statute. But the statute does not declare the contracts upon which those promises were made either illegal or void. It simply refuses to enforce them unless proved by a writing. When the defendant put his promise to pay in writing, he obviated all difficulty from the statute. The original promises could not

have been recovered upon, but this judgment is not on the original promises, but on the written undertaking to pay.

The bond authorizes a 5 per cent. collection fee. The plaintiff is entitled to add this to his judgment, but it must be computed upon the amount of the debt actually due. Judgment reversed, entry of satisfaction to be stricken off, and rule to open judgment discharged, with costs.

(176 Pa. St. 588)

COMMONWEALTH ex rel. CENTURY CO. v.
CITY OF PHILADELPHIA et al.

(Supreme Court of Pennsylvania. July 15,
1896.)

CITY CONTROLLER — BOARD OF EDUCATION — CONTRACT — WARRANT — AUDITING — MANDAMUS
— INSUFFICIENT ANSWER TO WRIT.

1. The duties of the city controller of Philadelphia are partly ministerial and partly discretionary, and, while the courts will not review his discretion, exercised in a proper case, yet, when he is called on by the courts to show cause why he should not be required to do a certain act, the facts must be made to appear sufficiently to show that they bring the case within his discretion, and that it was exercised in obedience to law.

2. Where a contract has been made by the board of education of a city for a matter within their department, and they have issued a warrant for payment of the claim thereunder, and an alternative writ of mandamus has issued to compel the city controller to sign the warrant, an answer by him that it does not appear that the contract was made in accordance with an act governing such contracts, without stating specifically the defects relied on; that the binding of the books which were the subject of the contract was so unsuitable as to render them unserviceable for public school use; and that the relator was allowing a very large commission to the agent who secured the contract,—is not ground of objection founded on matters within his discretion, and is not a defense to the writ.

Appeal from court of common pleas, Philadelphia county.

Proceedings in mandamus, on the relation of the Century Company, against the city of Philadelphia, the members of the board of public education, and John M. Walton, city controller. From a judgment in favor of defendants, petitioner appeals. Reversed.

Arthur M. Burton and Cephas Brainerd, for appellant. James Alcorn and John L. Kinsey, for appellees.

MITCHELL, J. Although the city of Philadelphia and the board of education are parties defendant, the only real contest is raised by the demurrer to the answer of the city controller. The answer appears to be based on a very exaggerated and erroneous idea of the controller's powers and authority, and the claim that he is "not subject to the order or direction of the court" is not to be tolerated. The duties of the controller, as was held in *Com. v. George*, 148 Pa. St. 463, 24 Atl. 59, 61, are partly ministerial and partly discretionary; and, while the courts will not re-

view his discretion, exercised in a proper case, yet he is not above the law, and his discretion is not arbitrary, but legal. When, therefore, he is called upon by the courts, the facts must be made to appear sufficiently to show that they bring the case within his discretion, and that it was exercised in obedience to law. On this subject the courts are the final authority, and their jurisdiction cannot be ousted by simply putting forth the assertion of discretionary power, without showing that the matter was properly within such discretion.

The answer in the present case, after denying the authority of the court, does proceed to set out three reasons why the controller refuses to countersign the relator's warrant: First, that it did not appear that any contract had been entered into between the city and the relator, as required by article 14 of the act of June 1, 1885. It is not clear to what extent this averment is intended to go. If it means that no contract at all was made, it is plainly contradicted by the answer of the board of education, and in effect, also, by the third reason in the controller's own answer, which avers commissions to the agent "who secured the contract." If, however, it means that the contract, though entered into, was not in accordance with the requirements of article 14, it should have gone a step further, and stated specifically the defects relied on. This reason was demurrable for want of precision. Secondly, that the controller found, after investigation, that the binding of the dictionaries was so unsuitable for a book of their size as to render them unserviceable for public school use. This reason is entirely outside of the province of the controller. What books, including what bindings, are suitable for the public school service, is not to be determined by him, but by the board of education. He is not intrusted with the duty of making, or even of supervising, the contracts of other departments. He is the city's head bookkeeper, and his office is to see that the various departments do not exceed their appropriations, nor apply them to purposes not within their proper scope. To this end he is clothed with very large powers of examination and investigation, and a large measure of discretion, but they do not extend to the revision of lawful contracts made by other departments within their proper sphere. This reason presents no excuse whatever for refusal to countersign the warrant. Thirdly, that it had been learned that the relator was allowing a very large commission to the agent who secured the contract, and the controller was informed by some of the members of the board of education that if they had known that fact they would not have agreed to purchase the books. This excuse is even more frivolous than the last. It is hardly necessary to say that what commissions the relator chooses to pay does not concern any one but the parties themselves, and the change of mind of some or all the members of the board

of education cannot alter the legal liability after a contract has been made.

The answer of the board of education sets out a by-law that no contract shall be awarded to publishers, etc., unless the bidder shall file an affidavit that the price is not greater than that charged buyers of like quantities, etc., and that reputable and responsible book dealers have alleged that the relator was then disposing of said dictionary to other parties at a lower price than that at which it was offered to the board. Had the controller's answer averred an investigation of this fact, and a refusal based thereon, it would not only have presented a good reason for refusing to countersign the warrant, but a substantial defense to the relator's claim. The board of education do not, however, aver belief in the allegation, and the controller makes no reference to it. So far as appears, therefore, the relator has a contract on which the city is legally liable, and, of course, no opinion or so-called discretion of the controller can defeat the claim. It follows that the mandamus should have been issued. In so deciding, however, it is not intended to enlarge the operation of that writ as a remedy, either at common law or under the act of June 8, 1893 (P. L. p. 345). This act was not meant, nor is it to be construed, to substitute mandamus for the writ of summons, and the ordinary proceedings and trial. Our judgment does not countenance any such view, but is only in the usual and regular course of the law, where all the facts are admitted upon the record, and only the result is to be pronounced. The contract, it is to be noted, was made by the board of education for a matter clearly within their department. They issued a warrant for payment, which was returned to them unsigned by the controller, and thereupon destroyed, supposing it to be *functus officio*. On the reopening of the subject by this litigation, the board promptly issued a new warrant, made return of the facts, and submitted the case without objection to the claim. Had the board of education at any time indicated that there was any defense to this claim, it is clear that there could be no remedy by mandamus, but only by suit prosecuted to judgment in the ordinary course of law. But they have not done so. The only contest comes from the controller, and his grounds of objection, set out at length in his answer, show that none of them were founded on matters within his discretion. Had any of them been valid, the court would not review his decision in regard to the facts; but when, admitting all the facts, none of the reasons are sufficient, the courts and not the official must determine the rights of the parties. This is the rule, even in cases of discretion vested in strictly judicial tribunals (In re Johnson's License, 156 Pa. St. 322, 26 Atl. 1066; Gross' License, 161 Pa. St. 344, 29 Atl. 25; Gemas' License, 169 Pa. St. 43, 32 Atl. 88); and a fortiori must it be the rule where the discretion, though ample and exclusive, is reposed

in a tribunal or an official who is only quasi judicial within prescribed limits.

Judgment reversed, and mandamus directed to be issued, unless other and legal grounds be shown why it should not.

(176 Pa. St. 280)

MENGEL v. NORTHWESTERN MUT. LIFE INS. CO.

(Supreme Court of Pennsylvania. July 15, 1896.)

LIFE INSURANCE—BREACH OF WARRANTY.

The insured, who died of delirium tremens within four months after taking out his policy, stated in the application that he had always been temperate, and that he had last consulted a physician about one year previously, for light influenza; but the uncontradicted evidence of the physician showed that he had attended the insured for five years preceding the latter's death (the last time about four months before the application), for "vomiting and nausea, the effects of overdrinking, the duration being from 12 to 36 hours." *Held* such a breach of a material warranty as to require a judgment for the company, as a matter of law.

Appeal from court of common pleas, Berks county.

Action by Levi W. Mengel, administrator of Jonathan S. Kelser, deceased, against the Northwestern Mutual Life Insurance Company, on a policy of insurance. From a judgment for plaintiff, defendant appeals. Reversed.

W. B. Bechtel, Philip S. Zieber, and Baer & Snyder, for appellant. Cyrus G. Derr, for appellee.

MITCHELL, J. The verdict in this case was in such flagrant disregard, not only of the evidence, but of the law, even as laid down by the trial judge, that it is difficult to see how the court below allowed it to stand. In his application for insurance, the deceased, to the question, "Have you always been temperate?" answered, "Yes." The incontrovertible proof was that he had been very frequently drunk, and, at least six times in the preceding five years, had required the services of a physician from that cause. He died in four months after the policy was taken out, and, by plaintiff's own showing in the proofs of death, the remote cause of death was intemperance, and the immediate cause delirium tremens. The defendant's second point was: "The insured having in his application, in answer to question 23 [How long since you have consulted any physician? For what disease? Give name and residence?] answered, 'About one year, for light influenza,' Dr. Jas. W. Kelser, Reading, Pa.," and the plaintiff having, in the proof of death, by the affidavit of Dr. James W. Kelser, shown that, during the five years preceding applicant's death, he attended said applicant for "vomiting and nausea, the effects of overdrinking, the duration being from 12 to 36 hours"; and it

being the uncontradicted evidence of said James W. Kelser that he had attended the said applicant within four months prior to the application, and prescribed for vomiting and nausea, induced by drunkenness,—there can be no recovery in this case, and the verdict must be for the defendant." And, the facts being substantially undisputed, the learned judge reserved the point, but subsequently entered judgment on the verdict. Without going into the other matters assigned for error, the facts admitted in this point show such a breach of a material warranty as to require the court to pronounce upon it as matter of law. Judgment reversed, and judgment directed to be entered for the defendant on the points reserved.

(176 Pa. St. 402)

ANTHRACITE SAV. BANK et al. v. LEES et al.

(Supreme Court of Pennsylvania. July 15, 1896.)

DEVISE—REMAINDERS—SALE BY ORPHANS' COURT—JURISDICTION.

Where testator devises land to two sons, with remainder to the children of each for the share of the parent, the remainder, contingent because at testator's death the sons have no children, becomes vested on their having children, and in no wise remains contingent because of the possibility of the birth of other children; so that the orphans' court has no jurisdiction, under the Price act (Act April 18, 1853; P. L. 503), to sell the property, its authority thereunder not extending to vested remainders.

Appeal from court of common pleas, Luzerne county.

Action by the Anthracite Savings Bank, trustee, and others, against Henry Lees and others, for installment of purchase money of land sold by the orphans' court, on a petition under the Price act of April 18, 1853 (P. L. 503). Judgment for plaintiffs for want of a sufficient affidavit of defense, and defendants appeal. Reversed.

D. L. Creveling and J. Q. Creveling, for appellants. D. L. Rhone, for appellees.

GREEN, J. It is very clear that, under the devise contained in the will of Philip Keller, his two sons took a life estate in the land in question, as tenants in common, each for the one undivided half of the land, with remainder in fee to the children of each for the share of the parent. It is equally clear that the interest of the children was a vested estate in remainder from the time that children were born. At the time of the death of the testator, neither of his sons had any children, and at that time the remainder was certainly a contingent remainder, depending on the subsequent birth of children. After the death of the testator, both of his sons married, and had three children each, all of whom are minors and now living. There is also the possibility of the birth of other children. The case, then, is the very ordinary

one of a devise to one for life, with remainder in fee to his children. The circumstance that there may be more children born, who may be entitled to come in and share the estate, in no manner affects the character of the estate in remainder. Its character as a vested estate was established at the birth of the first child, for then that which was uncertain, and therefore contingent, became certain and fixed, and the estate in remainder under the will became at once a vested remainder, and was no longer contingent. This conclusion is not at all disputed by the appellee, but it is claimed that, because of the possibility of the birth of future children, the remainder becomes contingent as to them, and hence the orphans' court had jurisdiction to grant the order of sale. The fault of this contention is very apparent. While there were no children, and it could not be known that there would ever be any, the existing condition was contingent, and it would require the positive fact of children born to remove the contingency; but, the moment that children are born, there is no longer any contingency, the condition of the devise is met, and the estate in remainder becomes necessarily vested. It certainly cannot become again contingent while there are children living, simply because there is a possibility that more children may be born in the future. Even as to such children, if any shall come into being, the law is perfectly well settled that the remainder will open and let in others who come within the class before the determination of the particular estate. This rule is thus expressed: "A remainder, where it has vested only in interest, and not in possession, will open so as to let in others who become capable of taking before the remainder is actually vested in possession; that is, before the determination of the particular estate. In other words, where real property is limited, by way of a remainder, to a class of persons, some or all of whom are unborn, if any of them come in esse before the determination of the particular estate, the property will vest in such person or persons, subject to open and let in the other members of the class who happen to come in esse before the determination of the particular estate." *Smith, Ex. Int. 704; Fearn, Rem. 314. In Fetrow's Estate, 58 Pa. St. 424, a devise was to Matilda, "during her natural life, and after her death I give, etc., the same unto her children, their heirs and assigns, forever. * * * Should the said Matilda die without issue as aforesaid, then and in that event I direct that the real estate bequeathed to her as aforesaid shall be sold, and the proceeds thereof I direct shall be equally divided amongst the other devisees named in this, my last will, or their legal representatives."* Matilda died after

the testator, without children. It was held that she took an estate for life, with contingent remainder to her children then unborn, which would have vested in them in the first child alone, and opening from time to time to let in others as they were born. This case is important, not only in affirming the general principle of letting in subsequently born children from time to time, but as also deciding that a devise to children then unborn would be changed from a contingent to a vested remainder upon the birth of the first child.

It is not disputed that the authority of the orphans' court under the Price act does not extend to vested remainders. The author of that act himself says (*Price, Real Est. p. 107*): "A limitation in a deed or will may be to one for life, remainder to his children; he having none at the time, which makes the remainder to the children contingent, because none might be born. Then one or more are born, and the law favors the vesting of contingent remainders at the earliest practical moment. Therefore, when the first child is born, the whole estate becomes instantly a vested remainder in him, but with a liability to be reduced to one-half or less as each other child shall be born. Now, the vested remainder will not be within our act, unless for minority or other cause than a contingency mentioned in the act, and the question will be whether the shares that might accrue to those who may yet be born can be barred. When none was born, there was a contingency that gave the court jurisdiction. Can it have jurisdiction as to the shares of those who may yet be born? As to them, the contingency is in fact as great as it was when none was born. The courts must determine the question whether it is within the spirit and policy of the law." Notwithstanding the doubt expressed by the learned writer, we are unable to see the difference between this and the ordinary case of a life estate, with a remainder in fee to children then unborn, but where children are born during the continuance of the life tenancy. In such case it is beyond all question that the contingent character of the remainder is lost the moment the first child is born, and thereafter the whole estate is vested, and simply opens to let in children afterwards born. As it is clear that the Price act does not embrace the cases of vested remainders, we see no other conclusion to be reached than that the order of sale made in the present case was void for want of jurisdiction. That being so, the purchaser was not bound to take the title, and the judgment must therefore be reversed. Judgment reversed, and the rule for judgment for want of a sufficient affidavit of defense is discharged, at the cost of the plaintiff.

(176 Pa. St. 382)

Appeal of TUSTIN.

(Supreme Court of Pennsylvania. July 15, 1896.)

ASSIGNEE—COMPENSATION—EXPENSES.

1. To entitle an assignee to more than 5 per cent. commissions, his labors must be extraordinary in their proportion to the fund raised and distributed.

2. An assignee may be allowed the expense of procuring his official bond, the deed of assignment having been made with an understanding of the parties to that effect.

Appeal from court of common pleas, Columbia county.

Accounting by G. M. Tustin, assignee of the Catawissa Deposit Bank. From a decree surcharging the assignee, dismissing exceptions to the auditor's report confirming the same, the assignee appeals. Modified.

James Scarlet and Robt. R. Little, for appellant. Grant Herring, W. H. Rhawn, and O. A. Small, for appellees.

WILLIAMS, J. The general rule regulating the allowance of commissions to an accountant was correctly stated by the learned judge of the court below. The circumstances that will justify an allowance in excess of 5 per cent. must be such as show an unusual amount of labor. The evidence in this case made it very clear that the accountant exercised intelligent attention and the utmost good faith in the discharge of the duties he assumed by accepting the position of assignee, but his principals were entitled to this. The faithful discharge of a duty affords no claim for an extra allowance. Extraordinary labor is the basis on which a claim for extraordinary compensation must rest, and we agree with the learned judge in the opinion that the labors of the accountant, while they were efficient, faithful, and successful, were not extraordinary in their proportion to the fund raised and distributed. The rate of commission allowed was, we think, a fair one, under all the circumstances, and we are not disposed to disturb it. The only point about which we are inclined to differ from the learned judge is in regard to the expense incurred in procuring the Guarantee Trust & Safe-Deposit Company of the City of Philadelphia to become surety for the accountant upon his official bond. The auditor found, in his ninth finding of fact, that "this item of expense and charge was agreed to be deducted, as such, by virtue of the deed of assignment and the understanding of the parties"; and, in his nineteenth finding, that so much of the testimony of S. D. Rindard and J. H. Vastine as was against this view of the arrangement between the parties was the result of a mistake on their part. The learned judge, in reviewing the auditor's report, held distinctly that "it is further found that the preponderance of evidence justified the auditor in finding the fact that it was consented to and agreed that the expenses of such suretyship should be de-

ducted from the general fund"; but he sets against this his own finding that there was a contract between the parties that, including this item, "the whole expense attending the settlement of the estate by the assignee should not exceed 5 per cent." We agree with the auditor that the evidence, taking it most strongly against the assignee, does not show a contract such as the learned judge held to exist. It shows, at most, only the expression of an opinion or belief that the expenses of closing up the affairs of the Deposit Bank would not exceed 5 per cent. All that was insisted on was an expression of opinion by him as to the probable expense. He expressed the opinion that it would exceed 3 per cent., but would not exceed 5. We do not see that he was asked to guaranty the correctness of his estimate, or that his selection was conditioned upon his payment out of his own pocket all expenses in excess of it. He should be allowed, under the findings we have referred to, the amount actually paid to secure the execution of his bond by the Philadelphia company, and, with this modification, the decree appealed from is affirmed. No order is made in regard to the costs of this appeal.

(176 Pa. St. 213)

LLOYD, Controller, v. SMITH et al., County Com'rs.

(Supreme Court of Pennsylvania. July 15, 1896.)

CONSTITUTIONAL LAW — COUNTY AUDITORS AND CONTROLLERS—CLASSIFICATION OF COUNTIES—CONSTITUTIONAL OFFICERS—SUBSTITUTION.

1. Act June 27, 1895 (P. L. 403), which provides for the substitution in certain counties of the office of county controller for that of county auditor, has but one subject; for while the substitution involves the abolition of one office, and the creation of another in its place, both are parts germane to the one purpose.

2. Act June 27, 1895 (P. L. 403), relating to county auditors, is not local and special legislation, though at its passage it applied to a limited number of counties only; since it applies to all the members of that class equally, and there is nothing in its provisions to prevent it from applying to other counties which may come into that class by increase in population.

3. The legislature may classify counties on the basis of situation, circumstances, and needs, subject to the supervision of the courts to see that it is actually classification, and not special legislation under that guise.

4. Act June 27, 1895, § 15, merely changes the name of "county auditor" to "county controller," without any change in the duties, powers, or law governing the office, as prescribed by Act 1834, by which the office was created, and is not within the meaning of Const. art. 3, § 6, which provides that no law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only.

5. Const. art. 14, § 1, which enumerates, among county officers, "auditors or controllers," makes the county auditor a constitutional officer only in the alternative; and the office may be abolished at any time by the legislature, provided that the constitutional alternate, a county controller, is put in the place.

6. Act June 27, 1895, § 15, which transfers the duties of the county auditors to the county controllers, is prospective, and to take effect on the expiration of the terms of the present coun-

ty auditors; but the controllers are now entitled to their offices, and to perform all the duties thereof which do not for the time being belong to the county auditors.

Appeal from court of common pleas, Luzerne county.

Bill by Joseph D. Lloyd, controller of Luzerne county, against Thomas Smith and others, county commissioners, to restrain defendants from drawing warrants on the county treasury for debts, etc., not audited and approved by complainant, and for other relief. From a decree in favor of defendants, complainant appeals. Reversed.

Henry A. Fuller, for appellant. Joseph Moore and Alexander Farnham, for appellees.

MITCHELL, J. It was agreed by counsel that no technical objection as to the form of remedy or the right of the respondents, as county commissioners, to dispute the plaintiff's title to the office of controller, should be raised; and we therefore proceed to the substantial question at issue.

The constitutionality of the act of June 27, 1895 (P. L. 403), is attacked upon four grounds: (1) That it contains two subjects; (2) that it is special and local legislation; (3) that it is a change of law, by the transfer of the duties of the auditors to the controller by mere reference, and without enumerating them or re-enacting them at length; and (4) that it abolishes the constitutional office of county auditor during the term of present incumbents. The first ground was abandoned at the argument, and the court below held the act unconstitutional on the last ground alone, without passing upon the others. But it is proper that we should notice them all, to make an end of the question.

1. The act has but one subject,—the substitution in certain counties of the office of county controller for that of county auditor. This, of course, involves the abolition of one office, and the creation of another in its place; but both are parts germane to the one purpose, which is the subject of the act.

2. Local and special legislation is not necessarily unconstitutional, though the list of prohibited subjects is long and comprehensive. But even in regard to some of the prohibited subjects, such as the affairs of counties, cities, etc., it was very early found that there were such differences in situation, circumstances, and requirements of the cities of the commonwealth, that classification with reference to their governmental machinery was of imperative necessity; and it was accordingly sustained, and the principle established that a law which does not exclude any one from a class, and applies to all the members of the class equally, is general. The same principle must make classification constitutional as to the other political and municipal divisions of the state, when considered in their governmental capacity. Classification of counties is therefore as per-

missible as classification of cities, and the legislature may determine what differences in situation, circumstances, and needs call for a difference of class, subject to the supervision of the courts as the final interpreters of the constitution, to see that it is actually classification, and not special legislation under that guise. The presumption is always in favor of the legislative command, and it must prevail, unless clearly transgressing the constitutional prohibition. Classification of counties with reference to population has already been recognized by this court (*Davis v. Clark*, 106 Pa. St. 377, 385; *McCarthy v. Com.*, 110 Pa. St. 243, 2 Atl. 423; *Reid v. Smoulter*, 128 Pa. St. 324, 18 Atl. 445, and perhaps other cases); and the line of division adopted by the act of 1895 is the same as that established by the constitution itself with reference to the judicial need of a separate orphans' court, and the mode of compensation of county officers. The act of 1895 is not unconstitutional as local or special.

3. The fifteenth section of the act of 1895 is not a revival, amendment, extension, or conferring of the provisions of the act of April 15, 1834, so as to bring it within the prohibition of section 6 of article 3 of the constitution. It makes no change in the duties of the office, but merely in the name of the officer by whom they are to be performed. If the act had provided that "the officer now known as the 'county auditor' shall hereafter in all counties having one hundred and fifty thousand inhabitants, and over, be called the 'county controller,' and shall, in addition to the duties and powers of said officer, have the following," then enumerating the new duties and powers covered by the act, its effect would have been precisely the same, and yet it could hardly have been contended that it was unconstitutional for not re-enacting at length all the provisions of the act of 1834. In substance, this section of the act of 1895 is nothing but a change of the name of the officer, and that is not within the purpose of the constitutional prohibition. The evil at which that was aimed was ignorant or uninformed legislation. There is no provision that legislators shall be learned in the law; and, although many of them are so, yet it is not always possible even for these to utilize and apply their knowledge immediately in the daily work of legislation. Hence changes in the law are not unfrequently made or attempted by legislators who determine what the law shall hereafter be without knowing what it now is. This fact in juridical history is as old as the record of judicial interpretation of statutes, and numerous examples could readily be given from the legislation of this state in the last 25 years to show that the mischief has not been cured by the constitutional provisions. It is not entirely curable, but section 6 of article 3 was intended as a preventive in part at least. Its object was the same as that of the concluding clause in section 3 of

the same article, requiring the subject of an act to be clearly expressed in its title, of which it was said in *Com. v. Samuels*, 163 Pa. St. 283, 29 Atl. 909: "The object of that requirement is that legislators and others interested shall receive direct notice in immediate connection with the act itself, of its subject, so that they may know or be put upon inquiry as to its provisions and their effect. Suggestions or inferences which may be drawn from knowledge deforms the language used are not enough. The constitution requires that the notice shall be contained in the title itself." It is in furtherance of the same desirable object that section 6 requires the legislature to know and set forth in immediate connection the existing statute, and the revival, amendment, extension, or conferring of its provisions which they intend to make. A mere change in the name of an officer, without any change in the duties, powers, or law governing the office itself, is not within the mischief or its prohibition.

4. The learned court below held the act invalid because it abolishes a constitutional office during the term of regularly elected incumbents. County auditors are not constitutional officers in the sense that the continuance of their office is mandatory. Their claim rests on their enumeration in section 1 of article 14, among county officers. But the enumeration is in the alternative, "auditors or controllers." It is argued that, as auditors had been superseded by controllers in two of the counties of the state at the time of the adoption of the constitution, the mention of controllers in article 14 was merely by way of recognition of the office where it then existed, and did not give the legislature the power to substitute it for the office of auditor in other counties. But there is nothing to justify so narrow a construction. The language used is general, applicable to all counties alike, and to future as well as then present time. The two counties in which controllers then existed were the largest in the state, but it was a matter of public history that others were growing in population, in wealth, business, and amount and complication of public affairs, that must sooner or later bring some of them, at least, to the same municipal requirements that Philadelphia and Allegheny had already reached. The aim of the constitution was to put its commands into the clearest and most direct form. If the office of controller was meant to be limited to the counties of Philadelphia and Allegheny, it would have been easier, plainer, and more in accordance with its general use of language to have said so explicitly, not only in the section quoted, but also in section 7 of the same article, where, instead of the words, "County auditors shall be elected in each county where such officers are chosen," etc., it would have been shorter, more direct, and more explicit to have said "shall be elected except in Philadelphia and Allegheny," etc.

No inference can be drawn against this construction from the fact that it impairs to some extent the uniformity of county governments, by leaving the alternative of auditors or controllers to the discretion of the legislature. A confirmatory parallel is to be found in the judiciary article. Nothing is plainer in the whole instrument than the intent to make a uniform judicial system throughout all the counties of the state. On this Procrustean bed, the most efficient and satisfactory judicial organization that Philadelphia ever had was sacrificed, against the wishes of the judges, the bar, and the people. Yet even in the judiciary article there is left the alternative of "justices of the peace or aldermen" (article 5, § 11), and where it was meant that the alternative should not exist, as in Philadelphia, all doubts were removed by the explicit declaration that "the office of alderman is abolished." The only tenable construction of section 1 of article 14 is that the county auditor is a constitutional officer only in the alternative, and that, so far as the office is concerned, it may be abolished at any time by the legislature, provided that the constitutional alternate, a county controller, is put in the place. The rights of the officers, incumbents at the time of the legislative change, depend on other considerations.

The right to an office is not the right of the incumbent to the place, but of the people to the officer. An office, therefore, not constitutional, exists by the will of the legislature only, and may be abolished at any time, and the incumbent has no standing to complain. *Com. v. Weir*, 165 Pa. St. 284, 30 Atl. 835. Whether an office which is only constitutional as an alternative with some other comes within this rule or not may be open to question, but we do not feel called upon to decide it now, as there is a fair construction of the act of 1895 which makes it unnecessary. The duties of auditor and controller are not identical, although the latter usually include the former. There is no incompatibility in the existence of the two offices together. The constitution directs that one of them must exist in each county, but it does not say that both may not. The act of 1895 provides for the election of a controller, and also that he shall perform the duties now performed by the auditors. The duties of the two, though naturally and preferably belonging together, are severable; and if the act had said expressly that the present auditors should continue to perform the duties of their office until the expiration of their terms, and thereupon the office should be abolished, and the duties transferred to the controller, the objection now under consideration would have no basis to stand on. If other rights, under the law, lead to the same result without such express words in the act, there is nothing in its general intent to prevent such a construction. In an exchange of offices there may naturally be some overlapping of terms and duties, and if, in the legislative view, the need for a con-

troller was immediate, but the existing terms of the auditors prevented his present assumption of all the duties that would finally pertain to his office, it would have been not unwise, certainly not unconstitutional, to meet the case by a temporary expedient. The legislature has not done so expressly, but it has passed an act which can best be carried out by such a construction. In adopting it, we are preserving the substance and plain intent of the act, without doing violence to any of its terms.

We are of opinion, therefore, that section 15 should be construed as prospective, and to take effect on the expiration of the terms of the present county auditors, but that the appellant is now rightfully entitled to the office of controller, and to perform all the duties thereof which do not for the time being belong to the county auditors. Decree reversed, with costs, and injunction directed to be awarded as prayed.

(176 Pa. St. 331)

BARBER v. LEFAVOUR et al.

(Supreme Court of Pennsylvania. July 15, 1896.)

DEED AS MORTGAGE—EVIDENCE—GROUND RENT—EXTINGUISHMENT—DEMAND.

1. Testimony of a grantor, uncorroborated by any witness, fact, or circumstance, that his deed was intended as collateral security, is insufficient to convert a deed absolute on its face into a mere security.

2. Under Act April 27, 1855 (P. L. 369), providing that where no payment, claim or demand is made for ground rent for 21 years, or no declaration of or acknowledgment of the existence thereof is made within that period by the owner of the premises subject thereto, a release or extinguishment thereof shall be presumed, and it shall thereafter be irrecoverable, a claim for arrears of ground rent, by a former owner thereof, on a former owner of the premises, does not interrupt the running of the statute.

Appeal from court of common pleas, Philadelphia county.

Suit by Benjamin B. Barber against Daniel Lefavour and Patrick Mullen, terre-tenant. Judgment for defendants. Plaintiff appeals. Affirmed.

W. Horace Hepburn, for appellant. Henry T. Dechert and W. Henry Sutton, for appellees.

McCOLLUM, J. The ground rent in question was reserved by the deed of March 1, 1855, from George C. Barber to Daniel Lefavour. It was conveyed by Barber to Joseph H. Duckett by deed dated November 23, 1857, and by Duckett to Richard V. Boswell by deed dated May 4, 1861. Boswell conveyed it to Benjamin B. Barber by deed dated October 27, 1882. The consideration named in each conveyance of the ground rent was \$3,750. There has been no payment of this ground rent, or on account of it, since its reservation in 1855. On the 2d of April, 1866, the lot in which the ground rent was reserved was sold by the sheriff

upon a judgment obtained in a suit upon a municipal claim, and Abram D. Wood became the purchaser of it. Wood conveyed the lot to George W. Relay by deed dated November 4, 1874, and Relay conveyed it to Patrick Mullen by deed dated April 14, 1890. After 1868, and before the commencement of this suit, no claim or demand was made upon Wood, Relay, or Mullen for or on account of the ground rent, nor any declaration or acknowledgment made by either of them of the existence of it. It will be seen from the above reference to the proceedings which resulted in the sale of the lot to Wood, and to the deeds by which the title he acquired was passed from him to Relay, and from the latter to Mullen, that Lefavour had no title to the lot after April 2, 1866. It will also be seen, from the reference to the deeds by which the title to the ground rent passed from George C. Barber to Benjamin B. Barber, that the former had no interest in the ground rent after the 23d of November, 1857. These conclusions respecting the ownership of the lot and the ownership of the ground rent are authorized and fully sustained by the documentary evidence, and there is nothing in the oral testimony which furnishes adequate ground for antagonizing them. It is true that George C. Barber testified that the conveyance of the ground rent to Duckett and to Boswell was intended as collateral security for his debt, but in this he was not corroborated by a single witness of fact or circumstance in the case. His testimony on this point was clearly insufficient to convert a deed absolute on its face into a mere security for a debt or loan. George C. Barber, according to his own testimony, recognized Wood, in the summer of 1868, as the owner of the lot, by demanding of him the arrears of ground rent. Lefavour never questioned the validity of the sheriff's sale, or claimed to any holder of the title which passed by it that he was the owner of the lot, or of any portion of it. In view of these facts, we cannot regard the slight discrepancy between the description of the lot in the sheriff's deed to Wood, and the description of it in Barber's deed to Lefavour, as available in this proceeding to preserve the judgment against the terre-tenant. It follows that after 1866 a declaration or acknowledgment by Lefavour of the existence of the ground rent could not prevent or delay an extinguishment of it under the act of April 27, 1855,¹ because the provision in

¹ Act April 27, 1855 (P. L. p. 369, § 7; *Purd. Dig.* 971; *Pepper & Lewis' Dig.* 2227), provides "that in all cases where no payment, claim, or demand shall have been made on account of or for any ground rent, annuity, or other charge upon real estate for twenty-one years, or no declaration or acknowledgment of the existence thereof shall have been made within that period by the owner of the premises subject to such ground rent, annuity, or charge, a release or extinguishment thereof shall be presumed, and such ground rent, annuity, or charge shall thereafter be irrecoverable."

the act in relation to such declaration or acknowledgment requires that it shall be made by the owner of the premises out of which the ground rent was reserved. If, therefore, the claim for arrears of ground rent which Barber testified he made upon Lefavour in 1873 was not sufficient to prevent the running of the statute from a prior period, the judgment entered by the learned court below must be affirmed. Did the claim so made have the effect which the plaintiff attributes to it? We think it did not. It was, at most, a claim by a former owner of the ground rent upon a former owner of the lot,—a claim made in a conversation between parties having no title to either. Judgment affirmed.

(176 Pa. St. 337)

HEISS v. BANISTER.

Appeal of PETERS.

(Supreme Court of Pennsylvania. July 15, 1896.)

GROUND RENT—OPENING JUDGMENT FOR ARREARS.

A judgment for plaintiff in a suit by A. against B. for arrears of ground rent should be opened on the petition of P., alleging that petitioner was the owner of the premises out of which the ground rent issued; that the first notice she had of the suit was an advertisement announcing that the premises would be sold on the judgment; that plaintiff had but a half interest in the ground rent, which was reserved by a deed executed in 1835, though she had recovered judgment for all of it; that for 25 years no payment, claim, or demand had been made for any ground rent under the deed, and no declaration or acknowledgment of the existence thereof had been made during that time by any owner of the premises, which by Act April 27, 1855 (P. L. p. 369), would extinguish the ground rent,—such allegations being supported by evidence, and no answer being filed or evidence offered to controvert them.

Appeal from court of common pleas, Philadelphia county.

In a suit by Amanda Heiss against Joseph Banister for arrears of ground rent, plaintiff had judgment. Petition of Rebecca E. Peters, terre-tenant, to open judgment, was denied, and she appeals. Reversed.

A. Atwood Grace and E. O. Michener, for appellant. Alexander & Magill, for appellee.

McCOLLUM, J. This is an appeal from the refusal of the learned court below to open a judgment entered in a suit for arrears of ground rent. The appellant, at the time of the institution of the suit, was a resident of Philadelphia, and the owner of the premises out of which the ground rent issued. The first notice she had of the suit was derived from the sheriff's advertisement announcing that her property would be sold on the judgment obtained in it. There was nothing upon the record, except the pencil indorsement on the writ issued for the purpose of making the sale, which indicated that she was recognized by the plaintiff as a terre-tenant. Immediately upon her discovery

of the judgment she commenced a proceeding to open it for the purpose of enabling her to interpose her defense to it. In her petition, which was the foundation of the proceeding, the defense was fully and clearly disclosed. The principal facts on which the proposed defense was based may be stated thus: (1) The plaintiff had but a one-half interest in the ground rent that was reserved by the deed of April 1, 1853; and (2) that, for 25 years preceding the filing of the petition, no payment, claim, or demand had been made for any ground rent under the said deed, nor any declaration or acknowledgment of the existence thereof had been made during that period by any of the owners of the premises. The petition was sworn to and subscribed by the appellant, and it contained an assertion of her ability to prove its averments. No answer was filed to it, nor evidence offered to controvert any of its allegations. In addition to the unanswered averments of the petition, testimony corroborative of them was submitted. Independent of this testimony, the court would have been justified in opening the judgment on the ground that there was no denial by the plaintiff of the facts alleged in the petition. *Hunter v. Mahoney*, 148 Pa. St., 232, 23 Atl. 1004. As the testimony was clearly corroborative of the uncontradicted averments of the petition, it was the duty of the court to allow the terre-tenant to present her defense against the judgment to a jury.

The plaintiff's claim was founded upon the deed of April 1, 1853, and the will of William Heiss, her husband, who died in 1883. William Heiss and Emanuel Peters were the grantors in the deed, and Joseph Banister was the grantee. In 1858 the property described in the deed was sold on judgment against Joseph Banister for arrears of ground rent, and bought by John F. Lamb for Emanuel Peters, who furnished the purchase money, and whose son Jacob M. Peters testified that the property had been continuously in the possession of his father, and those who represented him, since that time. Prior to the sale on the Banister judgment, Emanuel Peters conveyed his undivided one-half interest in the ground rent to the Exchange Mutual Insurance Company, a corporation that collapsed in 1862. There is no suggestion in or dehors the record that the company, or any one representing or claiming under it, received or demanded any payment for or on account of the ground rent after its failure. It is not claimed that William Heiss or the plaintiff ever acquired the interest in the ground rent which Emanuel Peters conveyed to the Exchange Mutual Insurance Company, or that the plaintiff has any interest in the ground rent reserved by the deed of April 1, 1853, beyond what she may have under and by virtue of the devise of her husband's estate to her. It is clear, therefore, that she has a judgment for twice as much as she would be entitled to if the

terre-tenant failed to establish her defense in regard to payment, claim, or demand for or on account of the ground rent, or declaration or acknowledgment by the owner of the premises of the existence thereof. We think that the testimony in the case, considered in connection with the failure of the plaintiff to interpose a denial of any of the averments in the petition, made it the duty of the court to open the judgment. The order discharging the rule to open the judgment is reversed, and the rule is reinstated and made absolute.

(176 Pa. St. 623)

MARSHALL v. FRANKLIN FIRE INS. CO. OF PHILADELPHIA.

(Supreme Court of Pennsylvania. July 15, 1896.)

INSURANCE—CONTRACT—INTERPRETATION—DAMAGES—PARTIES.

1. A policy for "perpetual insurance," in consideration of a certain deposit, provided that, if insured should transfer his policy, such transfer should be brought to the office of the company to be entered and "allowed" within a certain time, and that in default thereof all benefits of the insurance should be lost. *Held*, that insurer was not authorized to refuse to allow a transfer of the policy merely because it desired to terminate such class of policies.

2. Where insurer wrongfully refuses to allow the transfer of an insurance policy, it is liable for the cost of procuring other insurance.

3. The purchaser of land, as assignee of a policy for perpetual insurance on buildings thereon according to the terms of the policy, may sue in his own name for the wrongful refusal of insurer to allow the transfer of the policy.

Appeal from court of common pleas, York county.

Action by Logan A. Marshall against the Franklin Fire Insurance Company of Philadelphia. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Jere S. Black, Arthur Biddle, and George W. Biddle, for appellant. Geo. E. Neff and Henry C. Niles, for appellee.

WILLIAMS, J. We think, with the learned judge of the court below, that this case presents some questions that are new, and must be determined without much aid from our own decided cases. The plaintiff's right to recover is based upon a contract which describes itself as a policy "of permanent insurance." In the caption at the head of the policy it is also called "perpetual." It was issued by the defendant to John Hartman in May, 1839; and it undertakes, in consideration of a deposit of \$120, and certain charges for the policy, and the survey of the insured premises, "to be and remain forever liable to the said assured, his heirs, executors, administrators, and assigns," for any loss that may be sustained by fire to the buildings insured, not exceeding \$4,000. This contract, unconditional and perpetual in its terms, is followed by a statement of the

conditions upon which it is made, and of the manner in which the holder of the policy may at any time surrender it and reclaim his deposit, less 5 per cent., and so terminate the contract. The only provision for the termination of the policy by the action of the defendant company must be gathered from the third of these conditions, which is in these words: "In case any assured shall assign or transfer his or her policy, such assignment or transfer shall be brought to the office of the company, to be entered and allowed, within thirty days next after such assignment or transfer, and in default thereof the benefit of the insurance, and all claims upon the company, shall be lost. For every transfer of a policy, there shall be paid fifty cents." This stipulation recognizes the permanent character of the insurance, and the liability of the company to the holder of the policy, being also the owner of the property insured. All that is required of such holder is that he present the policy, within 30 days after he acquires it, at the office of the company, to have the transfer entered and allowed, and pay the fee of 50 cents for such entry and allowance. This had been done with the policy now in question on three different occasions, but when the plaintiff presented his assignment and transfer within the time required, and tendered the fee for the entry of the transfer upon the books of the company, he was met with a flat refusal. This action was brought to recover damages for such refusal. The question thus raised is whether the company may refuse to enter and allow a transfer of a perpetual policy, or is bound, upon the tender of the fee, to allow the transfer, and enter the name of the transferee upon its books as the holder. This depends upon the construction of the word "allow." This word is ordinarily equivalent to the word "permit," or to the words "consent to." Its use in any given case assumes the existence of a power to refuse to allow, permit, or consent to, and the right to elect whether to grant or withhold the allowance or permission asked for. But the nature of the contract, and its express recognition of the right of the insured to sell his policy with the property to which it relates, requires us to hold that this right to elect must be exercised, not arbitrarily and at will, but for cause, and in harmony with the purpose and spirit of the contract. If the purchaser and transferee is a person whose financial condition, habits of life, or moral character are such as to increase the hazard against which the company has undertaken to indemnify the original policy holder, so that if the risk was now offered for the first time it would be refused, it would not be reasonable to deny to the company the right to refuse the increased risk to which the transfer has exposed the insured property. But, on the other hand, if the situation, habits, and moral character of the transferee are unobjectionable, and do not increase the hazard of loss, it would not be reasonable to permit one party to a contract to terminate it

without cause, and against the protest of the other party. In this case the defendant company gave a reason for its refusal to enter and allow the transfer, and the validity of that action must depend on the validity of the reason on which it was based. When the plaintiff presented himself at the office of the company with the transfer of the policy, and the fee for its entry and allowance, in his hand, he was told that, as a matter of business policy affecting its own interests, the company had decided not to consent to the transfer of old policies, like that he had brought, but to terminate them, as fast as a transfer became necessary, by refusing to enter and allow such transfer. Was this a valid reason? It was an attempt by one party to a contract to terminate its liability at its own election, and for its own advantage, against the protest of the other party to it. It was the exercise of a power reserved for its protection against risks it had not undertaken to insure against, in a purely arbitrary manner to relieve itself from risks it had undertaken to insure against, in violation of its contract, and to the injury of the holder of the policy. It was therefore not a valid reason for the action taken, and the action of the company in refusing to enter and allow the transfer cannot be sustained. It was a violation of the contract for "permanent insurance," of which the plaintiff had a right to complain, and it afforded him a cause of action against the company.

The next question presented relates to the measure of damages. We see no reason for distinguishing this from any case in which the plaintiff sues on a broken contract. He may elect whether he will acquiesce in the action of the defendant, treat the contract as at an end, and recover back the consideration paid, or whether he will refuse to recognize the action of the defendant as terminating the contract, go into the market, and purchase what the defendant has refused to provide in the manner contemplated by the contract, and call upon the defendant to indemnify him against what it may cost when so obtained. The plaintiff has chosen to stand upon the latter of these positions, if the court shall be of opinion that he has the legal right to do so, and has submitted the facts upon which that question may be determined in the case stated agreed upon in the court below. We hold that he has a right to stand upon the position he has chosen, and to say to the defendant: "You terminated my policy in your own company in violation of its terms. You compelled me to buy insurance elsewhere. You must now indemnify me against the loss I have suffered in consequence of your own wrongful repudiations of your contract." This point is ruled by *Insurance Co. v. McAden*, 109 Pa. St. 399, 1 Atl. 256. The injury sued for was sustained by the plaintiff. The loss was his. As the purchaser of the property, and the policy of perpetual insurance upon it, he had the right, under the express terms of the contract, to present the policy for entry and allowance

by the company. Its refusal was not supported by any valid reason. The damages resulting from such refusal may be sued for by the plaintiff, who was compelled to suffer them, without using the name of the party originally insured as legal plaintiff. It is not necessary to go into equity, for the cause of action is one enforceable at law. It grows out of a violation of a contract, and is properly redressed by the recovery of damages by way of compensation. The contract does not run with the land, in the common-law sense of that phrase, but it is, in express terms, a contract to indemnify the owner of the property insured, he being also the holder of the policy. It is a contract for the permanent or perpetual insurance of the property, subject to the implied condition that the hazard shall not be materially increased; and, both, by the nature of the contract and by its express words, it is made with the owner, whether he becomes such by operation of law, or by the act of him who was the owner at the time the contract was made. In this respect it is clearly distinguishable from the ordinary policy of insurance. The assignments of error are overruled, and the judgment is affirmed.

(176 Pa. St. 612)

PATTERSON v. FRANKLIN et al.

(Supreme Court of Pennsylvania. July 15, 1896.)

CORPORATIONS — FALSE STATEMENTS IN APPLICATION FOR LETTERS PATENT—ACTION BY ASSIGNEE.

1. The assignee of an insolvent corporation cannot, in the right of his assignor, maintain assumpsit against the incorporators to recover the 10 per cent. of the capital stock required by law to be paid in before incorporation, because of the false and fraudulent statement of defendants, in their application for letters patent, that such sum had been paid in; the corporation itself being benefited, rather than injured, by the fraud.

2. The assignee of an insolvent corporation cannot, in the right of creditors, maintain assumpsit against the incorporators to recover the 10 per cent. of the capital stock required by law to be paid in before incorporation, because of the false and fraudulent statement of defendants, in their application for letters patent, that such sum had been paid in; a right of action, if any exists, being several to those injured by the fraud, and extending no further than the individual loss of the particular creditor who sues.

Appeal from court of common pleas, Lancaster county.

Assumpsit by D. R. Patterson, assignee for the benefit of creditors of the Keystone Standard Watch Company, against George M. Franklin and others. From a judgment for defendants on a directed verdict, plaintiff appeals. Affirmed.

I. C. Arnold and Henry Budd, for appellant. H. M. North and Brown & Hensel, for appellees.

WILLIAMS, J. The defendants were the incorporators and holders of the stock of

the Keystone Standard Watch Company. In their application for letters patent they set forth, among other things, that the capital stock of the corporation was \$500,000, divided into 5,000 shares of the par value of \$100 each, and "that fifty thousand dollars, being ten per cent. of the capital stock, has been paid in cash to the treasurer of said corporation, whose name and residence are William Z. Sener, Lancaster, Pa." The statement is the method prescribed by law for assuring the executive department of the state government that the requirements of the law have been complied with by the incorporators, and that they are entitled to be made a corporation. After letters patent have been issued, the statement, with all its indorsements, must be recorded in the proper county, for the information of the public, in order that the fact of incorporation may be known, and the credit to which the corporation is entitled may be intelligently judged of by all persons who may have occasion to do business with it. This statement, made and sworn to in the usual manner, is now alleged to have been false, in so far as it asserted the payment of \$50,000 to the treasurer of the corporation, and it is asserted that not one dollar in cash was so paid. It is certain that after a short business career the corporation, being unable to pay its debts, made an assignment for the benefit of creditors. The plaintiff in this action is the assignee. The defendants are the incorporators by whom the alleged false certificate was signed. The right to recover is rested on the alleged fraud committed by means of the false representation contained in the certificate. Now, the assignee succeeds to all the rights of action which his assignor had at the time of the assignment, whether matured or not. He can sue, therefore, for unpaid subscriptions to the capital stock, and for any debt due by a stockholder, as well as for debts due the corporation from others. He recovers because the corporation could recover, and all such demands are assets of the corporation, in his hands. It is important, therefore, to inquire what cause of complaint the corporation has against the defendants because of the alleged fraud. How did the corporation suffer because of it? If the certificate was a falsehood in the particular alleged, the executive department of the state government was cheated into issuing letters patent to persons not entitled to them. The state could complain, and, upon a showing of the fraud, cancel the letters patent. The business public could complain, and any person induced to credit the corporation because of the falsehood, and finding himself a loser, might proceed for the recovery of his individual loss in an appropriate form of action. But how can the corporation complain? The fraud was perpetrated for its benefit. It was a gainer, not a loser, because of it. It was given a considerable credit by the statement to

which, as it is alleged, it had no claim whatever. Let it be conceded that this statement was absolutely false, still no one could legally complain of it who was not injured by it. If A. falsely represents to B. that C. is worth a certain sum of money, and is therefore worthy of credit; B., if misled, and a loser because of the fraud upon him, might justly complain; but C., who benefited by the fraud, could have no just complaint against A., growing out of his false representation to B. So in the case before us. The lie, if lie there was in the certificate, was in the interest of the corporation. It gave it a credit to which it was not entitled. It enabled it to contract debts which it could not pay. Those who suffered are the parties to complain, not those who benefited by means of the fraud. The corporation had no right of action against the defendants, growing out of the false statement in the certificate, and the plaintiff, its assignee, has none. It is suggested that, if the assignee cannot recover in the right of his assignor, he may do so in the right of creditors. But the creditors have no joint action against the defendants. If a right of action exists, it is several to those injured, and extends no further than the individual loss of the particular creditor who sues. The question of the defendant's liability to those who were led to trust the corporation because of the false certificate is not before us. What we say is that, if they have a right of action, it is not an asset, the proceeds of which are for general distribution. The action is misconceived, and there can be no recovery in this case, though the fraud was admitted on the record in the terms in which it is charged. The right to complain is in the individuals who suffer, and the right of action extends only to the individual loss of the particular person injured, if a right of action exists. It is enough for the purposes of this case to say that the evidence offered, the rejection of which is complained of, was inadmissible for the reasons we have stated. It did not show, or tend to show, a cause of action in the plaintiff. The assignments of error are overruled, and the judgment is affirmed.

(176 Pa. St. 621)

MUSSER v. LANCASTER CITY ST. RY. CO.

(Supreme Court of Pennsylvania. July 15, 1896.)

STREET RAILWAYS—NEGLIGENCE—EVIDENCE.

1. Plaintiff, while walking in a public highway, was injured by the breaking of a wire cable used by the defendant street-railway company to control its cars on a steep incline. There was evidence that the cable, which had become weakened by use, had broken once before, and had been hastily repaired on the morning of the accident, and used without being tested. *Held*, that the question of negligence was for the jury.

2. In such an action, testimony to show that the attention of one of the directors of the defendant company was called to the weakened condition of the cable is admissible.

Appeal from court of common pleas, Lancaster county.

Action by Frank Musser, by his father and next friend, Isaac Musser, against the Lancaster City Street-Railway Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

H. M. North, George Nauman, and B. F. Eshleman, for appellant. W. U. Hensel and J. Hay Brown, for appellee.

FELL, J. The plaintiff, while walking in the public highway, was injured by the breaking of a wire cable used by the defendant company to control the movements of its cars on a steep incline. There was evidence that the cable had been weakened by use and exposure, that it had once before broken, and that on the morning of the accident it had been hastily repaired and used without testing its strength. This evidence was clearly sufficient to take the case to the jury, and we see no error in the manner in which it was submitted, or in the rulings upon the offers of testimony.

The fourth assignment of error, to which the appellant's argument is mainly directed, had no foundation on which to stand. The question objected to and allowed was intended to show a declaration by a director of the company that the manner in which the cars were operated was dangerous. The question, however, was not insisted upon, and was not answered. The witness' testimony was confined to what he had seen,—the breaking of the cable on a previous occasion,—and there is nothing in the record to which the argument applies. The witness Hall, who was not allowed to say whether he had done his work properly, had not repaired or adjusted the cable. He had assisted in the construction of some of the appliances. No complaint was made of his work. It was in no manner connected with the breaking of the cable, and whether it was well done was unimportant. There was no error in admitting the testimony of Westenberger to show that before the accident he had called the attention of a director of the company to the weakened condition of the cable, and had pointed out to him the apparent defects, or in overruling the question asked this witness on cross-examination,—whether the splicing of the cable had been well done. He had not seen it done, and it did not appear that he had examined it after it was done, or had any knowledge of the subject.

It is unnecessary to refer in detail to the numerous assignments of error. The negligence alleged was not in the plan of operation, but in allowing the cable to become torn and detached from the car. The plaintiff's proof was that the cable was defective; that the defects were apparent, and known to the executive officers of the company; that it had broken before, and on the morning of the accident had been spliced and attached to a heavily loaded car, and put in use with-

out a test, and without notice to persons passing on the highway. It was not an answer to this to say that an improved method for controlling the movements of the cars had been adopted, and skillful mechanics employed to construct the appliances. Whether there was reason to anticipate such an accident as that which resulted in the plaintiff's injury was for the jury. The learned judge properly declined to give binding instructions on the subject, and submitted it in a manner of which the defendant has no just cause of complaint. The judgment is affirmed.

(176 Pa. St. 603)

DOSCH v. DIEM.

(Supreme Court of Pennsylvania. July 15, 1896.)

INJURIES TO PROPERTY—EVIDENCE OF OWNERSHIP —LANDLORD AND TENANT—WHEN RELATION EXISTS—EVIDENCE.

1. In an action for damages to property resulting from the alleged wrongful eviction of plaintiff from leased premises, where the issue was whether plaintiff or his father was the lessee, evidence that the property damaged belonged to plaintiff, and the manner in which he acquired ownership and possession thereof, was admissible.

2. Where the father had testified that he had taken a lease which was afterwards canceled, and an oral lease made with the plaintiff, it was proper to show on cross-examination that the father had insured the property on the leased premises in his own name.

3. An instruction based on the theory that the acts and declarations of the father, in the absence of the son, were evidence against the son's title, was erroneous.

4. The order in which testimony shall be admitted is largely within the discretion of the court, and unless prejudicial error results, is not ground for reversal.

Appeal from court of common pleas, Lancaster county.

Action by Samuel Dosch against John K. Diem. There was judgment for defendant, and plaintiff appeals. Reversed.

H. M. Houser and Brown & Hensel, for appellant. B. Frank Eshleman and B. F. Davis, for appellee.

DEAN, J. Diem, defendant, leased to Adam Dosch, father of plaintiff, by written agreement dated November 13, 1891, his farm in Leacock township, Lancaster county, known as the "Groff Farm," for the term of one year from April 1, 1892, at a cash rent for grass of \$40, and one-half of all crops. At the date of this writing, Adam Dosch lived on the Berton farm, and his son Samuel, who had just been married, lived with him. At the trial in the court below, the plaintiff, the son, alleged and adduced much testimony tending to show that this written lease was canceled by the consent of the parties to it, and that then Diem entered into a verbal contract with him to rent the farm to him, on substantially the same terms as those in the written lease to the

father. Further, that, in the performance of this verbal contract, he purchased farm stock and implements, and moved on the Groff farm on April 3, 1892, the father's family going along, and taking up their abode in the house with him, the son. Samuel proceeded to plant spring crops, and do the work of a tenant on the farm; also, as he alleged, paid to Diem one-quarter of the cash payment when it fell due, about the 1st of July following his occupancy. The cancellation of the written agreement with the father, the oral contract with the son, and the payment of rent by the son as tenant, were all flatly denied by Diem, and he adduced much testimony tending to sustain this denial. He alleged that the father alone was his tenant, and that relation was created by the written contract. On the 27th of July, 1892, Diem, the landlord, averring rent in arrears under the written agreement, made complaint thereof before a justice of the peace against the father, and in this proceeding judgment was entered in his favor for \$290, rent in arrears, and that Adam Dosch, the father, deliver up possession of the premises to his landlord. After notice of this judgment to the father, the justice placed a warrant in the hands of the constable, directed against Adam Dosch, commanding him to execute the judgment by redelivery of the possession to Diem of the premises, and collection of the costs. After two ineffectual efforts, on the third attempt, in September, the officer put Diem in possession. In dispossessing the two Dosches, father and son, much damage resulted to the stock and goods. The evidence showed Diem present, directing the movements of the officer and his posse in removing the families and goods. Samuel Dosch, the son, then brought this action against Diem for damages. The question on which the right of plaintiff to recover at all turned, was whether, at the time he was ejected, he was the tenant of Diem. If not a tenant under the oral contract, he had no right of action for damages. Nearly 100 witnesses were called, many of them to testify to facts tending to prove or disprove the cancellation of the written contract with the father and the existence of the oral contract with the son. The learned judge of the court below submitted the evidence bearing on this question, as well as that on the amount of damage, to the jury, who, under the instructions given, found for defendant. We have now this appeal by plaintiff, with 15 assignments of error,—8 to rulings on offers of evidence, and 7 to charge of the court.

As to the first three assignments of error, the plaintiff offered evidence tending to show that he had acquired the ownership of certain personal property, which he alleged formed part of that thrown out of the farmhouse, and levied on for costs. When this offer was made, the cross-examination of plaintiff, when on the stand, had

disclosed an intention by defendant to deny plaintiff's ownership or title to nearly all the property on the farm. He had a right to prove his title to personal chattels by evidence of possession at the date of the alleged trespass. But he was not restricted to this. He might go further, and show how he acquired it. The objection that the record offered was of a feigned issue between him and other parties than Diem is not well taken. True, judgments are conclusive only as between parties and their privies; but this was not offered as an adjudication conclusive of plaintiff's title, but as evidence of the channel through which the property came to him, just as if he had offered a receipted bill of sale of the property, and had proven its genuineness. Such evidence is not conclusive. It may be attacked and discredited; still it is evidence. Besides, the plaintiff went further, and proposed to show that, although the other nominal party of record to the feigned issue was not Diem, yet that he was the real antagonistic, and the suit was in fact carried on by him. The court rejected this offer. We think in this there was error.

The fourth assignment is to allowing defendant's counsel to ask Adam Dosch, on cross-examination, if, after possession of the Diem property had been taken, he had not taken out insurance on it in his own name. We think, in view of the witness' testimony in chief as to the contract with his son made in his presence, this was allowable for purpose of laying foundation for attacking his credibility.

The fifth assignment is to the admission of evidence tending to contradict the witness as to the insurance. There was no error in this, and therefore the fourth and fifth assignments are overruled.

The sixth, seventh, and eighth assignments are really to the order in which the court admitted testimony. This is so much in the discretion of the court below that a very gross abuse of that discretion would have to be manifest to induce a reversal. While there was some irregularity here, it is not of that character which could have seriously injured the appellant. Therefore these assignments are not sustained.

The ninth, tenth, eleventh, and twelfth assignments are to those parts of the charge referring to the conduct and declarations of the father indicating that he was the lessee of the farm, and not his son. We think the complaint as to each of these assignments is well founded. The court seems to have fallen into the error of treating the father and son as conspirators in collusion to defraud Diem, the landlord, and, on this theory, to have treated the acts and declarations of the father in the absence of the son as evidence against the son's title. The father could not, by his independent acts and declarations, affect the son's title to the property, and his rights as a tenant.

To affect the son, he must be proven to have participated in these acts, to have assented to the truth of the declarations of the father. To show that the son at times heard of these declarations of his father made to third parties did not impose upon him the duty of denying them, and accusing his father of falsehood; and certainly they could not have the effect of destroying his title, if it was otherwise good. The father could not talk away his son's property, and we think the jury should have been plainly so instructed. In giving undue weight to the conduct and conversations of the father, and in failing to caution the jury as to the proper effect to be given them, we think that the learned judge of the court below erred. Therefore these four assignments are sustained.

There is nothing of merit in the thirteenth, fourteenth, and fifteenth assignments of error, and they are overruled; but, for those sustained, the judgment must be reversed. It is reversed accordingly, and *v. f. d. n.* awarded.

(19 R. I. 505)

MASSELL v. PROTECTIVE MUT. FIRE INS. CO. (three cases).

(Supreme Court of Rhode Island. July 18, 1896.)

INSURANCE—CONDITIONS OF POLICY—DESCRIPTION OF PROPERTY—CHANGE OF USE—WAIVER OF PROOFS OF LOSS.

1. Where, at the date of two policies of insurance,—one on a house, and one on furniture therein,—the furniture was in another house while the one insured was being repaired, but it was shown that the house was completed and the furniture removed therein before the policies were delivered or paid for, neither the repairing of the house nor the removal of the furniture constitutes a defense to an action to recover for their loss.

2. The fact that an insurance policy describes a house as of 3 stories, when it is properly described as $1\frac{1}{2}$ stories and a basement, does not vitiate the policy, no misdescription in the application being shown.

3. A policy of insurance on a house described as being occupied as a dwelling only is not rendered void by the subsequent use of the basement as a store, where the same company insured the goods in the store, making no objection, and it does not appear that such use was of a character to increase the risk.

4. A provision of a policy that it shall be payable 60 days after proof of loss is waived by a denial of any liability when proofs of loss are presented, and the insured may sue at once.

Actions by Leopold Massell against the Protective Mutual Insurance Company on three policies of insurance. There was a verdict for plaintiff in each case, and defendant petitions for new trial. Petition dismissed.

J. W. Hogan, for plaintiff. O. L. Kneeland, for defendant.

STINESS, J. Three suits were tried together upon three policies of insurance issued by the defendant to the plaintiff, resulting in a verdict for the plaintiff upon each, and the

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defendant petitions for new trials upon the grounds that the verdicts are against the evidence and for errors in rulings. Two of the policies were dated March 22, 1895, at which time the plaintiff was living in house No. 245 Willard avenue; one policy, of \$400, covering furniture described as "contained in the frame building, occupied as dwelling only, situate at Willard avenue," and the other policy, of \$600, covering his " $1\frac{1}{2}$ story and basement frame building, occupied as a dwelling only, situated at Willard avenue." At the date of these policies the plaintiff was repairing the cottage for his own use, with a store in the basement, and his dwelling above; and he told the treasurer of the company, who came to solicit the insurance, the purpose for which he was fixing the cottage, and that he would insure when it was done. The treasurer replied that he could do so now, but nothing more appears in the testimony of the talk at that time. In a few weeks the cottage was done, and the plaintiff moved into it; and on June 5, 1895, he took out another policy, of \$200, on the stock of goods in the store, described as "in the three-story brick and frame building, occupied as a dwelling and store, situated at 247 Willard Ave." The fire occurred August 10, 1895. The defendant offered no testimony at the trial, except upon the question whether it had denied its liability under the policies, and thus had waived its right to require proofs of loss, but relied in defense upon the claims that the furniture policy was void because the goods had been moved, that the house policy was void because it had been in alteration and repair for more than 15 days, and that the store policy was void because it misdescribed the property as a three-story building, and so misled the defendant. The plaintiff testified that the first two policies were not delivered or paid for until after he had moved into the cottage. Undoubtedly, if the contract had been understood to be made as of the date of the policies, a removal of the goods and the alteration of the house, without notice, and contrary to the terms, would have avoided them. *Lyons v. Insurance Co.*, 14 R. I. 109; *Wilson v. Insurance Co.*, 4 R. I. 141. The trouble is this: We cannot say that the policies did not attach to the repaired cottage in both cases. It is true that they are dated earlier than the time of the completion and removal, but, on the other hand, the policies do not specify the house intended to be covered. The company was notified that the plaintiff would not be ready for them until he had moved, and they were not delivered or paid for until the cottage was repaired, and he had moved into it. These facts seem to show that both parties must have understood the matter as the plaintiff says it was. If the defendant had shown that there was an earlier delivery of the policies, this would have settled the matter, at least as to the furniture. But as the case stands, on the plaintiff's testimony, the poli-

cies attached to the cottage when he moved into it, and there was no removal of furniture, or repairs, after that. The verdict was not, therefore, against the evidence; nor was there error in rulings, with reference to these two policies, upon these points.

The policy on the stock of goods in the store described the building in which they were as "247 Willard Ave." No misdescription in application by the plaintiff is shown, and, as the company knew and specified the particular house, we do not see how it could have been misled, even though it also described the building as one of three stories. It is quite possible that whoever attended to this business for the company—not very skillfully done in other respects—may have counted the basement, main floor, and attic each as a story.

It is also argued that the testimony shows that the plaintiff's wife was the owner of the stock of goods, and so the plaintiff cannot recover on that policy. It does not clearly so appear. It is also claimed that the use of the basement for a store made the risk more hazardous, and thus avoided the policy on the house. No testimony was offered to the effect of an increase of risk. As the stock in the store consisted of a small lot of dry goods, the increase of risk is not so apparent as to enable us to say that the verdict was wrong. As both policies applied to the same house, the issuing of a policy on the goods in the store must be taken to be a consent to the use of the basement for that purpose. Moreover, as neither of these points was taken at the trial, when the plaintiff could have made the testimony more clear, the defendant has no right to insist upon them now.

An exception was taken to a ruling that applied to all of the policies, which is the only question outside of those already considered. The policies were payable "sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss." The fire was on August 10th, and the suits were brought October 10th,—61 days after. The company was notified of the fire at once, and the secretary and manager were there about three hours after the fire. Formal proofs of loss were filed October 8, 1895, two days before these actions were brought. The plaintiff testified that the company denied all liability under the policies, and the judge, at the trial, ruled that such denial of liability waived the condition requiring proofs of loss. A party may waive conditions which are intended for his benefit. Proofs of loss are for the benefit of the insurer,—to give information of the extent and character of the loss. But they are of no avail if the insurer, in advance, denies all liability for the loss. Their production would be only an idle ceremony which the law will not require of the insured. May, Ins. § 469; Heaton v. Insurance Co., 7 R. I. 502. If, therefore, the plaintiff had the right, by reason of such denial, to bring his actions without filing proofs of loss at all, we do not see how he lost it by filing the proofs after-

wards. The position of the company was not changed. It is true that the defendant offered testimony to show that it did not deny liability, but a strong support for the finding of the jury that it did appears in the fact that the defendant claimed at the trial, as it claims now, that it was not liable under either policy. We are of the opinion that the defendant makes no case for a new trial upon the evidence or the rulings, and the petition is dismissed.

(19 R. I. 380, 532)

PROVIDENCE COAL CO. v. COXE et al.
(Supreme Court of Rhode Island. Feb. 27, 1896.)

SALE—ENTIRE OR DIVISIBLE CONTRACT.

A contract of sale of coal, "f. o. b. Cash, 30 days," to be shipped, a barge load immediately, the balance in equal monthly proportions, before February, is an entire, not a severable, contract; and the purchaser having failed to take the proportions for the months preceding December, and shown no waiver by the seller of his right to insist on cancellation of the contract for such failure, and no legal excuse therefor, cannot recover for the seller's refusal to make December and January shipments.

On Rehearing.

Under a declaration alleging plaintiff's readiness and willingness to receive and pay for certain coal according to a contract which provided for delivery thereof by defendants in several equal monthly installments, and asking damages for a breach of the entire contract, plaintiff cannot recover for defendants' failure to deliver the last installments thereof, where it appeared that plaintiff in fact refused to accept the first installments.

Action by the Providence Coal Company against Coxe Bros. & Co. Judgment for plaintiff. Defendants move for a new trial. Granted.

James, Wm. K. & Theodore F. Tillinghast, for plaintiff. James M. Ripley and John Henshaw, for defendants.

MATTESON, C. J. This is assumpsit on a written contract, of which the following is a copy: "Providence, July 2nd, 1892. Sold Providence Coal Co., to be shipped to Providence, R. I., 10,000 tons Beaver Meadow pea coal, @ \$1.85 per ton f. o. b. Cash, 30 days. Not insured. To be shipped, viz.: Barge load immediately; balance in equal monthly proportions before Feby. 1st, 1893; subject, however, to strikes, or any other unavoidable delay caused in shipping same. Coxe Bros. & Co., per F. J. Hartshorne." A jury trial was waived, and the case heard by the common pleas division. Decision in favor of the plaintiffs was given for a part of their claim, whereupon the defendants filed their petition for a new trial, alleging that the decision was erroneous.

We think the common pleas division erred in holding the contract to be severable. It is a single contract for the sale of one entire quantity of coal, to wit, 10,000 tons. The subsidiary provisions relative to shipments

and payment did not have the effect to split it into as many distinct contracts as there were to be separate shipments or deliveries. *Norrington v. Wright*, 115 U. S. 188, 204, 6 Sup. Ct. 12; *Iron Co. v. Naylor*, 9 App. Cas. 434. The common pleas division found, on the evidence, that the plaintiffs, though constantly urged by the defendants to furnish barges for the transportation of the coal according to the custom and course of dealing between them, or to allow the defendants to procure barges for that purpose for the plaintiffs, did not do so, and did not take the coal which was by the terms of the contract to be shipped in the months of July, August, September, October, and November, but received only 572.2 tons out of the proportions for those months, shipped with an installment of coal purchased under a former contract. We think that each neglect of the plaintiffs to take the shipments of coal for the months mentioned was a breach of the contract which warranted the defendants in canceling it, in the absence of facts tending to show a waiver of the right of the defendants to insist upon such breaches, or some legal justification on the part of the defendants for such breaches. *King Philip Mills v. Slater*, 12 R. I. 82, 90. The declaration, which consists of a single count, avers no facts showing, or tending to show, a waiver by the defendants of their right to insist on the cancellation of the contract for the failure of the plaintiffs to take the proportions of coal stated, nor any legal excuse for the failure, but avers a readiness and willingness at all times, of the plaintiffs, to receive and pay for the coal according to the contract. This affirmation of the declaration being negated by the evidence, and the plaintiffs themselves having been in default, it is clear that they were not entitled to recover damages for the refusal of the defendants to ship the proportions of coal for the months of December and January. We think the common pleas division erred in its decision awarding such damages. New trial granted, and case remitted to the common pleas division.

On Rehearing.

July 21, 1896.

The case which the plaintiffs seek to raise by their reargument, and which they also attempted to make on the original hearing, is not the case made by the declaration. Our opinion was rendered on the declaration as it is framed. The declaration avers a readiness and willingness of the plaintiffs at all times to receive the installments of coal which the contract required them to receive, and claims damages for the refusal of the defendants to deliver the coal according to

the contract. The common pleas division found, on the evidence, that, though constantly urged by the defendants to take the coal to be shipped in July, August, September, October, and November, 1892, the plaintiffs neglected to do so, and received but a small portion of one installment, shipped with coal under a former contract. The plaintiffs thus being in default, we held that on the declaration, as framed, averring their readiness and willingness at all times to receive the coal according to the contract, and claiming damages generally as for an entire breach of the contract, they were not entitled to recover for the refusal of the defendants to ship the installments of coal for the months of December, 1892, and January, 1893. We see no reason to change our decision. It seems to us that, to raise the question which the plaintiffs seek to raise, the declaration should set forth that though the plaintiffs neglected to send for and receive the coal required to be shipped during July, August, September, October, and November, 1892, and though the defendants were entitled to rescind the contract on that account, they nevertheless did not rescind it, but treated it as continuing in force, and therefore were bound to deliver to the defendants, on their demand, the installments of coal for December, 1892, and January, 1893, and that, though the plaintiffs demanded the installment which the defendants were so bound to deliver in December, 1892, the defendants refused to deliver the same, and to deliver any coal under the contract, etc. The plaintiffs suggest that the averment in the declaration of a readiness and willingness on their part to receive the coal may be regarded as immaterial, and rejected as surplusage. We do not think that it can be so treated. The declaration proceeds on the theory that the contract was an entire contract. In that view, the averment of a readiness and willingness to receive the coal, or, in other words, to perform the contract by the plaintiffs, was a condition precedent to the right to recover. The case which the plaintiffs now seek to establish is that the contract, though an entire contract, is so far separable that its installments or deliveries may be treated as separate or independent stipulations of the contract, so that the plaintiffs are entitled to sue, notwithstanding the fact that they were not ready and willing to perform the entire contract on their part, for such of the installments as they had been ready and willing to receive, because the plaintiffs had not elected to treat the contract as at an end, and had not rescinded it, before the demand by the plaintiffs for an installment of the coal deliverable under the contract at the time of the demand.

(19 R. I. 390)

In re STATEHOUSE BILLS.

(Supreme Court of Rhode Island. March 16, 1896.)

STATE AUDITOR—PRESENTATION OF BILLS—ITEMIZED ACCOUNT—DUTY TO DRAW ORDER.

Pub. Laws, c. 1201, § 9, provides that the amount received from the sale of certain scrip is appropriated for the payment of bills audited by a certain board, and the state auditor is authorized to draw his order upon the general treasurer for the payment of all bills out of the amount so received. Pub. Laws, c. 1322, § 4, provides that all moneys received by said board are appropriated for the payment of bills audited by said board, and the state auditor shall draw his order upon the general treasurer for the payment of such bills out of the money so received. *Held*, that said statutes contemplate the presentation of the bills of the original parties with whom they were contracted, as the bills to be audited, except in cases of small and unimportant incidental expenses, and unless the bills presented to the auditor, as audited by the board, are the itemized bills of the parties with whom they were contracted, or are accounts for incidental expenses, the auditor is not required to draw his order upon the general treasurer for their payment.

In re statehouse bills. Opinion delivered, upon request of the governor, on the points set forth in a communication to him from the state auditor.

To His Excellency Charles Warren Lippitt,
Governor of the State of Rhode Island and
Providence Plantations:

We have received your excellency's communication requesting our opinion on the points set forth in a communication to you from the state auditor, inclosed for our consideration.

The questions at issue turn upon the construction to be given to the following language, contained in Pub. Laws R. I. c. 1201, § 9: "The amount received from the sale of such scrip, less any premium received over and above the principal thereof as provided in section 8, or so much thereof as may be necessary, is hereby appropriated for the payment of bills audited by said board, or by a committee thereof duly authorized for that purpose, and the state auditor is hereby authorized and directed to draw his order upon the general treasurer for the payment of all such bills out of the amount so received,"—and upon the construction to be given to similar language contained in Pub. Laws R. I. c. 1322, § 4, as follows: "All moneys received by said board by virtue of the provisions of this act, are hereby appropriated for the payment of bills, audited by said board or by a committee thereof, duly constituted for that purpose, and the state auditor shall draw his order upon the general treasurer for the payment of such bills out of the moneys so received."

The communication from the auditor states that it is contended by the board of statehouse commissioners that he has no authority except to see that the names of the approving officers of the board are upon the

bills presented for payment, and that it has been the practice of the commissioners to send in for payment bills of their secretary for sundry expenses paid to others, without specifying fully what the expenses were, and without submitting vouchers for the payment. The auditor alleges that such a practice is contrary to the usages of the auditor's office, and that, if it is permitted and persisted in, it will prevent his rendering an itemized report of the expenditures of the state to the general assembly. He maintains that the word "bills," used in the statutes in question, for the payment of which he is directed to draw his orders on the general treasurer, refers to the original bills of the parties with whom they are contracted, and not to the bill of a second person who claims to have paid the original contractor, and presents a demand not accompanied by the bill of the original party as a voucher. The auditor refers to Pub. St. R. I. c. 32, § 10, which provides that whenever the general assembly shall make any appropriation for the erection or repair of any public building, etc., the auditor shall require satisfactory proof that the work specified has been faithfully performed according to the terms of such appropriation, before the money appropriated shall be drawn, etc., and maintains that it is within the province and authority of the state auditor to inquire into the several items of expenditure, in order that he may determine whether or not they are provided for by the act, and that a joint authority is conferred upon the board and the auditor by the provisions of the statutes in question. As the statutes relate to the auditing and payment of bills, and as an intelligent examination and allowance of such bills require a detailed statement of the several items and charges which go to make them up, we are of the opinion that the word "bills," in these statutes, is used in its primary signification of an account for goods sold, services rendered, or work done, with the prices or charges annexed, though it is doubtless applied often, in public speech, to the statement of a claim in gross, as well as by items. Moreover, unless the word be construed to require a statement of items, the auditor, as he suggests, cannot render an itemized report to the general assembly of the expenditures incurred, and the people will have no means of ascertaining for what the moneys have been expended. We do not think that the legislature intended such a result when it conferred authority on the commissioners, or their duly-constituted committee, to audit bills. We are of the opinion, also, that these statutes contemplate the presentation of the bills of the original parties with whom they were contracted, as the bills to be audited, except in the case of small and comparatively unimportant incidental expenses incurred by the commissioners, as, for instance, for postage, telegrams, expressage, and the like, for which vouchers would not ordinarily be taken. Such incidental expenses

may properly be embraced in an account by the person paying them, and be audited without the production of vouchers. Unless, then, the bills presented to the auditor as audited by the commissioners or their duly-constituted committee are itemized bills of the parties with whom they were contracted, or are accounts for incidental expenses of the character specified, we do not think that the statutes in question impose upon the auditor the duty of drawing his order upon the general treasurer for their payment. We do not think that the statutes in question are to be construed as conferring a joint authority upon the commissioners and the auditor. Chapters 1201 and 1322 are special statutes. In the matters to which they relate they exclude the operation of Pub. St. c. 32, § 10. When a bill is presented to the auditor in the form contemplated by the statute, and which has been audited by the commissioners or their duly-constituted committee, he has no discretion. It is his duty to pay it, unless, indeed, he should have reason to believe that its allowance was procured by mistake, fraud, or other undue means.

CHARLES MATTISON.
JOHN H. STINESS.
PARDON E. TILLINGHAST.
GEORGE A. WILBUR.
HORATIO ROGERS.
WILLIAM W. DOUGLAS.

(19 R. I. 387)

IN RE QUALIFICATIONS OF ELECTORS.

(Supreme Court of Rhode Island. July 6, 1896.)

ELECTORS—QUALIFICATIONS.

The constitution requires that an elector who is qualified to vote by reason of ownership of real estate, shall be one "who is really and truly possessed in his own right of real estate, * * * being an estate in fee simple, fee tail, for the life of any person, or an estate in reversion or remainder which qualifies no other person to vote." *Held*, that the owner of an equitable estate in land is not a qualified elector.

In the matter of the qualification of electors, in answer to a communication from the governor.

To His Excellency, Charles Warren Lippitt, Governor of the State of Rhode Island and Providence Plantations:

We have received from your excellency a communication requesting our opinion upon the following questions: (1) Is the right to vote, which is conferred by article 2, § 1, of the constitution of Rhode Island, limited to persons possessing the legal estates therein enumerated, to the exclusion of persons otherwise qualified by age, residence, citizenship, and having only equitable interests in such real estate? (2) Can a person be "really and truly possessed in his own right," under article 2, § 1, of said constitution, of an equitable interest in real estate?

To these questions we have the honor to submit the following reply:

The two questions present, in different forms, the single inquiry whether the ownership of what is termed by the courts an "equitable interest in real estate," to the extent described in article 2, § 1, of the constitution, is sufficient to qualify a person, in this respect, to vote. We answer this question in the negative. The constitution requires that an elector who is to be qualified to vote by reason of ownership of real estate, shall be one "who is really and truly possessed in his own right of real estate, * * * being an estate in fee simple, fee tail, for the life of any person, or an estate in reversion or remainder which qualifies no other person to vote." This language is plain, and clearly points out a vested legal estate held by one in his own right. In law the legal estate is the whole estate, and the holder of the legal title is the sole owner. But this title may be held for the beneficial interest of another, which interest has come to be called an "equitable estate." It is not, however, strictly speaking, an interest in the land itself, but a right which can be enforced in equity. The possession, therefore, is in him who holds the legal estate, and not in the owner of the beneficial interest. The latter cannot be said to be "really and truly possessed" of the real estate, either in law, or within the meaning of the constitution. It may be said that the word "possessed," in the constitution, is not used in its technical and strict sense, because it provides for ownership of an estate in reversion or remainder, when possession would be in another. Doubtless, this is so; and this construction was recognized by this court in *Re Liquors of Horgan*, 18 R. I. 542, 18 Atl. 279. "Possessed" is used in the sense of ownership, and with reference to an estate which really and truly belongs to one. Granting this, it must nevertheless be an estate in the land, which an equitable right is not; and the constitution goes on to specify what sort of an estate it must be, viz. an estate in fee simple, fee tail, for the life of a person, or an estate in reversion or remainder. These embrace well-defined legal estates, which are vested and owned. One may be said to be possessed of such an estate, in the general meaning of the word, because it is his property, although the present right of possession may be in another. But it would be a stretch of these terms to hold that they describe an equitable estate. They are often used, in connection with the word "equitable," for convenience in describing the extent of a beneficial interest which is held in trust; but evidently they were not so used in the constitution, in describing the qualifications of an elector. At the time of the adoption of the constitution, trust estates were so rare in this state that it is hardly to be presumed that they were had in mind

as a qualification for an elector. Moreover, a very great practical difficulty would arise, if the language used in the constitution should be held to cover an equitable interest. Every board of canvassers would become a tribunal to consider deeds and devisees in trust, of the most abstruse, technical, and perplexing character, in order to determine whether they convey equitable freeholds, if we may so call them, or not. Our opinion is that the constitution meant to provide for the simple ownership of a vested legal estate held by one in his own right, and for nothing else.

CHARLES MATTESON.

JOHN H. STINESS.

PARDON E. TILLINGHAST.

GEORGE A. WILBUR.

HORATIO ROGERS.

WILLIAM W. DOUGLAS.

(176 Pa. St. 550)

TATE et al. v. CLEMENT et al.

(Supreme Court of Pennsylvania. July 15, 1896.)

DEED—EFFECT OF DESTRUCTION—BONA FIDE PURCHASERS—INTERPRETATION.

1. After the delivery and acceptance of a deed to land, its effect as a conveyance cannot be defeated, so as to reinvest title in the grantor, by destruction and rescission of the deed, with the consent of the parties.

2. A subsequent grantee, as against a prior grantee holding under an unrecorded deed, cannot claim as a bona fide purchaser, where a recital in his deed refers to the prior deed.

3. The granting portion of a deed, passing all the estate of the grantor, cannot be diminished by a mere recital in the description.

Appeal from court of common pleas, Bedford county.

Action by Hugh Tate and another, by their guardian, Robert E. Brown, against F. H. Clement and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

Saml. T. Brown, for appellants. Kerr & McNamara, John H. Jordan, and A. O. Furst, for appellees.

MITCHELL, J. The learned judge below directed the verdict for the defendants, and there is no claim that there was any material question of fact in dispute which required submission to the jury. Both sides having agreed that the issue was one of law for the court, the only question before us is whether the court decided it rightly. Of this we entertain no doubt. The plaintiffs' own case showed that they had no title. They claimed under a deed from Samuel Tate, made in July, 1846; and this deed showed of itself that the grantor had at that time no estate in the land to convey. It recites that whereas the grantor, being seised, etc., and being desirous to convey, etc., "did, on the 27th day of February last past, seal and deliver to the said Martha L. Tate a deed therefor in fee," and whereas the said parties had been advised, etc., "wherefore the

said deed of conveyance has been, by the consent of the said parties, withdrawn, annulled, and canceled"; and thereupon it proceeds to convey the same land to a trustee, upon a separate use trust for the said Martha L. Tate, with contingent remainders over to her husband and children, etc., under which it must be conceded that the plaintiffs would have a good title if their ancestor was then seised of the land. But, as already said, his own recital above shows that he had previously parted with all his estate. He had sealed and delivered a deed in fee to his daughter-in-law Martha, and the estate had therefore vested in her. An estate once vested cannot be divested by the mere annulment and cancellation of the deed. That, as was well said by the learned judge below, was but the destruction of the evidence of the title, not the annulment of the title itself. No title can be divested by a mere recital in a deed, or by any form of deed to which the holder of the title is not a party. A fortiori is this the case where the title sought to be divested is in a married woman, and can only be conveyed in accordance with the prescribed statutory forms.

The appellant argues that the deed was not accepted, and that the recital shows that the delivery must have been for examination, and the subsequent grant indicates that there was no acceptance. But the words used by the grantor are "did seal and deliver," and delivery implies acceptance. There may be delivery in escrow, and there may be transfer of manual possession for examination or other purposes, but without acceptance there is merely a tender. Delivery implies both tender and acceptance, and there is nothing in this case to support any other than the ordinary construction of the word.

The appellant further argues that the deed of February, 1846, not having been recorded, cannot prevail against the later deed, which was duly put on record. But the grantee in the later deed was not a bona fide purchaser without notice. It is doubtful if, in equity, he could be treated as anything more than a volunteer; but in any case he took with notice in his deed itself that his grantor, as against the prior conveyance, had no estate to convey.

It is further argued that Martha L. Tate's deed to Clement was only a conveyance of her title under the trust deed of July, 1846, and therefore Clement took no more than an estate for her life. But this is a misreading of the deed. It is a conveyance to Clement, his heirs and assigns, of all the grantors' estate, right, title, etc., with special warranty; and the only reference to the deed of July, 1846, is in the description of the property as part of the land described in that deed. The granting portions of the deed to Clement passed all the estate of the grantors, whatever it was, and whencesoever derived, and the grant cannot be diminished by a mere recital in the description.

So far we have considered the case solely as it was presented by the plaintiffs. But, when we turn to the defendants' side, we find the uncontradicted testimony of Col. J. W. Tate that Martha took possession of this land in April, 1846, after the conveyance to her, and before the conveyance to Black as trustee; and she retained the possession except of the portion she sold until she died, in 1893. In addition, therefore, to the presumptions from the recital in the deed of July, 1846, she is thus shown to have been a grantee in actual possession when that deed was made to Black, and her possession was notice to him of her title.

There is no doubt that the result thus arrived at defeats the intentions of Samuel Tate, if they are to be gathered strictly from the language of his deed. And it may be that it defeats also the intentions of Martha L. Tate, as they may be inferred from her failure to take any active steps to set aside the trust. But the latter is by no means clear. If we are to draw inferences as to her actual intentions, it is hardly open to question that she regarded herself as the tenant for life, and her son the remainder-man, as jointly owning the entire fee, and intending to convey it to Clement. They were probably not informed as to the subject of contingent remainders, and did not contemplate the contingency of her surviving her son. But the case cannot be decided on inference or conjecture as to actual intentions. The evidence shows that the legal title and possession were in Martha Tate. There is no evidence that would enable the court to say that the title ever passed out of her by her own act; and it could not be taken out of her by the act of any other person. Judgment affirmed.

(176 Pa. St. 491)

COMMONWEALTH ex rel. BIGLEY et al. v. EWING et al., Judges.

(Supreme Court of Pennsylvania. July 15, 1896.)

APPEAL — SUPERSSEDEAS — DECREE DIRECTING DELIVERY OF REAL PROPERTY.

Under the fourth condition of Act March 17, 1845 (P. L. 158), providing that, to supersede a decree directing the sale or delivery of real property, an appellant must give a bond conditioned, among other things, to pay the value of the use and occupation of the premises in case of affirmance, a court may require a bond so conditioned on appeal from a decree requiring the removal of a flatboat which was permanently maintained by appellants on the river front of property owned by appellees, and the requirement of a bond conditioned for the payment of "damages" to appellees from the possession of the property by appellants is equivalent to that required by the statute.

Petition by W. P. Bigley and others against Thomas Ewing, J. W. F. White, and Christopher Magee, judges of court of common pleas No. 2 of Allegheny county, for a writ of mandamus. Petitioners demur to the re-

turn to the alternative writ. Judgment for respondents.

A. H. Mercer, S. S. Robertson, and Alex. Simpson, Jr., for petitioners. J. J. Miller and Shiras & Dickey, for respondents.

DEAN, J. S. Jarvis Adams filed a bill in equity in the court below against these relators and others, doing business as the Ireland Sand Company, as defendants, in which he averred he was the owner of a lot in the Ninth ward of the city of Pittsburg, fronting on the Allegheny river, 203 feet, and that, as riparian owner, he was entitled to the unobstructed frontage, subject to the rights of the commonwealth and the United States on the river; that he was an iron manufacturer, and the frontage was valuable to him as a boat landing; that defendants, without authority, persisted in maintaining a flatboat of large dimensions at the river front of his lot, and had attached the same to his land; that to this flatboat defendants moored large barges loaded with sand, manure, and other freightage, which, in conducting their business, they load and unload, thus obstructing him in access to the water from his lot, and causing him great damage. He therefore prayed that defendants be enjoined from so occupying and using the water frontage of his lot. To this defendants answered, in substance, denying the riparian right of plaintiff by reason of his ownership of the lot, but admitting that Sarah Bigley, one of defendants, occupied the river front, and transacted business thereon, without authority from plaintiff, and averring that he, having no right, could exact no rental, and further averring the use made by Sarah Bigley of the water front was lawful. The Shoenberger Steel Company, claiming to own 800 feet on the river, also filed a bill against the same defendants, setting out the same complaint, and praying for like relief, to which the same answer was filed. The case came on for hearing before Judge Ewing in the court below, sitting in equity, who found in favor of plaintiffs both as to the facts and law. Accordingly, on the 23d of December, 1895, it was decreed that W. P. Bigley and Sarah E. Bigley, two of defendants, and these relator plaintiffs, be required to remove the flatboat within 60 days, and, further, be enjoined from maintaining the same in front of the lots. On the 10th of January, 1896, before the expiration of the 60 days, the defendants against whom the decree was entered filed a præcipe for appeal to this court; entering recognizance in each case, with good securities, in the sum of \$500, conditioned for payment of costs only, with proper affidavit. The next day the recognizances were tendered to Judge White for approval. He refused to approve them, but directed that, before defendants' appeal should operate as a supersedeas, they should enter into recognizance in the sum of \$2,000, conditioned for payment of damages as well as costs, and stating, ap-

parently, as the reason for enlarging the penalty in the bond, that defendants persisted in continuing the nuisance. The defendants then presented their petition to this court, averring a belief in their right to an appeal on giving bond for costs, and alleging it to be the duty of the judge to approve the same in the form tendered, and praying for mandamus to the judges of the court below (these respondents), directing the approval of the \$500 recognizances. On the 12th of February, 1896, we awarded an alternative mandamus. To this return was made by Judge White, in part as follows: "At the trial of said cases it was clearly proven that the plaintiffs in the two cases had large iron establishments on the banks of the Allegheny river, with titles extending to said river,—Adams', on the lower side of a street, running to the river, and the steel company on the upper side, their lands abutting on the street; that the defendants had a large float or flatboat opposite the mouth of the street, and extending a considerable distance above and below, in front of plaintiffs' properties; that this float was fastened to stakes in the banks of the plaintiffs' properties, and had a board passageway to the street, used by teams for hauling coal, sand, and other materials to and from the float; that they had an office on said float, and also stable or shed, where they kept their horses or mules; that in addition to the float the defendants had always barges or boats tied to their float, bringing and taking away material, and these always seriously interfered with the plaintiffs' land, and sometimes entirely obstructed the landing in front of plaintiffs' properties, and entirely, at all times, prevented them from any landing at the street; that the defendants for some years had used their float and barges as a regular place of business for delivering coal and sand in the city, and for collecting and shipping manure, and greatly to the injury of the plaintiffs in their business. One great source of damage was the accumulation of river drift at the float, which obstructed the influent pipes to plaintiffs' works, causing delay and expense, and which, if continued, might stop the works for awhile, most disastrously to plaintiffs' business."

"When the bonds were presented in court for approval, the defendants' counsel stated they would not remove the obstructions, but would continue the business, and resist the plaintiffs' claim so long as it was possible to litigate it. If bail for costs will be a supersedes, the defendants will continue the obstructions, to the great damage of the plaintiffs. They may entirely exclude the plaintiffs from all access to the river. And in the end, when damages shall be assessed, the plaintiffs, in all likelihood, will not be able to recover one cent."

"Under these facts and circumstances, I thought the defendants should give bail for more than the costs,—enough, at least, to cover the probable damages the plaintiffs would suffer from a continuance of the obstructions. If I was wrong in this, on an intimation to

that effect from the supreme court the bonds heretofore presented will be at once approved."

To this return the petitioners demurred, as insufficient for a number of reasons, but the only one which we deem it necessary to notice is the sixth, as follows: "Because nothing in said return contained excuses respondents from the legal duty of approving the bonds offered on the appeals, in view of the admitted facts that they were ample in amount, and proper in character, to cover all costs which had accrued, and were likely to accrue, in said causes." The other reasons involve dispute as to the facts, and their sufficiency to move the discretion of the judge in determining the form and substance of his decree. If the discretion was reposed in him by law, to exact a recognizance greater in amount than \$500, and which should embrace damages as well as costs, a gross abuse of that discretion, of which here there is not the semblance, would have to be manifest before we would inquire into it. The only question is whether the learned judge of the court below was mistaken as to his power to enlarge the penalty in the bond so as to cover damages. The right of plaintiffs in the equity cases, both by bill, answer, and proofs, turned wholly on the extent of their riparian rights as owners of the lots to which defendants moored their flatboat. The court found as facts: There was no street along the river between the river and the lots; that Fourteenth street is 40 feet wide, and led to the river between the lot of Adams, on one side, and the Shoenberger Steel Company, on the other; that defendants' boat was 170 feet long, and extended across the street, and along the front of each property, and by so placing it the plaintiffs were deprived of the possession and enjoyment of their lots; that they had, as riparian owners of these lots, and as against defendants, the exclusive right to such possession. Clearly, the subject of litigation was the right to real property. We do not, in this proceeding, pass on the finding of facts by the learned judge of the court below, nor do we review his conclusions of law. The time for that is on the hearing of the appeal. What we do determine is that, manifestly, from the pleadings, proofs, and decree, the controversy was over the possession of real property. The effect of the execution of the decree is to oust these defendants from what the court found to be a defiant, wrongful possession of this realty, and to cause a redelivery of such possession to plaintiffs. The petitioners ask that this order be stayed pending the appeal. Their case then comes under the fourth condition of the act of March 17, 1845. That condition reads thus: "(4) If the decree or order appealed from direct the sale or delivery of the possession of any real property, the issuing and execution of process to enforce the same, shall not be stayed until a bond be given with sureties as herein before directed, in such penalty

as the court of common pleas shall deem sufficient, conditioned that during the possession of such real property by such appellant, he will not commit or suffer any waste to be committed thereon; and in case such appeal be dismissed or discontinued, or such order or decree be affirmed, such appellant will pay the value of the use and occupation of such property, from the time of such appeal, until the delivery of the possession thereof, pursuant to such order or decree." The reasons given for exacting the additional amount, by the learned judge of the court below, as heretofore quoted, are covered by the words of this condition. Therefore he did not exceed the power the act conferred. If he had directed the condition of the bond to be for the value and occupation by defendants of plaintiffs' property pending the appeal, as is the language of the act, as well as for costs, it would only have expressed the same thought as "damages" to plaintiffs from the possession by defendants of the property during the same interval. The demurrer is overruled, and the judgment entered for respondents.

(176 Pa. St. 584)

IRWIN v. NOLDE

(Supreme Court of Pennsylvania. July 15, 1896.)

TRESPASS TO LAND — SEIZING GROWING CROPS — INJURY TO LEASEHOLD — MEASURE OF DAMAGES.

1. The measure of damages for trespass to land, and seizure of growing crops thereon, made in good faith and under claim of title, is the value of the crop at the time of the trespass.

2. In trespass for ousting plaintiff from possession of a part of a farm held by him as a tenant, where it appeared that a portion of the land so taken contained a growing crop, the measure of damages is the difference between rental value of the whole leasehold before the trespass, and the rental value of the part not seized.

Appeal from court of common pleas, Lancaster county.

Action by Martin D. Irwin against Lorenz Nolde and another. Samuel R. Hess was substituted as administrator on the death of defendant Nolde. Judgment for plaintiff, and defendant Hess appeals. Affirmed.

For former reports, see 103 Pa. St. 584, 10 Atl. 480, 15 Atl. 777, and 30 Atl. 246.

Wilson Weaver, for appellant: H. M. North, T. B. Holahan, and E. K. Martin, for appellee.

FELL, J. This action grows out of a difficulty which originated 16 years ago between two sets of trustees claiming control of the property of a religious society. The controversy resulted in a number of suits in the civil and criminal courts of the county, and this is the fifth appeal arising from it which has reached this court. It is time it was ended. The action was in trespass for forcibly putting the plaintiff out of possession of

two fields of a farm of 40 acres, which he had rented of the society. The plaintiff had planted one of the fields with corn, and had partly prepared the other field for a crop of corn and tobacco. He remained in undisturbed possession of the balance of the farm. The only assignments which need be considered relate to the measure of damages. The defendant, at the time of the alleged trespass, had been elected a trustee of the society, and was acting as such. His title to the office was subsequently confirmed by the court of common pleas, but the decree was reversed on appeal. In taking possession of the fields he was acting under a claim of right, and was not guilty of a malicious or wanton trespass, and the extent of his liability was to make just compensation for the injury done the plaintiff. The learned judge so instructed the jury, but the difficulty was in determining the proper measure of compensation. The plaintiff claimed the full value of the crops which the defendant raised on the fields. The defendant contended that, as to the field in which corn had been planted a few days before he took possession, he was liable only for the value of the crop at the time of the trespass, and that the rental value of the acres taken was the measure of damages for the taking of the field in which no crop had been planted. Generally, in estimating damages, where no intentional wrong has been done, the value of the thing taken or destroyed is to be estimated as of the time of the illegal act. This rule applies to the destruction or removal of crops, and in estimating the value the actual value at the time of the trespass is to be taken. The conflict in the decisions where the property taken has been increased in value by the defendant, and the plaintiff claims the benefit of the increase, without any allowance for the labor expended, is due, to some extent, to the technical rules applicable to the actions of trover, replevin, and trespass. In Sedg. Dam. § 503, it is said: "But by the prevailing view the defendant, if he acted in good faith, is allowed the value of his labor; that is, the measure of damages is the value of the property as it was just before the defendant's wrongdoing began." Forsyth v. Wells, 41 Pa. St. 291, is cited as the leading case upon the subject. In the opinion in that case the chief justice said: "Where the defendant's conduct, measured by the standard of ordinary morality and care, which is the standard of the law, is not chargeable with fraud, violence, or willful negligence or wrong, the value of the property taken and converted is the measure of just compensation. If raw material has, after appropriation, and without such wrong, been changed by manufacture into a new species of property, as grain into whisky, grapes into wine, fur into hats, hides into leather, or trees into lumber, the law either refuses the action of trover for the new arti-

cle, or limits the recovery to the value of the original article." This action was in trespass for ousting the plaintiff of his possession of a part of a farm which he held as a tenant from year to year. The trespass which resulted in an ouster was but a single trespass, and, until another entry had been made by the plaintiff, he could recover for the single trespass only. Sedg. Dam. § 924. The damage was not to his crop, but to his leasehold, and it should be measured by the diminution in rental value. It should not be measured by the rental value of the fields taken, but by the injury to the whole. The loss of a single field by disarranging the operations of a farm as a whole may cause an injury much greater than the rental value of the acres taken. The real loss is the value of the use of the part taken, in connection with that which remains, and it is measured by the difference in rental value. This measure is reasonably free of uncertainty. It is easy of ascertainment, and of general application. The learned judge was not asked to instruct the jury to apply this rule, and no evidence of the diminution of rental value was offered. The instruction on the measure of damages asked by the defendant could not have been given, and, in the absence of any evidence applicable to the correct rule for the ascertainment of damages, we do not consider it our duty to send the case back. The crops had been harvested and their value ascertained before the trial, and this value was a guide—if not the best, the best which the evidence furnished—for the jury. The general instruction on the subject, limiting the recovery to compensation for the loss sustained, was correct and full, and substantial justice seems to have been reached by the finding of the jury. While not approving all that was said as to the measure of damages, we have, with some hesitation, decided to allow the judgment to stand, and it is accordingly affirmed.

(176 Pa. St. 513)

FIRST NAT. BANK OF LOCK HAVEN v. PELTZ.

(Supreme Court of Pennsylvania. July 15, 1896.)

BANKS—APPROPRIATION OF DEPOSIT TO PAYMENT OF NOTE—DISCHARGE OF INDORSER—ESTOP. PEL—OFFER OF EVIDENCE.

1. The duty which a bank holding a note owes to an indorser thereon, to appropriate a deposit in the bank to payment of the note, exists only where the maker of the note, at its maturity, has a deposit sufficient to pay it, and not previously appropriated to any other purpose, and does not apply to a deposit made after the maturity of the note, or to a deposit by a prior indorser, though he be in fact the principal debtor, and the maker be an accommodation maker.

2. An indorser of a note is not discharged by the mere giving to the holder of a judgment or other security by the maker or a prior indorser.

3. In an action against an indorser of a note, an offer by defendant of a certificate of liens to show a judgment in plaintiff's favor against a prior indorser for the amount of the note, to be followed by evidence that defendant had been secured on his liability as indorser by a prior judgment against the prior indorser, and that he had satisfied it on the procurement of plaintiff, whereby he lost his security, and plaintiff advanced its judgment to the position of a prior lien, being a general offer to prove facts tending to raise an estoppel, is competent, and should not be excluded on an objection to it, as a whole, of incompetency and irrelevancy, though there be objections to the certificate of liens; the mode of proving the facts, and the sufficiency thereof, when proved, to raise an estoppel, being matters for later objections.

Appeal from court of common pleas, Potter county.

Action by the First National Bank of Lock Haven against Emil Peltz, as indorser of a note. Judgment for plaintiff. Defendant appeals. Reversed.

The third assignment of error was as follows: "The court erred in excluding the following offer on the part of the defendant: 'Defendant's counsel offer in evidence a certified statement of the list of liens against Charles Kraemer, from the county of Clinton, for the purpose of showing a memorandum of a judgment entered in favor of the First National Bank in Lock Haven for the amount of this note, and the protest fees, of No. 87, January term, 1892, afterwards revived to No. 43, May term, 1895, for the purpose of showing that, at or about the time of the maturity of this note, Charles Kraemer, the payee and principal debtor, gave to F. S. & J. S. Johnson, representatives of this bank, a judgment note to cover this indebtedness, upon which judgment was entered, to be followed by evidence that the defendant, Emil Peltz, in this case, was the use plaintiff in judgment No. 66, January term, 1891, entered in the court of common pleas, Clinton county, against Charles Kraemer; that said Emil Peltz had an interest of \$15,000 in said judgment; that said judgment was assigned to Emil Peltz as collateral security for any indorsements he might make for Charles Kraemer; that, after the maturity of this note, the said First National Bank, knowing that said Emil Peltz held the assignment of \$15,000 of this judgment as security for any indorsements he had made for Charles Kraemer, procured the said Emil Peltz to satisfy his interest in said judgment without giving the said Emil Peltz any notice that the note upon which this action has been brought had not been paid. To be followed by evidence that said judgment was given to F. S. & J. S. Johnson, representatives of said bank, could have been collected, and can be collected from the estate of said Charles Kraemer; said Johnsons knowing that said Emil Peltz was an accommodation indorser on the note in controversy.' (Plaintiff's counsel object to the offer as incompetent and irrelevant. Objection sustained.) To which ruling by the court counsel for the

defendant except, and at their request this bill is sealed."

Dornan & Ormerod, for appellant. Larabee & Lewis and Furst & Furst, for appellee.

MITCHELL, J. The first assignment of error cannot be sustained. While a bank which is the holder of a note, and has on deposit at the time of maturity a sum to the credit of any party liable to it on the note, sufficient to pay it, and not previously appropriated by the depositor to be held for a different purpose, may apply the deposit to the payment of the note, yet it is not, in general, bound to do so. The cases where the right becomes a duty on the part of the bank rest on the special equity of the party—usually the indorser—to have the payment enforced against the depositor as the one primarily liable. *Bank v. Henninger*, 105 Pa. St. 496. And even in these cases all the circumstances enumerated must exist. Thus the deposit must be sufficient at the time of maturity of the note. Subsequent deposits will not raise the duty. *Bank v. Legrand*, 103 Pa. St. 309; *Bank v. Shreiner*, 110 Pa. St. 188, 20 Atl. 718. And the deposit must not have been previously appropriated to any other use. Cases cited *supra*, and *Bank v. Foreman*, 138 Pa. St. 474, 21 Atl. 20, where the principle was conceded, though an exception, of doubtful correctness, was made against a mere notice from the depositor not to pay, unaccompanied by a specific appropriation to a different purpose. And, lastly, the deposit must be to the credit of the party primarily liable. The rule is thus stated by our Brother Williams in the latest case on the subject (*Bank v. Seitz*, 150 Pa. St. 632, 24 Atl. 356): "The general rule is well settled that while the bank may appropriate funds in its hands, belonging to any previous party to the note, to the payment of it, yet it is not bound to do so. The note may be treated as in effect an order or check authorizing the bank to apply the deposit to the payment, but the deposit is not payment in law. * * * But, where the bank holds funds of the maker when the note matures, it is bound to consider the interests of the indorsers or sureties; and if it allows the maker to withdraw his funds after protest, and the indorsers are losers thereby, the bank is liable to them. The reason of this is that the maker is the principal debtor, and liable to all the indorsers whose undertaking is to pay if he does not." The appellant's offer was defective in two respects: It was not to show the state of Kraemer's account at the maturity of the note, but some days after, and Kraemer was not the maker of the note, but an indorser. It is true that it is claimed by appellant that this was an accommodation note, and known by the bank to be so, and that Kraemer was in fact the principal debtor, even as regards the maker. But, if this was so, it was by the arrange-

ment among the parties. On the face of the note, the maker was primarily liable; and although the bank may have supposed, as the cashier testified, from the presentation of the note for discount by the first indorser, that the second and third indorsements were for his accommodation, it was under no obligation to draw that inference as to the maker. But, if it had been, the duty of the bank to appropriate has not been carried by any case beyond the deposit of the maker. Nor is it desirable that it should be. On the face of the paper, the maker is the party to pay, and while the bank may, upon dishonor, secure payment from the deposit of any party liable to it, yet there is great force in the reasons for limiting its duty to do so to the party legally answerable in the first instance on the face of the paper. The rule thus rests on a liability fixed by law, and capable of immediate and conclusive determination by the evidence of the note itself. Otherwise it is thrown open to contest on the private arrangements of parties, to questions of notice and proof, and to all the uncertainties of the final ascertainment of the facts. While money deposited becomes the property of the bank, yet that result flows from the nature of money, which is to be measured by amount, and not by physical identity. Hence a deposit of \$100 is returned by another \$100, without regard to the identity of the notes or the coin, because legally they are the same. Except for this characteristic, a deposit of money to be returned on demand would be, like the deposit of any other article, a mere bailment. But though, for this reason, the title to money deposited passes to the bank, yet the whole business of banking is founded on the faith of the immediate availability of the deposit, as money, for the use of the depositor; and any rule that interfered with the freedom of action of either bank or customer, by compelling a stop of their dealings with each other to examine the relations of other parties to the deposit, would go far towards destroying that instant convertibility which is the essence of the business. We do not think it desirable to go beyond the line already clearly marked by the authorities.

The second assignment of error cannot be sustained. The giving of a judgment or other security by the maker or a prior indorser does not discharge a subsequent indorser. *Deposit Co. v. Craig*, 155 Pa. St. 343, 28 Atl. 703.

The third assignment, however, is well founded. The offer of defendant was, in substance, to show that he had been indemnified against the present liability on the note in suit, by a judgment against the prior indorser, Kraemer, and that he had satisfied that judgment on the procurement of the plaintiff bank, whereby he not only lost his security for indemnity in regard to the present claim, but the plaintiff advanced its own judgment against Kraemer to the position

of a prior lien. This offer was entirely competent. It was to prove facts which tended to raise an estoppel against the plaintiff in favor of the defendant. It is argued by the appellee that the certificate of liens presented was not such as was admissible in evidence, but the objection made and sustained was to the offer as a whole, which was of the certificate, etc., to be followed by proof, etc. How the facts were to be proved, and whether, when proved, they were sufficient to raise an estoppel, were questions not yet reached in the case. It is sufficient that the offer was a general one to prove relevant facts. As such it was competent, and should have been admitted. Further objections to the mode of proof, or the sufficiency of the facts when proved, could be raised later. Judgment reversed and venire de novo awarded.

(176 Pa. St. 535)

DAVIDSON v. GUARDIAN ASSUR. CO. OF LONDON.

(Supreme Court of Pennsylvania. July 15, 1896.)

ACTION ON POLICY—BURDEN OF PROOF—ALTERATION—PROOFS OF LOSS—WAIVER.

1. The burden of proof resting on insured to remove suspicion created by an apparent alteration in the policy, consisting of the insertion of a clause making it a three-year policy and a corresponding change in a date, was sustained by his testimony that the policy was in the same condition as when received by him, that he made no alterations in it, and that he had accepted it and relied on it as a three-year policy.

2. Where an insurance adjuster, after finding that the loss was total and in excess of the amount of the policy, assured plaintiff that he had done everything that was necessary, and that the loss would be paid, and agreed to prepare and send to plaintiff proofs of loss ready for his signature, but no proofs were thereafter received by plaintiff, there was a waiver of proofs.

Appeal from court of common pleas, Fayette county.

Action by Dr. J. H. Davidson against the Guardian Assurance Company of London. Judgment for plaintiff, and defendant appeals. Affirmed.

Boyd & Umbel and Edward Campbell, for appellant. Howell & Reppert and M. M. Cochran, for appellee.

FELL, J. The plaintiff held two policies of insurance issued by the defendant company and covering the same risk. It was admitted that one of the policies was in force when the fire occurred. It was claimed at the trial that the other policy, although written for three years, was intended to be for one year only. The fire occurred March 28, 1893. The policy in question was for the three years beginning August 1, 1891, and ending August 1, 1894. The words "for the term of three years" were written in the body of the policy by the agent of the company. The numeral "4" in the date "1894" was written over an erasure. It was not alleged that this

had been done by the plaintiff. The ground of defense was that, when the plaintiff received the policy, he had, or should have had, knowledge of the mistake made by the agent or his clerk, and that, with a design to take advantage of the mistake, he had retained the policy, instead of offering to return it or to pay the additional premium for the full term; in brief, that it was not a contract for three years, and that the plaintiff had not been misled by the agent's mistake to his injury. It was incumbent upon the plaintiff to remove the suspicion which attached to the policy by reason of the apparent alteration. This was done. Before it was admitted in evidence he testified that it was then in the same condition that it was in when received by him, and that he had accepted it and relied upon it as a policy running for three years. The issues raised by the testimony were submitted to the jury with great care, and with entire fairness to both parties. There was ample evidence both of an express waiver of proofs of loss and of facts from which an implied waiver could arise. On the day of the fire the plaintiff wrote to the agent through whom he obtained the insurance, and five days afterwards to the general manager of the insurance company, informing them of the loss. On the day after the fire the agent visited the premises, and, after examining the policies, arranged a meeting between the adjuster of the company and the plaintiff. The adjuster, after ascertaining that the loss was total and in excess of the amount of the insurance, assured the plaintiff that he had done everything that was necessary, and that the loss would be paid, and agreed to prepare and send to the plaintiff the proofs of loss ready for his signature. At the end of two weeks, not having received the proofs, the plaintiff wrote to the agent, calling his attention to the agreement, and asking if there was anything which he should do. The agent replied by letter, denying the liability of the company on one of the policies, admitting it as to the other, and requesting the plaintiff to correspond with the New York office. The plaintiff then wrote to the manager of the New York office, stating that he had been advised to do so by Mr. Henry, the adjuster, and asking that he be addressed in regard to the matter. To this the manager replied that he assumed that the correspondence referred to the policy for one year, and, "on that assumption, we beg to refer you to the printed terms and conditions of said policy, which give full instructions as to the mode of proceeding in the event of loss." The plaintiff at once replied, saying that the letter he had received was very unsatisfactory, that his claim was on both policies, and asking for a more specific statement of the position of the company as to the responsibility for the mistake in writing the policy. With this the correspondence ended. The authority of the agent in Pennsylvania, and of the adjuster, to do all that they assumed to do, is undenied. There

was a distinct and specific agreement in relation to the proofs of loss which relieved the plaintiff from any duty in relation to them until they were presented for his signature. This agreement was made at a time when the adjuster knew of the dispute as to one of the policies. The assent of the company to the agreement was never withdrawn. The liability of the company on one of the policies was at all times admitted, and the denial of liability upon the other was based upon specific grounds. "The trend of our decisions has been to hold insurance companies to good faith and frankness in not concealing the grounds of defense, and thus misleading the insured to his disadvantage. They may remain silent except when it is their duty to speak, and the failure to do so would operate as an estoppel; but, having specified a ground of defense, very slight evidence has been held sufficient to establish a waiver as to other grounds." *Freedman v. Association*, 168 Pa. St. 254, 32 Atl. 89. The judgment is affirmed.

(176 Pa. St. 579)

MOYER v. SUN INS. OFFICE OF LONDON.

(Supreme Court of Pennsylvania. July 15, 1896.)

INSURANCE—PROOF OF LOSS—SUFFICIENCY—SPECIAL CONDITIONS—ARBITRATION.

1. In an action on a fire policy, where the issue was failure to furnish proof of loss within the time limited by the policy, it appeared that the buildings insured were destroyed by fire August 25th; that the plaintiff immediately notified the agent, who in turn notified the company. On October 11th, plaintiff wrote to the company, stating the date, number, and amount of his policy, describing the property insured, the manner in which it was destroyed, the amount of concurrent insurance, the amount of loss, and the amount necessary to replace the buildings, requesting the company to notify him if anything more was required in order to comply with the conditions of the policy. *Held* that, in the absence of any indication from the company that additional proof would be required, it was sufficient to fix the company's liability.

2. Where a policy of insurance provided that the insured, if required, should furnish a certificate of a magistrate or notary as to the facts of loss, he is not obliged to furnish such certificate unless specially notified so to do, and a notification that the terms of the policy must be strictly complied with is not such special notice as will bind the insured.

3. Under a policy of fire insurance providing that an estimate of the loss shall be made by the insured and the company, and, if they disagree, by appraisers, the company cannot plead failure to submit the question of loss to appraisers, in the absence of any disagreement as to the amount of loss or request for such submission.

Appeal from court of common pleas, Elk county.

Action by Lazarus Moyer against the Sun Insurance Office of London. There was a judgment for plaintiff, and defendant appeals. *Affirmed*.

Fred H. Ely and Andrew A. Leiser, for appellant. Kinley J. Tener and Harry Alvan Hall, for appellee.

FELL, J. The policy of insurance upon which this action was brought contained the usual stipulations with regard to furnishing proofs of loss, and the defense was based mainly upon the failure of the insured to comply with the requirements of the policy in that particular. The plaintiff, who lived in Camden, N. J., had insured with the defendant company a dwelling house and stable situated in Elk county, Pa. On August 25, 1894, both buildings were entirely destroyed by fire. He at once notified the agent, and was informed by him that he had notified the proper officers of the company. On September 21st, he received a letter from the adjuster, Mr. Clinger, requesting him to go to Williamsport, and "go over the loss." In order to do this, he would be obliged to travel some 200 miles from his home, and, on the 29th, he wrote to the adjuster, objecting because of the expense and loss of time it would entail, and asking whether it was "unavoidably necessary." On October 10th, the adjuster replied by letter: "If you think it a hardship to meet me at Williamsport, do not comply with the request, but comply strictly with the policies you hold." On October 11th, the plaintiff wrote to the insurance company, stating (1) that he had a policy issued by it, giving its number, date, and amount, and describing the property insured; (2) that the property had been totally destroyed on August 25th, by a fire which originated on the property of a neighbor, and had been carried by the wind to his buildings; (3) the amount of insurance in another company; (4) the amount it would cost to replace the buildings. He further stated that he had notified the company's agent, and that their adjuster had examined the property, and found the buildings entirely consumed. He then recited the substance of his letter to Mr. Clinger, and continued: "I inclose herewith copies of both his letters. The last one, dated October 10, '94, is written in a mysterious manner, alluding to a strict compliance of the policy, but does not explain in what way I omitted to strictly comply with the policy. I have read both policies, and cannot find anything where I have failed in strictly complying with the conditions of these policies; but, if there is anything further to be done, I wish you would please inform me, and also inform me whether it was unavoidably necessary to answer the summons of Mr. Clinger or not; and, by so doing, you will greatly oblige," etc. To this letter the defendant replied: "The matter is in the hands of our representatives in Pennsylvania, and strict compliance with the conditions of the policy will be required."

The plaintiff had distinct notice that the requirements of the policy would be insisted upon. Although intended for the protection of the company, these requirements were conditions precedent to the right of action, and he was bound to comply with them in order to recover on the policy. On the other hand,

if in good faith he had attempted to comply, it was the duty of the company to notify him of any objections to the proofs furnished. This has been repeatedly decided. In *Gould v. Insurance Co.*, 134 Pa. St. 588, 19 Atl. 793, after a careful review of the cases, it was said by Mitchell, J.: "If the insured, in good faith, and within the stipulated time, does what he plainly intends as a compliance with the requirements of the policy, good faith equally requires that the company shall promptly notify him of their objections, so as to give him the opportunity to obviate them; and mere silence may so mislead him to his disadvantage, to suppose the company satisfied, as to be of itself sufficient evidence of waiver by estoppel." The plaintiff's letter of October 11th was intended to furnish the information required. No other conclusion is possible. He stated what he knew about the insurance on the building, the circumstances of the fire, and the extent of the loss. This he afterwards testified was all the information it was possible for him to give. He did not have such a knowledge of the buildings as to enable him to state their dimensions or the details of their construction. Referring to Mr. Clinger's letter, he said: "The last one is written in a mysterious manner, * * * but does not state in what way I omitted to comply with the policy. I have read both policies, and can't find anything where I have failed in strictly complying with the conditions; but, if there is anything further to be done, I wish you would please inform me." If, in the opinion of the officers of the company, this was not a substantial compliance, or if they wished further information, it was clearly their duty so to inform him.

The insured, if required, was to furnish a certificate of a magistrate or notary. He was not required to furnish one. It cannot be said that the notice to comply with the conditions of the policy was notice to furnish the certificate. The company could insist upon the certificate, but the insured was under no duty to furnish it unless required to do so. The arbitration clause was similar to, if not identical with, that considered in *Boyle v. Insurance Co.*, 169 Pa. St. 349, 32 Atl. 553, in the opinion in which case it was said by Williams, J.: "When one clause in a fire insurance policy provides that in case of loss an estimate shall be made by the insured and the company, and another clause provides that, in case they differ, the subject is to be referred to appraisers selected as therein provided, the remedies are successive, and neither party can insist upon the second who has not shown himself willing and ready to enter upon the first."

The defendant company, by letter of November 3d, distinctly denied its liability on the policy, basing its refusal to pay upon the failure of the plaintiff to furnish proofs of loss within the time specified. As the testimony was undisputed, and nearly all of it—

in fact, all that was material in making out the plaintiff's case—was in writing, we see no error in the peremptory direction given by the learned judge. The judgment is affirmed.

(176 Pa. St. 494)

BOYD v. HARRIS et al.

(Supreme Court of Pennsylvania. July 15, 1896.)

INJURY TO BRAKEMAN—CATTLE CHUTE NEAR TRACK
—ASSUMPTION OF RISK.

In an action for death of a brakeman, killed, while on a train, by striking against a cattle chute close to the track, on a siding, the court, instead of leaving it to the jury, should declare, as matter of law, that he had assumed the risk; it not being disputed that for nearly two months he had passed almost daily, and sometimes several times a day, the point at which the accident occurred, and had taken cars out of the siding before.

Appeal from court of common pleas, Cumberland county.

Action by Emma Boyd against Joseph Harris and others, receivers of the Philadelphia & Reading Railroad Company, for death of plaintiff's husband, a brakeman on the road, who, while on a train, was killed by striking against a cattle chute close to the track, on a siding. Judgment for plaintiff. Defendants appeal. Reversed.

J. W. Wetzel, for appellants. A. G. Miller and W. F. Sadler, for appellee.

WILLIAMS, J. This case presents a question, the importance of which extends far beyond the present parties, and the judgment to be entered herein. It is whether the location of the permanent structures along a line of railroad, necessary to accommodate its business, is to be determined by the railroad company, or by a petit jury. If by the former, they may be located with reference to the convenient and economical use of the railroad, and the accommodation of its traffic. If by the latter, these considerations will be lost sight of; and the proper location will be a shifting one, to be settled by each successive jury in accordance with its own notions and the peculiar features of the case on trial. One jury may hold a given location to be safe and proper. The next jury may hold it to be unsafe, and therefore improper. There are many such structures necessary to the operation of a line of railroad. Among the more important of them may be mentioned the bridges, station houses, grain elevators, warehouses, water tanks, coal chutes, cattle chutes, signal stations, and tool houses. The position of these buildings with reference to the track of the railroad, their size, the mode of construction, must be determined with reference to their purpose, and their convenient use as a necessary part of the physical plant of the railroad company. Where they shall be placed, and how they shall be arranged, are questions that belong to the railroad

company, as truly as the location of the switches and sidings, or of the track itself; and the discretion of its officers is no more under the control of a petit jury in the one case than in the other. This discretion is to be exercised in view of the conformation of the surface, the character of the business to be accommodated, and the convenience of the servants and employés by whom it is to be carried on. It is part and parcel of the work of construction, and is governed by the same principles. If any of these structures are so located as to involve unusual danger to employés operating the railroad, it is the duty of the company to advise such of its employés as are exposed to the danger, of its existence, or afford them an opportunity to know its character and extent by observation. On the other hand, the employés, when they take service upon a railroad, know that it is a service which exposes them to many dangers necessarily incident to the employment. The risk of these dangers they assume when they accept the employment. As between themselves and their employer, they undertake to exercise the measure of attention and care necessary to protect themselves from such dangers; and if they fall in this respect, and suffer injury in consequence, they are remediless. Our sympathies may be roused by the maimed employé, or in behalf of his helpless widow or orphaned children, but we are not at liberty to gratify our sentiments by charging against the employer the consequences of the folly or the neglect of the employé. This is well settled. It was said in *Railroad Co. v. Sentmeyer*, 92 Pa. St. 276, that an employé assumes the risk of all dangers incident to his employment, however they may arise, against which he may protect himself by the exercise of ordinary observation and care. When he has been warned of the existence of any particular danger, or has had opportunity to learn of its existence, he is bound to take notice, and to bring into his own service the requisite measure of observation and care for his own protection. This is an implied term or stipulation of his contract of service. He is bound to use his senses, and he "assumes such risks as are incident to the employment from causes that are open and obvious, the dangerous character of which he has had an opportunity to ascertain." *Brossman v. Railroad Co.*, 113 Pa. St. 490, 6 Atl. 226. This assumption embraces all such risks arising from his employment "as he knew, or, in the exercise of a reasonable degree of prudence, might have known," to be incident to his employment. *Schall v. Cole*, 107 Pa. St. 1. But descending from the statement of the general rule, and applying it to particular facts, the cases are numerous. It was applied by this court in *Kelly v. Railroad Co.*, decided in 1887, and reported in 11 Atl. 659, to a case in which the danger arose from the location of an oil

house between which and a passing train the distance was but eight inches. In several cases collected in *Gaffney v. Railroad Co.* (R. I.) 7 Atl. 284, it was applied to lumber piled near to the track. In *Lovejoy v. Railroad Corp.*, 125 Mass. 79, to a signal post. In *Wilson v. Railroad Co.*, 85 Ala. 269, 4 South. 701, to a water pipe. In *Gibson v. Railway Co.*, 63 N. Y. 449, to a projecting roof. To an overhead bridge in *Railroad Co. v. Rowan*, 104 Ind. 88, 3 N. E. 627. Cases are collected in 14 Am. & Eng. Enc. Law, 850, holding the same rule for other states, including Iowa, Maryland, Michigan, and New Jersey, and it seems to prevail very generally in this country.

The question was raised in this case by the seventh point on part of the defendant, which asked an instruction to the effect that the "deceased, for nearly two months, passing almost daily, and sometimes several times a day, the point at which the accident occurred, and having taken cars out of the siding before, is presumed to have had knowledge of the situation of the structures at this point, and to have assumed the risks of his employment, and dangers incident thereto, and the verdict must be for the defendant." This point was refused, without any qualification or explanation, and the jury was told that "it will be for you to determine whether he had knowledge of its situation; that is, of its proximity to the siding." The point asked the court to declare the legal effect of certain facts that were not in dispute, as matter of law. The answer turned the question over to the jury to be solved as a question of fact. The plaintiff's right to recover rested on the position that her husband had been exposed to an undisclosed and unknown danger, and had lost his life in consequence. The defendant's answer was that the danger was open and obvious, arising from the position of a structure that the deceased had passed many times, and, on one or more occasions, on the track of the siding where he was when the accident occurred. The facts set up in this answer were not denied. What was their legal effect? This the court was asked to declare. The duty to observe, and make himself acquainted with, the obvious dangers to which his employment exposed him, was on the deceased. The opportunity to observe, and acquire a knowledge of, these dangers had been enjoyed by him for many days. Under such circumstances, the fair legal presumption is that he had improved the opportunity to observe, and discharged the duty towards himself and his employer which his service required of him. If this proposition be denied, then for how many more months must an employé pass a point of danger daily before the presumption will arise? Will it ever arise? Or must the question of actual knowledge be turned over to the jury to guess at in all such cases? The point was wanting in

clearness of arrangement and expression, but it brought the attention of the court to the controlling question in this case as it is presented on this record. It was a question of law, if, as we understand, the facts grouped in the point were not in controversy, and it should have been treated as such. There is some evidence tending to show that the track of the siding had been changed and brought nearer the cattle chute at one time, but it does not appear whether this was before or after the deceased had been upon the siding, or before or after his entering the service of the defendant company. If before, he was warned to take notice when the opportunity to observe came to him. If after, he was entitled to notice, or to a fair opportunity to observe. The first assignment of error is sustained, and the judgment is reversed.

(176 Pa. St. 489)

PRESCOTT v. BALL ENGINE CO.

(Supreme Court of Pennsylvania. July 15, 1896.)

INJURY TO EMPLOYE—NEGLIGENCE OF FELLOW SERVANT—EVIDENCE.

1. An employé injured by the falling of a shaft, through the breaking of the rope with which it was being lifted, cannot recover of the master if a supply of ropes was furnished for such purpose, some of which were sufficient for such a heavy shaft, and a fellow servant selected one unsuitable for the purpose, or if, being suitable, it was so negligently put on the shaft as to be cut and weakened unnecessarily, and the accident was due to either of these causes.

2. In an action for injury to an employé by the breaking of a rope used to hoist a shaft, it being contended by defendant that a supply of ropes containing some suitable for the purpose was furnished, and that the workmen negligently selected one unsuitable for such a heavy shaft, a witness having testified that, when he was employed with the pulley, he selected from the stock of ropes just such slings as he chose, was asked if the other workmen had the same rights in the selection of slings as he had, and answered, "Yes," and then added, "The foreman told me." *Held* error to sustain an objection to the whole answer, it being competent so far as it rested on witness' knowledge of usage of the shop.

Appeal from court of common pleas, Erie county.

Action by Sampson Prescott against the Ball Engine Company for injury from the breaking of a rope used as a sling in hoisting a shaft in defendant's factory. Judgment for plaintiff, and defendant appeals. *Affirmed*.

Defendant's assignments of error from 13 to 17, inclusive, were as follows: "(13) From charge of court answering defendant's first point: 'First. If the jury find from the evidence that the sling was negligently or incorrectly put on the shaft by Hill and Sheer, or either of them, the plaintiff cannot recover, and your verdict should be for the defendant.' Answer: 'Affirmed, if you find that the sling was reasonably sound.' (14) Charge of court in answering defendant's second point: 'Sec-

ond. If the jury find from the evidence that one of the strands of the sling was cut by the sharp head of the set screw on the clamp, and that this was caused by the sling being incorrectly and improperly put on to the shaft by Hill and Sheer, the fellow workmen of Prescott, then and in that case the plaintiff is not entitled to recover, and your verdict should be in favor of the defendant.' Answer: 'Affirmed, if you should find that the sling was reasonably sound.' (15) From charge of court in answering defendant's third point: 'Third. If the jury find from the evidence that Joseph Shannon and — Hill were fellow workmen of the plaintiff, and that the accident was caused by the negligence of either of them, then and in that case the plaintiff is not entitled to recover, and your verdict should be in favor of the defendant.' Answer: 'Affirmed, if you find from the evidence that Joseph Shannon, as well as Hill, was a fellow servant [workman].' (16) From charge of court in answering defendant's fifth point: 'Fifth. If the jury believe the evidence of Harrington and other witnesses who testified on the part of the plaintiff, who testified as to the appearance of the sling, by the breaking of which the accident complained of was caused, and Hill and Sheer, fellow workmen of the plaintiff, were negligent in taking a worn-out sling with which to do their work, the plaintiff is not entitled to recover damages in this case, and your verdict should be in favor of the defendant.' Answer: 'Refused, provided you find that the sling used was one furnished by the defendant, and that the plaintiff had no knowledge of its condition.' (17) From charge of court in answering defendant's sixth point: 'Sixth. If the jury find from the evidence that the accident was caused through the negligence and carelessness of Hill and Sheer, or either of them, in using a sling which was insufficient for the work to be done, or in so putting it on the shaft that it was cut, then and in that case the plaintiff is not entitled to recover, and your verdict should be in favor of the defendant.' Answer: 'Affirmed, provided you find from the evidence that the sling used was insufficient, for the reason that it was too light a sling to safely lift the weight or shaft in question; provided, also, that you find that it was reasonably sound, but that it was cut because it was improperly or unskillfully attached to the shaft.'"

S. A. Davenport and J. M. Sherwin, for appellant. E. P. Gould, T. A. Lamb, and E. A. Walling, for appellee.

WILLIAMS, J. Whose was the negligence from which the plaintiff in this case suffered? Was it that of the defendant company, or that of a co-employé? This was the controlling question on which the plaintiff's right to recover depended. It was presented to the court by the defendant's points, Nos. 1, 2, 3, 5, and 6, the answers to which are

complained of by the assignments of error numbered from 13 to 17, inclusive. The duty of the employer is to provide a safe place in which his employes may work, suitable tools and machinery to use while at work, reasonably competent fellow servants with whom to work, and such instruction to the young and inexperienced as may be necessary to warn them against the peculiar dangers incident to the kind of work in which they are to be engaged. He must also furnish them with suitable materials for use. *Ross v. Walker*, 139 Pa. St. 49, 21 Atl. 157, 159. But he is not liable to them for injuries due to their incompetency or carelessness, or to the negligence or malice of their co-employes. The duty of an employe is to use his senses in all that relates to his employment, to exercise attention and care in the selection of materials from the mass provided for the general use, and in the manner of their general use, and to provide with reasonable diligence for the safety of himself and his co-employes in his management of his own share of the work to be done. In other words, he is bound to bring his mind as well as his limbs into the service of his employers so far as it may be necessary to enable him to exercise a reasonable degree of care over the interests of his employer and the safety of his co-employes and himself. If, through carelessness or because of a mistake in judgment, the rope selected for use on this occasion was unsuitable for the purpose for which it was wanted, or if, being suitable, it was so negligently or carelessly put upon the shaft as to be cut and weakened unnecessarily, and the accident was due to either of these causes, it is clear that the plaintiff had no cause of action. The jury must find the existence of these two facts before they will be justified in rendering a verdict in favor of the plaintiff, viz.: First, that there was no better rope in the stock on hand, from which the workmen had a right to select, than the one that was selected in this instance; and, second, that the failure of the rope selected was not due to the manner in which it was put upon the shaft, but to the insufficiency of the rope itself to answer the purposes for which it was offered to the workmen. We see no reason to doubt that the rigger was a vice principal, and, as such, charged with the duty of keeping ropes on hand some of which should be at all times suitable for use. But it was not his duty to select the rope to be used on each occasion when a rope was wanted. If good ropes were in stock, and a poor one was used, because of haste or carelessness or mistake in judgment, it was not the fault of the rigger as vice principal, but of the workmen themselves; and the injury suffered because of the use of the unsuitable rope could not give the injured person a cause of action against his employer. In the nature of things, the ropes will wear from using. In a few months they become worn so badly

as to be unsafe for heavy work, while they might be entirely safe for that which is lighter. Such ropes are not to be at once removed from reach, but their use must be left to the experience and judgment of those by whom the work is to be done. Care must be exercised according to the circumstances, by the employe, as well as the employer, up to a reasonable degree; and a failure to exercise such reasonable care is a failure in duty. It is therefore negligence. The answers complained of did not furnish the jury with a clear and distinct statement of the rule; and the errors assigned to them are sustained.

The fifth assignment should also be sustained. The witness Stahl had testified that he selected from the stock of ropes just such slings as he chose when he was employed with the pulley, and was asked, "Was it the same with the other workmen as to their right to get slings as you did?" He replied, "Yes, sir; they were," and then added, "The foreman told me so." The whole answer was objected to, and the evidence was excluded. So far as the answer of the witness rested on his knowledge of the usage of the shop, it was competent. If he knew the practice among the men was to select such a sling as they supposed was needed for the work to be done at the time, he had a right to say so. It was clearly the duty of the workmen to make such selection, unless a particular sling was provided for each particular piece of work, and they were required to use it. If this was required, it was the duty of the plaintiff to show it. It was important for the defendant to show no more than that a sufficient number of slings was provided for the use of the workmen, and that some of them, accessible at all times, were of sufficient strength for the support of a weight such as was handled at the time the accident occurred. If a poor one was used when a good one was within reach, this was negligence; and, whether chargeable to the plaintiff or to a co-employe, it relieves the defendant from all liability for the injury sustained. The errors pointed out require us to reverse this judgment. A venire facias de novo is awarded.

(176 Pa. St. 409)

MILLER v. NIEDZIELSKY.

(Supreme Court of Pennsylvania. July 15, 1896.)

STRIKING JUDGMENT FROM RECORD.

Defendant in his contract of purchase of a lot for \$250, payable \$50 down, balance in four equal annual installments, undertook to execute an amicable action of ejectment, and confess judgment therein in favor of the vendor, for the purpose of furnishing additional security, and to be used only on and after a default of payment, "of which the affidavit of the said first party, * * * filed with such amicable action of ejectment, shall be sufficient evidence"; it being further stipulated that "on the filing of said amicable action, accompanied by

the affidavit aforesaid," a writ of *habere facias* should at once issue. Defendant, who had put \$1,200 in improvements on the lot, and made the first deferred payment, was absent when the second installment became due; and plaintiff, separating the amicable action and confession of judgment from the contract, entered judgment thereon, and obtained possession under a writ of *habere facias*. Defendant soon after made tender. *Held*, that the judgment should be stricken from the record, and defendant given possession and rents collected by plaintiff.

Appeal from court of common pleas, Luzerne county.

Amicable action of ejectment by J. G. Miller, for use of F. Hart and another, against Pelagia Niedzielsky. Judgment for plaintiff was stricken from the record on petition of defendant, and plaintiff appeals. Affirmed.

Edmund G. Butler, for appellants. E. F. McGovern, for appellee.

WILLIAMS, J. We fully agree with much that is said by the appellants in regard to the necessity for the exercise of care in striking judgments from the record. The cases in which the exercise of such a power is proper are few. When a judgment has been regularly entered upon the records, it may be opened for cause shown, an issue may be directed to determine the right of the plaintiff to have execution upon it, or he may be restrained from proceeding to enforce it, as the facts may require. But, to justify the court in striking a judgment from its records, it should appear that its entry was unauthorized, and that the plaintiff had no right to place it on record as a lien or an adjudication against the defendant. An examination of the records now before us leads us to the conclusion that this is a proper case for the application of the principle enunciated by Portia in a celebrated case reported by Shakespeare in the Merchant of Venice. The plaintiff was permitted, in that case, to secure the pound of flesh "nominated in the bond," if he could do so without taking a drop of blood. Blood had not been stipulated for in the covenant on which the plaintiff sued. This limitation did not deny the right, but it affected the remedy. This case presents a somewhat similar question. The defendant purchased from J. H. Miller a building lot in Wilkesbarre township, Luzerne county, by an agreement in writing dated on the 28th May, 1893, for \$250. Of this price, \$50 was paid in hand, and the remaining \$200 was to be paid at the rate of \$50 per annum, together with interest on the whole sum unpaid, on the 28th day of May in each year, until paid. After the purchase the defendant proceeded to erect a double dwelling on the lot at a cost of \$1,200. When the first installment fell due it was not paid on the day fixed, but it was paid a few weeks later, with interest, and accepted without objection by the vendor. When the next installment came due the defendant was out of the state, and it was not paid on the day named in the agreement. In the agreement

signed by her, she had undertaken to execute an amicable action of ejectment, and confess judgment therein in favor of the vendor for the lot; but it was stipulated that this was for the purpose of furnishing an additional security for performance on her part, and the manner of its use was clearly provided for. It was to be used only on and after a default of payment, "of which the affidavit of the said first party, his heirs," etc., "filed with such amicable action of ejectment, shall be sufficient evidence"; and, in order to avoid delay, it was further agreed that "on the filing of said amicable action, accompanied by the affidavit aforesaid," a writ of *habere facias* should at once issue. The fair construction of these stipulations is that the amicable action and confession and the affidavit must be filed at the same time, and that the right of the plaintiff to a judgment depends upon the proof of the default, without which no judgment can be entered. The present plaintiffs purchased the legal title of Miller after the second installment fell due, separated the amicable action and confession of judgment from the contract of which it was part, and which furnished both the authority and the method for its use, and, without any affidavit or suggestion of default, entered judgment thereon, issued a writ of *habeas facias possessionem*, turned out the defendant's tenants, took possession of the house, and have continued in possession ever since. When the defendant returned, soon after, and learned what had been done, she proceeded to make a tender to the plaintiffs of the money due on the contract, with interest and costs, and then applied to the court of common pleas for relief, upon an affidavit setting forth all the facts. In this affidavit she stated the relation of the contract and its provisions to the amicable action and confession; charged that the latter had been fraudulently separated from the contract, so that neither its consideration nor the manner of its use should appear on the record, and that no affidavit, or other method for ascertaining the existence of a default or its extent, had been made use of before, or contemporaneously with, the entry of the judgment, and that strict performance of the contract had been waived by her vendor. An answer was filed, but it did not deny that the contract and the amicable action were originally one instrument, nor that the defendant had separated them, using the amicable action by itself, and without the affidavit which the contract made necessary. The plaintiffs admit, in effect, that they are in possession of the contract from which the amicable action was taken, but they make no denial that its contents are as the defendant alleges, or that it and the amicable action belong together, and constitute together the "additional security" that was in the contemplation of vendor and vendee. The case was presented to the learned judge of the court below on petition and answer. The rules of his court provided that averments in

a petition, not specifically denied in the answer, should be treated as admitted. Under the operation of this rule, the really important averments of the petition were admitted, and the facts before him for his judgment were substantially as follows: (1) A judgment had been entered upon the records, upon an instrument that was but part of the agreement between the parties, while the other and suppressed part of the agreement was that which prescribed the manner in which the holder should proceed to obtain a judgment. (2) The judgment so obtained had been entered without any authority whatever, if regard be had to the contract as a whole, since the contract authorized the use of the amicable action only in case of a default, and prescribed the manner in which the default should be shown. (3) The petition placed the contract before the court as fully as though it had been filed with the amicable action, and raised the question of the plaintiffs' right to a judgment under the provisions of the contract. Having these facts and the suppressed terms of the contract before him, the learned judge held that the judgment had been improperly entered, and should be stricken from the records. He did not deny the legal right of the plaintiffs to seize the defendant's house and lot, and appropriate to their own use the \$1,300 she had invested, without making any compensation to her therefor, provided they kept within the letter of the bond, but he held them to a literal compliance with its terms. So odious a forfeiture, asserted in so odious a manner, should be clearly authorized by the contract, and the terms of the contract should be strictly followed in asserting it, or the pound of flesh may not be enjoyed by the exacting creditor. The order appealed from is affirmed; the costs of this appeal to be paid by the appellants. It is needless to add that the defendant is entitled to prompt restitution of the possession, and of all rents received by the plaintiffs, and the court below will make all necessary orders for this purpose.

(176 Pa. St. 466)

AHL v. AHL.

(Supreme Court of Pennsylvania. July 15, 1896.)

CONVEYANCE OF LAND—PAROL TRUST—INSTRUCTION—EVIDENCE.

1. In an action against the executor of a deceased member of a firm for the value of certain iron land which was conveyed by a trust deed joined in by the plaintiff and the members of the firm to secure a creditor of the firm, and afterwards sold to satisfy the debt, defendant answered that this was part of the property of the firm, which was put into the hands of plaintiff to enable him to carry the business of the firm in his name for the benefit of the firm, and that he had no ownership in any of the property except as the agent of the firm, and plaintiff replied that the rest of the property was put in his hands for such purpose, but that he bought the iron land, and paid for it. *Held*, that the only question was whether plaintiff paid for the land, and that it was error to charge that defendant must establish a parol trust by satisfactory evidence.

2. All the property of a firm was conveyed to plaintiff. It was admitted by plaintiff that with the exception of certain iron lands this was to enable him to carry on in his name the business of the firm as its agent for its benefit. After such conveyance such land was conveyed by trust deed, joined in by plaintiff and the members of the firm, to secure a debt of the firm, and afterwards sold to satisfy it. *Held*, in an action against the executor of a member of the firm to recover the value of the land, plaintiff claiming that he bought and paid for the land, and that he received no consideration for its use to pay the firm debt, that plaintiff's ledger was not admissible as proof of payment to the firm of the purchase price of the land.

Appeal from court of common pleas, Cumberland county.

Action by Q. P. Ahl against Peter A. Ahl, executor of D. V. Ahl, deceased. Judgment for plaintiff, and new trial denied, and defendant appeals. Reversed.

The agreement for indemnity referred to in the opinion was as follows: "Whereas, Q. P. Ahl holds a lease of the Antietam Iron Works from Daniel V. Ahl, and he also holds a title to the Virginia ore bank property from J. A., D. V., and P. A. Ahl, who are conducting a business at said Antietam Iron Works under the firm name of J. S. Ahl & Co.; and whereas, the said firm of J. S. Ahl & Co. are indebted to William T. Hamilton, the Hagerstown Bank, and other creditors, and a chattel mortgage is held by said Hagerstown Bank for its proper protection, and the above-named real estate is to be held equally liable for any indebtedness not fully provided for; and whereas, it is agreed by said creditors that all of the said property shall be used in the manufacture of iron at said works, the proceeds of which are to be converted and appropriated to the benefit of the creditors of the said J. S. Ahl & Co. through an agent for said purpose under the direction and superintendency of a person selected by said J. S. Ahl & Company; and, whereas, the said Q. P. Ahl has been selected for that purpose: Now it is understood that he shall be protected and saved harmless from any individual liability that shall be incurred by him in the management of said business and the assuming of any indebtedness of the firm of J. S. Ahl & Company, excepting the \$8,000 mentioned in said lease, and payable to the Hagerstown Bank, as is more fully set forth in said lease; the rental under said agreement being assumed by J. A. Ahl in his final settlement of the partnership business of J. S. Ahl & Company, as heretofore. We also agree that if any sale of the Antietam Iron Works and ore banks are made by the said J. A., D. V., and P. A. Ahl while under the management of Q. P. Ahl, then there shall be paid him out of the proceeds of said sale at the time of conveyance the sum of \$5,000, and, in addition thereto, all moneys advanced by him while assisting in the operation of said works, and all individual liabilities incurred to be fully paid; and there shall also be paid out of the proceeds of said sale the bond of J. A.

Ahl, in full, with interest accrued on same at the time of payment. Q. P. Ahl is allowed, in case of any sale, to reimburse himself for any moneys expended by him in the operating of said works out of the ore manufactured, a full account of which is to be kept and rendered from time to time; Q. P. Ahl to be held to account to the said J. S. Ahl & Company, of the iron so manufactured, only that which has been sold and actually shipped by him, and in no event to be held for any liabilities of the said firm further than the extent of the property placed in his hands for that purpose, and the amount of iron so sold and delivered. Witness our hands and seals this 13th day of June, A. D. 1877."

S. M. Leidich, John Hays, William Trickett, and W. F. Sadler, for appellant. C. W. Webber, A. G. Miller, and J. W. Wetzel, for appellee.

WILLIAMS, J. There is but a single question of fact about which the parties to this action are at variance. The position and significance of that question will be readily seen by a glance at the facts that are conceded. The firm of J. S. Ahl & Co. consisted of J. S. Ahl, John A. Ahl, and D. V. Ahl, residents of Cumberland county, Pa. They were engaged in the manufacture and sale of pig iron at Antietam, Md. They obtained much of their iron ore from a tract of land in West Virginia, known as the "Virginia Ore Bank." The furnace at Antietam was owned by D. V. Ahl. The tract of ore was owned by the members of the firm as tenants in common. In 1877 the firm became somewhat embarrassed, and the continuous operation of the furnace was necessary to the payment of its debts. In order to make this possible, it was agreed that Q. P. Ahl, the plaintiff, a son of one of the partners, should take the lease of the iron works, and conduct the business in his name for the benefit of the firm. At the same time, the stock of coke and ore on hand was transferred to him, and the ore tract was conveyed to him. The business was then continued by the firm in the name of Q. P. Ahl, and under the superintendency of William C. Bradley, until the 1st of April, 1880, when it was closed. About the time work was begun in the name of the plaintiff, an agreement was entered into by the members of the firm for the purpose of indemnifying him against any liabilities he might incur on their account in consequence of the use of his name in what was actually their business. This was a reasonable and proper precaution for the protection of Q. P. Ahl under all the circumstances, and the weight of the evidence is in favor of the defendant's allegation that it was duly delivered to him at the time it was prepared and signed. At all events, it is conceded that the work was carried on at Antietam by the firm, in his name, and that the money was furnished by the firm for all the expenses

incident to the business. The plaintiff claimed no interest in the business as against J. S. Ahl & Co., nor, as we understand, did he claim royalties for the ores used. Late in the year 1877, William T. Hamilton, a creditor of the firm for a considerable sum, insisted on additional security for the money due him. To satisfy this demand, the firm offered and he accepted the Virginia ore tract, and a trust deed of it was made by the members of the firm and Q. P. Ahl to F. M. Darby for the purpose of subjecting it to Hamilton's debt. More than seven years afterwards the ore bank land was sold under an order of the circuit court of West Virginia for the payment of this debt. In 1892, D. V. Ahl died. On the 16th day of September, 1893, or about six years after the sale of the ore bank by the sheriff, this action was brought. The position of the plaintiff now is that he became the owner of the ore tract by virtue of the conveyance of 1877, and that he paid \$8,000 to the firm as purchase money therefor; that he joined in the trust deed without any consideration therefor; and that the subsequent sale of the tract for Hamilton's debt was an appropriation of his property for the benefit of J. S. Ahl & Co., for which he has a claim upon the members of the firm for reimbursement. This claim does not seem to have been made upon the firm while it was in existence, nor upon any member of it in his lifetime, nor until a year after the last survivor was in his grave. The single question of fact raised on the trial was over the payment by the plaintiff of the purchase money for Virginia ore tract. If this was not paid, then the title of the plaintiff to the ore tract was like his title to the lease of the furnace, and to the coke and ores in stock, at the time the business was undertaken for the firm in his name. The defendant alleges that these titles were put in Q. P. Ahl at that time to enable the firm to continue its business, for purposes of liquidation, in his name; and that he had no ownership in anything that was so transferred except as the agent of J. S. Ahl & Co., and that the execution of the trust deed by the plaintiff was a use of the title of the ore tract in accordance with the interests and directions of the owners, and its consequent sale by the sheriff divested no property right of the plaintiff, but simply applied the proceeds of the tract to the debt of its owners. Now, it will be seen that this is not a proceeding against a trustee. If a trust ever existed, it has been voluntarily executed. It is not an effort to escape the bar of the statute of frauds. It is an action in which the plaintiff claims to recover for money raised from his property, with his full consent, and applied to the payment of the debts of J. S. Ahl & Co. The reply made by the defendant is that the property from which the money was raised did not belong to the plaintiff, but was the property of the firm, to whose debts it was appropriated. The

question thus distinctly raised between these parties between whom confidential relations existed at the time is, did the plaintiff pay the owners for this land in 1877, or did he take it, as he took everything else relating to the business of this firm, for the benefit of the firm? The points submitted on the part of the plaintiff drew the attention of the learned judge away from this question, and led him to leave on the minds of the jury the impression that to justify a verdict in favor of the defendant it was necessary for him to establish a parol trust by evidence that was precise, full, clear, and satisfactory; and that he had failed to furnish such evidence. The assignments of error from the third to the seventh, inclusive, relate to this subject. The part of the charge embodied in the seventh assignment will show the character of the instructions referred to. The learned judge said: "It has been claimed by the defendant, to a certain extent at least, that it [the ore tract] was conveyed upon a certain trust, and on behalf of the plaintiff it is contended that there is no legal proof of a trust, or that, whatever trust there is being simply by parol, it could not be received to establish an express trust; and in that respect we agree with the contention of the plaintiff. There is no competent evidence produced here that would establish an express trust, for two reasons: First, because it is not in writing, as required by law; and, second, because it is not definite, clear, and distinct, such proof as is required for that purpose." There is a sense in which the arrangement between J. S. Ahl & Co. and the plaintiff may be said to have created a trust, inasmuch as he clearly held the iron works, the coke, the ore, and the business simply for the benefit of the firm; but it was a trust recognized and executed without question. The trust relation, in this sense of the word, was a conceded fact in the cause. It embraced, even in the plaintiff's own view of it, everything that came into his hands from the firm except the ore tract. This tract he used as he would have used it if he had recognized the trust as to it. He subjected it to the debts of the firm. He practically turned it over to them by the trust deed. Now, after the lapse of many years, he sets up a claim to be reimbursed. The defendant answers that this ore tract was part of the property of the firm, put into his hands to enable him to go on with the business of J. S. Ahl & Co. for their benefit; that he entered upon this trust, executed it, closed out the business, and retired from it having converted the property in his hands, including the ore tract, to the purposes of the firm. The reply is: "What you say is true, except as to this tract. This I took for myself, and paid for it." This, then, is the only question: Did the plaintiff pay for this particular piece of property when the conveyance was made to him? If he bought it, and paid for it, it was his. If he did not,

it was, like all else that the firm turned over to him, a part of the property needed in the prosecution of the iron business and the payment of the debts of the firm, and it was used in accordance with the wishes of the real owners. So much of the first assignment of error as relates to the admission of the ledger of the plaintiff as evidence against the defendant is also sustained. It was offered and received as proof of the payment of the purchase money for the ore tract to J. S. Ahl & Co. It was clearly incompetent, and we do not see that the defendant has waived the objection taken at the time by him. An additional observation should be made in regard to the agreement of 18th June, 1877, indemnifying Q. P. Ahl against liabilities to be incurred in the conduct of the business of J. S. Ahl & Co. This paper, in connection with the evidence relating to the time of its preparation and delivery, is strongly corroborative of the defendant's position. It harmonizes with the relations conceded to exist between the parties, and was entitled to weight on the disposition of the single question of fact in the case for the additional reason that its recitals are really inconsistent with the position now taken by the plaintiff. We agree with the learned judge that the verdict appears to be against the weight of the evidence, and we think this must be accounted for by the fact that the jury were led away from the single question in the case, and drawn to the conclusion that, having failed to establish a valid trust under the statute, the defendant had failed to make a defense to the plaintiff's claim, and that the plaintiff was, therefore, entitled to recover. The judgment is now reversed, and a venire facias de novo awarded.

(176 Pa. St. 536)

SAFE-DEPOSIT & TRUST CO. OF PITTSBURGH v. COLUMBIA IRON & STEEL CO.

(Supreme Court of Pennsylvania. July 15, 1896.)

MECHANIC'S LIEN—DESCRIPTION OF PROPERTY—EVIDENCE AS TO TIMELY FILING—AS AGAINST MORTGAGE.

1. As against a mortgage recorded after the filing of a mechanic's lien, but before judgment on a scire facias on the lien, neither the recitals in the lien, nor the judgment, are sufficient to establish the fact that the lien was filed in time.

2. A mechanic's lien for construction of foundations for a mill and boiler house sufficiently identifies the property by stating that the buildings are on the grounds of a certain company in a certain town; the mill being about 515 feet long by 110 feet wide for 260 feet of its length, and 64 feet wide for the remainder, and the boiler house, being about 50 feet from the mill, and 305 feet long by 36 feet wide.

Appeal from court of common pleas, Fayette county.

Action by the Safe-Deposit & Trust Company of Pittsburgh against the Columbia Iron & Steel Company. From a decree dis-

tributing the proceeds of sale of defendant's real estate under a judgment for plaintiff giving priority to a mechanic's lien filed by Huckestein & Co., the rights under which were assigned to Stoltzenbach & Pfeil, plaintiff appeals. Reversed.

The mechanic's lien was as follows: "Allegheny, Pa., 188-. The Columbia Iron and Steel Co. to Huckestein & Co., Dr.: For work done and materials furnished in the excavation, grading, concrete work, and brick and stone masonry in the new mill building and boiler house, and setting of boilers, and for the machinery and engine foundations pertaining to said mill building, at Uniontown, Pa.; said work and materials having been done and furnished under an agreement with the said Columbia Iron & Steel Company, a copy of which said agreement is hereto attached. The said work and materials being as follows, viz.: * * *. The said mill building and boiler and engine house are situated on the property or grounds of the said Columbia Iron and Steel Company, in the — ward of Uniontown, Fayette Co., Penna., and are iron structures; the mill building being about 515 ft. long by 110 ft. wide for 260 ft. of its length, and 64 ft. wide for the remaining portion of its length. The boiler and engine house is adjacent to the mill building,—about 50 ft. distant therefrom,—and is 315 ft. long by 36 ft. in width. We began work on same on the 29th day of June, 1886, and completed the same within the last preceding 6 months, to wit, on the 13th day of December, A. D. 1886."

S. E. Ewing, J. M. Oglevee, and H. A. Miller, for appellant. Boyd & Umbel, for appellee.

FELL, J. The controversy in this case arose before the auditor appointed to distribute the fund realized by a sheriff's sale of the real estate of the Columbia Iron & Steel Company. The sale was under proceedings upon a mortgage. The only claimants were the mortgagee and a mechanic's lien creditor. The lien was filed June 9, 1887, and judgment was obtained upon it March 30, 1892. The mortgage was recorded April 30, 1889. The auditor reported that "the evidence as to the time when the contract was completed is very meager, but the lien, as filed, states that it was not completed until December 13, 1886; and, in the absence of any evidence to the contrary, this is conclusive." There was in fact no evidence upon the subject, and the finding of the auditor is based entirely upon the statements contained in the lien. Work to the amount of nearly \$34,000 was done under a general contract, and the claim for work and materials in addition to the contract price was \$469. At the end of the lien is a statement, "We began work on the same on the 29th day of June, 1886, and completed the same within the last preceding six months, to wit, on the

13th day of December, 1886." The last date for work done and materials furnished is December 13th. Was this sufficient, as against a mortgagee whose mortgage had been recorded before judgment was obtained on the mechanic's lien, to establish as a fact that the lien was filed in time? A mechanic's lien is a claim only, and its averments and dates establish nothing. A judgment obtained upon it is, of course, conclusive against the owner, but he cannot waive the right of creditors to insist that the lien is invalid. As to them it is a judgment from its date only, and not even *prima facie* evidence of the relation of the lien to the commencement of the work on the ground. In the opinion filed by Sharswood, J., in the district court of Philadelphia, and adopted as the opinion of this court in Norris' Appeal, 30 Pa. St. 122, he said: "In a contest between mechanics and others for a fund in court, a judgment obtained by a mechanic on a *scire facias* is, as to other claimants, *res inter alios acta*, and not even *prima facie* evidence. As a judgment, it ranks merely from its date. To come in as a lien, it must be proved so as to entitle it to relate to the commencement of the building." This case was distinctly recognized and followed in McCay's Appeal, 37 Pa. St. 125, and Hahn's Appeal, 39 Pa. St. 409. The averments and dates in the lien were not aided by the judgment on the *scire facias*, and they were not in themselves sufficient to sustain the finding that the lien was filed within six months of the completion of the work. The finding of the learned auditor as to the time when the work was completed was excepted to, but it does not appear that the question whether the lien was evidence was raised before him. That no injustice may be done, an opportunity should be given the appellees to prove, if they can, such facts as will establish their right to participate in the distribution.

The lien is very inartificially drawn, but it is not fatally defective for want of a proper description of the buildings. The work was for the foundations, and the buildings were not completed at the time when it became necessary to file the lien. The description, we think, is sufficient to identify the property. The assignments of error relating to this subject are overruled. The remaining assignments are sustained, and the record is remitted to the common pleas in order that further testimony as to the time of the completion of the work may be taken and reported upon by the auditor.

(176 Pa. St. 580)

STRAIGHT v. WILSON et ux.

(Supreme Court of Pennsylvania. July 15, 1896.)

FRAUDULENT REPRESENTATIONS—STALE OBJECTIONS—OIL LANDS—EVIDENCE OF PRODUCTION.

1. The defense of fraudulent representations as to producing capacity of oil lands, interposed

to an action for balance of purchase money for the lands, must be sustained by convincing evidence to be worthy of consideration, where defendant made payments for 27 months, got an extension for a note coming due 30 months after purchase thereafter, bought out the interest of his partners in the purchase, and made no complaint about the purchase till action was brought for balance of purchase money.

2. On the question of misrepresentations of vendor as to the production of oil lands when the well was put into the "shut-down movement" seven months before the sale, evidence of the amount of oil credited by a pipe line to the vendor from such lands for two years prior to the sale is not admissible, such evidence not showing production, but delivery for market.

Appeal from court of common pleas, McKean county.

Action by R. J. Straight against Noah Wilson and wife. Judgment for plaintiff. Defendants appeal. Affirmed.

Berry & Edgett, for appellants. Wolf & George, Mullin & Mullin, and R. B. Stone, for appellee.

MITCHELL, J. The appellant bought an interest in oil territory from plaintiff, and gave in payment, *inter alia*, 15 notes for \$600 each, falling due at regular intervals of three months from the date of the purchase, June 1, 1888, and all secured by the mortgage now in suit. The first 9 notes, running to 27 months, were paid without objection, and when the 30-months note came due appellant sought and obtained an extension of time on it, and up to this point made no objection or complaint about his purchase. Some time after this he also bought out for his wife his partners in the original purchase. When, however, this action was brought on the mortgage for the balance of the purchase money, he defended on the ground that he was induced to buy by fraudulent misrepresentations of the producing capacity of the land. An objection so stale as this, and coming under such circumstances, would need to be sustained by convincing evidence to be worthy of any consideration at all. What was offered by appellant was not convincing, either in kind or quantity. The representations made by plaintiff related mainly, if not exclusively, to a period seven months before the purchase, and to the capacity at which the well was put into the "shut-down movement,"—an arrangement between oil producers to regulate and reduce certain portions of their production. Appellant complains particularly of the refusal to admit in evidence the pipeline statements, showing the amount of oil credited to plaintiff from this property for two years prior to the purchase. Whether the statements are in themselves the best evidence of what they purport to indicate was not clearly shown in the case, but, as counsel had agreed that they should be used in place of the pipe-line books from which they were taken, we do not think they could be rejected on that ground. But the evi-

dence which they contained was not in itself relevant to any issue in the case. They did not represent production, but delivery for market. The only representations by plaintiff that were proved were, as already said, as to the production at which the well was put into the "shut down." The statements did not profess to show production at all, but only the "runs," or amount of oil carried by the pipe line for the owner. No doubt, if applied to a considerable period of time, the "runs" represent the production but inferentially only, for their accuracy as to this purpose would depend on other factors, such as the working to full capacity, the storage in the tanks, the partial or complete run off, etc. There was no evidence on which a jury would have been justified in finding any fraudulent misrepresentations, and the learned judge was right in directing a verdict for plaintiff. Judgment affirmed.

(176 Pa. St. 273)

In re KERN'S ESTATE.

Appeal of GILPIN.

(Supreme Court of Pennsylvania. July 15, 1896.)

POWER OF ATTORNEY—DEATH OF PRINCIPAL.

1. A transfer of stock under a power of attorney after the death of the principal, which was known by the transferee, is invalid.

2. A pledge of stock under a power of attorney for debts other than the principal's, unauthorized by the power of attorney, which was seen by the pledgee, who also knew who owned the stock and who owed the debts, gives no lien.

Appeal from orphans' court, Philadelphia county.

Accounting by Hood Gilpin, executor of William H. Kern, deceased. From a decree denying the petition of the executor that payment of the claim of Richard P. Loper be suspended till delivery by him of assets belonging to the estate, the executor appeals. Reversed in part.

Bernard Gilpin and John G. Johnson, for appellant. J. Howard Gendell, for appellee.

WILLIAMS, J. The appellant filed an account as executor of W. H. Kern, deceased, early in 1894, which came up for audit before Judge Hanna of the orphans' court in June, 1894. Loper, the appellee, presented at the audit a claim against the estate of \$2,000, which was allowed, and to which, as we understand, no exception has been taken. The executor, however, presented his petition to the orphans' court, setting forth that Loper had in his possession certain stock belonging to the estate, which he refused to surrender, and for which he had paid no value to the decedent in his lifetime, or to his estate since his decease, and asking that payment of the money awarded to him should be suspended until the said stocks, assets of the testator, should be delivered up to him, the executor.

An answer was filed, in which Loper admitted that he had in his possession 66 shares of stock in the Knickerbocker Ice Company, which still stood on the books of said company in the name of William H. Kern; but he alleged that said shares belonged to him, and stated the facts out of which his title arose. These were substantially as follows: Loper had been the founder and organizer of a business establishment called "The Guarantors of Pennsylvania." As such, he held, not for his own use, but for the use of the Guarantors Company; three promissory notes for money due upon subscriptions to the stock of the company, given by William H. Kern, Howard R. Kern, and Walter R. Kern, respectively, for \$919.12 each. These notes were dated on the 1st of February, and were due in nine months. The answer alleges that Howard Kern was the attorney in fact of his father, who was in feeble health, and that in March, 1893, Howard indorsed, as attorney in fact, the 66 shares of stock in the ice company over to him as collateral security to the three notes. In April, 1893, William H. Kern died. In October following, as Loper states in his answer, Howard R. Kern agreed to turn over these shares of stock to him in consideration of the payment of the three notes due to the Guarantors Company. This was done. The shares in the Guarantors Company were then issued, not to the decedent or his executors, but to Howard R. Kern, who denies, as it seems, that his father or his estate is entitled to any part of them. The question raised upon these facts is whether the transfer alleged in the answer vested a title to the ice company stocks in the transferee, good against the executor of William H. Kern. It will be noticed that there is no controversy over either of the following facts: (a) That the Knickerbocker ice stocks belonged to William H. Kern; (b) that they were transferred by an attorney in fact, acting in the name of his principal; (c) that the arrangement to appropriate them to the payment of the three notes was made about six months after the death of William H. Kern, and the consequent revocation of the power of attorney; (d) that but one of the notes represented a debt of William H. Kern, the owner of the stocks. From these facts we think the legal conclusions are plain, and that they dispose of this case. First. Death works a revocation of a simple power of attorney, and vests the title of the decedent in his executor or administrator. The power of Howard R. Kern was, therefore, at an end when the arrangement for the payment of the notes was made by him; and the stocks, subject to any valid pledge that may have been made of them, were a part of the assets of the estate of William H. Kern. Second. If the conclusion just stated was debatable, the use of this stock, under the power of attorney, to pay debts for which the decedent was not liable, was a misappropriation of them. An attorney in fact can lawfully use

the property of his principal only in the business of the principal. The use of such property for the payment of his own debt or that of any other person is not authorized by the power. In this case Loper knew of the ownership of the father. He saw the power of attorney. He was bound to know that it conferred no power on the attorney except in the business of the principal. He knew that two of the notes were not the debt of the principal. He knew that the stock issued by him to Howard R. Kern did not go to his father's estate, but to himself. He is fixed with knowledge, both of the revocation of the power of attorney by the death of the maker, which he well knew, and of the misappropriation of the Knickerbocker ice stock in making use of it to pay the debts of other persons than its deceased owner, for these debts were paid to him. The note of William H. Kern could be properly secured by his attorney in fact by the pledge of his principal's property, and to that extent the decree of the court is sustained. It is reversed as to so much of the stock of the ice company as was applied to the payment of debts for which the owner was not liable. If the stock in the Guarantors Company issued in exchange for William H. Kern's note is claimed by Howard R. Kern, that is a question to be settled between him and the petitioner. He must restore it to his father's estate, unless he can show a valid transfer from his father to himself.

(176 Pa. St. 366)

In re FARNUM'S ESTATE.

Appeal of KRUMBHAAR.

(Supreme Court of Pennsylvania. July 15, 1896.)

WILLS—CONSTRUCTION—ADVANCEMENT—INTEREST.

Testator directed that out of the income of his estate annuities amounting to \$1,100 be paid to his sister and widow; that the residue of the income, and the whole of it after the death of annuitants, be divided every year equally among testator's children living at the time of the annual distributions, the children of a deceased child taking their parent's share; the payment of income to continue till the death of the last of testator's children, when the principal of the estate was to be divided as though testator had then died intestate. After execution of the will, testator advanced \$8,250 to his daughter C., for purchasing and furnishing a house and for immediate expenses, and by codicil declared that such money should be considered as advanced on account of her interest in the estate under the will, and be treated by his executors "as brought into hotchpot with or added to the capital or principal of said estate in their hands," for the benefit of his other children and their descendants, so as to reduce the share of C. or her descendants in the rents, profits, dividends, interest, and income of his estate "by an amount equal to the interest at six per cent. of said sum so paid or advanced." Held, that it was not testator's intention that his daughter pay 6 per cent. interest on her advancement for all the time that might elapse from his death till each of the other children should receive as much income as would equal the aggregate amount of 6 per cent. interest on the advancement (which, under the conditions

existing, would take about 40 years, without C. or her children receiving anything from the income), but that the children of C., she being dead, were entitled to share in the income when each of testator's other children had received from the income an amount equal to the advancement.

Appeal from orphans' court, Philadelphia county.

In the matter of the estate of Henry Farnum, deceased. From a decree dismissing exceptions to the adjudication of the auditor on the second account of the Fidelity Insurance, Trust & Safe-Deposit Company of Philadelphia, substituted trustee under the will of deceased, Charles H. Krumbhaar and others appeal. Reversed.

C. H. Krumbhaar and John G. Johnson, for appellants. George Sergeant, for appellee Mrs. Ellen Grubb. Edward L. Perkins, for appellee Henry Farnum.

GREEN, J. The question at issue in this case is confined within narrow limits. It is a perplexing question, nevertheless, rendered so chiefly by the circumstance that we find ourselves obliged to differ with the learned court below in two opinions delivered on the same question, at different times, by two of the very able and accomplished judges of that court. As we view the case, it resolves itself into a mere question as to what was the intention of the testator, as expressed in his will, in regard to the subject of interest on the advancement to his daughter Mrs. Bell. Two or three perfectly well-established rules prevail in regard to the general subject. One is that advancements do not, of themselves, bear interest. Another is that, if interest is to be charged on an advancement, it can only be done by force of an intent of the testator to that effect, and that intent must be clearly expressed in the will. *Miller's Appeal*, 31 Pa. St. 338; *Porter's Appeal*, 94 Pa. St. 332. It is apparent, therefore, that the only subject of discussion is, what is the expressed intention of Henry Farnum in relation to the matter in controversy? It is beyond all question that Mrs. Bell was to be affected by a charge of interest on her advancement. An advancement was made to her by her father after the main will was executed, and it amounted in the aggregate to \$6,250. The will was executed on August 9, 1851. By a codicil executed on November 1, 1852, he recited that, after the making of the will, his daughter Mrs. Bell had received from him at various times large sums of money for purposes named, and that she and her husband might receive further sums. He thereupon made the following provision in the codicil, to wit: "Now, I do hereby direct and declare that the principal of all sums so received from me by her, my said daughter, since the execution of my said will, or hereafter to be so received by her or her husband, shall be treated or consid-

ered as paid or advanced on account of her interest in my said estate under my said will, and shall be so regarded by my said trustees, and be treated and considered as brought into hotchpot with or added to the capital or principal of my said estate in their hands, for the benefit of my other children and their issues or descendants, and so as to reduce the share of my said daughter Caroline or her issue or descendants in and of said rents, issues, profits, dividends, interest, and income of my estate so in and by my said will devised in trust for the benefit of my said children, or their issue or descendants, by an amount equal to the interest at 6 per cent. of said sum so paid or advanced, or to be paid or advanced, to her, my said daughter, or her husband, by me." It cannot be doubted, in our opinion, that this is not, in any literal sense, a direction that the advancement made to the daughter by the testator in his lifetime shall bear interest. If such had been the testator's intent, it would have been properly expressed by a simple direction to that effect. In point of fact, it is a direction that the principal of the advancement should be added to the capital or principal of the testator's estate, so as to reduce the share of the daughter in the income of the estate as it had been given by the will by an amount equal to 6 per cent. of the sum advanced to the daughter. For the application of this direction we must recur to the will. By the terms of that instrument two annuities were directed to be paid by the trustees of the estate, one of \$500, to the testator's sister, and the other of \$600, to the testator's widow, both during their lives, respectively, and these annuities were to be paid out of the aggregate income of the estate. The will also directed that the residue of the income of the estate, and the whole of the income after the deaths of the two annuitants, should be divided every year into equal parts among the testator's children who should be living at the time of the annual distributions, the children of any deceased child taking their parent's share. There were but three children living at the testator's death, and one of them, Mrs. Bell, died a few years later, leaving two children, who are the present appellants. The testator's sister died in 1831, but his widow did not die until October 31, 1894. The total advancements to Mrs. Bell amounted to \$6,250. The payments of income to the children or their representatives were to continue until the last of the children was dead, and thereupon the principal of the estate was to be distributed to the persons who would be entitled thereto under the intestate laws of the commonwealth if the testator had lived until that time, and had then died intestate.

It is very manifest that the testator supposed that his estate would yield enough income to pay the two annuities, and also to pay his several children an annual sum which would

be greater to each than the annual interest at 6 per cent. on the amount of his advancements to Mrs. Bell, because he made provision by the codicil only for reduction of the share of income which would be due to Mrs. Bell by an amount which would be equal to the interest at 6 per cent. of the total sum advanced. But there could be no such reduction unless Mrs. Bell's share of the total income would be more than the amount of such interest. It must be conceded that in making the computation of the total income to be divided the amount of the interest at 6 per cent. on Mrs. Bell's advancements would have to be added to the income derived from other sources, and that the aggregate sum thus ascertained would have to be divided into three equal parts, of which Mrs. Bell would receive the one-third of the aggregate, less the amount of the interest at 6 per cent. on her advancement. If the estate had yielded income enough to permit of such a distribution, the method would have been perfectly simple, upon the ordinary principles of hotchpot distribution, and there would have been no occasion for any contest about it. But, owing to unexpected causes, the estate yielded for many years only a little more income than was necessary to pay the two annuities, and there was but a trifling amount of income each year for distribution. When the sister of the testator died, in 1881, the amount of her annuity was added to the general income for distribution, increasing it by that sum. The testator died in 1855. After the death of the sister, upon a settlement of the account of the trustee, it was agreed in writing by the parties interested that the amount advanced to Mrs. Bell was \$6,250, and that interest should be computed on this sum from December 15, 1858. On the adjustment of the account in the orphans' court it was found and adjudged in 1883 that during the whole of the 24 years that had thus elapsed from the death of the testator there was an accumulation of surplus income of \$3,086.32, and that surplus was in 1880 divided between the testator's two children, Mrs. Grubb and Henry Farnum. At the time of the adjudication in 1883 there was in the hands of the accountant a balance of income, after the payment of the widow's annuity, of about \$1,700. Of this sum it was claimed by the heirs of Mrs. Bell that they were entitled to receive a share, but the orphans' court held that they were not so entitled until the other two children of the testator had received an amount of income equal to the aggregate of 6 per cent. per annum upon the advancement of Mrs. Bell. It does not appear that any appeal was taken from this decision. At the present time it is stated in the opinion of the orphans' court the aggregate of income received by Mrs. Grubb and Henry Farnum in cash from the testator's death is \$10,714.20, each share being \$5,375.10. Neither Mrs. Bell nor her children have received a penny. Nevertheless, the adjudication made by the orphans' court charges Mrs.

Bell and her children with \$13,500, because it was interest on \$6,250 advancement from December 15, 1858, to December 15, 1894; in all 36 years. Then, bringing this sum into hotchpot of income actually received, \$10,714.20, and the sum charged as interest to Mrs. Bell, \$13,500, the whole is \$24,214.20, and, this being divided into three shares, each share is \$8,071.40. So that, according to this method, Mrs. Grubb and Mr. Farnum each get \$8,071.40 as income of the estate, and Mrs. Bell, instead of getting anything, still owes them \$5,428.60, or \$2,714.30 to each. It follows, if this is the correct mode of adjustment, that Mrs. Grubb and Mr. Farnum each take of income \$10,537.10, and Mrs. Bell takes nothing. It must be constantly borne in mind that the advancement to Mrs. Bell was not a loan of money, nor was it a gift of interest-bearing securities which would constantly produce income. On the contrary, the advancement was made, as is recited in the codicil, for the purpose of being spent at once to defray the cost of a voyage to Europe, and assist in purchasing a house and furniture in New York. So that it was known to the testator that the advancement could not possibly produce any interest whatever at any time in the future.

The question now arises, was it the intention of the testator that Mrs. Bell was to pay absolute interest at 6 per cent. on the whole amount of her advancement for all the years that might elapse from his own death until the death of all his children, or until the others would receive as much income as would equal the aggregate amount of 6 per cent. interest on the advancement? Two of these children are still living, and the length of time they may yet live is a matter of entire uncertainty. Nearly 40 years have now passed, and this interest charge is still running. Did the testator intend that such an enormous burden should be loaded upon his daughter? He knew that it might be many years before the last of his children would die, and he knew that the advancement could not possibly ever produce a dollar of interest, because it had already been spent in such a manner that it could not produce interest. And he further knew that his daughter was never to get any part of the principal of his estate, either by hotchpot or in any other mode. The whole of the principal of the estate was expressly given by the will to the persons who would have inherited his estate under the intestate law if he had been alive when his last surviving child died, and had then died intestate. If the children of Mrs. Bell at that time have died without leaving any descendants, neither Mrs. Bell nor her children would ever get a single dollar of the principal of the estate. In order to equalize Mrs. Grubb and Henry Farnum with their sister, Mrs. Bell, it would only be necessary that they should each receive from the estate as much money as was advanced to her, to wit, \$6,250. It seems to the writer, therefore, that when the amount of cash income received by them respectively

reached \$6,250, the income thereafter received should be divided equally between all three until the time of final distribution of the principal arrived. It is manifest that the contingency contemplated by the testator did not arrive, because there never was an amount of income over and above the annuities which would yield a sufficient sum to each of the children so that the share of Mrs. Bell could be reduced by a sum equal to 6 per cent. upon her advancement. The question, therefore, is, what was his intent as to the distribution of the income in the state of facts as they actually existed? Of course, if he had said his daughter should be charged every year with the full amount of interest at 6 per cent. on her advancement, she would be bound by it. But he did not say so, and from the language he did use in the codicil we are of opinion that he did not so mean. It seems to us it would be most oppressive, and therefore unjust, to hold that he intended to charge her with an amount several times larger than the whole sum of the advancements, when she had no income out of which to pay it. We would have to infer such an intention without express words to that effect, and without words from which such intent could fairly be implied. As advancements do not bear any interest in and of themselves, we do not feel at liberty to impute such an intent without express words, when the result would be so burdensome, so very unequal, and hence so extremely unjust. Nor do we feel, on the other hand, that we can sustain the contention of the appellants that in the years when there was no income, or a very trifling one, there should be no interest charge. Mrs. Grubb and Henry Farnum were not to have any of the principal any more than their sister, and there would be no way of equalizing them except through the income actually received. We therefore think they were entitled to have out of the cash income enough to give them as much as their sister received by way of advancement, and, when that result is attained, the income thenceforward received should be equally divided between the three, Mrs. Bell's children taking her share; and we so rule the case. The decree of the court below is reversed, and the record is remitted, with instructions to make distribution in accordance with this opinion; the costs of this appeal to be paid by appellees.

(176 Pa. St. 233)

BOYER et ux. v. FULMER.

(Supreme Court of Pennsylvania. July 15, 1896.)

MINING LEASE—ROYALTY.

S. leased land to plaintiff for the purpose of mining iron supposed to be there, but which had not been developed; the lessee to have the right to mine ore for 15 years; he to pay 60 cents a ton for every ton of ore sold from the premises during that time, to be paid monthly; the amount to be paid in any year not to be less than \$400; the lessee, however, in case the

royalties on the iron mined in any year did not amount to the \$400 to be paid in said year, to have the privilege of taking out ore in another year to make up the amount. Plaintiff thereafter assigned the lease to defendant, who agreed to pay to S. the royalty of 60 cents per ton, and to fulfill all of plaintiff's covenants, and to pay to plaintiff an additional sum of 17½ cents per ton on all ore mined, to be paid monthly; defendant to mine and pay for not less than 1,000 tons of iron every year; he to pay the royalty of 17½ cents per ton on 1,000 tons per annum, whether he mined that amount or not. Held that, the ore being exhausted, defendant was not bound to pay any royalty. *Timlin v. Brown*, 28 Atl. 236, 158 Pa. St. 606, distinguished. Mitchell, J., dissenting.

Appeal from court of common pleas, Northampton county.

Action by Abraham Boyer and Catharine Boyer, his wife, to the use of said Catharine Boyer, against Henry Fulmer. Judgment for plaintiffs. Defendant appeals. Reversed.

Edward Harvey and H. J. Steele, for appellant. William Fackenthal, for appellees.

GREEN, J. The learned court below ruled this case upon the authority of *Timlin v. Brown*, 158 Pa. St. 606, 28 Atl. 236. If the obligation of the defendants were the same as the obligation of the lessees in that case, the ruling would be correct. It must be conceded that there is a close similarity in the controlling terms of the contracts in the two cases. But a critical examination of the terms of the respective contracts has convinced us that they are radically different in the essential matter which gave rise to the decision in the *Timlin v. Brown* case. In that case the terms of the lease constituted a sale of the coal in place under the whole of the tract, and the price to be paid was the price of the whole of the coal, to be paid in maximum and minimum sums, which were absolutely fixed in any event. Our Brother Dean, delivering the opinion, said: "The grant is absolute of all the coal on the tract. The maximum and minimum prices are fixed absolutely. It is not a mere license to mine. This stipulation in the contract, 'In case the said Brown and Hunter fail to get out the amount before stated, they agree to pay a royalty on 10,000 bushels in each and every year,' fixes, without regard to contingencies, the liability to pay. * * * There is nothing in the contract indicating any intention to modify or relieve the defendants from their absolute obligation to pay on the contingencies of the mine proving unprofitable, or of the exhaustion of the coal before the end of the term." Our Brother Dean refers to the cases cited for the opposing contention, and points out the differences between them and the *Timlin* Case, and proceeds thus: "In all these cases the existence of the subject of the contract was unknown or uncertain, or, if it existed, the quality could only be determined by actual use. In the case before us, at the date of the contract the quantity was as well known as it could be at that time. * * * But the existence of

workable, marketable coal under this land had been demonstrated by the lessees in sinking the shaft. The only element of uncertainty—the quantity—they took the risk of by an unqualified covenant to pay a fixed sum." In the case at bar these elements are absent. The premises leased were a tract of timber land and a piece of arable land. The land was leased for the purpose of digging for and mining ore which was supposed to be there, but it had not been developed. The lessee was to have a right to dig for, mine, and take away iron ore for a period of 15 years, and was to pay 60 cents a ton for every ton of ore sold from the premises during the term, "to be paid monthly, but the amount to be paid to said first party shall in no year be less than four hundred dollars, to be paid within the year, respectively." In case of a temporary suspension of work, or if the lessee did not mine enough ore in any one year to yield \$400, he was to pay the \$400, but to have the privilege of taking out ore in another year to make up the amount. These were the terms of the lease, as it was made between the original parties. There was no agreement of any kind to pay a fixed, absolute, minimum sum for the ore on the place. That which was to be paid for was ore actually mined, and, of course, if the ore gave out before the termination of the lease, under the decisions which will be presently referred to, the obligation to pay royalty ceased. The lease was subsequently assigned to Fulmer by the lessee, or those who held his right, and a written agreement was made between the plaintiffs, who held the lease, and the defendant. This agreement contains first an assignment of the lease, to hold from April 1, 1878, for 12 years; then an agreement by Fulmer to pay to the original lessors, the Steely sisters, the royalty of 60 cents a ton stipulated to be paid in the lease, and also to fulfill all the covenants of Boyer, the original lessee. Next Fulmer agrees to pay to Catharine Boyer an additional sum of 17½ cents per ton on all ore mined and taken away from the premises, to be paid, monthly, between the last day of each month and the 15th day of the following month, with provisions for the weighing of the ore as taken away. Then comes a stipulation in the following words: "And the said Henry Fulmer shall mine and take away and pay for as aforesaid not less than one thousand tons of iron ore in each and every year. He shall pay to said Catharine Boyer her royalty of seventeen and one-half cents per ton on one thousand tons per annum, whether he mines that or not." This is the ordinary provision contained in mining leases, where a certain minimum amount is agreed to be taken out each year, and if it is not taken out the lessee agrees to pay the royalty notwithstanding. All such stipulations, however, proceed upon the theory that the ore or coal is in place, and can be taken out if proper efforts are made. They do not alter the fundamental character of the contract, or change its provisions as

they otherwise exist. They are intended as incentives for compliance with the duty of adequate performance and of prompt payment. Thus, in the case of *Muhlenberg v. Henning*, 116 Pa. St. 138, 9 Atl. 144, the lessees covenanted "to raise, mine, carry away, and sell at least 1,500 tons of iron ore annually during the continuance of this lease, or in default thereof to pay a royalty of \$525 annually." Yet, in an action to recover two years' royalty of \$525, we held that where the affidavit of defense alleged that, though the mines were worked in a workmanlike and skillful manner for about nine months, on account of the nonexistence of sufficient ore, and its inferior and unmerchantable character, the lessees were unable to carry on and continue the operations of digging, mining, and washing ore as was contemplated by the parties to the agreement, and could not perform the covenants of the lease, it was a good defense to the action. Mr. Justice Clark, delivering the opinion, said: "If, however, it was established by actual and exhaustive search that at the time of the contract there was in fact no ore in the land, or no ore of the kind contracted for, it cannot be pretended, upon any fair or reasonable construction of the contract, that the lessees were nevertheless bound for the royalty of \$525 annually; for the payment of the royalty was undoubtedly based upon the assumption of the parties that ore—ore of the quality specified—existed there. * * * We are not to construe the contract to require the lessees to perform an impossible thing. The \$525 is not a penalty. It is the price of the ore. The grant was of the ore in place, and if the subject-matter of the contract fail the price is not payable. If there was no ore to mine, there could be no royalty to pay. * * * We think the manifest meaning or intention of the parties, as exhibited by the terms of the contract, was, fifteen hundred tons of 'clean and merchantable iron ore' were to be mined in each year, if that quality and quantity of ore were there found, and that the contract, by necessary implication, must be so construed."

And so in the present case it is perfectly manifest that the parties contracted entirely with reference to iron ore which was supposed to exist, and did exist, on the land demised. The lessee was bound to use all proper efforts and exertions to find ore, and, if found, to mine and take it away, and to take out at least enough in each year to yield \$400 annually, and if he did not take out that much he was bound to pay the \$400 annually in any event; but, of course, this obligation proceeded upon the assumption that the ore was there, and continued to be there, in sufficient quantity to enable the lessee to perform his contract in this respect. If the ore was not there at all, or became exhausted, so that it could be no longer taken out in such quantity, the lessee was not bound to pay for it. He could not do an impossible thing, and therefore could not be held liable

for not doing it. There is nothing in this lease, or in the contract between the plaintiffs and defendant, which required him to do what he could not possibly do, or else to pay for not doing it. Neither the lease nor the contract is a sale of the ore in place for a definite, fixed, minimum sum, as was the case in *Timlin v. Brown*. Neither of these papers required that anything should be paid for, but ore which could be taken out. The money to be paid was the price of ore which was, or could be, mined. If that failed there was no liability to pay anything. The same doctrine was applied in the case of *Iron Co. v. Scott*, 15 Wkly. Notes Cas. 220. In that case Scott granted to the company "the exclusive right to dig and take away the iron ore in a certain tract of land, the company covenanting to pay at the rate of fifty cents per ton of ore mined," and, further, that for any period of three years, after the first year, the rent in the aggregate should not be less than \$10,000, whether ore to that extent was mined or not. The plaintiffs sought to recover for a period of three years the minimum rent, \$10,000, under this covenant. On the trial the defendant offered to prove that the premises did not contain the necessary quantity of ore, fit for use in a furnace, to yield the amount of royalty to be paid; and we held this to be a good defense, notwithstanding the absolute covenant for the payment of the amount named. Mr. Justice Gordon said in the opinion: "Hence the material question was, could the ore found in the leased premises, under the present methods of making iron, be properly used for the purpose indicated? If it could be so used, and there was enough of it, the plaintiff had a right to require the full performance of the contract. If, however, there proved to be a failure in either of these particulars, then was the defendant released from payment either in whole or in part, as the case might happen." The same doctrine was affirmed in the case of *McCahan v. Wharton*, 121 Pa. St. 424, 15 Atl. 615. In *Timlin v. Brown* there was an absolute engagement to pay a royalty on 10,000 bushels each year. That was the minimum purchase price of the coal, whether there was any coal there or not. But in the present case Fulmer simply agreed to mine 1,000 tons of ore each year, and to pay 17½ cents per ton whether he mined it or not; that is, if he fails to mine the quantity of ore he agreed to take out, he pays for it just as if he had mined it. But he is only to pay for ore which he might have taken out if he would. If the ore is not there, he is under no duty to pay, because he never could get it. The foundation of his liability to pay is the fact that the ore is there. If the ore is not there, the fundamental condition of all liability is gone.

The assignments of error are all sustained. Judgment reversed and new venire awarded.

MITCHELL, J., dissents.

(176 Pa. St. 354)

IN RE HAINES & CO.'S ESTATE.

Appeal of GROVE.

(Supreme Court of Pennsylvania. July 15, 1896.)

PARTNERSHIP—WHAT CONSTITUTES—PARTICIPATION IN PROFITS AS SUCH—COMPENSATION MEASURED BY A PROPORTION OF PROFITS—DISTINCTION—ASSIGNMENT FOR BENEFIT OF CREDITORS—RIGHTS OF CREDITORS.

1. An agreement between W. and B., members of the firm of W., B. & Co., and their co-partners, providing that the latter shall partially indemnify the former against losses which they may incur in a special partnership previously formed between W. and B. and certain third persons, under the name of H. & Co., in consideration that W. and B. will, on dissolution of the special partnership, pay to their co-partners in the firm of W., B. & Co. "a sum equal to 28⅓ per centum of the profits" realized by W. and B. from the business of such special partnership, does not make the parties to whom such sum is to be paid co-partners with W. and B. in the firm of H. & Co.

2. Both W., B. & Co. and H. & Co. having assigned for the benefit of creditors, a claim by one firm against the other may be proved against the debtor firm, since the two firms, notwithstanding the interest of W. and B. in both, are separate entities as to their respective creditors, and the assets of each are a separate fund for its own creditors.

Appeal from court of common pleas, Philadelphia county.

Claim by Henry S. Grove, assignee for the benefit of creditors of Wood, Brown & Co., against the assigned estate of Haines & Co. The auditor rejected the claim, and from a decree overruling an exception to the auditor's report claimant appeals. Reversed.

The decision of the trial court, and the agreement referred to in this opinion, are as follows:

"Memorandum of agreement made and entered into this 18th day of January, one thousand eight hundred and eighty-seven, by and between Richard Wood and Samuel B. Brown, of the city of Philadelphia, of the first part, and Henry Henderson, Charles A. Jenkins, Andrew E. Crowe, Henry C. Harper, and Joseph D. Wilson, all of said city, of the second part. Whereas, the said parties of the first part have become general partners in a limited co-partnership, under the firm name of Granville B. Haines & Company, for the purpose of carrying on the wholesale and retail dry-goods business for the term beginning on the thirtieth day of December, one thousand eight hundred and eighty-six, and ending on the thirty-first day of December, one thousand eight hundred and ninety-one, and, as such general partners, will together be entitled to receive fifty-six and one-half per centum (56½) of the annual profits of the business of said co-partnership, with corresponding liability as between themselves and their co-partners in said firm for the debts thereof; and whereas, the said parties of the first part desire that said parties of the second part shall indemnify and hold harmless them, the said parties of the first part, from and

against all losses which may result to them from the said business, to the extent of an amount equal to twenty-eight and two-tenths per centum ($28\frac{2}{10}$) thereof, and not exceeding sixteen and one-half per centum ($16\frac{1}{2}$) of the total losses of said business, and said parties of the second part are willing so to indemnify said parties of the first part in consideration of the payment to them of the sums equal to the proportions of the shares of the yearly profits from said business, to which said parties of the first part are entitled, as hereinafter set forth: Now, this agreement witnesseth that, in consideration of the premises and of the mutuality hereof, the said parties hereto have agreed, and do hereby agree, together as follows: First. The said parties of the second part will severally indemnify the said parties of the first part and their respective executors and administrators from and against all losses which shall or may result to them, the said parties of the first part, from the business of the said co-partnership of Granville B. Haines & Company, to the extent of a sum equal to twenty-eight and two-tenths per centum ($28\frac{2}{10}$) of the said losses, and not exceeding sixteen and one-half per centum ($16\frac{1}{2}$) of the total losses of the business of the said co-partnership, the said parties of the second part to contribute and pay to said parties of the first part the said sum in the following proportions, respectively, to wit: The said Henry Henderson, Charles A. Jenkins, Andrew E. Crowe, and Henry C. Harper each four and eight hundred and sixty-six thousands per centum (4.866), and the said Joseph D. Wilson nine and seven hundred and thirty-six thousands per centum (9.736) thereof. Second. And the said parties of the first part will, at the dissolution of said co-partnership, pay over to said parties of the second part, their respective executors and administrators, a sum equal to twenty-eight and two-tenths per centum ($28\frac{2}{10}$) of the profits by them, the said parties, realized from the business of said co-partnership, in the following shares, respectively, to wit: To Henry Henderson, Charles A. Jenkins, Andrew E. Crowe, and Henry C. Harper each four and eight hundred and sixty-six thousands per centum (4.866) thereof, and to the said Joseph D. Wilson nine and seven hundred and thirty-six thousands per centum (9.736) thereof. In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above written."

Opinion of the Court.

"The claim of Wood, Brown & Co. for a dividend was properly rejected by the auditor, for the reason that Wood, Brown & Co. were members, and not creditors, of the firm of Haines & Co. We place our decision on the written agreement between the members of the firm of Wood, Brown & Co., dated January 13, 1887, by which all of them became interested in the profits and losses of the firm of Haines & Co. It is true that only

Messrs. Wood and Brown signed the articles of agreement of Haines & Co.; but the agreement of January 13, 1887, above referred to, made all the members of the firm of Wood, Brown & Co. participants in the profits and losses of Haines & Co., and therefore partners. Whatever distinctions are made when profits are taken, as commissions or otherwise, there never has been any distinction made where profits are taken as such. In all such cases, parties participating in profits and losses are partners. This exception will be dismissed."

Frank P. Prichard, John G. Johnson, and George L. Crawford, for appellant. George P. Rich and Henry C. Boyer, for appellees.

MITCHELL, J. The court below placed its decision on the written agreement of January 13, 1887, between the members of the firm of Wood, Brown & Co., holding that it made all of that firm partners in the firm of Granville B. Haines & Co. But the learned judge, in his brief opinion, overlooked the distinction between participation in profits, as such, and a compensation or consideration merely measured by a proportion of profits. While this distinction was admitted in *Edwards v. Tracy*, 62 Pa. St. 374, 381, to be "of a very refined and shadowy character," it was held to have been "authoritatively established, * * * and it is entirely too late now to question either the rule or the exception." The agreement of January, 1887, nowhere provides for a participation in profits as such. Its language is: "The said parties of the first part will, at the dissolution of said co-partnership [G. B. Haines & Co.], pay over to the said parties of the second part * * * a sum equal to twenty-eight and two-tenths per centum of the profits," etc. No agreement of Wood and Brown without the joining of Haines and the other partners could make any outside persons partners in Haines & Co.; nor did this agreement attempt to do so, for, even as to Wood and Brown, there was no obligation to pay until their profits had been actually received by them, and then it was not a share, but a sum equal to a share, that was payable. If Wood and Brown had become individually insolvent, owing the parties of the second part, and having undeclared profits in Haines & Co., the parties of the second part could not have called upon Haines & Co. to declare and account for profits to them, for they had no title to profits as such even against Wood and Brown. The agreement of 1887 is not a contract of partnership at all, either as regards G. B. Haines & Co. or Wood, Brown & Co. It is a contract of indemnity only, between Wood and Brown, of the first part, and Henderson, Crowe, Jenkins, Harper, and Wilson, of the other part. The firm of Wood, Brown & Co. is not a party to it, or even mentioned in it at all. The fact that the seven persons concerned in

the contract were also the members of the firm of Wood, Brown & Co. was immaterial, as a matter of law. The legal effect would have been the same if the contract had been between Wood and Brown and X., Y., and Z., strangers, who agreed, for the consideration named, to indemnify Wood and Brown in the proposed venture, and whose right to have the debits and credits of Haines & Co. and Wood, Brown & Co. with each other settled on a strictly distinct basis could not have been questioned. The judgment cannot be sustained on this agreement. The auditor reached the same conclusion, but by a different process, based on the acts and declarations of the parties, the oral testimony, and the agreement of January 13, 1887, treated as merely an item of evidence in the inquiry for the intentions of the parties and the actual relations of the two firms. This ground of conclusion, however, is no more tenable than the other.

The auditor finds that Wood and Brown were the representatives of Wood, Brown & Co. in Haines & Co., and that the two firms were practically one, and therefore Wood, Brown & Co. could not claim as a creditor of Haines & Co., while other creditors remained unpaid. This view, as already discussed, is contrary to the legal effect of the written agreement. It is not worth while to consider that part of the argument which denies that the circumstances of the case were such as to justify a court in going behind the writing to inquire into the real intention of the parties, because we are of opinion that, even conceding that much, the auditor's finding is against the evidence. The facts are practically undisputed, and the question is of the proper inference to be drawn from them. A general statement is all that is necessary. The firm of Wood, Brown & Co. was formed for a term of five years from January 1, 1886. In the latter part of 1886, Wood and Brown, who were the senior partners and the capitalists of the firm, proposed that the firm should buy out Cooper & Conard, who had a retail business of similar kind next door. The junior partners objected that the proper business of Wood, Brown & Co. would suffer, because, among other reasons, customers objected to dealing with a wholesale house which had a retail branch, and because it would lessen the financial ability of the capitalist partners in their own firm, and would withdraw part of the time and attention of Brown which were due to their own business. The auditor reports that "the question remained under discussion in an entirely informal way for a month or more, but eventually the junior partners consented to do what Wood and Brown wanted." This brings us to the crucial question, what was it that the junior partners did consent to? As to this the auditor reports: "Exactly what was to be done to carry out their wishes was not exactly or succinctly stated. It was known to some, if not all, of the junior partners,

that the business of Cooper & Conard was to be bought by a new firm, which was to be a limited partnership, and that Granville B. Haines was to be interested in it, and give it his name; but what the extent of Wood, Brown & Co.'s interest was to be, or where the capital to represent that interest was to come from, was never discussed or stated." It is just here that the auditor makes the misstep which led to his erroneous conclusion. He assumes, without expressly finding the fact, that the firm of Wood, Brown & Co. was to be "interested"—i. e. partner—in the new firm of G. B. Haines & Co., and that Wood and Brown were to go into that firm, not in their individual capacities, but as representatives of Wood, Brown & Co. The evidence will not bear this construction. Pursuing the same view, the auditor then recites the agreement of January 13, 1887, and continues: "This agreement was intended by all parties to represent the proportions in which the profits to be made by the firm of Wood, Brown & Co. in the firm of Haines & Co. were to be divided, and the losses, if any, shared." As we have already seen, this is exactly what the agreement does not do. The firm of Wood, Brown & Co. was not a party to it, was not even mentioned in it, and it was a contract of indemnity between Wood and Brown, on one side, with Henderson, Crowe, Jenkins, Harper, and Wilson, on the other, which might just as well have been with five strangers so far as concerned its legal effect on the firm of Wood, Brown & Co. What, then, do we have? A proposition made and objected to; an informal discussion prolonged for a month or more; then a yielding of objections, and a consent; but what was to be done "not exactly or succinctly stated"; and, finally, the parties, with the aid of counsel, putting their agreement formally into writing. It would be difficult to imagine a case calling more strictly for the enforcement of the rule that all prior negotiations are merged in the writing which is to be the sole evidence of the intentions of the parties.

But, if we look beyond the writing, what is the evidence? We must start with the inherent incredibility that five men, partners in a large business, but not themselves capitalists, would embark their firm and their firm's capital in an additional enterprise, of a different, though somewhat similar, character, without, as the auditor reports it, "the extent of the firm's interest, or where the capital to represent that interest was to come from, being ever discussed or stated." Coming, then, to the parol testimony, the five junior partners deny positively and emphatically that there was any agreement outside of the writing, that there was any intention that the firm of Wood, Brown & Co. should become partners in Haines & Co., or furnish any capital to it, and any knowledge that Wood and Brown were using the firm capital for that purpose. On the other hand,

Both Wood and Brown speak in a general way of the intention that the firm should go into Haines & Co., but, when brought squarely to the pinch of the question whether there was any other agreement than the one in writing, refuse to say so. One or two other small items, such as the sale of goods by Wood, Brown & Co. to Haines & Co. at cost, and loose talk that the latter firm was the retail branch of the former, are not worth serious consideration. That the relations of the two firms were close, and that there were large transactions between them both in money and in goods, is entirely clear, but we find nothing to justify the inference of a partnership.

Several creditors of Haines & Co. and others, as appellees, have supported the judgment with arguments varying almost as much from each other as from that of the appellant. What has been already said disposes of the whole case on the main ground of contention, but one or two other suggestions may be briefly noticed.

It is urged that the assignee (appellant) is not entitled to prove against the fund until the accounts between the partners of Wood, Brown & Co. shall have been settled, and then only for the amount that may be found due to the partners other than Wood and Brown; in other words, that Wood and Brown, being partners in the debtor firm, cannot be creditors also of that firm as against other creditors. But this argument overlooks the effect of the insolvency of Wood, Brown & Co. The moment that fact is ascertained, the creditors acquire a right to all the assets of that firm, among which, undoubtedly, is their claim against Haines & Co. If Haines & Co. were solvent, there could be no question of the validity of this claim. Although Brown and Wood might be creditor partners, the right would be in the creditors of Wood, Brown & Co., as a firm, without reference to the status of the individual partners in either firm among themselves. And the insolvency of Haines & Co. does not change the rights of Wood, Brown & Co.'s creditors. As to their respective creditors, the two firms are separate and distinct entities, and the assets of each are a separate fund for its own creditors, just as the firm assets and the individual property of the partners are separate funds for partnership and individual creditors in ordinary cases, although the partners are equally debtors to both. Each class has a prior claim on its own fund, and only a secondary or postponed claim on the other after the latter's preferred creditors are satisfied.

The validity of the appellant's claim on its merits is also attacked. It is doubtful if any such question is really before us, as there was no exception on this subject in the court below, and, of course, there is no complaint by the appellant. But, to avoid all further difficulty, it may as well be disposed of. The auditor finds that "the right of Wood,

Brown & Co. to recover back the \$75,000 paid in as the capital of Wood and Brown, and the further question of the bona fides of the transaction by which the charge against Haines & Co. for \$100,000 worth of merchandise was wiped off the books of Wood, Brown & Co., without the payment of any consideration whatever," depend on the real relation of the two firms to each other. As we now hold that the relation was that of separate debtor and creditor firms, that makes an end of this contention. The use of the firm's money by Wood and Brown for their contribution to the capital of Haines & Co., and the debiting of their firm \$75,000 for that purpose on Haines & Co.'s books, were without the consent or knowledge of the other partners, and therefore unauthorized, if not fraudulent. Calling it "capital" on the books of Haines & Co. did not change the character of the act. Haines & Co. got the credit in their accounts, without being entitled to it, and afterwards charged Wood, Brown & Co. in the same way with \$100,000 worth of merchandise which the latter never bought or received. No subsequent juggling with the accounts in the books could make these anything else than debts, or amount to payment. Decree reversed, and the claim of appellant directed to be allowed.

(176 Pa. St. 294)

COMMONWEALTH v. PITTSBURGH FERRY BRIDGE CO.

(Supreme Court of Pennsylvania. July 15, 1896.)

BRIDGES—ENCROACHMENT ON HIGHWAY—REMOVAL—FINDINGS.

1. It is error to decree the removal of a bridge pier from the limits of a highway, where it is not found to what extent, if any, it encroaches on the highway.

2. The statement in the report of a master in favor of dismissing a bill to prevent the rebuilding of a bridge approach, on the ground that it interfered with a highway, that the pier on which the approach rested "is partly, at least, in the original lines of the road," coming immediately after the finding that the exact limits of the road, "as originally used," were indefinite, and followed by recitals of subsequent changes in the road, and that the pier was within the right of way taken by a railroad, with the conclusion that the "evidence as to the pier is insufficient to warrant a chancellor in decreeing its removal," does not warrant an inferential finding by the court that a part of the pier is within the highway, but only that it is within the "original lines" of the road.

Appeal from court of common pleas, Luzerne county.

Suit by the commonwealth against the Pittsburgh Ferry Bridge Company. Decree for plaintiff. Defendant appeals. Reversed.

Alexander Farnham, for appellant. John S. Harding, Henry W. Palmer, and Garrick M. Harding, for the Commonwealth.

MITCHELL, J. When this case was here before (148 Pa. St. 621, 24 Atl. 87), it was up-

on the commonwealth's appeal from the refusal of an injunction. The bill was filed to prevent the rebuilding of the approach to the bridge, upon the grounds, as stated in the opinion of this court, that it was *ultra vires*, and was a public nuisance, by interference with the highway. The master negatived both grounds, and advised a dismissal of the bill; but the court below was of opinion that the approach was in effect a relocation of the terminus of the bridge, and as such was *ultra vires*. An injunction against the rebuilding was, however, refused, on the ground that the disadvantages would be without corresponding benefit. The complainant was therefore left to its remedies at law. The decree was affirmed in this court, but upon the broader ground that the proposed approach was not a relocation *non ultra vires*, but an exercise of the right to rebuild the bridge at a safe height above the water, as demonstrated by experience, and the necessary ancillary right, after so building it, to construct a proper and convenient approach. The present appeal is by the defendant, and raises an entirely different question. The decree of the court below enjoined the appellant from supporting the approach upon a pier erected wholly or in part within the limits of the Carbondale road, and commanded the defendant, "immediately after building said elevated approach, to remove the present stone pier from the limits of the said highway." After the affirmance of this decree the commonwealth filed a supplemental bill to enforce the order to remove the stone pier from the limits of the highway, and the court made a new decree commanding the removal within 90 days. From this decree the defendant has taken the present appeal.

We are obliged to hold that this decree was improvidently made. Neither it, nor that part of the original decree on which it rests, is capable of specific enforcement without the establishment of the essential but disputed fact of the encroachment of the existing pier on the Carbondale road. That fact has never been judicially ascertained. The master refused to find it. In the view that he took of the case, recommending the dismissal of the bill, the fact became immaterial. It is true, he reported that in his opinion the preponderance of the testimony was "in favor of the view that this stone pier is partly, at least, in the original lines of the Carbondale road"; but he also reported that it was in the right of way taken by the Pennsylvania & New York Canal & Railroad Company, and his conclusion was that "the evidence as to the pier is insufficient to warrant a chancellor in decreeing its removal." The learned court below in its original opinion accepted the master's remarks upon the preponderance of the testimony as a finding that part of the pier was in the highway, and, adverting to the rule that the public is entitled to the whole highway, whether or-

dinarly used or not, held that the removal of the pier, in part at least must be commanded. In the face of the master's final explicit finding that the evidence was insufficient to warrant a chancellor in decreeing its removal, the view of the court can hardly be sustained; but, even if it could, the decree would still be improvident, for the question remained, what part of the pier, and how much of it was, within the lines of the road. In this connection the master's use of the words within "the original lines" is very significant, coming immediately after the finding that "the exact limits of the Carbondale road, as originally used, were undefined," and followed by the recital of the subsequent changes in the road which will be noticed further on. In fact, this part of the opinion and decree was of very subordinate importance, and necessarily received less attention than the real contest, which was upon the right to rebuild the overhead approach at all. Whether, if rebuilt, it should be rested on so much of this pier as might be in the highway, was a mere make-weight, at best; and the court, in decreeing upon it, reached its "conclusion with less hesitation because the master reports that it [the pier] is not absolutely necessary to the structure." The court made no finding of the facts for itself from the evidence. The decree might, and perhaps ought to, be accepted as an inferential finding that a part of the pier is within the highway; but it was a finding on the master's report, and the inference could go no further than his language would carry it,—that the pier "is partly, at least, in the original lines" of the road. The essential fact, what part, if any, is within the present lines, remained undetermined, and without it the plaintiff had no claim for relief with regard to the pier.

On the hearing of the supplementary bill and answer, the court below treated the first decree, and its affirmance by this court, as conclusive, and, without further inquiry into the fact of encroachment of the pier on the highway, decreed its removal in 90 days. This was error. The first decree was incapable of enforcement, for the reasons already stated, and it got no assistance from the action of this court. That part of the decree was in favor of the commonwealth, and, of course, on the commonwealth's appeal it was not objected to; assigned for error, nor passed upon by this court in any way. The present question, therefore, is now before us for the first time; and we are of opinion that the decree of the court below is erroneous, not only on the ground already discussed, but on the merits. The case bears very strong indications of belonging to the class in which the name of the commonwealth is used, not to enforce substantial rights in the public interest, but to assert a technical title for private ends. The Carbondale road, on which this pier is claimed to encroach, was never laid out by

legal proceedings, but became a highway by popular use, largely if not chiefly by persons coming to and from the ferry which crossed the river at this point. It ran parallel to the river, at the foot of a bluff or steep bank 16 feet in height, and was without any defined limits. Between it and the river the state, at a date fixed by the master as "some fifty years ago," constructed the North Branch Canal, over which persons going to the ferry crossed by a bridge on the line of the Ferry road, now known as "Mill Street," in the borough of Pittston. In 1850 the appellant built its bridge, and in 1852 the borough of Pittston laid out its Main street on the top of the bluff, parallel to the Carbondale road, and only 20 to 25 feet from it. In 1860 two railroads were built, crossing the Carbondale road diagonally at grade; and later the canal passed into the hands of the Pennsylvania & New York Canal & Railroad Company, which drained it, built tracks upon its bed, and took down the bridge at the Ferry road. In 1875, the larger part of appellant's bridge across the river having been swept away by flood, it was rebuilt at a higher level; and, among other reasons, to avoid the dangerous grade crossings of the railroad, an elevated approach was built, resting partly on the disputed pier, and connecting the bridge at its new grade with Main street on top of the bluff. This change was made with the consent of the borough of Pittston, and of some if not all the owners of property on the Ferry road, including the predecessors in title of Mr. Ross, who is really the active plaintiff in this litigation. In consequence of these changes, as the master reports, "instead of the Carbondale road, the great mass of the people used Main street, which was every way preferable." The same popular action which established the road in the beginning relegated it to disuse when it no longer served the public convenience. On this subject the master reports that, "in the view I take of this case, public rights are not involved. * * * The only private property that was shown to be injured is the property of Mr. Ross. His purchase was after the elevated bridge was built, and that fact must have been in the minds of the parties when the sale was made." And the learned court below based its refusal of the injunction asked by the bill largely on "the advantages to the public accruing from the maintenance of the present elevated approach, and the disadvantages, without corresponding benefit to the public, which would result from its demolition." These considerations could not, of course, take away or impair public rights in a highway once acquired; but they are reasons why a court of equity may withhold its aid when no real public interest is to be subserved, and more especially why it may require the public right to be strictly proved. Upon this last principle we rest this case. The com-

monwealth has failed to establish the fact of the occupation of any part of the highway by the pier in question. The master reported that it was "impossible to say with any degree of certainty whether or not the stone pier is in the highway," and, further, that "the evidence as to the pier is insufficient to warrant a chancellor in decreeing its removal." There has been no finding to the contrary, except, as already noted, by insufficient inference, and the conclusion of the master that the bill should be dismissed was the logical and proper disposition of the case. This appeal comes too late for us to take that course now with regard to the original bill, but, the commonwealth having found it necessary to invoke the aid of the court by supplemental bill to enforce the original decree, we are entitled to examine if that decree is one that we can enforce, and, if so, whether, in sound equity, we ought to do so. For reasons already stated, we are of opinion with the appellant on both these questions. Decree reversed and injunction dissolved, with directions to dismiss the supplemental bill. Appellee to pay all costs subsequent to the filing of said supplemental bill.

(177 Pa. St. 22)

LANDELL v. HAMILTON.

(Supreme Court of Pennsylvania. July 15, 1896.)

DEED—BUILDING RESTRICTION—EASEMENT AS TO LIGHT AND AIR—WAIVER.

The owner of three adjoining lots, each having a frontage of 25 feet, conveyed the outside lots to different persons, by deeds covenanting against buildings on the middle lot more than 10 feet high. The grantees built solid walls between their lots and the middle lot, for part of their depths, each 56 feet long, one of them 13 feet 9 inches high, the other 17 feet high for a distance of 19 feet, and 12 feet high for the remaining distance of 37 feet. *Held*, that while the walls were not "party walls" (there being no evidence that they were, except that they rested partly on the middle lot), and, even if they were, would as such merely give the middle lot owner the right to use them as party walls to the height of 10 feet, yet by their continued maintenance, and the consequent exclusion of light and air, the owners of the outside lots waived the building restriction to the extent that the walls exceeded 10 feet in height; but one outside lot owner could not waive the rights of the other, so that the height to which a building could be built at any particular point would be the height of the lowest wall at that point.

On rehearing. Modified.

For former report, see 34 Atl. 663.

DEAN, J. At the first hearing in this case, both in oral argument and on the paper books, the case turned on but a single question, viz. whether the restriction as to building placed by the original grantor on lot No. 1,208, in favor of lots 1,206 and 1,210, was perpetual, or whether it ended with the existence of the house then upon the middle lot. After a careful consideration, we de-

cided the restriction was continuing, and directed that an injunction issue in conformity to the prayer of the petitioner. The effect of this was to restrain defendants from putting any building on 1,208 to the rear of the house upon it in 1832, higher than 10 feet from the surface of the lot. The defendants then petitioned the court for a modification of the decree, for the reason that, even if the judgment of the court that the restriction was a continuing one were well founded, the plaintiffs, by their own acts, had relinquished the right to assert it to the full extent set out in Hause's deed of 1832. The case is fully reported. *Landell v. Hamilton*, 175 Pa. St. 327, 34 Atl. 663. The court ordered a reargument only on the question as to whether the decree should be modified, and, if so, to what extent. This reargument was heard on the 27th of May, 1896. As will be noticed in the reported case, Landell's lot is 1,208, the eastern one; the defendant's, 1,208, the middle one; and Allen's, 1,210, the western one. It now appears on reargument, that as to Landell's lot either he or his grantors, years prior to the filing of the bill to restrain defendants, had built a solid wall, 17 feet high, from the rear of the old building on 1,208, south towards Sansom street, a distance of not quite 19 feet, and then continued the same kind of wall, at the height of 12 feet, 37 feet further. The defendant calls this a party wall. There is no evidence that it is such, or was so intended by the builder, except that it extends over the line of 1,208, and rests partly on 1,208. The character of the structure, 12 feet in height for 37 feet in length, and then 17 feet high for about 19 feet, rebuts the inference that it was ever intended as a party wall in the legal signification of that term, to be used by both lot owners for building purposes. The most that can be said for it on the evidence is that it was a partition or division wall, the same as a partition fence dividing the two lots. It may have been a trespass on 1,208 to the extent it rests on that lot. If so, the owner or owners submitted to it; but by their submission they acquired no right inconsistent with the restriction imposed upon the middle lot by the covenant in the deed. The right to a party wall is statutory. It is not a right to at any time, and in any manner, use the land of another. One of two adjoining owners, for building purposes, may, subject to limitations consistent with the right of each, encroach upon his neighbor with a party wall. But, manifestly, this was no such structure, and conferred on defendants no right to assume that it absolutely terminated the restriction in favor of the Landell lot; for, even if a party wall, at most it gave the middle lot owner the right to use it as a party wall to the height of 10 feet, the limit of the restriction. But the wall was solid to the height and length it was built. The purpose of the restriction

was to afford light and air to 1,208, and the extent of the enjoyment was measured by the extent of the restriction on 1,208. That restriction was, no building or part of a building should be added to the house upon the lot to the rear, higher than 10 feet from the surface of the lot. But Landell or his grantors themselves erect a solid wall along the line of 1,208 and 1,208, 56 feet in length from the rear of the old building on the middle lot, through which neither light nor air could penetrate. By their own act, plaintiffs have said, "For 19 feet we do not ask for light and air, except at the height of 17 feet, and for 37 feet further we do not ask for either, except at the height of 12 feet." Clearly, equity will not compel defendants to award to plaintiffs that which, by their own distinct and unequivocal act, they have declared is valueless to them.

It is alleged now the ownership of plaintiff to 1,208 does not extend to Sansom street, but only 149 feet from Chestnut, leaving about 86 feet to which the injunction should not apply. To this it is replied the bill alleges, and the answer admits, plaintiffs, Landell et al., own back to Sansom street; and there is no proof to the contrary. So far as we can discover from the pleadings and proofs, the title of Landell et al., or any part of it, is nowhere disputed; therefore we can make no modification of the decree in this particular. The restriction here, by the covenants in the original deeds, renders it impossible to make such modification of the original decree as will preserve the apparent right of defendant as against each of these parties. The middle lot is servient to both the eastern and western; but the owner of neither the eastern nor western can, by his independent act or deed, relinquish that subserviency so as to affect the other. Here the owner of 1,208 has declared that for 19 feet light and air from 1,208 are valueless to him below a height of 17 feet, and for 37 feet further they are valueless below 12 feet; thus, for a distance of 56 feet, waiving the strict terms of the restriction. The owner of 1,210 has also waived the restriction by building his wall 56 feet to a height of 13 feet 9 inches. We cannot say, because the one waived the restriction for 19 feet to the height of 17 feet, therefore the other did so too; or because one waived it for 37 feet to the height of 13 feet 9 inches, therefore the other is bound, when by his own act he only waived to a height of 12 feet for that distance. As we have said, neither could, by his independent act or deed, affect the right of the other. But it seems to us the correct conclusion is that to the full extent they have equally gone in dispensing with the restriction both can in equity be made subject to our decree. Therefore we modify the original decree so that it shall not operate to restrain defendants from building to a height of 13 feet 9 inches for a distance of

19 feet from the rear of the old main building of the middle lot. Further, from the end of the 19 feet thus specified it shall not operate to restrain defendants from building to a height of 12 feet from the ground for a further distance of 37 feet. The costs of this case to be taxed as part of the original decree.

(176 Pa. St. 387)

In re HUGHES' ESTATE.

Appeal of VASTINE et al.

(Supreme Court of Pennsylvania. July 15, 1896.)

LIMITATIONS—INTERRUPTION—ACKNOWLEDGMENT.

Mere expressions of grateful intention to pay a person \$5,000, he having rendered various domestic services from time to time, is not enough to take a claim for the service out of the statute.

Appeal from orphans' court, Columbia county.

Accounting by Jacob H. Vastine and another, administrators of M. G. Hughes, deceased. From a decree dismissing exceptions to the auditor's report allowing the claim of J. R. Bibby, the administrators and heirs of deceased appeal. Reversed.

James Scarlet and George H. Smith, for appellants. Grant Herring and Charles G. Barkley, for appellee.

MITCHELL, J. This case belongs to the class of claims against a dead man's estate which we have had occasion several times lately to say should be scrutinized closely, and required to be proved by convincing evidence. The claim of J. R. Bibby was presented, in a lump sum, for \$2,800, with only the general dates "from about February, 1884, to June, 1891," and for most varied and miscellaneous services, without any itemization, and without book entries or other writing in support of it. And this claim, such as it is, was not presented until more than a year after the death of the decedent, although in the meantime the claimant, who was indebted to the deceased, made a settlement with the administrators, which included the payment of several small notes due by him. This circumstance alone would be very weighty against the good faith of the claim, were it not explained by the testimony of Harmon that the claimant was employed by the administrators about the business of the decedent after the latter's death, and was promised by one of them (Douglas Hughes) that the mortgage on his property should be canceled, and he should be well paid for his services to the decedent, besides. Without the clear testimony to this fact, it would hardly be possible to sustain the claim, in the face of the strong presumption against it. In regard to the latter subject, the learned auditor reports that "the fact that the claimant has presented so large a claim in a

lumped item, covering a period of seven or eight years' service, and such service being of so various a character, would of itself be sufficient upon which to reject this claim, were it not for the large amount of testimony given before the auditor, which direct, positive, and convincing evidence the auditor would have to disregard and set aside, by enforcing that which in an ordinary case would be the rule applicable in a lump charge; but as all the elements in a well-founded claim have been shown, excepting a proper book account, it would be arbitrary, and enforcing the rule too stringently, if this claim were rejected on that ground." The services were certainly proved, and the general value of them on a contract basis. But the proof of the contract itself is by no means so clear. We should have been as well satisfied if the auditor had put the services in the class of those rendered voluntarily, and without even implied contract basis, though with a hope and expectation of reward or gratuity, which, however strong the moral obligation on the recipient, could not be enforced against him or his estate, at law. The declarations of the decedent especially seem to point to the view on his part, at least, that the services gave rise to a claim on his gratitude, but not on his purse. But the auditor, on personal view and hearing of the witnesses, has found there was a contract, and the court below has approved the finding. We are not prepared to say they were so clearly wrong that we should reverse their finding on a question of fact.

On one point, however, we are constrained to reverse. There was no sufficient evidence to escape the bar of the statute of limitations. The claim was for services of the domestic and menial class, which are presumed to be paid at stated periods, according to the custom of the time and neighborhood. *Carpenter v. Hays*, 153 Pa. St. 432, 25 Atl. 1127. It would have to be reduced to a month or two, or a year at the utmost, were it not for the testimony of Mr. Rhawn, whose acquaintance with the financial affairs of the decedent enabled him to say that the claimant had not been paid. But there is nothing in that testimony to carry the claimant's right beyond six years. Nor is there anything in the declarations of the decedent, as testified to by any of the witnesses, to have that effect. None of them identify any debt, or fix any amount, except the one in which he said he would pay Bibby \$5,000, and this was coupled with a similar promise to Mrs. Kostenbänder; and both were so plainly mere expressions of grateful intention that they are without weight in the present connection. There is nothing in the case to show that Hughes, if alive, and sued for this claim, could not set up the statute of limitations against part of it, and his administrators have an equal right to do so now for his estate. The auditor fixed the value of the services at \$300 a year, and allowed for seven years. The claim was not presented before the auditor until 1894, but suit was

brought in the common pleas on July 25, 1892; and we presume the subsequent presentation in the orphans' court was by agreement, or at least tacit acquiescence in having it settled in that tribunal. At any rate, the parties went on, and had it adjudicated there. The bar of the statute would therefore begin in July, 1886, and the allowance of the claim must be reduced to the period from that date to the death of the decedent, in 1891. Decree reversed, and account to be restated in accordance with this opinion.

(176 Pa. St. 421)

CHRISTY et al. v. CHRISTY et al.

(Supreme Court of Pennsylvania. July 15, 1896.)

SALE BY COURT OF DECEDENT'S LANDS—RIGHTS UNDER CONTRACT BETWEEN DECEDENT AND PURCHASER—TRUST AGREEMENT—AUTHORITY OF EXECUTOR.

1. Testator's lands were sold by the orphans' court after his death, for payment of his debts, to one of his sons, who held a contract by which testator had sold to him an undivided half of all the mineral rights in part of the land. Prior to confirmation of the sale by the orphans' court, the purchaser made an agreement with the executor that he would hold the lands in trust for the benefit of all of testator's heirs; "that is to say, the interest in said tracts of which my father died seised, reserving my own interest in said tracts which I had at or before the time of my father's death." Held that, the purchaser having obtained legal title to all the property by the orphans' court sale, it was unnecessary for him to obtain a decree for specific performance of his agreement with his father, but, having paid to the executor the amount due under such agreement, his rights as to the half interest in the minerals became fixed, and freed from any claim of the other heirs, as cestui que trust, to have an accounting therefor under his agreement with the executor.

2. After the sale by the orphans' court the executor had authority to submit to a referee the matter of how much the purchaser owed the estate on the contract which the purchaser had made with testator for the purchase of the half interest in the mineral rights.

3. Where one of the heirs buying testator's land at a sale by the orphans' court for payment of testator's debts agrees with the executor that he will hold the lands in trust for the benefit of all the heirs, with a proviso that said heirs are to pay a pro rata share in the purchase money, the fact that they had not paid or tendered him any part thereof does not bar their right to compel him to account as trustee; he not having demanded any money, and having had sufficient in his hands to reimburse his advances for them.

Appeal from court of common pleas, Blair county.

Action by Gallitzin A. Christy and others against John T. Christy and others; T. M. Christy and another, executors of John T. Christy, deceased, being substituted in his place, he having died pending the action. From the decree, said executors appeal. Reversed.

The contract between John T. Christy and F. J. Christy, executor of Francis X. Christy, deceased, was as follows: "Gallitzin, Novem-

ber 2, 1878. In consideration of love and affection for my brothers and sisters, children and heirs of Francis X. Christy, late of Gallitzin township, deceased, and for one dollar, lawful money of the United States, to me in hand paid, the receipt whereof is hereby acknowledged, I do hereby bind myself, my heirs, executors, and assigns, that should I purchase at orphans' court sale the herein-after tracts of land, situate in Gallitzin township, of which my father died seised, I will hold the said tracts of real estate in trust for the benefit of all the heirs of my father, the said Francis X. Christy, deceased; that is to say, the interest in said tracts of which my father died seised, reserving my own interest in said tracts, which I had at or before the time of my father's death, to wit: Tract No. four (4), as described in the bill of sale, containing 200 acres and allowance, being part of the Catherine Hester tract; tract No. five (5), as set forth in the said bills of sale, containing 415 acres, more or less, warranted and known as the 'Catherine Hester Tract.' Witness my hand this 2nd day of November, A. D. 1878. Said heirs are to pay an equal pro rata share in the said purchase money in the said tracts of land. In witness hereof I have hereunto set my hand. J. T. Christy. F. J. Christy. Witness: F. M. Christy." The contract made in 1865 between Francis X. Christy and John T. Christy was for sale by the former to the latter of an undivided half of all the mineral right in and to a certain tract of land for \$2,000.

Daniel J. Neff and Aug. S. Landis, for appellants. John D. Blair and W. H. Sechler, for appellees.

MITCHELL, J. The learned judge below gave too broad an effect to our decision in this case when it was here before. 162 Pa. St. 485, 29 Atl. 781. All that was then before the court, and determined, was the interpretation of the will of F. X. Christy; the persons who were entitled to be considered his heirs as to the surface of the land and the mineral rights, and their status, by virtue of such heirship, as cestui que trust under the agreement of 1878 between F. J. Christy and Dr. J. T. Christy in regard to the latter's purchase of F. X. Christy's land. In other words, it settled the mode of distribution of F. X. Christy's estate, whatever it might be, but neither raised nor decided any question as to the extent of that estate in these lands. That question is now before us. The learned judge was of opinion that that had been decided adversely to appellants, but, in addition to the ground of *res adjudicata*, he based his decree on the failure of Dr. Christy to perfect his title under his agreements with his father, F. X. Christy, by proceeding in the orphans' court, after the latter's death, to obtain a decree of specific performance. He therefore held, as matter of law, that Dr. Christy had abandoned his agreements with his father,

and was not now entitled to enforce them; and he also, inferentially, found an abandonment as matter of fact. The conclusion, however, overlooks the force of Dr. Christy's position in this litigation. He was the owner of the legal title in fee, and in possession, and this is a bill to declare him a trustee as to a part of the land. To the validity of his legal title these plaintiffs, at least, could never object; for they claim under F. X. Christy, and Dr. Christy holds all of F. X. Christy's title, by virtue of an orphans' court sale for payment of his debts. That sale passed the title clear of all claim of the plaintiffs as heirs, and, had the purchaser been a stranger, would have passed it clear of Dr. Christy's claim, not only as heir, but as a prior purchaser by unrecorded articles of agreement. But, as Dr. Christy was himself the purchaser, his previous equity was preserved. It merged in his legal title, and was protected by it. He had no need to go into the orphans' court for specific performance; for all that could have given him was F. X. Christy's title, and that he had already. His legal title was therefore beyond attack by any of the present parties. The plaintiffs come into court on an equity arising solely under the agreement of November 2, 1878. By that, Dr. Christy, as the purchaser of the land which stood in his father's name, recognized his father's interest, and agreed to hold it in trust for his father's heirs. But he expressly confined the trust to "the interest in said tracts of which my father died seised, reserving my own interest in said tracts which I had at or before the time of my father's death." This agreement was made on the day of the orphans' court sale,—either just before or just after the sale, but before confirmation,—and it is the foundation of the plaintiffs' rights. Without it, as already said, the purchaser, whether Dr. Christy or a stranger, would have taken the entire title of F. X. Christy, indefeasible by any of his heirs. With it, there were two equities which survived the sale—First, the right of the executor to an account, and the balance of the agreed purchase money due from Dr. Christy to his father; and, secondly, the right of the heirs to come in as joint holders of their father's interest, on payment of their pro rata share of the purchase money paid by Dr. Christy at the orphans' court sale. With regard to the first, the executor and Dr. Christy agreed to submit the whole matter to Alvin Evans, Esq., as referee; and, this being made a rule of court, the referee filed an award, finding the sum due from Dr. Christy to his father's estate. Judgment was entered upon it, and it was paid by Dr. Christy. This ended the controversy as to one-half of the land, and left the legal title in Dr. Christy freed from any further equity in that behalf. It is impossible to sustain any finding of an abandonment in fact by Dr. Christy of his rights

under the agreement of 1865, in the face of his express reservation of them in the agreement of 1878, acquiesced in and enforced by the executor, and conclusively established by his receipt of the amount due by award of the referee.

It is argued by appellees that this submission was unauthorized and void, as beyond the powers of the executor after the sale, and after the equitable title in the land had passed to the heirs. But this objection is founded on a misconception of what was submitted to the referee. It was not the title of the heirs remaining in the land under the agreement, but the amount of money due their father's estate, which it was clearly the province of the executor to ascertain and collect. There was not then, and is not now, any denial that the father made the agreement of 1865; and that it was still in force was, as already said, expressly declared in the agreement of 1878, without which plaintiffs have no right at all in the land. The agreement as to the tract of land known as the "Stackhouse Survey," does not seem to have been included in the reference. In fact, there does not seem to have been any controversy about it needing to be referred. The agreement is not denied, nor the payment of the consideration by Dr. Christy. It was expressly reserved with the other in the agreement of 1878, and the title of Dr. Christy to an undivided half is now beyond further question. The payments by Dr. Christy in the course of the litigation with the Cambria Iron Company had no proper place in the account.

Secondly, the plaintiffs, as heirs of F. X. Christy, are cestuis que trustent, under the agreement of 1878, as was held at the previous hearing of the case, in 162 Pa. St. 485, 29 Atl. 781. At the date of filing their bill they had not paid or tendered any part of the purchase money to Dr. Christy, and the master and court below had held that this was such laches as required the bill to be dismissed. This court, however, taking into consideration the facts that, while no money had been paid, none had been demanded, and that Dr. Christy had in his hands sufficient to fully reimburse his advances for plaintiffs, held that the latter were entitled to an account on the principles then stated. That ruling we now repeat, with the addition that the accounting must be on the basis of F. X. Christy's estate in the land having been an undivided half.

This litigation has been unduly protracted and obstructive. The conduct of appellants' testator, as the learned court below said, "was far from being commendable"; but this, while justifying a refusal of commissions, cannot deprive him of his legal rights. Decree reversed, and account ordered to be restated in accordance with this opinion. Each party to pay its own costs in this court.

(176 Pa. St. 633).

LOUCK v. ORIENT INS. CO. OF HARTFORD, CONN.

(Supreme Court of Pennsylvania. July 15, 1896.)

INSURANCE—CONSTRUCTION OF POLICY.

A fire policy covering four buildings, described as a half-story building "occupied by the assured as a distillery," a building occupied as a bonded warehouse, a hogpen between the distillery and warehouse, and a building occupied as an ice house, to be void if the subject of the insurance be a manufactory and it cease to be operated for more than 10 consecutive days, will be held to be an insurance of a distillery not operated, but occupied; it appearing that it was not operated at the time of, or after, the issuing of the policy, and had not been for some time, and that insured had no intention to presently operate it, but that he had an office on the premises, which he occupied, and in which he slept, and it not appearing that assured made any misrepresentation or concealment.

Appeal from court of common pleas, York county.

Action by Levi M. Louck against the Orient Insurance Company of Hartford, Conn. Judgment for defendant. Plaintiff appeals. Reversed.

Gelse & Strawbridge and Nevin M. Wanner, for appellant. Niles & Neff and Charles H. Bergner, for appellee.

DEAN, J. On February 1, 1894, defendant issued to plaintiff a policy of insurance against fire, in the sum of \$1,150, for the term of one year. The risk covered four buildings, described thus in the policy:

- \$ 750 00 On his two and a half story frame, shingle-roof building, 28x34 feet, occupied by the assured as a distillery, situated in Monaghan township, York county, Pa., near Bowmansdale.
- \$ 250 00 On his iron-clad building, 36x50 feet, and frame addition, 18x20 feet, occupied as a bonded warehouse, situated about seventy-five feet east of distillery.
- \$ 75 00 On his frame, shingle-roof hogpen, situated between distillery and warehouse, being about ten feet from the former and eleven feet from the latter.
- \$ 75 00 On frame, shingle-roof building occupied as an ice house, situate about thirty feet north of distillery.

\$1,150 00

On the 6th day of June, 1894, the property was wholly destroyed by fire. There was no question raised as to the fact of loss, or that preliminary proof of it, as required by the policy, had been made. But the policy contained this condition: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstances concerning this insurance, or the subject thereof. * * * Or if the subject of the insurance be a manufacturing establishment, and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days." The undisputed testimony

was that the distillery was not in operation at the date of the policy or of the fire, and had been standing idle for about 2½ years; nor was it the intention of the owner to presently put it in operation. The policy in suit was a renewal of a previous one for one year in the same company, which was about expiring. Both the original and the renewal policy were delivered to plaintiff by L. T. Deininger. Through him the business was transacted, and he received the premium from defendant. White & Jessop were the regularly authorized agents of defendant, and through them Deininger obtained the policies, and by them they were countersigned before delivery. As a fact found by the jury, Louck informed Deininger, both at the date the policy was issued, and afterwards, that the distillery was not in operation, and he did not know when it would be, to which Deininger replied, it made no difference. The court submitted the evidence to the jury as to the value of the property destroyed, and also as to whether the insured informed Deininger that it was not in operation as a distillery at the date of insurance and afterwards. But the court, on an interpretation of the policy, assumed, and so instructed the jury, that the description of the property imported a distillery in operation at the date of insurance; if, however, the company had notice, by virtue of the notice to Deininger, that then and afterwards it was not in operation, that would be a waiver of the right to forfeit for a violation of the 10-day clause. And, further, whether the testimony as to notice to and knowledge on part of Deininger was notice to the company was a question of law, which question the court reserved. The jury having found for plaintiff on the evidence as submitted, the learned judge of the court below afterwards, in opinion filed, entered judgment for defendant, notwithstanding the verdict, on the question reserved. From that judgment, plaintiff appeals, assigning five errors to the rulings of the court on the point reserved. They are all practically disposed of by a determination of the fifth.

Assume, with the learned judge of the court below, Deininger occupied no such position towards the company as authorized him to waive written conditions of forfeiture, and that notice to him was not notice to the company; put completely aside the testimony which the jury believed, that Louck notified him expressly that the distillery was not in operation at the date of the policy, and had not been for more than two years, and that he had no intention of presently operating it,—then, how stands the case? The learned judge says: "This policy is not binding upon the company, either because the risk was not truly represented, so that the company was deceived into issuing a policy upon a subject of insurance materially different from the true subject; or, if the insured is to be taken as bound by the description in the policy, and if, therefore, he is estopped to deny that the distillery was in operation when the policy

was issued, then the contract is not binding, because the manufactory 'ceased to be operated for more than ten consecutive days.'" And this constitutes appellant's fifth assignment of error. But, putting aside Louck's testimony, as we have already suggested, we cannot see any evidence tending in the least to show the risk was not truly represented, and that the company was not fully aware of the condition of the property when it issued its policy. The description in the policy is that the property is "occupied by the assured as a distillery,"—that is, the building containing the stills; the bonded warehouse, 75 feet distant, of which the government had the keys; the hogpen, 11 feet off; and the ice house, 80 feet. The insured had an office on the premises, which he occupied, and in which he slept. There is not one word in the description suggesting the stills were then in operation. The purpose of the buildings is plainly indicated by the word "distillery" but nothing further. It must be borne in mind, these are the written words of the company, inserted in the contract framed by it, and are therefore to be taken as fully describing what it supposed it was insuring. It is not intimated that Louck represented the distillery was in operation, or that he concealed from the company the fact that it was not then, and had not been in operation for years. But the company, instead of saying, if it so believed, "a distillery now being operated by the assured," or "now being run by the assured," or using language of like significance, adopts the very words which describe the exact condition of the property,—a distillery merely occupied by the assured. It was a distillery, and intended by the owner as such, but not operated, and he did not know when it would be started. He occupied it then as he had for years before, and as he did for months afterwards, although in the whole time he did not distill a quart of whisky. And, without misrepresentation or concealment, this is just what the company, by its policy, insured,—an occupied, idle distillery,—no matter what the scope of the authority of its agent. The agent did not frame the policy and insert the description. That is the company's instrument. Every contract must be interpreted in view of the subject of it, and the surroundings of the parties at the date of it. A company receiving a property owner's money, and undertaking to indemnify him against fire, by a written contract descriptive of the subject, cannot plead ignorance of the palpable condition of that subject, where there is no pretense of fraud, misrepresentation, or concealment. We might as well assume that one who, by written contract, buys a farm, could defend against payment of the purchase money because it was upland instead of meadow, as he thought. For misrepresentation or concealment which misleads, equity will relieve, but not for ignorance of that which is before his eyes, and which he must see. Parties to

such a contract as this are conclusively presumed to have seen that which was obvious. If at the date of the contract the distillery had been running, and had afterwards stopped for more than 10 days, the forfeiture clause might have been invoked. This, not because the word "occupied" implied it was in operation, but because, in view of the situation of the subject of the contract at the date of it, such would have been the reasonable interpretation. But how can this language defeat the contract, when the manufactory was not in operation at the date of insurance? It could not cease, when it had not commenced. Therefore the forfeiture clause has no application to the facts of this case, and we will not wrest language from its ordinary meaning to enforce forfeitures which are odious. The judgment is reversed, and it is directed that judgment be entered on the verdict for plaintiff.

(176 Pa. St. 430)

**BOROUGH OF DU BOIS v. DU BOIS
CITY WATERWORKS CO.**

(Supreme Court of Pennsylvania. July 15,
1896.)

**WATER COMPANY — CONTRACT WITH BOROUGH —
CANCELLATION—REMEDY FOR INAD-
EQUATE SUPPLY.**

1. A contract by which a company agrees to construct waterworks and furnish a borough and its inhabitants with an adequate supply of water, all to be taken from springs on certain land, will not be canceled merely because the springs prove inadequate, mistake as to the capacity of the springs having been no more the fault of the company than of the borough.

2. The remedy given by Act April 29, 1894, § 34, cl. 3 (P. L. 94), relating to gas and water companies, by which courts are authorized, on bill filed by any citizen using the water, alleging impurity or deficiency, to compel the water company to correct the evil complained of, and to make "such orders in the premises as may seem just and equitable," applies to cases of contract as well as to water rights acquired by eminent domain under the act of 1894, and authorizes bill by a city or borough which has contracted with a company for water as well as by a private citizen, and admits of reformation of the contract.

Appeal from court of common pleas, Clearfield county.

Bill by the borough of Du Bois against the Du Bois City Waterworks Company for cancellation of a contract.

The contract made by plaintiff and the United States Waterworks Company, Limited, and by such company assigned to defendant, was as follows: "This agreement made this 10th day of August, A. D. 1889, between the borough of Du Bois, state of Pennsylvania, party of the first part, and the United States Waterworks Company, Limited, of North Tonawanda, New York, party of the second part, witnesseth as follows: The said the United States Waterworks Company, Limited, hereby agrees to furnish an adequate supply of pure, wholesome water to the borough of Du Bois and its inhabitants, on the following con-

ditions, to which the said the United States Waterworks Company, Limited, by these presents binds itself, its successors and assigns: First. The source of supply shall be from springs on the lands now owned by John E. Du Bois, located about six miles northeast of said borough, from which springs water shall be piped direct to the reservoir, and in no case will water be taken from open streams or containing surface water. Second. The said works shall be completed, and water delivered to said borough of Du Bois, within six months from the acceptance and signing of this agreement by the said borough. A standing pressure of at least eighty pounds per square inch is guaranteed on a level of the intersection of Long and High streets, and a corresponding pressure at other points where fire hydrants may be located, varying only by the difference in altitude; and the system of piping shall be of a capacity sufficient to throw at least six streams of water each through fifty feet of 2½-inch hose with one-inch ring nozzle under the pressure above designated. Third. The said the United States Waterworks Company, Limited, will lay three miles of pipe in said borough, to be computed from the iron bridge near the Alpine House. On each said three miles of pipe they shall erect a first-class double-discharge, frost-proof fire hydrant at such point as they shall be directed by the council of said borough, provided that at least an average of one hydrant shall be erected on every 400 feet of pipe laid. And it shall be the duty of the said borough of Du Bois to designate the point or points at which said hydrants are to be erected before the pipe or pipes on said streets shall have been laid; said fire hydrants to be used for the purpose of extinguishing fires and flushing public sewers only, but not to be used for flushing sewers when any hydrants are in use for suppressing or extinguishing fires. Fourth. The council of said borough shall have the right to order the extension of said pipes at any time during the continuance of this agreement, and when said extension is ordered said borough shall locate at least one fire hydrant on every 400 feet of pipe so ordered laid, and shall pay for the use of water from the same at the same rate per hydrant as provided in this contract to be paid for the hydrants erected on the first three miles of pipe; and when said extensions are ordered it shall be the duty of the said the United States Waterworks Company, Limited, its successors or assigns, to lay the pipe so ordered, and erect hydrants thereon, within a reasonable time after receiving notices from the said borough to do so. It is also agreed by said borough of Du Bois that the said the United States Waterworks Company, Limited, shall have the right to enter upon any streets, lanes, alleys, or public places in said borough, and make extensions for furnishing water for domestic use, at such times as they shall think proper; but in case of such voluntary exten-

sion no fire hydrants shall be located or charged for without the express consent of the council of said borough. Fifth. Water from the hydrants for public sewer flushing when necessary, and also water for one public watering trough in each ward, shall be furnished without charge; provided, that the authorities of said borough shall furnish at such watering troughs suitable devices to prevent waste. Sixth. The said borough of Du Bois hereby agrees to pay for the use of water furnished as herein provided for the sum of \$35 per annum for each hydrant erected in accordance with this agreement, for a period of twenty years after the completion of the works in accordance with this contract. Said sum to be paid semiannually to such person or persons as said United States Waterworks Company, Limited, shall in writing direct. Seventh. The council of said borough shall test the waterworks for fire protection within ten days after having been notified by the said the United States Waterworks Company, Limited, in writing, of the completion of said works; and if upon said test said works shall be found by said council to have been completed in accordance with this contract, said works shall be accepted by them, and hydrant rental shall be paid from the time of their completion. Eighth. The said the United States Waterworks Company, Limited, agrees for itself and its assigns to use all due diligence in laying the said pipes and erecting said works, to prevent accidents from the ditches and openings to be made, and to keep all excavations guarded and lighted at night, and on the laying of said pipe to replace all streets, lanes, and alleys and other places in as good condition as they were, as near as may be, without unnecessary delay. Ninth. It is agreed by the said the United States Waterworks Company, Limited, that the prices or rates for domestic and other purposes shall not at any time exceed the following schedule, said rate to be paid semiannually in advance on the first day of May and November in each year: * * *. Tenth. The said borough of Du Bois hereby agrees to make payments above specified, and that they will grant to the said the United States Waterworks Company, Limited, the right of way in, on, and over all public streets, lanes, alleys, or public places in said borough, to enter upon the same, to erect, construct, and maintain said waterworks. Eleventh. The said borough of Du Bois also agrees that they will from time to time pass all necessary ordinances for the protection of said waterworks and their property, franchises, and rights of the said company, and that they will provide all necessary penalties for injuring, damaging, or meddling with said works, or in any point thereof. It is also agreed by the United States Waterworks Company, Limited, that the council shall have the right at any time to order the said company to change the grade or position of any line of pipe or hydrant, and said company hereby

agrees to make such change, provided the said council shall first agree to pay the actual cost thereof. Twelfth. It is hereby mutually agreed by the parties hereto that the said United States Waterworks Company, Limited, shall not be bound to supply water to any premises for any specific purpose alone, but only on premises where water is taken and paid for, for domestic or other inside use, and in all cases charge will be made in addition to general or domestic rates for each fixture for all purposes for which such fixture is applicable."

A. L. Cole, for appellant. W. C. Pentz and George A. Jenks, for appellee.

MITCHELL, J. The power of a court of equity to compel the cancellation of a contract, though well established, is very exceptional in its character. Its purpose is never to interfere with the freedom of contract, or with proper legal liability, even for bad bargains, but only to supplement the powers of courts of law where there is exceptional equity of a settled and recognized kind. Hence it is never to be exercised except in very clear cases and for definite cause. The causes which will justify it were stated as long ago as *Delamater's Estate*, 1 Whart. 362, and experience and the amplification of equity powers in 60 years have not furnished any instance of their enlargement. In that case Chief Justice Gibson said: "The grounds on which equity interferes for rescission are distinctly marked, and every case proper for this branch of its jurisdiction is reducible to a particular head. They are principally fraud, mistake, turpitude of consideration, and circumstances entitling to relief on the principle of *quia timet*." In *Yard v. Patton*, 13 Pa. St. 278, this language was quoted as authoritative, and it was added that each of these causes should be established by positive and definite proof. In *Graham v. Pancoast*, 30 Pa. St. 89, it was said by Strong, J.: "Inadequacy of price, improvidence, surprise, and mere hardship have each been held sufficient to stay the active interposition of a chancellor. Yet no one of these, nor all combined, furnishes an adequate reason for a judicial rescission of a contract. For such action something more is demanded,—such as fraud, mistake, or illegality." In *Rockafellow v. Baker*, 41 Pa. St. 319, it was said: "Our interposition is invoked, not to carry out and accomplish what the parties have begun, but to undo what the parties have accomplished. How narrow the grounds are upon which a court of equity will interpose for such a purpose, and how cautious and reluctant its steps will be in that direction, were fully shown in *Graham v. Pancoast*, 30 Pa. St. 97, and *Nace v. Boyer*, Id. 109. Nothing but fraud or palpable mistake is ground for rescinding an executed contract." And in *Stephen's Appeal*, 87 Pa. St. 202, it was

said: "No fraud or mistake or turpitude of consideration and circumstances entitling her to relief on the principle of *quia timet* are proven. Nothing less than one of these clearly established would justify the court in ordering the rescission of an executed contract." No case has gone beyond these; and while we do not say that a willful and obstructive refusal to perform a contract, under circumstances which practically prevent the party aggrieved from entering into another, may not afford ground for equitable cancellation, yet some such special grounds must appear in order to take the case out of the general rule that remedy for mere breach must be sought at law.

Tested by these settled principles, there is no case here at all for the court's interference. Neither the bill nor the findings of fact under it charge any fault to the defendants. They show a want of strict performance, but they also show that strict performance was impossible, not from any lack of effort on the part of the defendants, but because the contract limits the source of supply to springs on the Du Bois land, and those springs are inadequate to furnish the needed quantity of water. The utmost that is made out by the bill and the evidence is that the contract calls for the performance of an impossibility by reason of a mistake of fact as to the capacity of the stipulated source of supply. But this mistake was no more the fault of defendants than of plaintiff, and the parties cannot be put back in *statu quo*. If the defendants have, to their misfortune, made a contract whose full performance is impossible, they may be unable to recover the stipulated rental, either in whole or in part. But this is a matter of defense in an action at law, and affords no ground for the cancellation of the contract. Certainly there is no equity in putting the entire loss arising from a mutual mistake upon one party, with no consideration for the injury to its plant and franchise, and no allowance for the money already expended thereon without fault. The case is pre-eminently one for mutual concession and amicable adjustment on a fair basis, either by reduction of the rental or by enlargement of the permitted source of supply. But, failing this action by the parties themselves, equity will not help one of them to put the whole loss on the other, but will leave them to such remedies as they may have in a court of law.

Reference was made in the court below and here to the act of April 29, 1874, § 34, cl. 3 (P. L. 94; *Brightly's Purd. Dig.* [12th Ed.] p. 955, pl. 4), relating to gas and water companies, by which the courts of common pleas are authorized, on bill filed by any citizen using the water, alleging impurity or deficiency, to compel the water company to correct the evil complained of, and to make "such order in the premises as may seem just and equitable." The learned judge be-

low was of opinion that this remedy did not apply to cases of contract, but only to water rights acquired by eminent domain under the act of 1874, and it has been argued here by appellees, citing Lehigh Water Co.'s Appeal, 102 Pa. St. 515, and Waterworks Co. v. Prager, 129 Pa. St. 605, 18 Atl. 561, that this section applies only to private citizens, and does not include municipal corporations. Both these views, however, are erroneous. What was decided in those cases was that the exclusive privilege of furnishing water, given by the act to the first company erecting works, does not prevail against a city or borough building waterworks in its municipal capacity and under its general powers. In the present case the borough is not the builder or owner of waterworks, but a mere consumer under contract, and stands upon the same basis as any private citizen in regard thereto. The remedy given by the act is intended to be adequate, and we see no reason why it may not be made so. The whole subject is put under the control of the court in the broadest terms, and, being one which concerns the public interests, may be treated with regard thereto, to the extent necessary, even to the reformation of the contract upon a basis just and equitable to both parties, where, as here, it was made in mutual mistake as to an essential fact, and a remedy for the difficulty may be found without violation of the main intent of both parties in the original instrument. Decree reversed, and bill dismissed, with costs.

(176 Pa. St. 429)

**UNITED STATES WATERWORKS CO.,
Limited, v. BOROUGH OF DU BOIS.**

(Supreme Court of Pennsylvania. July 15, 1896.)

**WATER COMPANY—CONTRACT WITH BOROUGH—
RESCISSION—LIABILITY FOR WATER USED.**

1. Where the circumstances do not justify a court of equity in canceling a contract of a company to supply a borough with water, the borough itself cannot rescind it.

2. Even though an attempted rescission by a borough of a contract for water were effective, still the water company having continued to supply water, though less than the contract quantity, and the servants and employes of the borough having continued to use it, the borough would be responsible.

3. A company contracted with a borough to construct waterworks and furnish an adequate supply of water to the borough and its inhabitants, all to be taken from springs on certain lands. It was stipulated that there should be a certain pressure where hydrants were located, and the borough agreed to pay for use of the water furnished as provided \$35 per annum for each hydrant erected in accordance with the agreement for 20 years, payments to be made semiannually. The supply from the springs was inadequate, the parties being mutually mistaken as to the capacity, and the pressure was not that stipulated, but a considerable amount of water was furnished and used. *Held*, that the company was entitled to recover for the service actually rendered, measured by the contract price for the services stipulated, neither the thing to be furnished nor the consideration to be paid being single and indivisible.

Appeal from court of common pleas, Clearfield county.

Action by the United States Waterworks Company, Limited, to use of the Du Bois City Waterworks Company, against the Borough of Du Bois, to recover for water furnished for defendant's fire hydrants. Judgment for defendant. Plaintiff appeals. Reversed.

A. L. Cole, for appellant. W. C. Pentz, Thomas H. Murray, and Allison O. Smith, for appellee.

MITCHELL, J. It was held in Borough of Du Bois v. Du Bois Waterworks Co. (opinion filed herewith) 35 Atl. 248, that the circumstances would not sustain the cancellation of the contract between those parties by a court of equity, and of course they would not justify one of the parties themselves in attempting a rescission. The ordinance of the borough was beyond its authority and wholly ineffectual for that purpose. But, even if the ordinance had been effective, the direction of a verdict for defendant could not be sustained. It is admitted that a considerable amount of water was supplied by the plaintiff, although it fell short of the contract quantity, and it was shown or offered to be shown that the defendant's servants and employes had used it, notwithstanding the ordinance rescinding the contract. For such use the borough is responsible. Even if the borough was authorized to rescind, it could not escape liability for continued use by its agents; it was bound not only to notify them to stop, but to see that they obeyed. This is not a case for the application of the rule as to entire contracts. Neither the thing to be furnished nor the consideration to be paid was single and indivisible. The plaintiff is entitled to go to the jury on the value of the service actually rendered, measured by the contract price for the service stipulated. Judgment reversed, and venire de novo awarded.

(68 N. H. 601)

STATE v. MERRICK.

(Supreme Court of New Hampshire. Merrimack. July 27, 1894.)

**COSTS IN CRIMINAL ACTIONS—LAW AND ORDER
LEAGUE.**

Where an indictment for the unlawful sale of liquor, prosecuted by a law and order league at their own expense, is dismissed by the attorney general without their consent, the prosecutors are entitled to be reimbursed for their taxable costs.

William D. Merrick was indicted for the unlawful sale of liquor. Upon dismissal, prosecutors moved for the allowance of costs. Granted.

W. H. Sawyer and Burleigh & Adams, for prosecutors. N. E. Martin and C. E. Clifford, for the county.

Indictment for the unlawful sale of liquor. An association called, the "Law and

Order League" prosecuted the defendant in the police court and before the grand jury at their own expense, for the purpose of obtaining one-half the fine. The attorney general, without their consent, and for reasons not stated, entered a nolle prosequi to the indictment. The prosecutors moved that their taxable costs in the police court and before the grand jury be allowed them, to be paid by the county. It was held that the motion should prevail. All concurred.

(68 N. H. 284)

WINIPISIOGEE LAKE COTTON & WOOLLEN MANUFACTURING CO. v. CITY OF LACONIA.

(Supreme Court of New Hampshire. Belknap. July 26, 1895.)

TAXATION—VALUATION OF PROPERTY—EVIDENCE—RES JUDICATA.

1. In proceedings to abate taxes, evidence of the value of the land at the previous assessment is competent in determining its value at the time of the assessment complained of.

2. A judgment on appeal from the refusal of assessors to abate taxes is, in a proceeding to abate taxes thereafter assessed on the same property, conclusive evidence of its value at the former assessment, leaving nothing to be determined but the appreciation or depreciation in value since that time.

3. Act July 18, 1876 (Pub. St. c. 58, § 7), providing that the assessors shall, in the month of April in each year, reappraise all such real estate as has changed in value in the year next preceding, and correct all errors in "the then existing appraisal," does not authorize them to disturb the valuation as established by a judgment of the appellate court.

Application by the Winipisiogee Lake Cotton & Woollen Manufacturing Company to the assessors of the city of Laconia for an abatement of taxes. From a decision of the assessors refusing the application, petitioner appealed and certain questions were reserved. Case discharged.

E. A. & C. B. Hibbard and E. B. S. Sanborn, for plaintiffs. F. N. Parsons (with whom was S. S. Jewett), for defendants.

CARPENTER, J. The chief object of the present proceeding is to obtain a judicial determination of the fair market value of the plaintiffs' property on the 1st day of April, 1893. Upon that question the value of the same property on the 1st day of April, 1892, is competent evidence. Ordinarily it would be quite as difficult—would require as extensive and expensive investigation—to determine its value on that day as upon the day in question. The right to show the value in 1892 would be of no value to either party unless it has been in some way ascertained. But, if it were established,—as, for example, by agreement,—the field of investigation would be much narrowed, and the cost of the trial greatly diminished. It would be the value in 1893, except in so far as the property may have increased or decreased in value during the year. On the trial the inquiry would

be restricted to the question of the alterations of value during that period, and their extent.

Upon the plaintiffs' petition, the value of the property on the 1st day of April, 1892, was judicially found and declared by a judgment rendered by this court in due course of law. The parties had the opportunity to present, and, it must be presumed, presented, all their evidence on the question, and were fully heard. No sufficient reason has been suggested, or is perceived, for denying to the judgment the same conclusive effect upon the question adjudicated that by law appertains to judgments in other cases.

Whether the appraisal by selectmen or assessors, not appealed from, is conclusive for any purpose, except as the basis for the assessment of taxes for the current year, is a question that need not be considered. Assuming that their appraisal is not conclusive on their successors in office, it does not follow that the judgment of the court upon an appeal from their determination is equally inconclusive. An appeal does not necessarily carry with it to the appellate court the infirmities, whatever they may be, of the subordinate tribunal. So long as the court has jurisdiction of the subject-matter and of the parties, the method by which the cause or question is brought before it—whether by appeal or otherwise—cannot be material to the effect of its judgment.

The assessors are required to appraise property for taxation at its fair market value. *Cocheco Manuf'g Co. v. Strafford*, 51 N. H. 455, 481, 482. In discharging this duty they must necessarily, in most cases, act on their own judgment. *Hayes v. Hanson*, 12 N. H. 284, 289. But neither the law nor their oath requires them to exercise their judgment in defiance of the law of the land. If the value of land or other property is legally established, to appraise it at a different value would be a violation of law and of their oath, whatever might be their personal opinion on the subject.

The act of July 18, 1876 (Pub. St. c. 58, § 7), providing that "the assessors and selectmen shall, in the month of April in each year, examine all the real estate in their respective cities and towns, shall reappraise all such real estate as has changed in value in the year next preceding, and shall correct all errors that they find in the then existing appraisal," has no relation or application to the present question. It had become a common practice of selectmen to set down in the invoice real estate at the same value year after year, without examination or inquiry; overlooking, it might be, valuable improvements. *Dewey v. Stratford*, 42 N. H. 282, 288. The object of the statute (as well as that of the second section of the act of July 10, 1874, repealed by it) was to correct this mischief. The "then existing appraisal" intended is the appraisal made by the last preceding board of assessors, and not the valuation established by a judgment.

The judgment is conclusive evidence of the value of the property on the 1st day of April, 1892, and a bar to any investigation of its value on or before that day, by the assessors or before the court. *McConologue's Case*, 107 Mass. 154, 170, 171, and cases cited. Case discharged. All concurred.

(57 N. H. 244)

NEWELL et al. v. TOWN OF HANCOCK
et al.

(Supreme Court of New Hampshire. Hillsborough. March 11, 1892.)

GRANT TO TOWN—BEQUEST—SCHOOL DISTRICT—
LOCATION OF SCHOOLHOUSE—WARRANT—NOTICE BY COUNTY COMMISSIONERS.

1. A grant of land to a town for specified purposes, and "for any other necessary public use," at its discretion, authorizes it, after applying part of it to a particular use, to apply the same land to a different necessary public use when no longer needed for the original purpose.

2. Land was given to a town for "a convenient common" about a meetinghouse, for other specified purposes, and "for any other necessary public use," at its discretion. Thereafter a bequest was made "for the reclamation and embellishment of the common." At the time the will was made and when testator died, part of the land was occupied by an old schoolhouse, by authority of the town. *Held*, that testator did not intend use of the legacy to be conditioned on all structures being removed from the land, and none thereafter being erected thereon.

3. If a bequest to a town for reclamation and embellishment of a common authorizes the purchase, with part thereof, of an addition to the common, the addition will be subject to the same public uses as the original common is subject to under the grant thereof to the town.

4. The warrant for the annual meeting of a school district specifies the location of a schoolhouse with sufficient definiteness to give the board of education jurisdiction in the premises under Gen. Laws, c. 88, § 5, providing, "If at a meeting duly holden for the purpose the district do not agree upon a location for a school house, * * * the school committee upon the petition of three or more voters, shall determine the location," the warrant reading, "To see if the district will vote to build a new schoolhouse, at or near the village."

5. Even if notice of hearing by county commissioners as to the location of a district schoolhouse, under the final authority given them in the matter by Gen. Laws, c. 88, § 6, should be in accordance with section 7, the district alone, in its corporate capacity, can take objection that it was given otherwise.

Bill in equity by John Newell and others, legal voters in Hancock, against the town of Hancock, the town school district, the school board, and the building committee of a schoolhouse. Facts agreed. Bill dismissed.

In 1785, James Hosley, "in consideration of the town of Hancock's being pleased to agree upon a plot to set a meetinghouse on upon my land, and for divers other good causes and considerations," granted to the town a tract of land, containing some seven acres, "for a convenient common about said meetinghouse for stabling of horses on the Sabbath, to build houses on for the people to assemble in upon Sabbath noons, for burying yard and training field, for roads, etc., or for any other necessary public use, at the

discretion of the town, and for no other purposes." This gift was formally accepted by the town, and in the exercise of its discretion it has at different times voted to allow the common to be used for the additional public purposes of a public pound (1809), a schoolhouse (1810), a hearse house (1810), an academy building (1830), and an armory and public hall (1875), which is now used as a grange hall. In 1888, one Whitcomb, a native of the town, and familiar with the common and the way in which it then was and had been used and occupied, gave to the town, among other bequests in his will, the sum of \$10,000 (which was duly accepted), "one half thereof, or such part of the said one-half as may be considered necessary, for the reclamation and embellishment of the common, * * * and the rest of said ten thousand dollars as a fund of which the income shall be used for the increase and maintenance of said reclamation and embellishment." At this time the common was incumbered by the schoolhouse, which had become ruinous, unsightly, and unfit for use, and by the old academy building, claimed by one Turner, which had been occupied for many years by a poor class of tenants as a dwelling house, and in the rear of it was a workshop and stable. All these buildings were in a poor and tumble-down condition, and disagreeable and offensive to the people of the town. In 1889 the town caused the schoolhouse to be taken down, and removed from the common, and at a legal meeting held on April 12, 1890, the selectmen were authorized and instructed to buy the old academy or "Turner Building," so called, and the land south of it, owned by Wm. F. Symonds, the same to be paid for from the Whitcomb legacy," and "to sell the buildings at public auction * * * within thirty days from the time of taking the deed; the same to be removed from the common within thirty days from the date of sale." In pursuance of this vote, the selectmen bought the Turner Building, with the adjacent old buildings, and four acres of the Symonds land, for \$1,500, which was paid from the Whitcomb legacy. All the buildings were sold by auction, in accordance with the vote, and have been removed from the common, with the exception of the Turner Building, which was purchased by the school district with the intention to remodel it, and use it for a schoolhouse upon a different location on the common. Subsequently, and upon petition, the county commissioners located the schoolhouse lot upon the site of the old schoolhouse of 1810, more than four-fifths of the lot being a part of the old common, and less than one-fifth a part of the addition paid for from the Whitcomb legacy; and the town has by formal vote approved the location, and granted the district the use of the land. The plaintiffs, who are citizens and legal voters in Hancock, object to the location, and allege that the building of a schoolhouse on the common would be a gross violation on the

part of the town of its obligation to Whitcomb and his representatives after accepting his legacy, and that it would injure the beauty of the common, etc. These allegations are denied by the defendants. The plaintiffs also allege, and the defendants deny, that the proceedings before the commissioners were insufficient and illegal, and without legal notice of the hearing. And one of the plaintiffs (Tuttle), who is an executor and nephew of Whitcomb, makes the additional claim, in both his official and private capacity, that if the Whitcomb legacy is allowed to be used as it has been by the defendants, it is a forfeiture of the entire legacy, and that the same should be ordered paid to the estate by the town. The prayer of the bill is for a decree settling aside the proceedings of the county commissioners, and for an injunction restraining the defendants from erecting a schoolhouse on said lot, or any other part of the common. Some additional facts are sufficiently stated in the opinion.

David Cross, J. S. H. Frink, and George B. French, for plaintiffs. R. M. Wallace, F. G. Clarke, and Wm. L. Foster, for defendants.

BLODGETT, J. In granting to the school district the perpetual use of the school lot, the town neither exceeded its power under the Hosley grant nor violated any obligation to Whitcomb arising from the acceptance of his legacy. By the terms of that grant the town was to appropriate the land for certain specified purposes, and "for any other necessary public use," at its discretion. The power to exercise its discretion is concurrent with the enjoyment and continuance of the grant. There is no condition attached to the gift restraining the town from changing the public use to which any part of the land may be devoted, and an appropriation of a part of it to a particular use did not exhaust the power of the town to apply the same land to a different necessary public use when no longer needed for the original purpose. The discretion to determine the character of the use implies the power to change it, and, this power being vested in the town, the general doctrine invoked by the plaintiffs, that land already applied to a public use cannot be wrested from that use, and devoted to an inconsistent use without special legislative authority, has no application. If, however, it did apply, its application would not aid the plaintiffs; for, if the determination of the use to which the grant, or any part of it, should be devoted exhausted the power of the town, so that it could not afterwards change the use, the dedication of a part of the land to the use of a schoolhouse in 1810 was final and perpetual. There is, then, no solid ground on which the plaintiffs' contention can stand, so far as it relates to that portion of the school lot embraced within the Hosley grant. As regards the remaining portion

of the lot, which was purchased by the town with the funds of the Whitcomb trust, it is not perceived how the contention practically stands any better; for, if the common, as established by the Hosley grant, could properly be enlarged under the language of the Whitcomb bequest by making additions to it, as by the Symonds purchase, such addition would become a part of the original common, and subject to the same public uses to which it is subject; and if this is so, it follows that the partial location of the school lot on the Symonds addition is a proper location under Hosley's grant for necessary public uses. But, if the purchase of that addition was, as claimed by the plaintiffs, a misappropriation of the Whitcomb legacy, and a breach of the trust under which it was accepted and held (as to which no opinion can properly be expressed in this proceeding for want of necessary parties), then the town must restore to the trust fund the amount used in making the addition; but in that event the town will still continue to hold the land, divested of any rights of the Whitcomb trust, and, it having, by its vote, given to the district the perpetual use of the entire school lot as located by the commissioners, the location upon the Symonds part of it stands no differently, for the purposes of this case, from that upon the Hosley part.

The acceptance of the Whitcomb bequest by the town did not change the meaning of his will, nor limit or impair the town's rights under the Hosley grant. When Whitcomb made his will, and up to the time of his death, a portion of the common, selected by the commissioners in 1890 as a location of the proposed schoolhouse lot, was occupied by the old schoolhouse. He was familiar with the common, and the way in which it was and had been used and occupied, and undoubtedly he was also familiar with the terms of the Hosley grant. The Whitcomb legacy was "for the reclamation and embellishment of the common, so called." Did the testator mean by the word "common" a lawn or park not occupied by buildings, or did he mean the common to be used as it had been legally used? The presumption is that he used the word "common" and the words "reclamation" and "embellishment" in senses consistent with the legal public uses which the town can make of the common under the Hosley grant, and that he did not intend or attempt to impair or restrict the legal uses of the land under the grant. If it had been his purpose to make it a condition of the bequest that all structures should be removed from the common, and that no buildings should thereafter be erected upon it, he would have so provided in his will. The absence of such a provision is of itself sufficient evidence that the testator did not intend to restrict the town in the legal use of the Hosley grant.

The plaintiffs also contend that there had

been no action on the part of the district in reference to the schoolhouse and its location which gave the board of education jurisdiction in the premises, because the warrant for the annual meeting holden March 5, 1889, did not specify the location with sufficient definiteness, and because there was no subsequent neglect by the district, or by its committee, to make a location, which gave to the petitioners the right of petition to the school board or to the commissioners. The objection of indefiniteness is overruled. The warrant was (article 6), "To see if the district will vote to build a new schoolhouse at or near the village, with suitable outbuildings;" and (article 7), "To see what sum or sums of money the district will raise, by taxation or otherwise, for building, purchasing, renting, repairing, or removing such schoolhouses and outbuildings as the wants of the district require, procuring land, and providing suitable furniture and apparatus and needful conveniences therefor." These articles are sufficiently definite in respect of location. At this meeting it was voted that the district build or purchase a building suitable for a schoolhouse at the village, and that a committee of five persons be appointed to take the matter into consideration, and to report at that meeting; and a sum of money was voted to be raised to carry out the vote. A committee was then appointed, but it failed to report at the meeting. Subsequently another meeting of the district was called, with an article in the warrant to take the sense of the qualified voters as to their preference of a location for the schoolhouse at the village, but the article was dismissed without action thereon. Thereupon 23 citizens petitioned the board of education, setting forth the vote at the annual meeting, and the failure of the committee to comply therewith, to locate the school buildings and acquire the land by purchase or otherwise, as the law prescribes. The objection that these petitioners had no grievance which entitled them to a hearing before the board of education is likewise overruled. "If at a meeting duly holden for the purpose, the district do not agree upon a location for a school house, * * * the school committee, upon the petition of three or more voters, shall determine the location." Gen. Laws, c. 88, § 5. The location fixed by the school board failing to be satisfactory, it was the right of eight or more voters of the district, who felt themselves aggrieved by the location (Laws 1887, c. 105, § 7), to appeal to the county commissioners, who, in such cases, are invested with final authority (Gen. Laws, c. 88, § 6). Such an appeal having been taken, a hearing was appointed and had by the commissioners who made the location in question, which the plaintiffs finally ask to have set aside for want of legal notice of the hearing, which was given by posting a copy of the petition and

order of notice thereon at two of the most public places in the district, and by delivering a copy to the clerk and each of the school board. This objection, like the others, must be overruled. The ground on which it rests is that section 7 of chapter 88 of the General Laws provides that, in the case of schoolhouse petitions to the county commissioners, they shall give notice of the time and place of hearing by causing a copy of the petition and order of notice thereon to be posted on the outside of the outer door of each schoolhouse in the district, if there be any in the district, and, if not, in one or more public places in the district, at least 14 days before the time so appointed; and by causing a like copy to be given to or left at the usual place of abode of the clerk and prudential committee of the district a like time before the time appointed for the hearing. And so the claim of the plaintiffs is that, the town of Hancock at the time of the hearing constituting but one school district, notice of the hearing should have been posted on the outside door of every schoolhouse in the town. But the district system, to which chapter 88 applies, was superseded by the radically different town system, which went into effect March 1, 1886; and it is not open to reasonable doubt that sufficient and ample notice of the hearing was given conformably to the new order of things. If, however, it were otherwise, it is for the district alone, and in its corporate capacity, to take the objection. The injunction prayed for is denied. Bill dismissed.

SMITH, J., did not sit. The others concurred.

(87 Conn. 317)

STATE BANK v. BLISS et al.

(Supreme Court of Errors of Connecticut.
Feb. 21, 1896.)

JOINT WILL—PROVISIONS—PRACTICABILITY—RESERVATION FOR ADVICE—PROCEDURE.

1. Gen. St. § 1114, which provides that no reservation for the advice of the supreme court of errors in cases tried before other courts shall be made "without the consent of all parties to the record," refers only to the consent of such of the parties to the record as choose to appear in the trial court.

2. Where a will, purporting to be a joint act, creates a common fund, out of which the debts of each testatrix and her funeral expenses are to be met, and legacies to third parties paid, and provides against its probate till both makers are dead, after making each the residuary legatee of the other, it presents an impracticable scheme, and all its provisions must fall together.

Case reserved from superior court, Hartford county; Ralph Wheeler, Judge.

Suit by the State Bank, as administrator of the joint will of Emily Spencer, deceased, and Jane A. Spencer, against Charles E. Bliss and others. Case reserved.

John R. Buck and John H. Buck, for plaintiff. E. Henry Hyde, Jr., for defendant Lou-

ise Hart. Sidney E. Clarke, for defendant George H. Foster. John H. Light, for defendants Elizabeth Spencer Crane and Sarah Spencer Ellis.

BALDWIN, J. The reservation by which this action comes before us was made with the consent of all the parties appearing in the cause. Several of the defendants named in the complaint, and served with process, have entered no appearance, and among them is Jane A. Spencer, the sole heir at law.

The General Statutes (section 1114), provide that no reservation for the advice of this court, in cases tried before other courts, shall be made "without the consent of all parties to the record in such cases." We think that this limitation of jurisdiction, first introduced into our statutes in 1879, refers only to the consent of such of the parties to the record as choose to appear in the trial court. Under a literal construction of the statute, such as to make it require the consent of every person who was made a party, the privilege of resorting to this court for its advice might often be defeated by the failure to obtain the consent of some defendant whose neglect to enter an appearance was due simply to the fact that his interest was too trivial to justify the expense of his active participation in the suit.

The will in question describes itself as a joint will, and, by its terms, was not to be offered for probate until after the death of both the sisters. Such a direction was plainly contrary to the declared policy of our law, which makes careful provision that every will shall be propounded for probate as soon as may be after the testator's decease. Gen. St. §§ 544, 547, 568. If it be of any legal effect, its insertion may have given the survivor and sole heir at law a right to object to the probate of the instrument when it was in fact presented to the court of probate, shortly after the death of Emily Spencer, as the will of the latter. *Schumaker v. Schmidt*, 44 Ala. 454, 467; 1 Redf. Wills, 182. No such objection, however, appears to have been made, nor did she take any appeal from the decree of probate. It must therefore stand as the will of Emily Spencer, duly executed.

But while its validity as a will, sufficient in respect to the form of the instrument and the mode of its execution to pass the real and personal estate of Emily Spencer, has thus been established by the adjudication of the court of probate, this same provision as to the time for proving it has a material effect in determining whether the terms in which it is expressed are such as to constitute a valid disposition of that estate. She, plainly, did not intend that any of the pecuniary legacies which it gave should be paid until after the death both of herself and of her sister. As she directed that the will should not be proved until then, she must have known that the funds out of which they were to be satisfied, consisting in part, at least, of her es-

tate as administered upon before the court of probate, would not exist until then; nor would there be any executor clothed with authority to discharge them. The probate of her will, earlier than she designed, cannot give any different meaning to the words which she has employed to dispose of her property. This same provision, however, had it been complied with, and were it to be held valid, if it would not have deprived her sister of the benefit of the residuary bequest in her favor, would certainly have seriously affected the character of the interest which it gave her. If, upon a probate subsequent to the death of the latter, the bequest could have been held, by relation, to have become vested at the death of Emily, the use and profits during the period between those deaths could not have been actually received by Jane, under the will of Emily, without a violation of our probate law; nor could she have conveyed a title to any of the property which an ordinary purchaser would be ready to accept, since the residue could not be ascertained until the prior legacies were paid, as well as the debts of each testatrix.

In the case of *Walker v. Walker*, 14 Ohio St. 157, a joint will was offered for probate after the death of both testators, which, after providing for the payment of the debts and funeral expenses of each, contained certain reciprocal gifts by each to the other, and then disposed of their residuary estate by specific devises, general legacies, and a residuary bequest. The court held that such an instrument was not the proper subject of probate as the will of both or either of the testators, and suggested that a contrary decision might lead to questions such as these: "One of the testators may survive the other for half a century. When is the will to be proved, and to thus become practically operative? On the death of both testators? If so, how is the estate of the first decedent to be administered in the meantime, and what is to become of debts and legacies? If it is to be proved on the death of the first decedent, how are the legacies to be paid? If they remain in abeyance until after the death of both testators, what, in the meantime, is to be done with that portion of the property of the decedent which is ultimately to be devoted to their payment? If, on the other hand, they are to be paid in part at once, in what proportion is the property of the first decedent to contribute for that purpose?"

A will operates as a conveyance by way of appointment. That now before us purports to dispose by a joint act of two separate estates, consisting of property held in common. The order of disposition is particularly described. First, the debts and funeral expenses of each testatrix are to be paid; next, pecuniary legacies to the amount of nearly \$40,000 are provided for; and then each makes the other her residuary legatee and devisee, unless their deaths should be simultaneous or within 24 hours of each other, in which

event the residue is to go as a common fund to their next of kin. Most of the questions so forcibly put by the court in *Walker v. Walker* are thus distinctly presented to us for decision. It is impossible now to determine what debts the surviving sister may owe at the time of her decease; but these, as well as those of Emily, must be ascertained and paid before any of the legacies can be satisfied. If these legacies are to be viewed as given solely by the testatrix who was the first to die, their satisfaction will be impossible, for they amount to more than her whole estate. If, on the other hand, only half of each legacy is to come out of Emily's estate, that half cannot be paid so long as Jane survives, without disregarding the plain intent of the will that no payments shall be made under its provisions until after the decease of both sisters, since then only was the will to be presented for probate, and the estates placed in course of administration. Such a postponement, however, could not legitimately increase, meanwhile, the income of the survivor, for she was to share only in the residue remaining after the particular legacies were satisfied; nor could that be until after the payment of such debts as she herself might owe at her decease,—necessarily an unknown quantity until that event occurred. When, again, did the particular legacies vest? As to one of them, that to Mrs. Crane, it was especially provided that it should not vest until the will was proved, a date which, in the contemplation of the testatrix, could not be reached during the life of Jane. But if any of the other legatees had died after Emily and before Jane, whatever might be their rights in Emily's estate, could they have had any claim upon that of Jane, who survived them? The will is partly a joint and partly a mutual one. Each testatrix executed it as the will of both, and in order to accomplish a common purpose. Its form would indicate that it was originally drafted as a joint will only, and that the reciprocal provisions and contingent residuary gift to their next of kin, found in the clauses numbered from 5 to 8, were subsequently inserted. A will strictly mutual is, in legal effect, nothing but the individual will of that one of the testators who may die first. *Lewis v. Scofield*, 26 Conn. 452. To give such a construction to the will now under consideration would do violence to its terms. It purports to be a joint act. It creates a common fund out of which the debts of each and her funeral expenses are to be met, and legacies to third parties paid; and it provides against its probate until both the makers are dead, after making each the residuary legatee of the other. This scheme is one which it is impossible to carry out, and its various parts are so related to each other that all must fall together. The superior court is advised that the estate of Emily Spencer which may remain after the payment of debts and charges should be distributed as intestate estate. The other judges concurred.

(97 Conn. 324)

In re WADDELL-ENTZ CO.

(Supreme Court of Errors of Connecticut.
Feb. 21, 1896.)CORPORATIONS—INSOLVENCY—DISTRIBUTION OF
PROPERTY—COLLATERAL SECURITY—
SURRENDER—DIVIDENDS.

1. The property of an insolvent corporation, when taken into possession by a receiver under the statutory provisions for the winding up of a corporation, becomes a trust fund to be divided among such creditors as may duly file their claims, on the basis of the actual indebtedness due to each.

2. In consideration of a loan of \$4,500 to a corporation, a creditor received its demand note for that amount, and also received 10 bonds issued by the corporation for \$1,000 each, which were referred to in the note as "collateral security." The bonds were not secured by a lien on property, or by the obligations of third persons. On default in payment of the principal note the payee sold the bonds to himself for the sum of \$50, after the corporation had become insolvent, and presented his claim against the estate, then in the hands of a receiver, for \$14,450, on which he claimed dividends. *Held*, that the bonds were not collateral security, and hence their sale to himself by the holder did not alter the amount of the debt due from the corporation.

3. Gen. St. § 1942, which provides for the winding up of an insolvent corporation, and the placing of its property in the hands of a receiver for distribution among all creditors in equal proportions, places insolvent corporations within the meaning of the insolvency act (Gen. St. § 590), which requires a secured creditor of an insolvent estate to elect between the surrender of such security, and a dividend from such estate only upon the excess of such claim above the value of such security.

Case reserved from superior court, Hartford county; Elmer, Judge.

Application by the receiver of the Waddell-Entz Company for instructions as to the proper distribution of the funds of the estate in payment of a dividend on certain claims proven.

Morris W. Seymour and Howard H. Knapp, for receiver. John H. Perry and George E. Hill, for claimant William A. Procter. Antonio Knauth, for claimants John C. Brown and Margaret B. Smith.

HAMERSLEY, J. When the law takes possession of the property of an insolvent debtor, that property becomes a trust fund to be divided among such creditors as may present their claims in the prescribed manner; and the respective interests of the creditors in the fund are, as between themselves, of an equitable nature, to be determined on a basis of equality. This is true of the property of an insolvent corporation when it is taken possession of by a receiver under the statute providing for the winding up of a corporation as truly as when it is taken possession of by a trustee under the statute regulating insolvent estates. *New Haven Wire Co. Cases*, 57 Conn. 352, 387, 18 Atl. 266. The questions submitted by this reservation present little difficulty when it is remembered that the real question is, not what remedies each creditor may have had

against the solvent corporation, but simply what is the amount of actual debt due from the insolvent estate to him? Such debt, and such only, can be proved, as the basis for an equitable distribution of the trust fund. A consideration of the disputed claims of William A. Procter and Knauth, Nachod & Kuhne will dispose of all the others.

Procter's claim (aside from the 13 bonds, Nos. 32 to 44, about which no question arises) is based on a loan to the Waddell-Entz Company of \$4,500. As evidence of the debt, he received a demand note for that amount (Exhibit C). He also received 10 notes or bonds (in the form of Exhibit D) for \$1,000 each, and claims that the debt on which he is entitled to a proportionate dividend from the trust fund is \$14,500. If he had received a demand note for \$14,500, or if he had received 145 notes under seal for \$100 each, it would hardly be claimed that he could prove more than his actual debt of \$4,500. Whatever advantages possession of evidences of debt in such form might secure to him in enforcing his rights against his debtor, the possession of such advantages does not alter the fact that his real debt is \$4,500, and that fact must control his right to a dividend from the insolvent estate. The amount of his debt is not altered because in the demand note the 10 bonds delivered to him are called "collateral security." They are not collateral security for the payment of the original debt. The demand note itself is, in a sense, a security, dependent for its value on the credit and property of the borrower. Another note, or 50 other notes, furnish a similar security. They might aid the creditor in enforcing speedy payment by the debtor, but in case of insolvency it is the actual debt, and not the multiplication of evidences of debt, that defines the creditor's interest in the trust fund. "Collateral security" necessarily implies the transfer to the creditor of an interest in some property, or lien on property, or obligation, which furnishes a security in addition to the responsibility of the debtor. The law regulating this subject rests on the assumption of such transfer to the creditor of property, in some form, on which property he relies for security, and which he is entitled to apply, instead of resorting to the debtor's own property, towards the satisfaction of his debt, by virtue of a contract, implied or express, as the case may be, but collateral to the contract of indebtedness. A debtor's additional promises to pay cannot, from the very nature of the case, be treated as collateral security for his debt, unless such additional promises are themselves secured by a lien on property, or by the obligations of third persons. Under such circumstances, they may be treated as collateral security, so far as is necessary to obtain the benefit of the lien or obligation. This self-evident proposition has rarely been discussed in reported

cases. The principle, however, has been clearly stated by the courts of New York and Massachusetts. *People v. Remington*, 54 Hun, 480, 8 N. Y. Supp. 31, affirmed 121 N. Y. 675, 24 N. E. 1095; *Third Nat. Bank v. Eastern R. Co.*, 122 Mass. 240. See, also, *Merchants' Nat. Bank v. Eastern R. Co.*, 124 Mass. 518. In the case of *In re Litchfield Bank*, 28 Conn. 575, it was apparently conceded by all parties that the currency of a state bank, pledged as security for the payment of its promissory notes, is pledged as money. The case turned on a claim of tort in selling the money so pledged, and the question now at issue was not considered.

The amount of Mr. Procter's debt is not altered by the sale from himself to himself of the bonds. Such bonds were not "collateral security" for the demand note, and their sale to himself or others would not be governed by the law peculiar to the disposition of such security. Whether or not they might constitute a debt for their face value in the hands of a third party who had purchased them from Procter, would depend upon the circumstances of such purchase. Their standing, in such case, as a debt against the insolvent estate, would not depend on their sale as "collateral security," but on their valid assignment to an innocent third party. Mr. Procter, by purchasing these bonds from himself after he had been advised of the insolvency of the company and the appointment of a receiver, and after he had presented his debt of \$4,500, did not put himself in the position of, nor in a position analogous to that of, an innocent third party.

One claim of Knauth, Nachod & Kuhne raises a different question, although its solution is largely controlled by the same principle, i. e. the equality of the creditors in respect to their equitable interests in the trust fund. These claimants held collateral security for their debt. They have sold that security through proper legal proceedings, and have received the proceeds. The fact that they themselves were purchasers at the sale is immaterial. They now insist that, for the purposes of a division of the trust fund, the amount or value of the proceeds received by them from the sale of their security cannot be deducted from the original amount of their debt. It is undoubtedly true that a creditor holding collateral security may, in case of nonpayment of the debt, pursue all his remedies at the same time, or either one before having recourse to the other. He is not bound to apply the collateral security before enforcing his direct remedy. He has a legal property interest in the security as well as in the debt. To deprive him of either might be in the nature of an violation of the obligation of a contract. His rights, however, are limited to the satisfaction of his debt, and if he gains more, a trust arises which equity will enforce. But when the debtor is insolvent, and his property is taken into the custody of the law as a trust fund to be dis-

tributed among the creditors, on the basis of equality, under direction of a court exercising equity powers, the right of a secured creditor to a share of that fund stands on the same footing as the right of every other creditor who presents a claim; and the amount upon which he is entitled to a dividend must be determined on the same principles. He cannot be deprived, without consent, of the property which he holds as security; he cannot be deprived of his right to sue the debtor for any unpaid balance (unless by force of a discharge in insolvency or bankruptcy); but his share of the trust fund must be determined by the same rule which determines the share of every other creditor, and that is a rule of equity for securing equality of treatment. Whether this rule of equity will permit a secured creditor to proceed against the fund in the hands of the trustee, as he might have proceeded against his debtor, without applying his collateral security to the reduction of his claim, and so to receive a dividend from the property of the insolvent, sequestered, by operation of law, for the equal benefit of all creditors, on that portion of his debt which the property of the debtor, sequestered by his own act for that special purpose, has paid or will pay in full, is a question as to which courts in different jurisdictions have differed. The cases are reviewed in *People v. Remington*, 121 N. Y. 328, 24 N. E. 793. It may be doubtful whether in this state, prior to the act of 1853 relating to insolvent debtors, this question had been conclusively settled, although *Findlay v. Hosmer*, 2 Conn. 350, and some subsequent cases, indicate an approval of the rule contended for by counsel for Knauth, Nachod & Kuhne. It is unnecessary, however, to discuss the question, for we are satisfied that legislation on that subject has settled the doubt in favor of a different rule.

The insolvent act of 1853 contained a provision (now found in section 590 of the General Statutes) requiring a secured creditor, who presented his claim against the estate, to elect between the surrender of such security, and a dividend from such estate only upon the excess of such claim above the value of such security. In *Mechanics' & Farmers' Bank's Appeal from Probate*, 31 Conn. 63, 70, it was held that this statute placed all the property of the insolvent in the custody of the law, to be disposed of according to law; that the creditor has no vested interest in such property; and that the statute was "strictly remedial, providing for the appropriation of the debtor's property, on principles of equity and justice, among all his creditors." The provision in relation to secured creditors was extended to insolvent estates of deceased persons, so that this equitable rule applied to the distribution by law of all insolvent estates, including insolvent corporations. In 1869 a law was passed for the winding up of cor-

porations, and under that law the property of the insolvent corporation could be taken possession of, for division among all creditors in equal proportions, by a receiver appointed by the superior court, as a court of equity, as well as by a trustee appointed by the court of probate under the insolvent act. *New Haven Wire Co. Cases*, supra. The present proceeding is brought under this act, which is still in force, substantially unchanged. Gen. St. § 1942. The act confers on the court full equity powers to make such orders as to the doings of the receiver, "and as to the payment of debts and distribution of the effects of said corporation, as may be just and conformable to law." We think the property of an insolvent corporation is in the custody of the law to the same extent, and for the same purposes, when transferred to a receiver under section 1942, as when transferred to a trustee under the insolvent act, and that the principle of the rule in respect to the participation of secured creditors in the distribution of such property, which is obligatory in the latter case, ought to be applied in the former. This is just, and required by the insolvent act.

The superior court is advised: First. William A. Procter is entitled to a dividend only on the original indebtedness of \$4,500, and the 13 coupon obligations numbered 32-44. Second. John C. Brown and Mrs. Smith are entitled to dividends only upon the amount of their demand notes. Third. Knauth, Nachod & Kuhne are entitled to a dividend on the excess of their claim of \$12,336 above the amount received by them from the sale of their collateral security. They are not entitled to a dividend upon the eight coupon obligations. The other judges concurred.

(87 Conn. 339)

HARTY v. MALLOY.

(Supreme Court of Errors of Connecticut.
Feb. 21, 1896.)

BASTARDY—EVIDENCE—STATEMENTS OF PLAINTIFF —EXPENSES RECOVERABLE.

1. In a bastardy proceeding brought by the mother, evidence of acts of intercourse between the parties prior to the one claimed to have resulted in plaintiff's pregnancy is admissible; but evidence that plaintiff's consent was obtained by a promise of marriage is irrelevant, and its admission prejudicial error.

2. Although plaintiff was not put to the discovery in the time of her travail, statements made by her, both before and after the birth of her child, that defendant was its father, are admissible.

3. Plaintiff, having testified that she stated to defendant's father that defendant was the father of her child, was asked on cross-examination what she told him. Held, that such question did not render admissible, on her redirect examination, testimony as to the entire conversation, or of other conversations or communications following.

4. Whether or not the time elapsing between the date of the alleged intercourse with defendant, as testified to by plaintiff, and the birth of her child, was such as to disprove her claim that the child was then conceived, was a question of fact for the jury, under the evidence.

5. Gen. St. § 1208, authorizing the recovery in bastardy proceedings of one-half "the expense of lying-in, and of nursing the child," to be ascertained by the court, does not authorize the allowance of the child's burial expenses; but the services of a neighbor or of a member of plaintiff's family, who assisted in the nursing, may be proper to be considered, though no contract to pay for them is shown.

Appeal from court of common pleas, New Haven county; Hotchkiss, Judge.

Complaint by Alice Harty against Thomas Malloy for bastardy. Judgment for plaintiff, and defendant appeals. Reversed.

Samuel C. Morehouse, for appellant. Tilton E. Doolittle and John A. Doolittle, for appellee.

FENN, J. This is a bastardy proceeding, brought by the mother, and tried to the jury in the court of common pleas for New Haven county. The plaintiff obtained a verdict in her behalf, and judgment was rendered thereon by the court. The errors assigned upon appeal relate largely to the action of the court in relation to the admission of evidence. These we will first consider.

Upon the trial it was admitted that the defendant, at the time of the occurrence mentioned in the complaint, was a minor, just under the age of 16 years, and resided with his parents in West Haven, in the town of Orange; that the plaintiff was unmarried, and lived with her parents in the city of New Haven; that on March 9, 1895, the plaintiff gave birth to a male illegitimate child, who lived only a few days. The plaintiff introduced no evidence to show that such child was not a fully developed child, or a child the birth of which was premature. The plaintiff offered evidence, and claimed to have proved, that on the evening of the 4th of July, 1894, an act of sexual intercourse took place between her and the defendant, and that her pregnancy resulted therefrom. The plaintiff also offered, against the objection of the defendant, evidence in chief of two acts of sexual intercourse between herself and the defendant,—one in January, and one in February, 1894. It was admitted by the plaintiff that there were no other such acts, except these two, between herself and the defendant previous to said 4th of July, 1894. The court admitted the evidence, the defendant duly excepting. We think this ruling of the court, though going closely to the verge of the law, must be sustained, upon the authority of *Norfolk v. Gaylord*, 28 Conn. 309, and upon the reasons and grounds therein stated.

But the court, in this connection, went further, and, against the exception and objection of the defendant, allowed the plaintiff to offer evidence that she had, in January and February, 1894, consented to such intercourse only after a promise of marriage made by the defendant to her. This was clearly error. The introduction of such evidence would doubtless tend to assist the

plaintiff in her effort to obtain a verdict from the jury; but it would do so, not because it aided to establish the truth of the principal matter in dispute, but because it would incite sympathy in her favor, and prejudice against the defendant. Efforts to introduce, in jury trials, evidence only desirable for such reason, should not meet with especial favor from this court.

It was not claimed that the plaintiff was put to the discovery of the paternity of her child at the time of her travail; but in explanation, apparently, of why she was not, evidence was, against the objection and exception of the defendant, offered and received, that at the time of her parturition, and a day or two after, she was unconscious, and in such a condition that she was unable to converse, and that she was given anaesthetics to relieve her of pain, so that she might have a comfortable delivery. In all probability, the admission of this evidence did the defendant no especial injury, but we are unable to discover its relevancy. In connection with it, evidence, also excepted to, was offered, that, about a week after delivery, the plaintiff stated to the doctor, when taking certificate of birth, that the defendant was the father of her child; and that she also stated to her father, mother, and sister, both before and after birth of the child, when asked by them who was the father of the child, that Thomas Malloy, the defendant, was. Regarding the above statements, no claim appears to have been presented that they were made as near to the time of her delivery as, by reason of her condition, she was able intelligently to, and did, converse. The importance of such fact, if it had existed and appeared, we do not determine. As the case stands, these statements, and others to which we will next allude, were admissible, independent of discovery at the time of travail, or they were not admissible at all.

The plaintiff also offered evidence in chief, admitted by the court against the objection of the defendant, both of herself and of several members of the family, and of others, that at various times between the 4th of July, 1894, and the birth of her child, on the 9th day of March, 1895, she had stated to them that the defendant was the father of her unborn child. Except as limited by what we shall hereafter state as to particular matters, we think the views held and expressed by this court in several cases justify these rulings of the court below. *Booth v. Hart*, 43 Conn. 480; *Robbins v. Smith*, 47 Conn. 182; *Benton v. Starr*, 58 Conn. 285, 20 Atl. 450. But the principles of these decisions will not justify the entire action of the court below in reference to this class of evidence.

It further appears that the plaintiff testified that she told the father of the defendant that his son was the father of her child. Thereupon defendant's counsel, upon cross-

examination, asked the plaintiff, "What did you tell Mr. Malloy?" Counsel endeavored to, and did, confine his questions and the witness' answers, as to the interview, exclusively to that limit; that is, the plaintiff's statement to the father of the defendant, and the date of the conversation. On redirect, plaintiff's counsel claimed the entire conversation, and the court, against the objection of the defendant, allowed it to be given by the plaintiff. She stated that the defendant's father gave her a dollar, and told her to go down to a drug store, and buy pills,—"a box of Hooker's pills"; that she went, got them, came back, and showed them to Mr. Malloy; that he told her they would bring her round right; asked her how many the prescription said to take; she replied, "Three." "Well," he says, "you never mind. Three isn't enough. You take seven or eight." Another objection made by the defendant was that here was the conversation of two interviews, all admitted because the defendant asked for the specific language used by the plaintiff in making her statement to the father of the defendant, that his son was the father of her unborn child. Surely, the defendant's counsel objected faithfully, but his only relief was that to his objection counsel for plaintiff interjected: "We have heard that over and over again." Then the court said: "I think, having admitted that first interview,—you having called for the whole conversation at the first interview,—that the conversation at a subsequent interview on the same subject is admissible." Certainly, the record shows that all the conversation at the first interview was not called for or desired by the defendant; and neither the said ground stated for the ruling, nor the ruling itself, if it had such a basis, was correct.

There was also error in the action of the court in admitting a letter from the plaintiff to the defendant's father; but as this action was based upon and in extension of the other ruling to which we have just referred (as was also the evidence of one Condon as to what the defendant's father said and did when he received the letter), and as such action arose under peculiar circumstances, which can hardly exist upon another trial, it is unnecessary to go into the details which would be essential in order to make the matter plain to those who are not familiar with the case.

The defendant has also assigned as error, in his reasons of appeal, the refusal of the court to charge the jury as desired by him in his second and third requests, to the effect that as it did not appear, nor was claimed, that the birth of the child was premature, the act causing pregnancy must have occurred early in June, 1894; and that, as it was not claimed that the defendant had any intercourse with the plaintiff between February, 1894, and July 4th of that year, upon the facts the verdict should be

for the defendant. The court held this to be a request to charge the jury upon a question of fact, and declined. This action we think correct.

Error is also assigned in the action of the court in the performance of its statutory duty, under Gen. St. § 1208, in ascertaining "the expense of lying-in, and of nursing the child." The only item the including of which in the bill, upon the finding, appears to us clearly erroneous, is that of \$25 for burial expenses. It may be a matter for regret that the language of the statute is not broad enough to justify this, but we cannot hold that it is. The only other items objected to are the allowance to a neighbor who assisted in the nursing, and to the plaintiff's sister, who assisted for a period of three weeks. The question raised as to these items may be a close one, but, under all the circumstances detailed, we think the action of the court correct. There is error, and a new trial is granted. The other judges concurred.

(57 Conn. 345)

CARNEY et al. v. WILKINSON.

(Supreme Court of Errors of Connecticut.
Feb. 21, 1896.)

BOUNDARIES — PROCEEDINGS TO RE-ESTABLISH — VALIDITY.

In a proceeding to establish lost and uncertain bounds to land, under Gen. St. § 2975, providing for the appointment by the court of "a committee of not more than three disinterested freeholders," who may employ a surveyor to assist them, to establish such bounds, where the services of a surveyor are necessary, the one employed must, like the committee, be a person who is disinterested, and the employment of the agent and surveyor of one of the parties in the matter vitiates the action of the committee, and its report should be set aside.

Error from superior court, New Haven county; Ralph Wheeler, Judge.

Complaint by Charles B. Wilkinson against Kate Carney and others to establish lost and uncertain bounds to lands. From the sustaining of a demurrer to defendant's remonstrance against the report of the committee appointed to establish such bounds, and the confirmation of its report, defendants bring error. Reversed.

James P. Platt and Cornelius J. Danaher, for plaintiffs in error. George A. Fay, for defendant in error.

HAMERSLEY, J. Some questions of interest, and not free from doubt, involving the meaning and effect of the statute under which the original complaint was brought, were discussed in argument. They arise, however, on this writ of error, with such limitations that any consideration of their merits which does not extend beyond the issue directly involved must be unsatisfactory; and, as there is a fatal error apparent on the face of the record, we confine the decision to that error. The statute (section 2975 of the General

Statutes) provides for an appointment, by the court to which a complaint for the establishment of lost and uncertain bounds is brought, of "a committee of not more than three disinterested freeholders, who * * * shall inquire into the facts, and erect and establish such lost and uncertain bounds, and may employ a surveyor to assist therein; and shall report the facts and their doings to the court." It then provides that the court may confirm said doings, and that certified copies of the report and decree of confirmation shall be recorded in the land records, and that "the bounds, so erected and established, shall be the bounds between said proprietors." It is clear that upon proof of material misconduct on the part of the committee in erecting and establishing such bounds, the court must reject their report. Even when the report of a committee of a similar character is held to be conclusive as the judgment of a special statutory tribunal, their report may be set aside for "misconduct on the part of the committee, or irregularity in their proceedings." *Suffield v. East Granby*, 52 Conn. 175, 180. In the present case the committee reported: "I find that the land records of the town contain boundaries and descriptions which enable a surveyor, with some assistance from the recollection of living witnesses, to fix the location of the disputed bound with reasonable certainty. I therefore proceed to fix the location of said bound, and establish it as follows." The defendants in the complaint remonstrated against the acceptance of the report, and said that the report ought to be rejected, because (in addition to other matters alleged) "the conduct of the committee was improper in this: that he employed the agent and surveyor of the plaintiff to fix and restore said pretended boundary." The plaintiff in the complaint did not demur specially to this ground of remonstrance, nor to the manner of stating the ground, but demurred specially to other grounds, and generally "because said remonstrance is uncertain and informal and argumentative in that it does not allege any specific facts why said report should not be accepted, save that the committee did not decide correctly upon the facts before him." The court below sustained the demurrer, overruled the remonstrance, and confirmed the action of the committee. It is immaterial whether or not the allegation of the remonstrance was in fact true. Its truth is admitted by the demurrer. In sustaining the demurrer and rendering judgment notwithstanding the admitted truth of the allegation, the superior court held that such action by any committee is not in law *prima facie* improper, and cannot be sufficient ground for rejecting a report. This is error, fatal to the validity of the judgment. It is essential that the conclusions of such committees should be as free from all improper influences as the verdicts of juries. The surveyor, whose employment is authorized by

statute to assist the committee in reaching its conclusion, should be as disinterested in respect to his duties as the committee itself. It appears from the record that the conclusion of the committee was based on conditions—i. e. boundaries and descriptions contained in the land records—"which enable a surveyor, with some assistance from the recollection of living witnesses, to fix the location of the disputed bound." And so it appears that the assistance of the surveyor employed by the committee was a necessary factor in the process of deduction which must determine its judgment. The employment for such purpose of a person who was then the "agent and surveyor" of a party interested in respect to the very question at issue is in law irregular and improper. It well may be that upon a hearing on the allegation of the remonstrance the court might have been satisfied, and have found that the assistance of the surveyor had no influence on the judgment of the committee. Whether such finding would heal the error is a question not before us. The trial court has held that the law does not regard the introduction of such interested assistance into the deliberations of a quasi jury as legally improper. A judgment whose validity depends on the correctness of that ruling cannot stand. The practical effect of such a rule of law would tend to impair confidence in legal tribunals, and to endanger the purity of trials. *Harris v. Woodstock*, 27 Conn. 567, 572; *Pond v. Milford*, 35 Conn. 32, 35; *Beardsley v. Washington*, 39 Conn. 265, 268; *Greene v. East Haddam*, 51 Conn. 547, 555. Judgment for the plaintiffs in error. The other judges concurred.

(57 Conn. 349)

SCOTT v. SPIEGEL, Sheriff.

(Supreme Court of Errors of Connecticut.
Feb. 21, 1896.)

HABEAS CORPUS—PLEADING—JUSTICE OF THE PEACE—EXECUTION OF SENTENCE.

1. Under Act 1895, c. 326, p. 667, expressly providing for any kind of pleadings in habeas corpus proceedings, where a mittimus signed by a justice of the peace is made a part of the return a demurrer to the return, and an answer raising an issue of fact, cannot be pending at the same time.

2. A justice of the peace may, within any reasonable time after conviction and sentence, issue a mittimus to carry into effect his judgment, though his court has been adjourned without day.

Appeal from superior court, New Haven county; George W. Wheeler, Judge.

Petition for a writ of habeas corpus by Walter Scott against Charles R. Spiegel, sheriff. There was a judgment for respondent, and petitioner appeals. No error.

Lucien F. Burpee and Cornelius J. Danaher, for appellant. E. P. Arvine and Charles H. Sawyer, for appellee.

ANDREWS, C. J. The superior court made certain findings of fact, to which exception is

made by the plaintiff. The evidence upon which these findings were made is certified up in the record. As these were questions of pure fact, depending upon the consideration of evidence, we do not understand it is within our power to revise or change them. If, however, it was open to this court to do so, we should be of opinion that the evidence was sufficient to support the conclusions. We agree with the superior court that the only questions properly in the case were such as were presented by the plaintiff's answer to the defendant's return. In the first volume of Swift's Digest (side page 569), it is stated that in cases of habeas corpus, by the common law, the "truth of the return cannot be contested, and there is no remedy for the party aggrieved, but an action on the case for the false return, or by information, or indictment in the name of the public." To the same effect are the authorities cited by the plaintiff on this part of his brief. And Swift's Digest, at the page above noted, adds, "As the remedy by the common law is very imperfect, it has been supplied in this state by statute." In 1815 the legislature of this state had provided for pleadings and procedure in cases of habeas corpus, by an enactment, one section of which has been continued without change in every Revision to this time. It is now section 1271 of the Revision of 1888. That section declares that, "when any statements contained in such a return shall be contested, such court or judge may hear testimony, and examine and decide upon the truth, as well as the sufficiency of the return, and render such judgment as to the law and justice shall appear." Since that statute, it has been permissible, in cases of habeas corpus, for the applicant to demur to the return, to deny it, or to confess and avoid its effect by setting up other facts. A writ of this kind could not, of course, be made to perform the office of a writ of error. Since the passage of that statute, the parties to these writs have been accustomed, whenever they saw fit to do so, to use the liberty of pleading indicated by the quoted section. *Hill v. Goodrich*, 32 Conn. 588; *Macready v. Wilcox*, 33 Conn. 321; *In re Bion*, 59 Conn. 372, 20 Atl. 662; *Yudkin v. Gates*, 60 Conn. 426, 22 Atl. 776; *Whalen v. Olmstead*, 61 Conn. 263, 23 Atl. 964. Whatever doubt there was, if any, as to the propriety of such procedure in cases of habeas corpus, must now be removed by the act of 1895, c. 326, p. 667, which expressly provides for any kind of pleadings in any case where a mittimus signed by a justice of the peace is made part of the return. And when pleadings are allowed the rules which govern pleadings, so far as they are applicable, must be observed, and the effect of the pleadings on the question upon which the court is to decide must be held to have its full force. One of these rules is such that a demurrer to the return, and an answer raising an issue of fact, cannot be pending at the same time. *Hoadley v. Smith*, 36 Conn. 371, 372; *Hotchkiss v. Hoy*,

41 Conn. 568; *Brainard v. Staub*, 61 Conn. 570, 24 Atl. 1040. Another is that the plaintiff, having presented an issue of fact upon the return, cannot raise any question as to its legal sufficiency. *Adams v. Way*, 32 Conn. 160; *Morehouse v. Northrop*, 33 Conn. 380, 387; *Hoadley v. Smith*, supra; *Healey v. New Haven*, 49 Conn. 394.

Applying these rules to this case, and regarding the questions of fact as settled, the only remaining question presented by the return is whether or not the justice of the peace had power to issue the mittimuses 10 days after the plaintiff had been sentenced; the justice court at which he had been convicted having, meantime, been adjourned without day. It is found that all the proceedings before the justice, up to and including the sentences, were regular and lawful. So that the question is, did such delay operate to deprive the justice of power to issue the mittimuses? Stated in another way, the question might be, did that delay operate to exempt the plaintiff from being compelled to comply with these lawful sentences which had been pronounced against him? "A justice of the peace is a judicial and ministerial officer. He performs judicial duty in the trial of causes, and ministerial duty in recording his judgments. He is both judge and clerk of his courts. His duties as recording officer are similar in every respect to those performed by clerks of the higher courts. The only difference in the cases consists in the sources of knowledge that they have of the judgments that have been rendered, which they are required to record. * * * But differences in the sources of knowledge, in this respect, make no difference in the character of the duties they perform." *Smith v. Moore*, 38 Conn. 105, 109. It is very likely true that when the justice court was adjourned without day the judicial officer could no longer act. But the ministerial officer remained, and might do any act which such an officer could lawfully do. As clerk of his own court, this justice of the peace had powers entirely analogous to the powers which the clerks of the higher courts have. A mittimus after conviction is, in criminal cases, similar to an execution after judgment in a civil case. It is final process. It is the carrying into effect the judgment of the court. The clerk of the superior court has power to issue a mittimus after the term of court has adjourned, to carry into effect an order made by the court while in session. *Taintor v. Taylor*, 36 Conn. 242. A clerk of the superior court can issue an execution in a civil suit at any time while the judgment remains unsatisfied. A justice of the peace may, in like manner, as the clerk of his own court, issue an execution on any judgment which he has rendered, or an alias or pluries execution, at any time, so long as the judgment remains in force, and he continues in office. In respect to the power of a court to issue a mittimus at a date subsequent to the sentence, 2 Swift's Dig., side page 41C, says: "So, where the defend-

ant is present when the verdict or judgment is rendered against him, though the court should not order him into custody, and he is suffered to go at large, yet they may at any time afterwards issue a warrant to commit him for the nonpayment of the fine and costs; for the defendant is taken into or retained in custody solely for the purpose of enforcing the payment of the fine and costs. When that is not necessary the court may, at discretion, permit him to go at large, and can then as well issue a warrant against him for the fine and costs as if he were in actual custody." This language is intended, doubtless, to apply to the higher criminal courts. Whether the same rule would apply to a justice court, to the same extent, we need not decide. But we have no doubt that a justice of the peace may, within any reasonable time after conviction and sentence, issue a mittimus to carry into effect his judgment, even though his court has been adjourned without day (*Taintor v. Taylor*, supra; *Gano v. Hall*, 42 N. Y. 67; 12 Am. & Eng. Enc. Law, 42), and that the time here allowed was not unreasonable. It should be added that, if the mittimuses in the case are in fact defective in form,—as the conviction and sentences in the case were regular and lawful,—they may and should be amended by the justice so as to be made faultless. There is no error. The other judges concurred.

(67 Conn. 361)

DENSLOW v. GUNN, Judge.¹

(Supreme Court of Errors of Connecticut.
Feb. 21, 1896.)

MANDAMUS—BOND FOR COSTS—GUARDIAN—APPOINTMENT—NOTICE TO PARENT.

1. Under Gen. St. § 896, providing that in any civil action by a nonresident, if it do not appear to the authority signing the process that plaintiff is able to pay the costs if judgment should be rendered against him, he shall enter into a recognizance to the adverse party, a respondent, in mandamus proceedings by a nonresident, on application for an alternative writ and entry of a rule to show cause why such writ should not issue, is not entitled to have the application quashed for want of a recognizance, such application not being process.

2. Gen. St. § 459, provides that in the appointment of a guardian of a minor personal notice shall be given the parents, and if a parent is a nonresident such notice shall be given as the court of probate may order. Section 642 provides that, if a parent has legal notice, his appeal shall be taken within a month, but if he has not such notice he may appeal within twelve months. *Held*, that a public notice given by publication in a newspaper, and by posting a notice upon a signpost, was not sufficient to require a nonresident parent to appeal within the month, in the absence of proof that such notice was intended for and reached the parent.

Appeal from superior court, New Haven county; Prentice, Judge.

Application by Le Grand N. Denslow against George M. Gunn, judge, for a writ of mandamus. There was a judgment for petitioner after demurrer sustained to the return, and respondent appeals. No error.

¹ For further proceedings, see 35 Atl. 1125.

William B. Stoddard and Edward H. Rogers, for appellant. Edwin A. Smith, for appellee.

FENN, J. The appellee, Denslow, on October 11, 1894, made a written motion to the superior court, then in session at New Haven, to issue a writ of mandamus requiring George M. Gunn, judge of the court of probate for the district of Milford, to allow an appeal to said Denslow from an order of said court appointing a guardian over the minor son of said Denslow, or to signify cause to the contrary to said superior court. No alternative writ issued, but instead thereof a rule was ordered to be entered to show why such writ should not issue upon such motion. Thereupon the appellant came into court, and moved to quash, on the ground that said "motion and writ of mandamus is prayed for by said petitioner, Le Grand N. Denslow, who is described in said process as, and is in fact, a resident of Los Angeles, state of California, and not an inhabitant of this state, and that no bond or recognizance to the adverse party, with surety, to prosecute his action to effect, was taken or given in this action." This motion was denied by the court. The appellant then made return, stating that on August 30, 1893, Mary A. Smith, the grandmother of said minor Edwin P. Denslow, petitioned said court of probate for the appointment of a guardian over said Edwin P. Denslow; that on said 30th day of August, 1893, the said Le Grand N. Denslow was not a resident of the state of Connecticut, and that his place of residence was unknown; that in pursuance of an order of said court said petition was assigned for a hearing on the 16th day of September, 1893, at 10 o'clock in the forenoon, and that in pursuance of an order of said court notice of the pendency of said petition and the time and place of hearing was given by publishing a notice thereof two times in the Milford Sentinel, a paper having a circulation in said district, and posting a like notice on the signpost in said Milford, which notice contained a copy of said petition and the order of said court fixing said 16th day of September, 1893, for a hearing on said petition; that said Le Grand N. Denslow had legal notice of said proceedings, by reason of said published notice, before said 16th day of September, 1893; that on said 16th day of September, 1893, a guardian was appointed by said court over said Edwin P. Denslow, as alleged in said motion, and no appeal was taken or attempted to be taken from said order or decree until the 15th day of September, 1894. A demurrer to this return was sustained by the court, and a peremptory writ of mandamus directed to issue.

Two questions are presented to us upon this appeal: First. Did the court err in denying the appellant's motion to quash? Second. Did the court err in holding that the facts stated in the return did not show such

such notice to the appellee as required him to appeal within one month from the order and appointment by the court of probate?

Concerning the first of these questions, it is the claim of the appellant that the proceeding by mandamus is a civil action, within the meaning of section 896 of the General Statutes. That statute provides that: "If the plaintiff in any civil action be not an inhabitant of this state, or if it do not appear to the authority signing the process that he is able to pay the costs of the action, should judgment be rendered against him, he shall, before such process is signed, enter into a recognizance to the adverse party with some substantial inhabitant of this state as surety, or some substantial inhabitant of this state shall enter into a recognizance to the adverse party, that the plaintiff shall prosecute his action to effect, and answer all damages in case he make not his plea good." If the claim thus stated presents a question of some difficulty, it also, as we think, presents one which was not properly before the court below, and is, therefore, not before us on this appeal. At the time the motion to quash was filed and denied, the conditions referred to in the statute did not exist. There was no "authority signing the process," for there was no process, mesne or final; no writ, alternative or peremptory. There was only a motion or application for such writ. It is true, indeed, that upon this a rule was entered to show cause, but it was cause why the alternative, not the peremptory, writ should issue; that is, to show cause why the act should not be done, or an order issue to do it, or again show cause. This surely was nothing more than notice of the pendency of an application or motion. If, under the provisions of section 896 of the General Statutes, a bond or recognizance was requisite, the one to take it would be the authority signing or directing the issue of the alternative writ. Objection for want of such action, taken to preliminary proceedings, and previous to time or opportunity for action, is premature. It is true, indeed, that the proceedings in this case were similar to those in *Security Co. v. Fyler*, 60 Conn. 448, 458, 22 Atl. 494. The application was treated as the alternative writ. But this was informal. It was done after, and not before, the motion to quash had been filed and passed upon. And it could not have been done, and clearly the court below would not have undertaken to have it done, except in the way stated in the case just referred to,—“by the consent of all the parties.” If, after such consent, it be admitted that the application became, to all intents and purposes whatever, the same as an alternative writ, and the appellant had thereupon renewed his motion to quash, it could not have prevailed; for, if otherwise well taken,—a question which, as we have said, we do not regard as before us, and do not intend to decide,—the defect in the process would have been waived by the consent

given by “voluntarily appearing and submitting to the jurisdiction of the court.” *Morse v. Rankin*, 51 Conn. 328.

In reference to the remaining question, Gen. St. § 459, provides: “Before any court of probate shall appoint a guardian of a minor, having a parent or parents, it shall require personal notice to be given such parent or parents, in such manner as it shall deem proper; but if any parent shall reside out of this state, or the place of his residence be unknown, such notice shall be given as the court of probate may order.” The appellee resided out of the state, and the place of his residence was unknown. He was not present at the time of the hearing. If he had legal notice to be present, under Gen. St. § 642, his appeal should have been taken within one month; if he did not have such notice, then he was entitled to twelve months, acted in time, and his appeal should, as held by the superior court, have been allowed. There is another section (Gen. St. § 446) which provides how notice shall be given “whenever in any proceeding in, or matter pending before, a court of probate, public notice is required.” Doubtless the notice given was sufficient to comply with the requirements of this last section, in cases to which it applies. But it does not apply to this case. Here no public notice was necessary; notice to the appellee, as a parent, was required. True, under the circumstances which existed, such notice might be given as the court of probate might order, and be legal. The question now is, does the return show that such notice was ever ordered, or given at all? It seems to us, as it did to the court below, that it does not. Notice was published in a newspaper having a circulation in Milford, and put upon the signpost there. The appellee could not have been bound by such notice, if he had possessed a known residence in this state. It would not be as likely to reach him, in fact, if he resided elsewhere and away. Notice so given might, indeed, reach him, and might be so given and be legal, whether it did or not. But we think, in order that the latter statement should be true, it should be a fact, and should appear, that the object sought in giving the notice was to reach the appellee; that, looking towards that result, the court directed and gave notice,—not to the public, adapted best to reach the broadest public, yet irrespective of any superior rights of the parent to have such notice,—but to the parent, irrespective of the public, not concerned or required to be notified at all. In other words, we think that with an eye and purpose single to notify a party absent, and whose place of residence was unknown, a different form or mode of notice, more likely to accomplish its object, would probably, and certainly might possibly, be adopted by a judge of probate, than if he merely undertook to give a proper public notice, including the parent as one of that class only. We think the statute in question contemplates, requires, and provides

for this. Because it does not appear that the appellant did what we thus hold essential, we think the court below ruled correctly. There is no error. The other judges concurred.

(97 Conn. 373)

GREENTHAL v. LINCOLN et al.

(Supreme Court of Errors of Connecticut.
Feb. 21, 1896.)

FRAUDULENT CONVEYANCES—WHO MAY ATTACK—PLEADING—FINDING OUTSIDE OF ISSUES.

1. Gen. St. § 501, provides that all transfers by any person, with a view to insolvency, shall be void, which are not in writing, for the benefit of all his creditors, but no transfer otherwise valid shall be void unless proceedings in insolvency are instituted within 60 days. Section 2528 makes all conveyances made with intent to avoid any debt or duty belonging to others void as to them. *Held*, that in an action by a transferee of property, for its conversion, defendants could not question plaintiff's title, as in fraud of creditors, without pleading that they were either the representatives of the insolvent estate of the assignor, or creditors of such assignor, who had attached the goods as his property, and in the absence of such pleading a finding by the court that the transfer to plaintiff was made with a view to insolvency, and was fraudulent and void, was outside the issues, and will not support a judgment for defendants.

2. After filing a general denial, the filing of an amended answer, purporting to be a complete answer, which does not contain a general denial, operates as a withdrawal of the general denial.

3. In conversion, where defendant's answer set up no title in him, failure to demur thereto, or to object to evidence of title, was not a waiver of an objection to a finding of title in defendant, based on such evidence.

Appeal from superior court, New Haven county; George W. Wheeler, Judge.

Action by Robert Greenthal against Lincoln, Seyms & Co. and others. Judgment for defendants, and plaintiff appeals. Reversed.

James E. Russell, for appellant. J. Gilbert Calhoun, for appellees.

BALDWIN, J. By Gen. St. §§ 501, 504, all transfers of property by any person in falling circumstances, with a view to insolvency, shall be void, which are not in writing, for the benefit of all his creditors, and lodged for record in the proper court of probate; but no transfer otherwise valid is to be thus made void, unless proceedings in insolvency are instituted in such court within 60 days. Section 2528 further provides that all fraudulent conveyances or contracts, "made or contrived with intent to avoid any debt or duty belonging to others, shall, notwithstanding any pretended consideration therefor, be void as against those persons only, their heirs, executors, administrators, or assigns, to whom such debt or duty belongs." The effect of these statutes is to make such a conveyance as that under which the plaintiff claims, not absolutely void, but only voidable. A transfer of the kind described in section 501 is only voidable by proceedings in insolvency, and for the benefit of the insolvent estate.

One of the kind described in section 2528 is voidable only at the instance of creditors, or those who may represent them. The answer originally put in by the defendants was a general denial, but when they subsequently filed what they termed an "amended answer," which purported to be in itself a complete answer to the whole complaint, it took the place of the general denial, and operated as a withdrawal of that defense. A general denial is only permissible, under the practice act, when it is intended in good faith to controvert all the allegations of the complaint. Gen. St. § 874. The defendants' amended answer did not deny, and therefore admitted, most of the plaintiff's averments. Practice Book, p. 16, rule 4, § 4. Our statutes formerly gave the defendant a right to plead, by special leave of the court, as many several matters by distinct pleas as he should think necessary for his defense. Gen. St. (Revision of 1875) p. 424, § 11. This provision was expressly repealed by the practice act. Practice Book, p. 8, § 29; Gen. St. (Revision of 1888) § 1015. Had it been retained in force, one of the main purposes of the new system of pleading would have been frustrated. The practice act distinctly abandoned the professed aim of the common law to bring every legal controversy to an issue upon some single, certain, and material point. *Craft Refrigerating Mach. Co. v. Quinipiac Brewing Co.*, 63 Conn. 551, 560, 29 Atl. 76. Instead of this, it was provided that no issue need be joined on a demurrer, and that the denial of any material allegation should constitute an issue of fact. Practice Book, p. 17, § 12. Any number of issues might be raised by answer, but it must be in one and the same answer, though the defenses were separate. The object of the change was, in large part, to secure from the pleader admissions of the truth of whatever he knew to be true, or (having knowledge or information sufficient to form a belief) did not believe to be untrue, in the material allegations of the adverse party. Practice Book, pp. 16, 17, rule 4, §§ 4, 5, 7. There are few complaints in which all that is averred can be honestly denied. That in the present action was no exception to the rule, and the defendants therefore could not properly stand upon a general denial. They had taken the goods, and taken them forcibly, from the plaintiff's possession. The only questions were those of the lawfulness of his possession, and so of his title, when challenged by the creditors of his assignor. The amended answer was framed with this view, and such an amendment necessarily waived and superseded the general denial. It was, however, apparently based upon the erroneous theory that a conveyance within the terms of section 501 was ipso facto avoided, if insolvency proceedings were taken within 60 days after it was made. This not being the law, the defendants, who did not deny that they had forcibly taken the goods from the plaintiff's possession, could only justify by showing that

they were creditors of the assignor, and had attached the goods as his property. But, if such facts were to be proved, it was necessary that they should be pleaded. Under the practice act, as fully as at common law, all pleadings must set up the material facts on which the pleader relies. Gen. St. §§ 874, 880; Practice Book, p. 16, rule 4, § 6. The finding of the superior court that the defendants were attaching creditors, being without the issue, cannot support the judgment.

It is contended by the defendants that by failing to demur to their answer, or to object to the evidence of the attachment and of the debt upon which it was founded, the plaintiff opened the door for the proof of those facts, and cannot now be heard to complain of the effect which the court gave to them. There is no such rule of practice, nor could there be without subverting those principles on which the science of pleading rests. Every motion in arrest, or writ of error, grounded on the insufficiency of the pleadings to support a judgment, would be open to a similar objection. *Todd v. Munson*, 53 Conn. 579, 4 Atl. 99. The verity of records and the conclusiveness of judgments alike require that the facts determined should be those only which are within the issues joined. The defendants' answer was not a defective statement of title, which a verdict or judgment might cure. It was not even a statement of a defective title. No title whatever was stated, and, for aught that appeared in their pleadings, they might have been mere marauders, who seized and carried off the plaintiff's goods without claim of right. There is error, and a new trial is ordered. The other judges concurred.

(67 Conn. 368)

BURR v. BOOTH, Deputy Sheriff.

(Supreme Court of Errors of Connecticut.
Feb. 21, 1896.)

IMPRISONMENT OF DEBTOR—INSOLVENCY PROCEEDINGS—REFUSAL TO SIGN EXAMINATION.

Gen. St. § 528, providing that courts of probate "may require any debtor whose estate is in settlement before them to attend and submit to an examination on oath upon all matters relating to the disposal or condition of his property * * *; which examination shall be in writing, shall be signed by said debtor, and shall be filed with said court," and further providing that "if such debtor shall refuse to appear and submit to an examination, when required so to do, as above provided, the court may commit him to prison," does not authorize the imprisonment of a debtor, who has appeared and submitted to the examination required, because of his refusal to sign such examination.

Appeal from court of common pleas, New Haven county; Hotchkiss, Judge.

Petition by Buckley Burr against William A. Booth, deputy sheriff, for a writ of habeas corpus. From a dismissal of the writ, and a judgment of remand, petitioner appeals. Reversed.

Henry G. Newton and Henry F. Hall, for appellant. Charles S. Hamilton and Charles A. Harrison, for appellee.

ANDREWS, C. J. Upon the application of the plaintiff, alleging that he was deprived of his liberty without law or right, by the defendant, a deputy sheriff of New Haven county, the court of common pleas of that county issued a writ of habeas corpus, commanding such officer to produce the plaintiff in court, together with the cause of his detention. The defendant produced the plaintiff, and made return on the writ as follows: "In obedience to the within writ, and by virtue of the same, I have brought the body of the within-named Buckley Burr to this court room of the court of common pleas for New Haven county, where I have him, the said Buckley Burr, in court; and, for the cause of his detention by me, I assign and state that on the 24th day of December, 1895, there was put into my hands for service a mittimus in the words and figures following: 'To W. A. Booth, Deputy Sheriff for New Haven County, Greeting: Whereas, at a probate court for the district of Wallingford, holden this day before me, wherein Buckley Burr, an assigning insolvent debtor, was cited before said court for an examination on oath on all matters relating to the disposal on condition of his property, to his trade and dealing with others, and his accounts concerning the same, to all debts due or claimed from him, and all other matters concerning his property and estate, and the due settlement thereof according to law, under section 526 of the General Statutes of 1888: Said Buckley Burr, having been summoned by said court, appeared before said court, and was duly examined under oath concerning his affairs, as hereinbefore mentioned, and at the close of said examination, which said examination was in writing, being by said court required and demanded to sign said written examination, willfully and contemptuously neglects and refuses to sign such examination. Wherefore you are hereby commanded to take the said Buckley Burr, and him commit to the keeper of the jail at New Haven, in and for the county of New Haven, who is hereby required to receive the said Buckley Burr into his custody, and him safely keep within said jail for the term of five (5) days, and until the said costs of such commitment be paid, or he be otherwise legally discharged. Hereof you are not to fail, but due service make, and leave with said keeper this mittimus. Dated at Wallingford this twenty-fourth day of December, A. D. 1895. John A. Martin, Judge of the Court of Probate for the District of Wallingford.' And that by virtue of said mittimus I have taken the body of the said Buckley Burr for the purpose of delivering him to the keeper of the jail at New Haven, in and for the county of New Haven, in accordance with the direction of said mittimus. I therefore assign the premises aforesaid as the cause of the detention by me of the said Buckley Burr." To this return the plaintiff demurred "because it appears upon the face of the mittimus therein set out that the judge of probate

had no jurisdiction to commit the plaintiff to jail, or to issue the said mittimus, for the cause therein stated." This demurrer was overruled. Answer was then made to the return, to which the plaintiff demurred. The court sustained this demurrer, held the return sufficient, dismissed the writ, and remanded the plaintiff to the custody of the defendant. From this judgment the plaintiff appealed, and assigned as error that the court erred in overruling his demurrer to the defendant's return.

The only authority the court of probate had to issue the said mittimus must be found in section 526 of the General Statutes. There is no other authority suggested. That section provides that courts of probate may "require any debtor whose estate is in settlement before them to attend and submit to an examination on oath upon all matters relating to the disposal or condition of his property * * *; which examination shall be in writing, shall be signed by said debtor, and shall be filed with said court." Then, after various other provisions, the section says, "If such debtor shall refuse to appear and submit to an examination, when required so to do, as above provided, the court may commit him to prison, for not longer than five days, and until the cost of such commitment be paid." It appeared by the said mittimus that the plaintiff was an assigning, insolvent debtor, whose estate was in settlement before the said court of probate; that he had been cited to appear before said court for an examination, pursuant to the provisions of the said statute; that he attended, and was duly examined on oath, which examination was in writing; and that, "being by said court required and demanded to sign said written examination, willfully and contemptuously neglects and refuses to sign such examination." The plaintiff insists that he cannot be imprisoned for refusing to sign his examination; that he had done all those things which the court of probate could require him to do on pain of imprisonment; that he had appeared when required, and had submitted to the examination. He says the word "examination," in the last clause of the said statute, does not include the act of signing, but is complete when all the questions have been asked and answered under oath, and have been put in writing. And he says all this was done, and that the court of probate treated this as the complete examination, as is manifest by the mittimus itself, which recites that he (the plaintiff) was cited to appear before said court for an examination; that he did appear, and was duly examined under oath, and at the close of said examination, which "examination" was in writing, being required to sign said "examination," refused to sign said "examination." On the other hand, it is claimed in behalf of the defendant that the examination provided for in said section includes the signing, and would be incomplete without the signature, and would be valueless; that the words of this

last clause of the statute, "when required so to do, as above provided," mean that the insolvent must sign when required so to do, just as much as he must appear or must be examined when required; and that the penalty of imprisonment is attached to a refusal to sign, as fully as it is to a refusal to do either of the other things. We have no occasion to decide between these arguments. We are convinced that the statute does not authorize the court to imprison for a refusal to sign the examination, and the fact that there is a doubt in this respect is conclusive against the power to imprison. No one should be sent to jail unless there is a clear warrant of law for so doing. There is nothing in respect to which the law is more jealous than of the personal liberty of each citizen. The reasoning of this court in *Noyes v. Byxbee*, 45 Conn. 382, is decisive of the present case. See, also, *Cole v. Egan*, 52 Conn. 219. There is error, and the judgment of the court of common pleas is reversed. The other judges concurred.

(57 Conn. 379)

Appeal of WHITING.

(Supreme Court of Errors of Connecticut.
Feb. 21, 1896.)

WILLS—CONSTRUCTION—ELECTION.

Testatrix, after giving, by will, to W. for life, one-half of her residuary estate, provided he should pay to her during her life, or to her executor, a certain sum, the value of certain property which he had received from her, entered into an agreement with W. whereby the indebtedness to testatrix was acknowledged, and W. agreed to pay interest to testatrix during her life on such sum. The agreement provided that, in case of her death before that of W., the debt due from him should be a free gift to him, and not in any way charged to him, or accounted for by him. Subsequently testatrix executed a codicil, which reaffirmed all the provisions of the will. Held that, as the codicil had the effect of a will of that date, W. was required to pay the sum required by the will, or forfeit the bequest made to him on that condition, even though he had complied with the agreement for payment of the interest.

Appeal from superior court, New Haven county; Hall, Judge.

Appeal by John H. Whiting from certain orders and decrees in the distribution of the estate of Mary A. Beers, deceased. No error.

Henry G. Newton, for appellant. John W. Bristol and Samuel A. York, for appellees.

HAMERSLEY, J. Upon the settlement of the administration account, it became the duty of the court of probate to make an order for the distribution of the residuary personal estate in the hands of the executor. The will of Mrs. Beers gave one-half of that estate to the children of John H. Whiting, to be paid over to them upon the settlement of the estate, unless said Whiting should pay, either to the testatrix during her life or to her executor upon demand after her death,

the sum of \$6,000 (assumed by the will to be due from Whiting to the testatrix), in which event said one-half of the residuary estate was to be paid to William E. Downes, to be held in trust during Whiting's life, and then to be delivered to said children. If in fact the \$6,000 had been paid, the estate must be distributed to Downes, trustee; and, if it had not been paid, the distribution must be to the children of Whiting. The determination of this fact of payment is a necessary incident to the exercise of the power of distribution vested in the court of probate. No question of forfeiture of vested rights, or title to property such as has been held to be without the jurisdiction of a court of probate, was involved. *Hall v. Pierson*, 63 Conn. 332, 344, 28 Atl. 544. Upon the trial in the superior court the appellant offered certain evidence which the court ruled to be inadmissible. Such ruling is the only error assigned in the appeal to this court. The evidence consisted of a memorandum of agreement between the appellant and Mrs. Beers, as explained by the testimony of Whiting and others. The "reasons of appeal" filed in the superior court set up this memorandum, and the allegations of the fulfillment of its conditions by Whiting, as the only ground for the appeal from the orders of the court of probate. The questions thus presented to the superior court were: Have the conditions of the memorandum of agreement been carried out by Whiting? Is this agreement, together with such execution on his part, a payment of the \$6,000, as required by the will?

The record shows that the evidence excluded constituted the appellant's whole case. The appellees objected to its admission. Under these circumstances it was agreed by counsel that the evidence should be received, and that afterwards the objections to its admissibility might be renewed, and the court then rule upon the same. Accordingly, the memorandum was read to the court, the appellant was sworn as a witness, examined, and cross-examined, and, after the whole case of the appellant had been thus heard, the appellees renewed their objections to the evidence, and the court excluded the same. No ground of objection was specified by the appellees, and no reason for exclusion is stated by the court. The appellant's claim in behalf of the admissibility of the evidence is stated in paragraph 9½ of the finding. It is that the evidence "tended to show and did show a sufficient compliance with the condition of said will to enable appellant to hold the property therein given to him." The court overruled this claim, and held that all the testimony did not show a compliance on the part of the appellant with the condition of the will. The appellant then rested, the appellees offered no evidence, and the court rendered judgment that the appeal be dismissed, and that the orders of the court of probate be

affirmed. If the admissibility of this testimony had depended on its relevancy to the fact of a settlement between the appellant and the testatrix of his indebtedness to her for the proceeds of the Air Line securities mentioned in the will, it might have been admissible. But its admissibility did not depend on the tendency or sufficiency of the evidence to prove a settlement as claimed by the appellant. If such settlement were made, it was made some six months prior to the execution of the second codicil of the will, and that codicil was made in view of and with plain reference to the alleged settlement. This is apparent from the record. The will was executed May 2, 1891. It bequeaths specific sums to three legatees; gives the whole residue, one-half to William E. Downes in trust to pay the net income to her granddaughter by marriage, Jennie Downes Whiting, and upon her death to deliver said one-half to the children of said Jennie Whiting; and the other half (specially including in that half, as property bequeathed, a debt of \$6,000 due from Whiting to the estate) to the children of her grandson John H. Whiting (the appellant). (But, if said Whiting shall pay the sum of \$6,000,—in the manner above stated,—then the one-half, including the sums so paid, is to go to said Downes in trust to pay the net income to Whiting during his life, and upon his death to deliver the same to his children, in pursuance of the bequest to them.) The will appoints William E. Downes executor. The first codicil is executed July 27, 1891. It changes one of the three legacies and republishes the will. October 21, 1891, the following paper is executed: "Memorandum of agreement, made this 21st day of October, 1891, between Mary Ann Beers and John Whiting, both of New Haven. Whereas, the said John H. Whiting has received from the said Mary Ann Beers the sum of nine thousand dollars, upon which he promises to pay interest to her at the rate of four per cent. so long as she lives, payable quarterly; and it is understood and agreed that, if the said John H. Whiting survive her, the said principal sum shall be a free gift from the said Mary Ann Beers, and not in any way charged to or accounted for by him, the said John H. Whiting, and that if she, the said Mary Ann Beers, shall survive him, the same shall be paid back to her, and not otherwise: Now, therefore, to secure such payment it is agreed that he, the said John H. Whiting, shall place in the hands of Henry Stoddard, Esq., an insurance policy for said sum of nine thousand dollars upon the life of said Whiting, and a note for said sum of nine thousand dollars, to be held by him, the said Stoddard, until the death of one or the other of the parties hereto, and to be by him then delivered unto the survivor. Mary Ann Beers. John H. Whiting." May 7, 1892, the second codicil was executed. It revokes "any will and codicil, and every instrument

of a testamentary nature whatever, made or executed since the 27th day of July, A. D. 1891, if any such exists," and then says: "I hereby reaffirm, establish, and declare the last will and testament executed by me, and dated May 2, A. D. 1891, as modified by the codicil thereto, dated the 27th of July, A. D. 1891, to be my last will and testament; and I hereby ratify and confirm the provisions of said will and said codicil thereto." The last codicil, executed October 7, 1892, refers only to two of the legacies, ratifying the provisions of the will and codicil.

Republication of a will brings it to date, and makes it speak at that time in respect to matters which have arisen between its first execution and the republication. *Giddings v. Giddings*, 85 Conn. 160, 32 Atl. 334. It has often been held that a codicil which recognizes the existence of a former will operates as a republication. But in this case the republication is direct. The intent of the testatrix is expressed with unmistakable precision. Since the former will was made she had executed a document which might be claimed as giving to Whiting, in case he survived her, the fund of \$6,000 which by the will was bequeathed to his children. She revokes this "instrument of a testamentary nature," and declares the former will "to be my last will and testament," and ratifies and confirms "the provisions of said will." If the testatrix, on May 7, 1892, had executed a new will, in which she had referred to the provisions of the former will in relation to Whiting and his children, and to the agreement of October 21, 1891, and then disposed of her estate by the same language used in her former will, the effect of such new will would be the same as is that of the codicil which she did execute on that day; and the intent of the testatrix to give the \$6,000 which on that day (May 7, 1892) she declares she understood to be due her from Whiting, to her great-grandchildren, and to give Whiting the income of that fund and of other property upon his payment to herself or her executor of the sum of \$6,000, would be no more clearly expressed. It is patent and admitted that if Whiting did owe Mrs. Beers \$6,000, as stated in her codicil of May 7, 1892, he has not paid it since that time. The evidence excluded by the superior court was not offered, and could not have been received, for the purpose of altering the clearly expressed meaning of the will. It could only be relevant for the purpose of showing that Whiting was not indebted to the testatrix, as stated in her will. In other words, the appellant undertook to prove that the fund of \$6,000 given by the testatrix to her great-grandchildren, coupled with a gift to him in view of such disposition of the fund, was not in fact the property of the testatrix, but was the property of himself. And for such purpose the testimony was wholly irrelevant.

If it proved the appellant's contention, it also proved that he was entitled to take nothing under the will, and that the order of distribution must stand. Where a will bequeaths property of the testator to a legatee, coupled with a bequest of other property to another, such legatee, in setting up any right or claim of his own to such other property, surrenders all interest in the property so bequeathed to him. This rule springs from manifest principles of equity,—i. e. maxims of honesty,—is firmly settled, and is good in law as well as in equity. *Carter's Appeal*, 59 Conn. 576, 587, 22 Atl. 320; *Hall v. Piereson*, 63 Conn. 332, 345, 28 Atl. 544; 3 Bac. Abr. 314; *Watson v. Watson*, 128 Mass. 152. In *Cooper v. Cooper*, 6 Ch. App. 15, the facts were somewhat analogous to the facts in this case, and the court says: "She [the testatrix] attempts and purports to give by her will that which was not hers, but her children's. It does not appear to me in any wise material by what previous titles it had become the children's. At her death they are found to be the true owners of property disposed of by her, and at the same time they are found to be named as objects of her testamentary bounty. That seems to me to state the requisites, and the only requisites, for raising the obligation to elect." In this case the appellant set up in the superior court his own claim to the \$6,000 fund the testatrix had bequeathed to his children. It was immaterial whether this claim was well founded or not. He could not enforce it without losing his beneficial interest under the will; and so the evidence offered by him that it was well founded could not affect the validity of the orders of the court of probate, and the appellant cannot complain of its rejection. Whether John H. Whiting can now elect to carry out the provisions of the will, and to pay the \$6,000 he has refused to pay upon demand, is a question not involved in this proceeding, and not considered. There is no error in the judgment of the superior court, and new trial is denied.

ANDREWS, C. J., and TORRANOE and FENN, JJ., concurred.

BALDWIN, J. (concurring). The reasons of appeal filed in the superior court, after describing the agreement between Mrs. Beers and the appellant of November 21, 1891, a copy of which was annexed as Exhibit B, stated that the appellant "duly paid the interest to said Mary Ann Beers specified in said Exhibit B." No other allegation was made of his fulfillment of the terms of the agreement. Under these pleadings, proof that payment of interest had been waived was inadmissible. The only question presented was whether it had been actually made. The exclusion of the evidence offered by the appellant being thus fully justified, while I concur in the affirmance of the judgment of the superior court, I deem it unne-

essary to express an opinion as to the effect of the republication of the will after the execution of the agreement.

(57 Conn. 290)

MANSFIELD v. SHELTON et al.

(Supreme Court of Errors of Connecticut.
March 6, 1896.)

WILLS—CONSTRUCTION—LIFE ESTATE.

Under the provisions of a will, in terms, "all the rest and residue of my estate, both real and personal, and wherever situated, I give, devise, and bequeath to my said wife, to be used and appropriated by her, as much as she may wish for her happiness, without any restrictions or limitations whatsoever," followed by provisions that after the death of the wife, and the payment of her debts and settlement of her estate, whatever property might remain should pass to a trustee for final distribution as directed, only a life estate vested in the widow of the testator, and hence the subsequent provisions of the residuary clause were valid and operative.

Case reserved from superior court, New Haven county; Shumway, Judge.

Action by Burton Mansfield, trustee of the will of Charles Shelton, deceased, against William R. Shelton and others. Case reserved.

William L. Bennett, for A. Louise Woolson, William R. Shelton, and the executor of the will of Caroline M. Shelton, deceased. J. Frederic Kernochan and Samuel H. Fisher, for Grace Martin, William Budington, Z. Grenell, Inez Grenell, and Julia Pierson.

FENN, J. This is a case reserved by the superior court for the advice of this court. The questions presented relate to the construction and legal effect of provisions contained in the last will and testament of Charles Shelton, who died about June 4, 1888, seised and possessed of an estate, consisting of real and personal property, of the value of about \$33,000. That portion of the will of Charles Shelton material to the present inquiry is as follows: "All the rest and residue of my estate, both real and personal, and wherever situated, I give, devise, and bequeath to my said wife, to be used and appropriated by her, as much as she may wish for her happiness, without any restrictions or limitations whatsoever; and upon the decease of my said wife, and after the payment of all her debts and the settlement of her estate, I give, devise, and bequeath whatever of property or estate of such residue and remainder shall remain undisposed of at the decease of my said wife to Edward A. Cornwall, of Cheshire, of said New Haven county, in trust, to keep and hold the same, or invest the same, as said trustee shall deem to the best advantage, for the use and benefit of the children of the present wife of my nephew Charles W. Shelton, and of the survivor or survivors of such children, so long as they shall live, or any one or more of them, and that such trustee pay and deliver to such surviving children, in equal portions to each, from time to time, and

at least as often as once in each year, the net avails of the income of said estate so given to him in trust as aforesaid, upon the annual settlement of his trust account with the court of probate: provided, nevertheless, that, in the event of the decease of my said wife, my said sister, Grace A. Budington, shall, upon the finding of the judge of probate in which my estate shall be pending for settlement, be found to be in needy and in necessitous circumstances, then, upon such finding and decree of such court of probate, I give and bequeath to the said trustee one-third of such residue of said estate so given to my said wife for the use of my sister during her life, and the remaining two-thirds of the same to be held for the use and benefit of the children of my said nephew's wife, the income of which one-third shall be paid to my said sister annually, so long as she shall live; and upon her decease the whole of said income is to be paid, as aforesaid, to said children and the survivor of them. But, if my said nephew shall die without leaving issue surviving him by his present wife, then such part or portion of said residue or remainder of my estate as shall remain undisposed of at the decease of my wife I give, devise, and bequeath to my brother, William R. Shelton, and my said sister, and to their heirs forever, to be equally divided between them, share and share alike; and, in the event of the death of my brother before the decease of my wife, the portion of said residue so given to my said wife, which would thus belong to him, if living, I give, devise, and bequeath to his wife, Anna L. Shelton, and her heirs forever." Soon after the death of the testator, his will was duly probated in the court of probate for the district of New Haven; and the widow, Caroline M. Shelton, who was named as executrix, duly qualified as such. In July, 1889, she returned her account with the estate, and the same was accepted by the court of probate. After the due settlement of the estate, and the payment of the legacies bequeathed by his will, she possessed and enjoyed the residue thereof until her death, which occurred June 23, 1894. Edward A. Cornwall, the trustee named in said will, having died before the decease of Charles Shelton, the said Caroline M. Shelton on the 14th day of February, 1893, was duly appointed by the court of probate for the district of New Haven trustee under the said will, in the place of the said Edward A. Cornwall, deceased, and duly qualified as such trustee. The plaintiff, who is the present trustee under the will of said Charles Shelton, in the place of said Caroline M. Shelton, deceased, has received and is possessed of real and personal property of the value of about \$23,000, being the rest and residue of the property of the said Charles Shelton, undisposed of by the said Caroline M. Shelton in her lifetime under the will of her husband, said Charles Shelton, deceased.

The first and only difficult question presented is stated thus in the complaint: "Whether,

under said will of Charles Shelton, the rest and residue of his estate, devised and bequeathed to his wife, as therein set out, became her property and estate in fee, or whether she took therein an estate for life only; and whether or not the disposition attempted to be made of whatever property or estate of such residue and remainder as should remain undisposed of at the decease of said Caroline M. Shelton, and the settlement of her estate, is valid by way of executory devise." The more recent cases in this state which merit consideration in the present examination are *Sheldon v. Rose*, 41 Conn. 371; *Lewis v. Palmer*, 46 Conn. 454, 455; *Glover v. Stillson*, 56 Conn. 316, 15 Atl. 753; *Peckham v. Lego*, 57 Conn. 553, 19 Atl. 392; *Hull v. Holloway*, 58 Conn. 210, 20 Atl. 445; *Methodist Church v. Harris*, 62 Conn. 93, 25 Atl. 456; and *Sill v. White*, Id. 430, 26 Atl. 396. These decisions are in harmony, and consistent with each other, and they establish certain rules or principles as the settled law of this state, which may be stated thus: First. If the primary gift conveys and vests in the first taker an absolute interest in personal, or an absolute fee simple in real, property, it exhausts the entire estate, so that there can be no valid remainder. Second. A life estate, expressly created, will not be converted into a fee, absolute or qualified, or into any other form of estate greater than a life estate, merely by reason of there being coupled with it a power of disposition, however general or extensive. Third. An express gift in fee will not be reduced to a life estate by mere implication from a subsequent gift over, but may be by subsequent language clearly indicating intent, and equivalent to a positive provision. Fourth. Except as restrained by the foregoing limitations,—indeed, in some instances, apparently impinging upon them,—the question as to whether the primary gift is in fee, so as to exhaust the entire estate, is in each case to be decided upon a careful examination of the entire will, aided by legitimate extrinsic evidence, to ascertain the actual intent of the testator, which intent, when so discovered and made obvious, is controlling.

In illustration of the scope, limitations, and application of the foregoing rules, a reference to language used by this court in some of the cases cited will be appropriate. In *Sheldon v. Rose*, supra, the testator gave his wife, in case of her remarriage, "only one-half of the property, * * * which shall go to her for her support during her natural life." The will contained no residuary clause, and there was no specific disposition of any possible remainder after the death of the wife. This court held the wife had an estate for life only, and not in fee, and so the estate became intestate when the wife's interest terminated. In reaching this conclusion the court, by Carpenter, J., said: "It is not clear that the testator intended to give her an absolute estate, while the language used seems to indicate a contrary intention.

* * * We have come to the conclusion that the testator did not intend to give an estate in fee." The opposite result in *Methodist Church v. Harris*, supra, is based on the same grounds. In that case the testator gave property to his wife, "and to her heirs forever," with a proviso that "whatever of the same, if any, she may leave, not used by her for her support and comfort, I give and bequeath." The court, by Carpenter, J., said: "The intention to give a fee is clear, and we discover in the subsequent words no evidence of an intention to revoke the gift. It is a bald attempt to limit a fee upon a fee, which the law will not allow." In *Lewis v. Palmer*, supra, the language of the devise was, "I give to my sister S. the use of all the rest of my real estate during her natural life, and for her to dispose of as she may think proper, right, or just." This court, by Carpenter, J., said: "We find no case where a life estate created by express words is enlarged to a fee by the power of sale. There are cases where there is an apparent life estate, with power of disposal, but without any disposition of the remainder, in which it is held that the devisee takes a fee. There are other cases where there is a devise of an estate generally, with an express power to sell, in which it is held that the devise over of the remainder is void for repugnancy. But we think none of the cases go so far as to disregard the obvious and acknowledged intention of the testator. All seem to regard that, when discovered, as conclusive. Courts differ widely as to what the intention is, and oftentimes different courts" (might he not have said the same court?) "will draw different conclusions from similar language, and sometimes even from language precisely identical. But usually there will be found something in the will, or something omitted, or something in the situation and circumstances of the estate and the parties interested, to account for these apparent differences; and most of them, it is believed, may in that way be reconciled." In *Glover v. Stillson*, supra, this court, by Carpenter, J., said: "We now come to the main question,—does the second clause give a life estate, or a fee? There are two methods of construing wills: One is to ascertain the intention of the testator, and give effect to that, so far as it is consistent with the policy of the law. Within those limits, all artificial rules of construction must yield to the intent. The other is to apply legal rules, and construe the language used accordingly. In the latter case it cannot be denied that the intention of the testator is often defeated. This case affords an excellent illustration. We are asked to say, as matter of law, that the power of sale enlarges an express life estate to a fee. If we do so, what becomes of the intention of the testator? His intention to give pecuniary legacies to the parties named, and the residue to the orphan asylum, is just as certain, and, we may add, just as provident, as the intention to provide

for his sisters; and that intention, by the construction contended for, is wholly defeated. The power of sale may, in doubtful cases, aid in ascertaining the intention; but to give it an artificial and technical force, and thereby defeat the manifest intention of the testator, is wholly inadmissible." In *Peckham v. Lego*, supra, this court, by Loomis, J., quotes the above language from *Glover v. Stillson*, and adds, "These utterances, we think, are in accord with the decided preponderance of judicial authority in the United States." Similar, and perhaps even stronger, expressions are used in *Hull v. Holloway* and in *Sill v. White*, supra. The leading case of *Smith v. Bell*, 6 Pet. 68, opinion by Chief Justice Marshall; *Brant v. Iron Co.*, 93 U. S. 326, 334; and *Giles v. Little*, 104 U. S. 291, 296,—have been frequently cited by this court, and are among the almost numberless decisions in accord with the foregoing doctrines. In the light and with the assistance of these established principles, let us approach the question presented in this case.

In the language of the clause before us, there is no express gift of a life estate, as in many of the cases cited, or of a fee, as in *Methodist Church v. Harris*, supra. Such arbitrary and technical rules, therefore, as have been, in some jurisdictions,—indeed, in very many cases,—applied to such expressions, are not relevant here. The testator, at the outset, gave his residuary estate to his wife. Whether in fee or for life, he did not say. True, had he stopped there, and the will contained nothing further, the effect would have been to give his wife a fee in the realty, and an absolute estate in the personal property. But this would have been because his intention to do this would be clearly manifest. If there was anything else in the will indicative of the testator's intent concerning the matter, it would require consideration, and be given full weight. The testator did not stop here. He continued, "to be used and appropriated by her." This, also, would indicate an intention, if this were all, that the gift be absolute; but he added, "as much as she may wish for her happiness, without any restrictions or limitations whatsoever." This essentially modifies the preceding words, and, taking the entire language down to this point, contained in and forming a part only of a single sentence, shows the purpose of the testator was that all of his residuary estate should go into the hands of his wife, not as an absolute estate,—not "to her and her heirs forever," as was the case, and expressly stated, in *Methodist Church v. Harris*, supra,—but for life, the limit beyond which her earthly happiness could not extend, with full power of disposition, for the promotion of such happiness, of as much of the estate as she might wish for that purpose, which it is evident the testator believed would not be all, as in fact it was not. Had the testator stopped here, the case would, we think, be stronger in support of the

claim that only a life estate was intended to be given to his wife, though coupled with a power of disposition, than in *Sheldon v. Rose*, supra. Certainly it could not have been said, as in *Methodist Church v. Harris*, supra, that the intention to give a fee was clear. But we have not even yet considered the most significant part of the testator's language. He continues: "And upon the decease of my said wife, and after the payment of all her debts and the settlement of her estate, I give, devise, and bequeath whatever of property or estate of such residue and remainder shall remain undisposed of at the decease of my said wife to Edward A. Cornwall, of Cheshire, of said New Haven county, in trust;" adding somewhat lengthy and elaborate trust provisions for the benefit of those unprovided for in any other portion of the will, who were apparently natural objects of the testator's bounty,—provisions which can have no operation except in case that some of the residuary estate of the testator remained undisposed of under the previous part of the residuary clause, and by the wife acting within the scope of its limitations. Here then, following the gift to the wife, and introductory to the trust provision, in the residuary clause, was language also very unlike the language of the will construed in *Methodist Church v. Harris*, supra. Here was no proviso concerning whatever property, if any, might be left. No doubt seems to have existed in the mind of the testator concerning this. There were no children to be provided for. The wife was to have full provision for herself, but limited to herself. Even her debts, if any, were to be confined to such as she herself might contract for things necessary or desired for her personal happiness, and, as ascertained upon the settlement of her estate, were to be paid; but then whatever remained of the residuary estate of the testator was to go as his,—not her—gift, devise, and bequest, and to those who were his, and not necessarily her, natural objects of bounty. Our conclusion is that only a life estate vested, by virtue of the will, in the widow of the testator, and that the subsequent provisions of the residuary clause are valid and operative.

The recent case of *Chase v. Ladd*, 153 Mass. 126, 36 N. E. 129, involved the construction of language so similar to that, but stronger in support of the claim that it created an absolute estate than that before us, with the same result which we have reached, that we deem a reference fitting, as indicating the views of a sister jurisdiction, in which such questions, as shown by a long line of decisions, have received unusual examination. In this case the testator gave and devised all his property to his wife, "to her own use and behoof forever," but provided that, if any of such property should not be expended for her support and maintenance during her lifetime, it should be disposed of in the manner designated in the will. It was held

that the language used did not vest the property in the wife absolutely, but merely conferred upon her a right to use it for her support, and, if necessary for that purpose, to dispose of it during her life, leaving whatever she had not so disposed of to vest after her death in other persons, as provided in the will. The same result was reached in *Kent v. Morrison*, 153 Mass. 137, 26 N. E. 427, where the language was, "I give, devise, and bequeath to my beloved wife, Mehitable Kent, all the estate, both real and personal, that I die seised and possessed of, giving her full power to sell and convey the same by deed (part or all of it); and the proceeds thereof are to be used for her comfort, and otherwise as she may think proper."

The other questions presented in the case may be directly answered. They do not require discussion. As bearing upon them, however, it should be stated that it appears that Grace A. Budington, the sister of said Charles Shelton, named in his said will, died before the decease of the said Caroline M. Shelton. Charles W. Shelton, named in said will, has died, leaving two children, parties to this suit. The mother of said children was at the time said will was made, and at the time of the death of said Charles Shelton, the wife of said Charles W. Shelton.

The superior court is advised: First, that the wife of Charles Shelton took, under his will, a life estate only, not an absolute property or fee simple, and that the disposition made in such will of whatever property or estate of the residue and remainder which remained undisposed of at the decease of Caroline M. Shelton, and the settlement of her estate, is valid; second, the trust created by said will for the benefit of the children of Charles W. Shelton is valid; third, the fee of said property, in the contingency which has happened, was not disposed of, and it vested, as intestate estate, in the heirs at law of said Charles Shelton. The other judges concurred, except HAMERSLEY, J., who dissented.

(67 Conn. 411)

UNDERWOOD v. COMMISSIONERS OF FAIRFIELD COUNTY.

(Supreme Court of Errors of Connecticut.
March 26, 1896.)

COUNTIES—BOARD OF COMMISSIONERS—POWERS— DETERMINING VALIDITY OF TOWN ELECTION.

Gen. St. § 3053, as amended by Pub. Acts 1889, c. 117, providing that "the county commissioners of each county may license * * * suitable persons to sell or exchange spirituous and intoxicating liquors in suitable places in those towns within their respective counties in which such licenses can be legally granted," does not confer on the county commissioners the duty or power of determining the validity of a vote in a town on the question of license or no license, and they cannot be required by mandamus to issue a license in a town, the records of which show a majority voting against license.

Case reserved from superior court, Fairfield county; Elmer, Judge.

Application by George J. Underwood for a writ of mandamus directed to the county commissioners of Fairfield county. Case reserved on the answer to the alternative writ and demurrer thereto. Judgment denying application advised.

Stiles Judson, Jr., for petitioner. Allan W. Paige, for respondents.

TORRANCE, J. This case comes here by way of reservation upon the questions raised by the plaintiff's demurrer to the return made by the respondents to the alternative writ of mandamus, and the parties have stipulated upon the record that the return shall be "treated and considered as an agreed finding of facts in the case." The substance of the facts agreed upon may be stated as follows: In October, 1804, the legal voters of the town of Westport voted in favor of "License," while at the annual town meeting in October, 1895, they voted, if the vote is a legal one, in favor of "No license." Unless annulled by the vote of 1895, the vote of 1804 remained in full force. The vote of 1895, however, was taken by ballots contained in envelopes which were not marked by the envelope booth tenders "with their respective names, but only with their respective initials." The ballots so contained in said envelopes were counted by the counters appointed and sworn to count the same, and they, under their hands, delivered to the moderator a certificate, in duplicate, stating that 257 votes had been cast in favor of license, and 378 votes had been cast in opposition to license. The moderator, before the adjournment of said meeting, publicly declared the result of said count; and he forthwith indorsed on said certificate, in writing signed by him, that said certificate showed the result of the official count on the ballot for "License" and "No license." One of said certificates he placed in the ballot box, and sealed it up with the ballots cast and returned to that box. The other, on that or the next day, he deposited in the office of the town clerk of Westport. The record of the result of that vote made by the town clerk of Westport upon the town records, is as follows: "License—Yes, 257. License—No, 378." In October, 1895, but some time after this vote upon the license question, the plaintiff, in due form, made application to the respondents for a license to sell spirituous and intoxicating liquors in Westport; and they refused to act upon his application, on the ground that Westport was then a "no-license" town, as shown by its records, and they had no power to inquire or to determine whether the aforesaid ballots cast upon the question of "License" and "No license," were or were not valid legal ballots. The plaintiff "is a suitable person to sell such liquors," and the "place" described in his application is a suitable place for the sale of such liquors. These are the controlling facts in the case, and upon them the plaintiff asks that a writ

of mandamus shall issue to the respondents, requiring them not only to exercise the ordinary duties of their office with respect to his application for a license, but also "to inquire and determine whether at said meeting held on the first Monday of October, 1895, at said Westport, said town in fact legally voted against the granting of licenses in said town, and is a town in which spirituous and intoxicating liquors may be sold."

The sole objection made by the plaintiff to the validity of the ballots in question is the fact that they were contained in envelopes marked with the initials, instead of the names, of the booth tenders; and this, it is claimed, is contrary to the provisions of chapter 308 of the Public Acts of 1895. The plaintiff claims that it is the duty of the respondents to try and determine the validity of the town vote, in a case like the present, just as a court would try the question in a contested election case under the provisions of a statute; and he bases his right to the writ of mandamus mainly upon that claim. If, therefore, it can be shown that no such duty is imposed on the county commissioners, the right to the writ fails. If such a duty is imposed by law upon the county commissioners, it must be imposed by some statute, either by express words, or by clear implication; for the commissioners are a special statutory tribunal, and such powers and duties as they have are conferred and imposed by statute. No claim is made that the duty in question is imposed upon them in express terms by any statute, but the claim is that it exists by implication; and this claim appears to rest mainly upon the statutory language which is here quoted, namely: "The county commissioners of each county may license * * * suitable persons to sell or exchange spirituous and intoxicating liquors, in suitable places in those towns within their respective counties in which such licenses can be legally granted." Gen. St. § 3063, as amended by chapter 117 of the Public Acts of 1889. The argument seems to be that inasmuch as the commissioners can grant licenses only in towns in which such licenses "can be legally granted," this, by implication, imposes upon them the duty of determining judicially, as a court might, whether the vote of a town for or against license, in a given case, was or was not a legal, valid vote. That the language relied upon will not bear such a construction appears evident from the language itself, as well as from the character of the tribunal on which it is claimed the duty is laid, and the nature of the questions to be determined. The language relied upon occurs in a statute, the main purpose of which is to confer and impose upon the commissioners the power and the duty to grant licenses, and the mode of exercising the power and of performing the duty is specifically pointed out; and the power and the duty are administrative, and not judicial, in their nature. If the legislature, in this statute, had intended to confer and

impose upon the commissioners the judicial power and duty which the plaintiff contends for, it is reasonable to suppose that it would have defined the power and duty, and provided the mode in which they should be exercised and performed; and it has done nothing of this kind. The phrase in the statute, "in those towns in their respective counties in which such licenses can be legally granted," is really equivalent to the words, "towns which have not voted against license"; and the phrase is used as descriptive of the class of towns in which licenses may be granted, and not as descriptive of a judicial duty imposed on the commissioners.

The county commissioners are not judicial, but administrative, tribunals; and their powers and duties are almost exclusively administrative, and not judicial. *Groton v. Hurlburt*, 22 Conn. 178; *Hopson's Appeal*, 65 Conn. 140. And the intent of the legislature to impose upon them the duty here claimed ought not to be inferred from language of doubtful import, or which is fairly susceptible of a different construction. The questions involved in determining, upon evidence extrinsic to the records of the town, whether a certain vote of the town was or was not a valid, legal vote, are judicial questions, depending upon the construction of statutes, largely; and they are often difficult and intricate questions, which can only be fully and effectively settled by a tribunal possessing full judicial powers. The effective performance of such a duty requires a settled mode of procedure, upon written statement or complaint setting up the facts to be investigated, the power to compel witnesses to appear and give testimony, and the power to open and examine ballot boxes if necessary.

On the whole, from the language of the statute, as well as from the nature of this statutory tribunal, and the nature of the questions which the plaintiff asks it to determine, it is clear that the duty in question is not imposed upon the county commissioners. In the performance of their duties they were not bound to look beyond the records of the town, in order to determine whether they would or would not grant licenses therein, and the town records in this case justified them in refusing to consider the plaintiff's application for a license. In coming to the conclusion that the duty contended for by the plaintiff is not imposed on the county commissioners, it is assumed, without deciding the matter either way, that the ballots in question here were, as claimed by the plaintiff, illegal, and ought not to have been counted. The plaintiff says that, unless the county commissioners can pass upon the validity of the vote in question, there is no way in which its validity can be determined. That question, however, is not before this court now, and no opinion is expressed upon it. The superior court is advised to deny the application for a peremptory writ of mandamus. The other judges concurred.

(57 Conn. 428)

CARSTENSEN v. TOWN OF STRATFORD
et al.(Supreme Court of Errors of Connecticut.
March 26, 1896.)**NEGLIGENCE—MUNICIPAL CORPORATIONS—DEFECTIVE STREET—JOINT LIABILITY—STATUTORY NOTICE OF INJURY.**

1. It cannot be held as a matter of law that the driver of a horse injured in the darkness by reason of excavations in the street was guilty of contributory negligence because he drove over such street instead of another equally convenient.

2. In the construction of a street-railway track in the streets of a town, under Pub. Acts 1893, c. 169, it being made the duty of the railway company to keep a portion of the highway in repair to the satisfaction of the selectmen, it is the duty of the selectmen to exercise a reasonable degree of supervision over the work to that end, and they are chargeable with knowledge of the condition of the street, which it was their duty to possess.

3. Where a horse fell into an excavation made by a traction company in constructing its track in a street, and left unguarded in the night, and on turning away from it fell into another in the part of the street reserved for use by the public, and under charge of the town authorities, in consequence of which he became frightened, and ran away, and was injured, both the town and the traction company are liable for the injury, and may be sued jointly.

4. Under Gen. St. § 2673, requiring written notices to be given of an injury before suit against a town, stating, among other things, the place of its occurrence, where a horse became frightened and ran away by reason of his falling into excavations in a street, the place where the excavations were was the place of the injury, in a legal sense, though the loss and damage may have resulted from a collision during the runaway.

Appeal from court of common pleas, Fairfield county; Walsh, Judge.

Action by Henry Carstesen against the town of Stratford and the Bridgeport Traction Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Morris W. Seymour and Howard H. Knapp, for appellant Bridgeport Traction Co. Stiles Judson, Jr., for appellant town of Stratford. Thomas M. Cullinan and John Cullinan, Jr., for appellee.

TORRANCE, J. This is an action for an injury to the plaintiff's horse and wagon, claimed to have been caused by a defective highway. The questions upon this appeal arise out of the facts found, and the substance of the finding may be stated as follows: On the 24th of July, 1894, and for some considerable time prior thereto the Bridgeport Traction Company was and had been engaged in building a street railway along the center line of a highway in Stratford called "Stratford Avenue." This work was being done with the knowledge and approval of the selectmen of Stratford, and under their supervision. During the construction of the railway a part of Stratford avenue alongside the line of construction was kept open for public travel. On the night of the 24th of July, 1894, there was,

within the lines of the street railway on said avenue, an excavation about 2 feet wide, 14 inches deep, and 10 or 15 feet long "along the rail of said track, on the side used for the travel of vehicles," and near by, upon that part of the avenue "which was then being used and kept open for public travel," was a hole 2 feet wide, 3 feet long, and about a foot deep. The night was so dark that these holes "could not be seen except by the aid of lamps." There were no lights near them, and they "were not guarded or protected in any manner." The excavation along the railway track "appeared to be necessary in order properly to perform the work then being done by said traction company." It "did not appear upon the trial how long said holes had remained in the condition described, nor that the selectmen of the town of Stratford had actual knowledge of their existence." On the night in question, "the plaintiff's horse and wagon were being driven by a person who had hired the same," over Stratford avenue, along that part of it then open to public travel. The driver knew that the work of building the street railway was going on there, and he drove slowly, and with care. There were two other highways in Stratford which he might have taken to reach his destination, and they were as convenient for that purpose as Stratford avenue; "but it did not appear that he was familiar with said highways." While thus driving, and "without negligence" on his part, the horse and wagon went into the first of the above-described excavations, and, passing out of the same, "almost instantly" went into the second one, above described. In consequence of this the horse became frightened and unmanageable, "and ran away, passing over heaps of dirt and stone on said Stratford avenue and Main street in said Stratford, placed there by said traction company; and on said Main street, at a point distant from said holes from 1,000 to 1,500 feet, ran into a hitching post on the side of said street, and became detached from said wagon, and continued his flight over some fences and through some fields." The horse was seriously injured, and the wagon and harness were badly broken; but "no evidence was presented showing specific injury to horse or damage to wagon or harness before said horse ran into said post." The statutory notice of the injury given by the plaintiff to the defendants described as the cause of it the excavations aforesaid, and the heaps of dirt, stone, and other material on Stratford avenue and Main street. On the trial the defendant objected to evidence to show that the horse came in contact with the hitching post, "upon the ground that the written notice of the place was of a different place, and because the cause of said injuries, as stated in said notice, was of a different nature, viz. that of falling into excavations upon said Stratford avenue";

but the evidence was admitted, and the defendants excepted. On the trial the defendants made certain claims of law, which the court overruled. The errors of which the defendants complained may be summarized as follows: The court erred in holding: First, that the plaintiff was not guilty of contributory negligence; second, that the defendants were guilty of negligence; third, that the statutory notice was legally sufficient.

In support of the first claimed error, the defendants say that the driver knew that Stratford avenue was torn up, and there were two other highways equally convenient for him, which he might have taken; and upon these two facts they found their claim. Under the circumstances, and upon the facts found, the question of contributory negligence is clearly one of fact, and the finding of the court thereon cannot be reviewed here; but, if it could be, the mere fact that the driver, with the knowledge aforesaid, did not take either of the other two safe and convenient roads, with which he was not familiar, would not constitute contributory negligence as matter of law. *Congdon v. Norwich*, 37 Conn. 414.

With reference to the second error, the claim is that the facts did not warrant the court as matter of law in finding either or both of the defendants guilty of negligence. The town says it was not guilty, on two grounds: First, because it had no notice, actual or constructive, of the defective condition of the highway; and, second, because, even if it can be charged with such notice, it was not responsible for that condition, inasmuch as it was caused by the other defendant, under legislative authority, and the town had no right to interfere in the matter. The finding disposes of the first of these claims adversely to the town, for it fairly shows that both of the excavations which caused the runaway were made in the process of constructing the railway, and this process was going forward, not only with the knowledge and approval of the selectmen, but under their supervision. Under the act of 1893 (chapter 169, Pub. Acts 1893) it was the duty of the railway company to keep a certain portion of the highway in repair to the satisfaction of the selectmen; and for the purpose and to the extent of protecting from danger persons legitimately using the highway it was the duty of the selectmen, after the traction company began to occupy the highway for its purposes, to exercise a reasonable degree of supervision over a work which they had, in an important sense, authorized, which they knew was going forward daily, and which might at any time render the highway dangerous to such persons. There is nothing to show that the selectmen could not have discovered the defective condition of the highway by the use of reasonable diligence, and, in the absence of a finding to that effect, they

were justly chargeable with a knowledge which it was their duty to possess. *Cusick v. Norwich*, 40 Conn. 376; *Boucher v. New Haven*, Id. 456; *Brooks v. Somerville*, 106 Mass. 271, 274; *Russell v. Town of Columbia*, 74 Mo. 480. The other claim, that even with such notice of the defects it would not be liable in this action, inasmuch as they were caused by a third party, over whom the town had no control, and who was authorized by its charter to do the acts complained of, cannot be sustained. One of the excavations which caused the runaway was outside of the railway lines, and upon that part of the highway kept open for public travel, which it was the duty of the town to keep in repair; and as to this, inasmuch as the town was chargeable with notice of it, clearly it was the duty of the town to reasonably guard against danger from it; and this duty it neglected to perform. And as to the excavation within the railway lines, of which the town is chargeable with notice also, we think the town, under the act of 1893, aforesaid, was guilty of negligence, so far as this plaintiff in this action is concerned, in not taking reasonable precautions to warn him against danger from it. It was in consequence of getting into both excavations that the horse ran away. The existence of each, unguarded in any way, contributed to cause the runaway, which is found to have been the result of the combined effect of both excavations. The traction company, under the statute, was clearly responsible for the condition of that part of the road within its own lines; and, if it had been made sole defendant in this suit, the fact that the negligence of the town had contributed to cause the runaway would have been no defense. "In general, the negligence of third parties, concurring with that of the defendant to produce an injury, is no defense. It could at most only render the third party liable to be sued also as a joint wrongdoer." *Cooley, Torts*, 684; *Ricker v. Freeman*, 50 N. H. 420; *Randolph v. O'Riordan*, 155 Mass. 331, 29 N. E. 583; *Tompkins v. Railroad Co.*, 66 Cal. 163, 4 Pac. 1165. The case at bar can fairly be regarded as one which could be brought under section 9 of the act of 1893, aforesaid, against both the town and the traction company; and in this view of it the court was justified in finding that the town was negligent.

With respect to the negligence of the traction company the finding is equally conclusive. It made an excavation within its lines, which was necessary and proper enough for purposes of construction. It was one that might be dangerous to public travel. It was the duty of the company to guard travelers against such danger. It neglected that duty; and that negligence essentially contributed to the injury sustained by the plaintiff. But the defendants object to this part of the finding, because they say the traction company and the town were not joint wrong-

doers, and the traction company was not liable for the negligence of the town in failing to properly guard against danger on that part of the highway which it was the separate duty of the town to keep in repair. The argument seems to be that, in order to make two parties responsible as joint wrongdoers, there must in all cases be some concert of action between them in causing the injury, or some common duty resting upon them which both have violated; but this is not necessarily so. "There are cases in which two or more persons have so acted, though not in concert or simultaneously, as to be liable as joint wrongdoers." *Pol. Torts*, 381, 391. This principle was recognized and acted upon in *Clark v. Chambers*, 3 Q. B. Div. 327, and in many of the cases therein commented upon; also in *Ricker v. Freeman*, *supra*, *Ring v. Cohoes*, 77 N. Y. 83, and many others that might be cited. "If no fault can be attributed to the plaintiff, and there is negligence by the defendant and also by another independent person, both negligences partly directly causing the accident, the plaintiff can maintain an action for all the damages occasioned to him against either the defendant or the other wrongdoer." *The Bernina*, 12 Prob. Div. 58, 61. "When several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of the causes." *Ring v. Cohoes*, 77 N. Y. 83. Upon the facts found we think the defendants must be regarded as parties whose "negligence in part directly" caused the runaway, and therefore the court did not err in finding the traction company guilty of negligence.

The remaining question relates to the sufficiency of the statutory notice given in this case, and the only objection to its legal sufficiency is that it does not sufficiently describe the place where the injury occurred. The plaintiff claims that the place of injury was that part of Stratford avenue where the horse first began to be unmanageable, and no claim is made that the notice did not fully and accurately describe that place. The defendants seem to claim that the hitching post was the place of the injury, because up to the time of collision with that no harm had come to the plaintiff's property; or at least they claim that this last place formed part of the place of the injury which the plaintiff was bound to describe in his notice. The statute (*Gen. St. § 2673*) requires written notice to be given of the injury, and, among other things, of the "place of its occurrence." What, then, was the "injury" in this case? It was not the hurt done to the horse, nor the harm done to the wagon and harness. These were the loss and damage resulting from the injury. "An injury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right" (*Parker v. Griswold*, 17 Conn. 288, 302); and the injury

to the plaintiff in this case occurred at the place fully and accurately described in the notice, and not at the hitching post or elsewhere. For the purpose of this case it is sufficiently accurate to say that the proximate cause of the injury was the existence of the two unguarded holes in the road, and that the injury was received where this cause operated to produce the runaway; and the court did not err in holding the notice to be legally sufficient, and in admitting the testimony objected to. There is no error. The other judges concurred.

(67 Conn. 445)

FRISBIE v. PRESTON et al.

(Supreme Court of Errors of Connecticut.
March 28, 1896.)

ADMINISTRATION—CLAIMS AGAINST ESTATE—POWER OF ADMINISTRATOR—PARTIES.

1. *Gen. St. § 583*, provides that every creditor of an insolvent estate who shall not exhibit his claim within the time limited shall be barred of his claim unless he can show some asset not embraced in the inventory, or accounted for by the administrator, in which case he shall notify the administrator, who shall make an additional inventory thereof. *Held*, that to entitle an administrator to recover newly-discovered estate, consisting of land, to be applied in payment of a claim not exhibited within the required time, the land must have first been included in the additional inventory required by the statute.

2. The administrator of a decedent cannot sue for the benefit of the mortgagee, to enforce a mortgage given by his decedent against a subsequent grantee of the decedent.

Appeal from superior court, Hartford county; Thayer, Judge.

Suit by Samuel Frisbie, administrator, against Edward M. Preston and others. There was a judgment for defendants, and plaintiff appeals. No error.

John O'Neill, with whom was Frank W. Etheridge, for appellant. Theodore M. Maltbie, for appellees.

FENN, J. The sole plaintiff in the present action is, and is described as, the administrator with the will annexed on the estate of Eli D. Preston, late of Farmington, deceased. The defendants, seven in number, are alleged to claim interest in certain land by virtue of a deed of conveyance made, signed, and acknowledged by said Eli D. Preston in his life, recorded on the land records of Farmington, which deed, it is further alleged, "was never delivered by the said Preston to the grantees named therein, and never became a completed conveyance, but the same was and is now null and void." A considerable part of the 32 paragraphs of the single count in the complaint is devoted to the statement of certain alleged obligations of the estate of said Eli D. Preston to his daughter-in-law, Ellice Preston (now, by a subsequent marriage, Ellice Humiston), by reason of an indebtedness of \$3,000, evidenced by a note for said sum, and mortgage to secure the same

on a portion of the land in question, and a legacy for the same amount, in the will. The relief claimed is: First. That the said deed of conveyance, which was made an exhibit, may be declared to be null and void. Second. That, "in the event that it shall be found that the deed * * * was delivered, then the plaintiff claims a decree that the land described in said mortgage deed shall stand charged with a mortgage, or an equitable incumbrance in favor of the plaintiff as such administrator, to the amount of three thousand dollars, with the interest thereon, and that said mortgage or equitable incumbrance shall take precedence of the conveyance made to the defendants, or any of them. * * *" Third. Such other relief as seems equitable. Fourth. "That said land described in said mortgage deed shall stand charged with the payment of three thousand dollars, with the interest thereon, in favor of the plaintiff, for the use and benefit of the said Ellice Humiston." The defendants on the same day, January 9, 1896, filed a demurrer to the complaint, and to the first, second, and fourth prayers for relief, and also a motion to expunge certain paragraphs of the complaint as "immaterial and impertinent." The court, on the same day, January 31, 1896, granted the motion to strike out, and sustained the demurrer as to the second and fourth claims for relief, and also the demurrer to the entire complaint, on the ground of demurrer—being the second ground—which reads as follows: "It is not alleged that said property has been inventoried as a part of the estate of Eli D. Preston, deceased, or that the court of probate has ordered the sale of the same to satisfy debts or legacies."

The questions presented by the reasons of appeal relate to the correctness of these several rulings. In granting the motion to strike out, the court evidently regarded the allegations directed to be expunged as statements of evidence, not of ultimate, material, or issuable facts. There can be no question as to the correctness of this view, so far as most of the averments are concerned. The complaint, however, is so peculiar in its structure that in order to decide regarding this ruling, as to some of the statements, it seems material to enlarge the consideration to an extent which involves the correctness of the other rulings also. To illustrate: All the allegations in relation to the note and mortgage were stricken out. With these absent, the complaint would contain no foundation for the second and fourth prayers for relief, the demurrer to which was sustained. Substantially the same may be said as to the statements regarding the legacy. These also were, in effect, expunged. If the retention of the allegations concerning either of these, or any other matters, would have made the complaint stronger to resist the final test of the demurrer to it as a whole, which was sustained, they should not have been expunged. If, on the other hand, the complaint, as it original-

ly stood, was bad upon demurrer, these subordinate rulings were merged in the broader one, and became immaterial. We will therefore come directly to the question which may be decisive of the whole matter.

Was the demurrer—treated as one to the entire complaint, with all its original allegations and prayers for relief—properly sustained? In considering this question, we must, from the outset, and throughout, keep in mind who the plaintiff is and in what capacity he sues, and is entitled alone to relief. We say this because neither the complaint, nor the ingenious brief and able argument in support of its validity, appears to lead in the direction of such clear conception. Ellice Humiston (or Preston) is not a party to the record. So far as the claimed legacy is concerned, the will—made an exhibit—gave it to the plaintiff in trust, as executor of such will. But the plaintiff avers that he declined to accept said trust as executor, and he nowhere alleges that he accepted any other trust, duty, or obligation, except that of administrator of unadministered estate, in June, 1895,—more than eight years after the death of the testator. He claims to be nothing else. He asserts nothing to show that he is anything else. He sues as nothing else than such administrator, and he is entitled to no relief except such as the complaint shows his right to as such administrator. Advancing, then, from this starting point, the plaintiff claims that the facts alleged show him to be entitled to relief in some of the forms in which relief is demanded, on one or another of these grounds; that is to say, as based either upon the alleged indebtedness of the estate to Ellice Humiston, evidenced by the note and mortgage, or upon the legacy. The court below regarded the complaint as counting upon the indebtedness alone, and the rest as matters averred in explanation and support of such claim. But the plaintiff strongly protests against this view, and we will consider the case as broadly as he himself asserts it. First, however, let us look at the matter of indebtedness. What appears in the complaint as bearing upon this? Eli D. Preston died March 16, 1887. He was then indebted to Ellice Humiston in the sum of \$3,000 for work and labor,—a simple contract debt. On March 31, 1887, the will of said Preston was probated. The plaintiff, therein named as executor, declined such appointment. Martin L. Parsons, of Farmington, was appointed administrator with the will annexed, accepted the appointment, gave bonds, and duly administered a portion of the estate,—all, in fact, except the land now in question. On January 21, 1890, said Parsons settled his administration account with said estate. In said account he charged himself with personal property and credits and choses in action only. The amount was \$5,102.84. The credit amounted to precisely the same sum, exactly exhausting the estate. The largest item was, "By paid claims allowed, \$4,014.09." Ellice Humiston presented no

claim whatever against said estate, and nothing was allowed to or paid to her out of said estate. The said estate was represented insolvent, and was and is in fact insolvent. The same was and is being settled as an insolvent estate. There is no other estate, except the land in question, to pay the said claim of said Ellice. The said land was not originally inventoried or claimed as any part of the estate of the deceased, and said land has never been administered upon as a part of said estate. On June 6, 1895, said Martin L. Parsons resigned as administrator on said estate. His resignation was accepted. Afterwards, on July 6, 1895, the plaintiff was duly appointed.

From the above facts it appears that Ellice Humiston, though a creditor of the deceased, has never become a creditor of his estate. The plaintiff, in his anxiety to subject the estate which he represents to a liability in her behalf, states a reason thus: "The said Ellice did not present any claim against the estate of the deceased, because she believed her claim was secured by the said mortgage deed and note, and she continued to believe that the same was sufficient for her protection until after the time limited for presenting claims against said estate had expired." In reference to this, two principles enunciated by this court are significant. The first is stated by Seymour, J., in *Cone v. Dunham*, 59 Conn. 145, 161, 20 Atl. 311. The other may be found in *Rhodes v. Seymour*, 36 Conn. 1, 7. The court, by Butler, J., said: "It is well settled, by authoritative decisions in this state and elsewhere, that executors are agents or trustees only, whose duty it is to administer according to the will of the testator, and according to law, and not to subject the estate by their admissions." The provisions of Gen. St. § 588, are most specific, positive, and absolute: "Every creditor of an insolvent estate who shall not exhibit his claim to the commissioners within the time limited, shall be debarred of his claim against said estate unless he can show some estate not embraced in the inventory or accounted for by the executor, administrator, or trustee." Here, then, is a creditor—the only existing one, so far as the complaint indicates—whose claim is barred, unless, as asserted, there be newly-discovered estate. But, granting there is such estate, what does the statute then prescribe? "In which case he shall notify the executor," etc. Waiving this, which is not alleged, what next? "Who [the executor, etc.] shall make an additional inventory of such newly discovered estate." This is the prescribed initial step. The plaintiff, himself administrator, neither alleges in the complaint, in the first instance, that he has done this, or amends such complaint by so stating after the court below has ruled it to be essential. Instead of this, he says in his reasons of appeal that such ruling is erroneous, and asks in his brief: "What purpose is served by inventorying this land? The administrator claims it. The defendants, in

their demurrer, do not deny his right to it, if needed to pay debts." We shall see presently that it is not shown to be needed to pay debts. But, in answer to the question thus propounded by the plaintiff, one purpose served by the inventory would be that the direct and positive requirement of the statute to that effect would be complied with. If important to determine why such requirement was made, the decisions of this court in other cases supply abundant reasons. Such inventory is the basis and foundation upon which all the other proceedings prescribed by the statute, or requisite to be had, rest and depend. *Sacket v. Mead*, 1 Conn. 13, 19; *Minor v. Mead*, 3 Conn. 289; *Williams v. Morehouse*, 9 Conn. 470; *Beach v. Norton*, Id. 182; *Andrus v. Doolittle*, 11 Conn. 283; *Moore v. Holmes*, 32 Conn. 553-558; *Blakeman v. Sherwood*, Id. 324; *State v. French*, 60 Conn. 478, 23 Atl. 153. The plaintiff, as administrator, until he made an inventory of the property in question, had no title or right to interfere with it, or to harass and vex those who have been in undisturbed possession of it, under claim of record title derived from the deceased in his lifetime, during the entire settlement of the estate, and for many years after. He says again in his brief, in treating this question, "One of the purposes of this bill is to remove the cloud from the title, and, plainly, a court of equity has this jurisdiction." But "the jurisdiction of equity cannot be invoked to adjudicate upon the conflicting titles of parties to real estate. That would be to draw into courts of equity, from the courts of law, the trial of ejectments. He who comes into a court of equity to get rid of a legal title which is alleged to cast a shadow over his own title must show clearly the validity of his own title, and the invalidity of his opponent's. * * * The proper forum to try titles to land is a court of law, and this jurisdiction cannot be withdrawn at pleasure, and transferred to a court of equity, under pretense of removing clouds from titles." *Miles v. Strong*, 62 Conn. 95, 105, 25 Atl. 459. For the validity of anything which may be called title, or the equivalent for title, in an administrator appointed for such purpose, and situated as the plaintiff is, to real estate held as this is, it is requisite that every provision of Gen. St. § 538, be complied with. First, there must be an inventory. Without this there can be nothing else. Then, of course, there must be more. The claim must be presented, not to the commissioners, whose duties are at an end, not to the administrator, who never had or has any duty in passing upon the claim, but to the court of probate, which is required to decide upon it, and allow what shall appear to be due the creditor. Thereupon an order is passed, as is further prescribed. Then, and then only, in a case like the present, does the condition of things exist which makes applicable to it, in its entirety, what was said by this court in *Bassett v. McKenna*, 52 Conn. 437, 438: "It is too late, in Connecticut, to question the right

and the duty of an administrator to inventory property fraudulently conveyed by his intestate, when that property is needed for the payment of debts, and to institute all necessary proceedings to appropriate the property to that use." Then, and then only, does it appear that there is a debt to be paid, for which, therefore, property—the property in question—is needed, and that it is claimed by the estate as assets for that purpose. Then the administrator has title, in the sense that he is entitled, that it is his right and duty to institute necessary proceedings to appropriate the property to that use. In the absence of the allegations referred to, and of anything in any sense equivalent thereto, the demurrer, as based upon this part of the claim, was properly sustained.

But, as we have seen, the plaintiff further contends that he is entitled to the relief demanded in his second and fourth prayers. Concerning the note and mortgage, the allegations in the complaint are to the effect that on October 27, 1896, the said Eli D. Preston made a note to secure his alleged indebtedness of \$3,000 to Ellice Humiston, and secured such note by a mortgage deed of a portion of the land now claimed; that this mortgage was recorded in Preston's lifetime, but that it was delivered to said Ellice by the scrivener who drew the deed, after the death of said Eli D. Preston. It is further stated that "on the 14th of June, 1894, the said Ellice Humiston, believing that the said note and mortgage were good and valid, brought an action before the superior court for Hartford county on the first Tuesday in September, 1894, and such proceedings were had that on April 11, 1895, said court adjudged said note and mortgage deed to be void, and the same were declared to be invalid and of no effect." It may be added that the case just referred to, brought by said Ellice Humiston against the present defendants, came upon appeal by the said Ellice before this court, which sustained the judgment of the superior court, which embraced also a judgment against said Ellice upon a cross bill, supporting the defendants' claim that said mortgage constituted a cloud upon their title. Thus, in addition to the want of title in the then plaintiff, the validity of the defendants' title—a question necessarily involved (*Miles v. Strong*, supra)—was decided in a suit to which said Ellice was a party. It is unnecessary to decide either question again, for her benefit, in a suit in which she is not a party. Besides, it is a matter in which the present plaintiff has, in the capacity in which he sues, no interest or concern. There is no error upon this point.

One ground remains: The plaintiff asserts the land is needed to constitute assets for the payment of the legacy. Much of what has already been said applies to this claim. But, further, it does not appear, nor is it claimed, that Ellice Humiston can be at the same time a creditor and a legatee. It is asserted that she is one or the other. The legacy is spoken

of as having been provided to secure payment to her of the debt due from the testator. She has never claimed the legacy. She has sought to recover the debt by the attempted foreclosure of a part of the land in question. So far as it appears, it may be for her interest still to insist upon the debt. The complaint prays for relief in the event that it shall be found that the deed to the defendants was delivered, though the complaint alleges that it was not. If delivered, the legacy would not be entitled to precedence over the voluntary conveyance thereby perfected. Apparently, the former proceeding between Ellice Humiston and the defendants, which we have referred to, settled that question as against her. The plaintiff, then, has neither the color of right which would come from an inventory,—a finding of the court of probate that the land is needed to pay the legacy, and an order of sale for that purpose; but, instead, he is asking relief because property is needed to pay a legacy left by the will of one whose estate, he alleges, "was and is in fact insolvent, and was and is being settled as an insolvent estate." An estate made insolvent, perhaps, it may be said, by the claim, not abandoned, but pressed at least by him, of the very person, as a creditor, whom he is endeavoring, with or without her assent, to assist as a legatee; doing this at the same time, in the same action, by allegations relating to the inconsistent matters, sometimes in different, and sometimes in the same, paragraphs of the single count of his complaint. Here, also, we think, the court below did not err. There is no error in the judgment complained of. The other judges concurred.

(87 Conn. 400)

ROGERS SILVER PLATE CO. v. JENNINGS
et al.

(Supreme Court of Errors of Connecticut.
March 26, 1896.)

ACCORD AND SATISFACTION—SELLING CONTRACT—
SETTLEMENT—CONSTRUCTION—CONSIDERATION.

1. In a settlement between a manufacturing concern and its selling agents under a contract, it was provided that, in consideration of the payment by the agents of a sum stated, in cash, "and the agreement by them to settle, when adjusted, any errors that may exist in amount credited for merchandise shipped, and any difference in correction in prices claimed by them, * * * we agree to release the said [agents] from all liability resulting from, or obligation incurred by, said contract, * * * and we hereby acknowledge receipt of all claims and demands to date, not above excepted." The manufacturers afterwards sued the agents upon the contract, and, besides recovering on the excepted items referred to in the settlement, also recovered on a special count for damages for the agents' failure to sell goods to the amount undertaken in the original contract. *Held*, that the written settlement was a complete defense to any claim for special damages.

2. The payment by the agents of the cash sum stated was a sufficient legal consideration for the settlement.

3. The agreement "to settle, when adjusted, any errors that may exist" in respect to two items of the account, was, in effect, an agree-

ment that the manufacturer should not be bound as to them, and was not a condition precedent to the validity of the settlement.

Appeal from superior court, Fairfield county; Robinson, Judge.

Action by the Rogers Silver Plate Company against Erwin M. Jennings and others. Judgment for plaintiff, and defendants appeal. Reversed.

Daniel Davenport, for appellants. John W. Alling and James E. Walsh, for appellee.

TORRANCE, J. This is an action to recover money claimed to be due as the balance of an account, and also damages for the breach of a written contract; and the complaint contains the common counts, and a special count setting up the contract. The case was tried before one of the state referees, who reported the facts found to the superior court. The defendants remonstrated against the acceptance of the report. The plaintiff demurred to the remonstrance. The court sustained the demurrer, accepted the report, rendered judgment for the plaintiff, and from that judgment the defendants took the present appeal. The questions upon this appeal relate mainly to the effect given by the court below to certain facts found by the referee, and the substance of so much of his report as bears upon those questions may be stated as follows: By the terms of the written contract made between the plaintiff and defendants, dated June 18, 1891, and set up in the complaint, the plaintiff appointed the defendants as its sole agent for the sale of all goods manufactured by it, for the period of six months beginning July 1, 1891; and in consideration thereof the defendants agreed to purchase of it, in the manner prescribed by the contract, goods which it manufactured or dealt in, "to the net amount of fifty thousand dollars (\$50,000) or more, at prices designated by said Rogers Silver Plate Company, f. o. b. Danbury, Conn." The plaintiff was to make "fair and equitable prices, and fill all orders promptly, reasonable allowance being made from time of receipt of order or construction of goods." All purchases of each month were to be paid for in cash, or by note at thirty or sixty days with acceptable indorser, "on the first day of the second month following." The plaintiff was to furnish at least four lines of samples, packed in trunks, "for use in traveling and displaying said goods" by the defendant; and "all other expenses pertaining to the sale or delivery of said goods" were to be borne by the defendants. Under this contract the defendants, during the six months therein designated, instead of taking \$50,000 worth of goods as agreed, took only a little over \$33,000 worth, and at the end of the contract period there appears to have been some dispute between the parties as to the amount of the balance due to the plaintiff upon the

goods which the defendants had received under the contract. Under these circumstances, and as the result of correspondence between them, the parties came together at Bridgeport on the 19th of January, 1892, in an attempt to adjust and settle the matters in dispute between them. At this interview the defendants presented a document, annexed to the report of the referee, marked "Exhibit 36," "as the correct statement of their account with the plaintiff." The plaintiff's books of account were then in Danbury, "and they had there at Bridgeport no means of their own to ascertain whether defendants' said account was correct or not." Exhibit 36 is headed "Final Settlement, Jan. 19th, 1892." It contained, among other things, the following statement:

Rogers Silver Plate Co.	
Total credits as per bills rend.....	\$30,027 17
Cherub wgt's	1,331 25
Syracuse Watch Co.....	847 21
Boots, 1 gro. 7½ doz.....	74 18
Shoes, 4 "	150 00
Three trunks	
	<u>\$32,429 81</u>
Dr.	
Five trunks and re-	
pairs	\$ 318 00
Mdse. ret'd	413 40
Broken, etc.	15 87
Correct's on a/c, etc...	124 05
Bill rend. twice.....	16 10
Dis. on a/c.....	560 00
Cash	28,000 00
	<u>29,447 42</u>
	\$ 2,982 39
Less correct's in prices.....	579 64
	<u>\$ 2,402 75</u>

It also contained itemized statements of the above "Dr." charges of "Mdse. ret'd," "Broken, etc.," "Correct's on %, etc.," and "Correct's in prices." As the result of that interview, the plaintiff executed and delivered to the defendants a document, of which the following is a copy, to wit: "Bridgeport, Conn., Jan. 19th, 1892. In consideration of the payment of Jennings Bros. of the sum of \$2,402.75 in cash, and the agreement by them to settle, when adjusted, any errors that may exist in amount credited for merchandise shipped, and any difference in correction in prices claimed by them, amounting to \$579.64, upon goods furnished under contract dated June 18th, 1891, we agree to release the said Jennings Bros. from all liability resulting from or obligation incurred by said contract, and we agree to deliver this day to said Jennings Bros., f. o. b. cars at Danbury city, 887½ doz. cherub paper weights, made as heretofore agreed upon; also (1) one gross, 7½ dozen boots, and (4) four gross shoes, made as heretofore agreed upon; and we hereby acknowledge receipt of all claims and demands to date, not above excepted. Rogers Silver Plate Co. N. B. Rogers, President." The report of the referee then proceeds as follows: "The defendants paid the plaintiff

the sum specified in the said document, and the plaintiff delivered to the defendants the articles therein described, and the parties separated. Soon after the return of the plaintiff to Danbury, on an examination of its books of account, it found that there were errors in the amount credited the plaintiff by the defendants in the said document, 'Exhibit 36,' which amount credited the plaintiff is referred to in the said document of release as follows, to wit: 'And the agreement by them to settle, when adjusted, any errors that may exist in amount credited for merchandise shipped.' The errors in this regard amounted to the sum of five hundred and thirty-two dollars and sixteen cents (\$532.16). They also found there were errors in the sum of five hundred seventy-nine dollars sixty-four cents (\$579.64), which the defendants debited the plaintiff in the said document, 'Exhibit 36,' and called in the same 'corrections in prices,' which amount is referred to in the said document of release, as follows, to wit: 'And any difference in correction in prices, claimed by them [the defendants], amounting to \$579.64, upon goods furnished under contract dated June 18, 1891.' The errors, in the said sum of \$579.64, amounted to the sum of three hundred and sixty-one dollars and eleven cents (\$361.11). Soon after the discovery of these errors, the plaintiff sent the defendants a true statement of its account, correcting therein the errors described, and called upon the defendants to agree with it in adjusting the said errors. The defendants refused, and continued to refuse up to the bringing of this suit, to make any adjustment with the plaintiff of these errors described, or to make any settlement with the plaintiff differing in any respect whatsoever from the one of January 19, 1892, as shown by 'Exhibit 36,' although a reasonable time for so doing had long elapsed when this suit was brought." The errors thus discovered by the plaintiff in the account, after the Bridgeport interview (\$532.16 and \$361.11), amounted to \$893.37. The referee finds that this last amount, aside from any question as to the effect of the writing of January 19, 1892, represents the balance of account in favor of the plaintiff on the 1st of January, 1892; that this balance "became due and interest-bearing" on the 1st of February, 1892; and that the defendants were owing the plaintiff, "under said contract, on the 1st of January, A. D. 1895, principal and interest, the sum of one thousand and forty-nine dollars fifty-nine cents (\$1,049.59)." He further finds that for goods bought by the defendants from the plaintiff after January 19, 1892, the defendants owed plaintiff, principal and interest, on January 1, 1895, the sum of \$108.07, "thus making the entire indebtedness of the defendants to the plaintiff, on the 1st day of January A. D. 1895, the sum of one thousand one hundred and fifty-eight dollars thirty-six cents (\$1,158.36)." The report then proceeds: "The undersigned therefore finds the issue in this part of the

case in favor of the plaintiff, so far as the questions of fact are concerned, and, if the superior court shall be of the opinion on these facts, that the law is so that the plaintiffs can recover the amount due under the contract of June 18, 1891, notwithstanding the said document of January 19, 1892, given by the plaintiff to the defendants, then the undersigned finds that the plaintiff recover of the defendants the sum of one thousand one hundred fifty-eight dollars thirty-six cents (\$1,158.36), with the interest thereon after the 1st day of January, 1895; but, if the court shall be of the contrary opinion, then the undersigned finds that the plaintiff recover of the defendants the sum of one hundred eight dollars seventy-seven cents (\$108.77), with the interest thereon from the 1st day of January, A. D. 1895."

Upon the matter of the damages recoverable under the special count, the referee found, in substance, as follows: The defendants took under the contract goods only to the amount of \$33,334.08, thus leaving a balance of \$16,665.92 which they failed to take. When the contract period terminated the plaintiff had on hand \$10,000 worth of these goods ready to be delivered to the defendants had they called for them, and it "could and would have had the entire amount manufactured, called for by the said contract, if the defendants had given it orders to that extent. The plaintiff's usual profit in the sale of goods manufactured by it of the kinds of those sold to the defendants had been twenty per centum on the amount of the sales, and it is highly probable, if the defendants had fulfilled their contract, and purchased the last-named amount of the plaintiff, the plaintiff's profit on the same would have been twenty per centum, making its profit equal to the sum of three thousand three hundred thirty-three dollars and eighteen cents (\$3,333.18) on the sale; and the undersigned so finds." The \$10,000 worth of goods on hand December 31, 1891, as aforesaid, were afterwards "sold and disposed of by the plaintiff, at the best price it could obtain, which was less than the cost of manufacturing the same." Upon these facts with reference to damages under the special count the referee found conditionally in substance as follows: If the court should be of opinion, upon the facts found, that the plaintiff could not recover any damages under the special count, then the referee found "the issue in this part of the case in favor of the defendants"; if it should be of opinion that plaintiff could recover only nominal damages under this count, \$10 is found to be nominal damages; and if it should be of opinion that plaintiff could recover "real damages" under this count, then it was found that the plaintiff was entitled to recover either 20 per cent. of \$10,000 or of \$16,665.92, as the court might determine.

The foregoing statement from the report of the referee presents the principal material facts in the case, and the controlling ques-

tion relates to the operation and effect of the writing of January 19, 1892. After the report had been accepted, the parties were heard by the court "as to what judgment should be rendered" thereon, and at this hearing the defendants made certain claims, which the court overruled. Among the claims thus overruled were two, the substance of which may be stated as follows: First, the writing of January 19, 1892, on the facts found, "operated as and was a release of all the claims arising under the contract of June 18, 1891," except as to two items, namely, "errors in account credited for merchandise shipped," and "differences in correction of prices," and as to these the only remedy open to the plaintiff after January 19, 1892, "was the institution of a suit for the adjustment of these items;" second, that upon the facts found, damages for the breach of the contract of June 18, 1891, arising from the failure of the defendants to take the full \$50,000 worth of goods, could not be recovered in this action. The court found that the plaintiff was entitled to recover, under the common counts, the sum of \$1,189.42, and under the special count the sum of \$4,221.43, and rendered judgment for the plaintiff for the sum of \$5,210.90 and its costs.

In holding that the plaintiff was entitled to recover any damages under the special count, the court clearly erred. The fair inference from the facts found is that the writing of January 19, 1892, was a valid binding agreement, and, if so, the plaintiff was not entitled to recover such damages. No claim is made that it was executed or obtained by fraud or mistake or surprise of any kind, and the only claims made respecting its binding force are, in substance, that it was made without consideration, or upon one that failed, or was upon condition which has not been performed; and these claims are not true. The consideration stated in the writing itself is the payment of the \$2,402.75 in cash, and the agreement "to settle, when adjusted, any errors that may exist" in respect to two of the items of the account. The fair inference from the writing itself and the facts found is that this money was not due and payable on the 19th of January, 1892, but at some future day; and that its payment in cash then and there was the real consideration for the writing. The agreement to settle for the errors, if any, in two of the items in the account, was not, as the plaintiff seems to suppose, an agreement to settle for those errors as the plaintiff might subsequently claim them to be; but it was, if taken literally, an agreement to settle for them as they might be subsequently found to exist to the satisfaction of both parties, or at least by some competent judicial tribunal. In other words, it was, in effect, an agreement that the plaintiff should not be bound, as to these two items, by the statement of them made by the defendants in Exhibit 36. As the cash was paid as agreed, and the agreement asked for was made, the

writing in question was made upon a legal consideration which has not failed in any respect, and of which the plaintiff has had the full benefit. The claim that the writing was given upon condition that the defendants should settle for the errors in the two items aforesaid as the plaintiff might subsequently claim them to exist is equally without foundation. The writing in question, then, is a valid agreement, and by its express terms it releases the defendants "from all liability resulting from, or obligation incurred by," the contract of June 18, 1891, so far as special damages under the special count are concerned; and acknowledges "receipt of all claims and demands to date" save those expressly excepted in and by the writing itself. It was thus a complete answer to any claim for special damages under the special count, and the court below erred in holding otherwise. In sustaining the demurrer to the remonstrance, and in accepting the report, the court below committed no error; and, in view of the result reached by this court, it is not deemed necessary to consider the other assignments of error.

While it thus appears that the plaintiff is not entitled to the sum found to be due to it by the court under the special count, it also appears that the plaintiff is entitled, upon the facts stated in the report, to the other sum which the court below found to be due to it under what is termed in the judgment the first count in the complaint, and that finding is not affected by the error in the other finding of the court. If the judgment below could be regarded as divisible or severable in this respect, it might be reversed in part only; but the judgment is for one entire sum, to wit, \$5,210.90, and it must be reversed in toto, that the amount for which judgment can be rendered upon the report may be legally assessed. The reversal will not open the cause below beyond the exigencies of the case, and will be retrospective so far, and so far only, as the proceedings upon the record appear to have been impugned by the judgment of reversal. There is error. The judgment of the superior court is set aside, and the cause is remanded to that court to be proceeded with in accordance with the views herein expressed.

FENN, BALDWIN, and HAMERSLEY, JJ., concurred. ANDREWS, C. J., dissented as respects the effect given to the release under the finding of the state referee.

(58 N. J. L. 653)

MORAN et al. v. MAYOR ETC., OF JERSEY CITY.

(Court of Errors and Appeals of New Jersey. July 20, 1896.)

APPEAL—REVIEW—QUESTIONS OF FACT.

1. Upon a writ of error brought to reverse the judgment of the supreme court rendered upon proceedings in certiorari to review a municipal

assessment for benefits, the finding of the supreme court upon questions of fact is a finality.

2. The act of 1881 (P. L. 34; Supp. Revision, p. 84), by which the supreme court is empowered to decide disputed questions of fact, does not apply to this court.

(Syllabus by the Court.)

Error to supreme court.

Action by Charles Moran and others against the mayor and aldermen of Jersey City. From a judgment of the supreme court for defendants, plaintiffs bring error. **Affirmed.**

Collins & Corbin, for plaintiffs in error.
Spencer Weart, for defendants in error.

GARRISON, J. This writ of error brings up the judgment of the supreme court affirming the final assessment for benefits for improvements to lands of the prosecutors. The legislative course prescribed and pursued in the premises (P. L. 1871, p. 1094) includes a report of commissioners of assessment to the board of works, and an adjudication thereupon by that body. From this action the prosecutors, by writ of certiorari, appealed to the supreme court, where, upon such proofs as the parties saw fit to produce, the judgment was rendered which this court is now asked to review. Upon a writ of error in such case the finding of the supreme court upon questions of fact is a finality. That court, in the absence of statutory provision, is powerless to determine a dispute of this nature. The act of 1871 (P. L. 124) conferred such power in certain cases, which, by subsequent enlargement, has been extended to "the proceedings of statutory tribunals." Supp. Revision, p. 84. These statutes do not apply to this court, nor is there any intimation in these acts of a legislative purpose to disturb its purely appellate character. The titles of the original act, viz. "An act relative to the writ of certiorari," does not, in terms, apply to writs of error, while it points unerringly to that court whose prerogative the writ of certiorari is. The body of the act likewise indicates with entire clearness that the court upon which the additional power is bestowed is one that already possesses the organs necessary to its proper assimilation, since it is enjoined to institute its inquiry "by deposition or in such other manner as is according to its practice."—language that is wholly devoid of application to this court.

There is a statute that applies to this court in cases that come within its provisions. P. L. 1881, p. 194.

By virtue of this act, all courts are required, where any tax or assessment is set aside or reversed for irregularity or defect in form or illegality, to amend such errors, and, if need be, to ascertain for what amount the property is legally liable. For obvious reasons, the case before us does not fall within the category, unless it be decided that such legal defect exists,—a matter

with respect to which this court deals without statutory aid.

If we eliminate from the case all contentions of fact, there appears to be no semblance of illegality in the assessment brought here by this writ. The argument that the commissioners, the board of works, and the supreme court have proceeded upon wrong principles, when reviewed in the light of the established propriety of their finding upon matters of fact, is merely to reopen a question that is definitively closed. The circumstance mainly relied upon as indicating that a wrong principle of valuation has been followed is that the property of the prosecutors is almost uniformly adjudged to be benefited more than that of adjoining owners; but this is a question of fact, upon which three competent tribunals have passed. In the face of the established fact that the values, benefits, and damages returned with this writ are in all respects true, it is a contradiction in terms to say that the principle adopted was at fault, since in such case the only principle involved is the ascertainment of the truth. This being so, there is nothing before us upon which a writ of error can operate. The judgment of the supreme court is affirmed.

(54 N. J. E. 690)

STONE *et al.* v. NEWELL *et al.*

(Court of Errors and Appeals of New Jersey.
July 18, 1896.)

FRAUDULENT CONVEYANCE—SUFFICIENCY OF EVIDENCE.

Where there is nothing in the case which satisfactorily indicates that defendant grantor made a deed with intent to defraud his creditors, and there is no evidence that, if such intent did exist, defendant grantee had any participation in such purpose, and the consideration paid was the full value of the property, a decree setting aside the deed as in fraud of creditors cannot be sustained.

Appeal from court of chancery; Bird, Vice Chancellor.

Bill by Harry Newell and Charles S. Ridgeway, partners, against Samuel G. Stone, Anna Stone, and John R. Jackson, to annul a deed of land alleged to be in fraud of creditors. From a decree in favor of complainants, defendants appeal. **Reversed.**

A. De Unger, for appellants. A. Hugg, for respondents.

LUDLOW, J. Bill in this cause was filed by Newell & Ridgeway, as judgment creditors of Samuel G. Stone, to annul a deed of land in Camden county, N. J., referred to in bill made by said debtor, Stone, January 15, 1894, and prior to said judgment to John R. Jackson, alleging that said conveyance was made to hinder, delay, and defraud the creditors of said Stone. The case was heard on bill, answer, and proofs, before Mr. Vice Chancellor Bird, who held the deed to be void as to the complainant and others, judg-

ment creditors of Stone, on the said grounds as stated in the bill, and advised decree accordingly. The facts, as shown in the case before this court, and which have been carefully considered, do not, in our judgment, sustain or warrant the conclusion of the learned vice chancellor who heard and decided the cause. In our opinion, the sale and conveyance of the premises referred to in the bill, made by Stone and wife to Jackson, were fair and in good faith. The consideration which was paid to Stone therefor by Jackson (\$10,000) was the full and fair value of the property. There is nothing in the case which satisfactorily indicates that the defendant Stone made said sale or deed with any fraudulent intent or purpose, as charged in the bill; and there is no evidence, and nothing from which any reasonable inference can be drawn, that if any such fraudulent intent or purpose did exist in the mind of Stone in the said transaction, the defendant Jackson had, or could be chargeable with, any knowledge of, or participation in, any such intent or purpose. The decree of the court of chancery should be reversed.

(53 N. J. L. 400)

PIERCE v. CAMDEN, G. & W. RY. CO.

(Court of Errors and Appeals of New Jersey.
April 21, 1896.)

CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

Intestate, who had been in the employ of defendant trolley company for about a month as extra conductor, and had been over that part of the road where the accident happened but once prior thereto, was collecting fares from a platform step which ran along the length of the car, and, while reaching to the bell rope to register a fare, struck his head against a pole which was only $6\frac{1}{2}$ inches from the outside edge of the step, and was killed; the pole next to the one causing the accident being 10 inches from the step. *Held*, that it was for the jury to determine whether intestate was guilty of contributory negligence, there being no direct proof that he had knowledge of the pole which caused the accident.

Error to supreme court.

Action by Rebecca C. Pierce, administratrix of the estate of John H. Pierce, deceased, against the Camden, Gloucester & Woodbury Railway Company. A motion for nonsuit was granted, and plaintiff brings error. Reversed.

J. W. Westcott and H. S. Scovel, for plaintiff in error. J. W. Morgan and D. J. Pancoast, for defendant in error.

LUDLOW, J. This suit was brought by the plaintiff administratrix, under the statute, to recover damages for the death of her intestate, caused, as alleged, by negligence of defendant company. On the trial there was a motion for nonsuit at the close of plaintiff's evidence, which was granted by the court, and exception thereto sealed, and this writ of error is brought to review that judicial action. The case shows that the in-

testate, Pierce, was hired August 13, 1894, by the defendant company (defendant in error) for occasional service as an extra conductor on the company's trolley road operated between Camden and Woodbury. It was an ordinary trolley road, with double tracks; having its wires fastened to poles set on the outside of the tracks, generally, along its route, which is about seven or eight miles. The intestate had formerly acted as a conductor, for about 11 months, on the Camden Horse Railroad, in the city of Camden. It does not appear that, before or at the time he went into defendant company's service, he had any knowledge as to its said road, the method of construction, or of the company's way of operating it. He was set to work occasionally, for the first two or three weeks, as conductor on the lower end of the route,—a branch between Woodbury and Almonesson, the cars of which did not run this side of Woodbury. He did not have steady employment. What work he had was for the most part on that lower branch, and it was not clearly proved that prior to September 15, 1894, he ran a car, as conductor, on the main route, between Woodbury and Camden, except for one day,—September 11th. On the night of September 15, 1894, about 10 o'clock, he left Woodbury for Camden in charge of an open car, or trailer, having several passengers. This sort of a car is open on both sides. Its seats for passengers run crosswise the whole width of the car, and on each side, projecting therefrom, is a platform step, about $7\frac{1}{2}$ inches wide, running the car's length, which is for the use of passengers getting on and off, and particularly for the use of conductors for collecting and registering fares; the rope for registry of fares running along the upper part of the car, within reach of this platform step. On the night above mentioned, as this car left the limits of Woodbury, going at rapid speed, the conductor, Pierce, was moving along the platform step, attending to his business; and, as he was reaching up for the registry rope to mark a fare, his head came in contact with a pole standing close to the car, and he was knocked off and almost instantly killed. A passenger who happened to be looking at the conductor at the moment says that he saw him fall, and that the night was so dark that the pole could not be seen until at the very instant when it struck the conductor's head. It was discovered that the pole by which the conductor was hit stood on the center space between the double tracks, and was only $6\frac{1}{2}$ inches away from the outside edge of that platform step where the conductor was at work, and that it was one of a few (five or six) poles which, for some reason, had been set at that particular locality (just outside of Woodbury, in the country part of the road) in the center space between the double tracks; these five or six poles

were set about 90 to 120 feet apart, covering a distance of a few hundred feet; and that the next pole north of the one which hit the conductor was set 10 inches off from said outer edge of said platform step. The plaintiff's case having rested, a nonsuit was directed by the learned justice who tried the cause, on the grounds on which the motion was based:

1. That the intestate knew of the danger and risk that his position as conductor involved, on that particular route, from the pole in question. As there was no direct evidence in the case proving any such knowledge on the part of the intestate, it was a matter of inference, from the facts, whether he had or had not such knowledge, which was for the jury to determine.

2. That the intestate was negligent in being unnecessarily on that side of the car while passing the pole which caused his death. This depended on the intestate's knowledge of the danger, and was also, as the case stood, a matter solely for the jury. The car was going at rapid speed on a very dark night.

3. That the danger from this pole was obvious, and not latent, and was assumed by the contract of service. This was a question of fact, under all the circumstances as shown in this case. Some of the five or six poles were set irregularly, as to distance from passing cars. One was 10 inches off, another 6½ inches off, and all were from 90 to 120 feet apart. One might be passed in safety, and another not. Such a dangerous irregularity in the planting of these poles might, and might not, be discoverable to persons in rapidly passing cars, exercising ordinary, reasonable care and observation; and while the intestate had on one occasion run a car on this part of the route, and passed the poles in question, he may have been on the opposite side of the car at that moment, or he may have passed other of these poles at that place in safety. He may on that occasion have run a close car, and not an open car. But there was no direct evidence in the case before the court that the deceased ever had any knowledge of the pole in question, or of the danger or risks therefrom; and whether or not he ought to have known of the danger from the pole by which he was hit was a matter of inference from the facts, and was for the jury. *Railroad Co. v. Marion*, 57 N. J. Law, 94, 30 Atl. 316, is in some respects applicable to the matter before us. Let the judgment of nonsuit be reversed, and venire de novo issue.

STIEFEL v. STIEFEL.

(Court of Chancery of New Jersey. June 24, 1896.)

DIVORCE—ADULTERY—EVIDENCE.

In an action by a husband for divorce on the ground of adultery, evidence that the wife,

who lived apart from plaintiff, and received little from him towards her support, sustained intimate relations with a man who lived at her house, and who was known to some of the neighbors as her husband, is insufficient, in the absence of any direct proof of improper relations, to sustain a decree for plaintiff.

Petition by Isaac Stiefel against Kate Stiefel for a divorce. Dismissed.

Geo. G. Tennant, for petitioner. Hudspeth & Puster, for defendant.

STEVENS, V. C. The petitioner and defendant were married in the city of New York on August 17, 1879. The petitioner was at that time only 18 years old, and the defendant only 15. A short time before the marriage they had had sexual intercourse, causing pregnancy. They were married with the knowledge and consent of defendant's parents, but without the knowledge of petitioner's parents, who were not informed of the marriage until shortly before the commencement of this suit. They have never lived together. After the marriage, defendant continued to live at her parents' home until her mother's death,—a period of about 10 years. The child was born on February 1, 1880, and died within a year or two after defendant's mother died. On the mother's death, the family, consisting of several brothers and sisters, broke up, and defendant rented rooms in Fifth street, New York, keeping, she says, boarders. She lived there over a year and a half. After that she moved three or four times to different houses in New York City, and then rented a small house in Bayonne, where she lived about two years. From there she went back to New York. After that she lived for a short time in Greenville, then again returned to New York, and is now living in Jersey City. During all this time she supported herself at times by working in a store, at times by sewing or working for a milliner, and also by keeping boarders. It is admitted that because of her husband's wishes she never assumed his name. While her child lived, the petitioner contributed a small sum to his support. It is admitted by both sides that petitioner and defendant had no sexual intercourse until the death of defendant's mother. After that time the defendant says they had, occasionally. The petitioner denies it. It would seem from the testimony of both parties that, while they had little or no affection for each other, they were not unfriendly, and met frequently. The acts of adultery charged against defendant in petitioner's amended petition are first with Philip Bulkley and Adolph Brash in the summer of 1893, and then with one Murphy, otherwise called Schwarz, from April, 1892, to May, 1894, and during the months of October, November, and December, 1895, and January and February, 1896. The acts of adultery charged to have been committed with Bulkley and Brash are said to have taken place in Bayonne. The story is that Bulkley, who is a meat carrier in Washing-

ton Market; and employed in the establishment in which petitioner is the bookkeeper, was invited by defendant and her friend Carrie Jennings to come over and see them at Bayonne; that he invited Brash, another carrier in the same establishment, to go with him; that they went to the house in which defendant was then living, took dinner there, and that afterwards the two men and the two women went together to a saloon on the corner of Twenty-Second street and Avenue D, and there had sexual intercourse in the two small sitting rooms back of the barroom. The story as told by the two men is not corroborated, and appears to me to be incredible. It is impossible to believe that any but the lowest and most shameless prostitutes could have participated in such an affair as these men speak of. There is no evidence to show that the saloon was of such a character, or so situated, as to make the place a suitable one for such an occurrence; and there is no evidence, outside of the testimony of the men themselves, to impeach the character of Miss Jennings, or to indicate that defendant herself was so lost to all sense of shame that she could have been the contriver of it. Miss Jennings and the defendant deny the story in toto, and there was nothing in the appearance or demeanor of either witness to suggest its truth. The two men testify that while at dinner at defendant's house they were waited on by Rebecca Sears, whom they said they identified as present in the court room. Rebecca Sears denies that they were there, or that she ever saw them. The decided weight of the evidence is against the petitioner on this branch of his case. The second charge of adultery has far more appearance of probability. The pertinent facts are these: Murphy's real name was Schwarz. Under that name he had been a frequent visitor at the house of defendant's mother during the latter part of her life. He styles himself a comedian, and he appeared in that kind of performances called "variety shows." He was, he says, commonly known as "the Dutch Murphy." He saw in defendant, who had a vivacious and humorous disposition, an aptitude for the stage, and he proposed a combination between them under the stage name of "Murphy & Fields." He taught her a few songs and dances, and showed her how to conduct a burlesque sparring match with him. They appeared from time to time in variety shows and benefits, given mostly in the city of New York and its vicinity. On one occasion they went with a troupe as far as Marietta, Ohio. At times he took up his residence in the house or flat rented by defendant, and she, too, was generally known by the name of Murphy; but whether Mrs. Murphy or Miss Murphy is one of the questions in dispute. The petitioner's case consists in proof of these facts. In addition he produces a witness—a Mrs. Lees—to prove that while living in Bayonne she on one occasion introduced Mr. Murphy to her as her

husband. The evidence of this witness is, however, not supported, in respect of the words of introduction used, by the recollection of her husband, who was present at the time, and it might have been the product of the not unnatural inference drawn by the witness from her belief as to the situation. Still the petitioner's evidence, standing alone, would, I think, warrant the conclusion that Murphy and defendant lived together in Bayonne as man and wife. It is noticeable, however, that this evidence (except that of Mrs. Lees) does not necessarily point to guilt. The case is devoid of testimony (such as is usual in such cases) going to show improper conduct. The parties are not represented by any one as indulging in any familiarity. No clandestine meetings are testified to. No proof is given that they ever occupied the same apartment. The inference of adultery committed at Bayonne is sought to be drawn merely from the fact that they lived in the same house, that they were known by some of the neighbors as Mr. and Mrs. Murphy, and that on the one occasion above alluded to defendant is said to have introduced Mr. Murphy to Mr. and Mrs. Lees as her husband. On the part of the defendant, we have, first, the evidence of the defendant herself, who admits that she had an occasional business connection with Schwarz, otherwise called Murphy, of the kind mentioned, but denies that she sustained any other relation to him. She says that he, with others, at different times, boarded at her house, for the purpose of helping her to earn a livelihood. In this she is corroborated by Schwartz himself; by Carrie Jennings, who says that she herself occupied the same room with defendant, and that Schwarz occupied another room, either alone or with some other boarder; by Rebecca Sears, the servant in the house; and by McCormick, a boarder for nine months, who testifies to having occupied the same room with Schwarz. It must be remembered, moreover, that Mrs. Stiefel was placed in a position of considerable hardship and difficulty. Her situation was abnormal. She was married to petitioner, who was under an obligation to take her to his home, and to give her adequate support, but who, for prudential reasons, did not do so. While he did not absolutely cast her off, he contributed almost nothing to her maintenance, and was himself, to some extent, responsible for her mode of life. It does not appear that after she became of age he ever offered to live with her and support her, or that she ever evinced unwillingness to do so. Under these circumstances, it would be straining things to say that she had not a right to take as a boarder the one friend who appears to have been willing to give her practical assistance, and that, if she did, she must, without direct proof, be deemed to be criminal. While the occupation she at times chose to follow exposed her to temptation, and while her close association with her stage partner was such

as to arouse suspicion, still, in her trying and peculiar situation,—a situation in part at least created by her husband,—I do not think I would be warranted in inferring adultery from the facts testified to by plaintiff's witnesses, explained as they are by defendant and her witnesses. The bill should be dismissed.

(54 N. J. E. 607)

WALTON v. WALTON et al.

(Court of Chancery of New Jersey. July 8, 1896.)

CONTEMPT — WHAT CONSTITUTES — INABILITY TO SATISFY JUDGMENT — PLEADING.

1. Failure of defendant to comply with a decree against him for the payment of money is not ground for attachment for contempt, where defendant is unable, because of poverty, to make such payment.

2. The fact that defendant, while the action in which the decree was rendered was pending, mortgaged his property, and expended money for counsel fees to secure a modification of a decree, does not constitute a contempt, the mortgage being made in good faith to secure a pre-existing debt.

3. The fact of defendant's inability to pay was properly pleaded in answer to the application for attachment for contempt in failing to pay money under a decree.

Action by Alfred C. Walton against William P. Walton, executor of the will of William Walton, deceased, and Jacob Vreeland, Jr., a trustee under the will, praying for the removal of the trustee and a recovery of the trust funds. There was a decree against the defendant Walton for payment of the amount of the trust fund, and appointing John Wright trustee in place of defendant Vreeland. The defendant Walton having failed to pay over the money under the decree, the trustee, Wright, applied for an order to attach him as for a contempt. Application denied.

Barton & Dawes, for petitioner, Wright. E. R. Walker and G. D. W. Vroom, for defendant W. P. Walton.

GREY, V. C. This is an application for an order to attach the defendant William P. Walton as for a contempt for disobeying an amended decree made in this court in this cause on April 21, 1896, and duly served upon him; directing him, within two days after such service, to pay to the petitioner, John Wright, trustee, etc., the sum of \$1,938.76, with interest from August 1, 1892, and further directing him and one Jacob Vreeland, Jr., to pay costs and counsel fee. The facts shown upon which it is claimed the defendant William P. Walton should be attached are these: William P. Walton was executor of the will of his father, William Walton, who died in the year 1876. By the will the executor was directed to pay \$2,800 into the hands of Jacob Vreeland, Jr., also a defendant in this suit, and Vreeland was directed to pay the interest thereof to the complainant, Alfred C. Walton, quarterly during his

life, and, if he married and left heirs, at his death to pay the principal sum "to said heir or heirs, as the case may be, but, in case he should die, without any heirs, then the said sum of \$2,800 to be equally divided between my [testator's] other children." Vreeland was a son-in-law of the testator, and at the time of the settlement of the estate, March, 1878, was worth \$13,000. The executor, by arrangement with Vreeland, and by his direction, in settlement of this legacy, paid over \$1,938.76 (part of this \$2,800) to several of Vreeland's creditors, on whose claims he (the executor) was surety, and paid only the residue, \$861.24, directly to Vreeland himself. Vreeland, as part of this settlement, gave to the executor a bond and mortgage conditioned that he (Vreeland) should pay the interest as above stated to Alfred, and the \$2,800 principal to his heirs, and, in default of heirs, to the testator's children, as prescribed in the will. In 1881 the executor consulted counsel regarding his responsibility under the will as to this legacy. He stated to the lawyer whom he consulted that he had paid the money into the hands of Vreeland, and was advised that Vreeland was trustee, and that he, and not the executor, was responsible for the money, and that Vreeland was not bound to give any mortgage securing it. There seems to have been no disclosure by the executor to his counsel of the fact that the larger part of the legacy had, by Vreeland's direction, been paid by the executor to certain of Vreeland's creditors. There is no evidence that there was any fraudulent purpose in omitting to state this fact to his counsel. The executor seems to have believed that his payment by the direction of Vreeland, then entirely solvent, to other persons, was in fact a payment to Vreeland as directed by the will. Acting on this opinion thus obtained, the executor shortly afterwards canceled the mortgage. Vreeland continued to pay the interest to Alfred until 1892, when he failed; and the bill was filed in this cause, making the executor, Vreeland, and the children of the testator, defendants, and praying that Vreeland and the executor might be decreed to be personally responsible for the \$2,800 and interest, and that Vreeland might be removed as trustee, and a new trustee appointed. In the meanwhile the executor had become financially insolvent, and pending this suit, during an extension of time to answer, he placed a mortgage to one Allen upon his farm, securing in great part previously existing debts. No defense was made to the bill of complaint in this cause, and a decree pro confesso was entered, and on February 25, 1896, final decree was taken, removing Vreeland, and appointing John Wright (the petitioner for the attachment against Walton) as trustee, and directing the executor and Vreeland to pay the \$2,800, with interest from August, 1892; the latter decree being afterwards (on April 21, 1896)

amended, so as to direct the payment by the executor and Vreeland of only the \$1,938.76, and interest from August, 1892, with costs to be taxed, and counsel fee of \$50. The petitioner, Wright (the new trustee), caused the amended decree to be served on the executor, and prays that he may be attached for disobedience of its command. The executor admits the service, and, by his answer, says he is, because of his poverty, unable to obey the decree. The evidence taken on the hearing indisputably proves that the executor has no money wherewith to make the payment decreed to be made, and has no property except that which he now offers to the trustee. He delivered to the petitioner, as trustee, on the hearing, in the presence of the court: (1) A deed conveying his interest in his farm; (2) a bill of sale for his horse and two wagons; (3) an assignment of his interest as lessor in the lease of the farm. These include all the property which he has been shown to possess, and these transfers are now in the possession of the trustee, awaiting his acceptance.

An attempt was made to influence the action of the court by showing that the complainant, who is entitled to the interest on the fund which has been dissipated, and two of the possible distributees, do not desire the executor to be attached. But it appears that the trustee has the legal right to these moneys, and may be responsible, not only to these parties, but also to others who do not appear. The petitioner, as trustee, being entitled to receive the fund, has the right to select such method of procedure to secure it as he may be advised and may determine will most fully conduce to that end. The act of contempt alleged is the omission to pay the money when ordered to make payment by decree of this court. The only answer offered is the declaration that the defendant executor is, because of his poverty, unable to pay the money in compliance with the order of the court. The petitioner insists that no such answer can be received; that the court should direct an attachment in the first instance, because of the failure to obey; that inability to perform can only be set up on application to be liberated, and if, after a proper time of incarceration, it appears that the defendant cannot comply with the decree, he can then be set free. The rule is that any facts existing when the application to hold for contempt is made, which would support a motion to enlarge from custody, ought to be shown in answer to the application to hold the defendant in contempt. The defendant, on the coming in of the order to show cause, should frankly exhibit the intent which actuates him, although he fails to obey, and state the circumstances which show obedience to be beyond his power. Such a condition, when fairly proven to be actually existing when the decree was made, is to be considered as a showing of cause why the

supposed offense was not committed. If it be true that the defendant could not, at any time since the making of the decree for payment, perform it, he certainly could not be in contempt of it; for the existence of a contempt of this character presupposes that, being able to perform the decree, the defendant willfully refuses or omits to obey. In *Wartman v. Wartman*, Taney, 362, Fed. Cas. No. 17,210, it was held that the existing excuse relied on must be set up in answer to the application for the attachment, and would not secure a discharge after contempt. In *State v. Gulick*, 17 N. J. Law, 437, the supreme court held that it was too late for the defendant to excuse himself after the rule to attach was made absolute, unless by some matter which had arisen since the rule was made absolute.

There remains the further question of the sufficiency of the excuse which the defendant makes. The proceedings in the cause show that the defendant executor has not for many years had any part of the testator's assets in his hands. The decree does not direct him to fulfill the trust which he undertook, nor to deliver any such assets to the trustee. The bill prays, and the decree directs, that the defendant shall be personally responsible, and shall pay certain sums of money to the trustee. It is a decree for the payment of money. The defendant shows to the court that he has neither money nor property with which to perform the decree. The object of the application in this case is not the assertion of the dignity of the court, which has not been directly contemned, but it is the redress of the wrong done to the petitioner by the failure to obey the court's decree. The defendant executor, against whom the attachment was made, declares by his answer and testimony that he intends no disrespect to the court by his omission to obey its decree; that his reason for not obeying is that the decree directs him to pay money; that he is utterly insolvent, and has, since the decree was made, had no sufficient property or money to apply in such payment, but he tenders to the new trustee everything that he has, and submits whether he is in contempt for his failure to perform, when performance is impossible to him. This proof of inability to perform is, as above stated, not refuted. It is alleged that the defendant made a mortgage to Allen while his time to answer the bill of complaint was under extension, and that this mortgage was a fraudulent anticipation of the decree, and that he has spent a considerable sum in the defense of the recovery in this suit, which should have been applied in satisfaction of the decree, and that he has declared he would not pay the petitioner's claim. I think the evidence shows that the mortgage to Allen was made in good faith, in great part to secure pre-existing debts, that the small sum of cash paid the defendant might readily have been used before the decree was made, and therefore before it was obligatory upon him,

and was too small to suggest a fraudulent purpose in making the mortgage, so that his testimony that he has no money or property sufficient to pay the sum decreed must be taken to be true. At the time the mortgage was made a defense to the claim set up in the bill was still open, and there is no proof that there was any fraudulent purpose in securing the extension of time, which was done in the ordinary way, through counsel; and the transaction has no other coloring than an exercise by the defendant of his right to prefer Allen, whose debts he admitted, rather than the complainant, whose claim he denied, and expected at that time to defend. The defendant's expenditure of money in defending these proceedings, by employing counsel, etc., on application to open and amend the decree (in which he was in part successful), and in defense of the petition to attach him, cannot be imputed to him as in contempt of the decree. He had a clear right to make a defense and to employ counsel, even against the final decree, by petition to open or amend, or by appeal, or to answer the petition in this matter to save him his liberty. To hold his expenditures, fairly made for the purpose of exercising this right, to be in contempt, would be an interference with an indisputable privilege. So his declarations, pending the proceedings, that he would not pay, are to be taken in connection with the whole of the proofs as to his state of mind on this subject, and they show that during the period of struggle to lessen the decree or to secure a new hearing he made these statements. It is nowhere shown that he had the means to pay, and that he refused to apply them to the satisfaction of the decree. I think the evidence shows that the defendant is unable to make the payment which he is directed to make by the decree, and that this is a sufficient answer to the petition to hold him as for a contempt for nonperformance of the order of the court. There is no proof of any purpose to defy the court's decree, or of a fraudulent purpose to avoid obedience. In *State v. Trumbull*, 4 N. J. Law, 139, it was held that, to justify an attachment for not obeying process of the court, it must appear "that the disobedience was of such a nature as to indicate a design to condemn the process or authority of the court." *Dodd v. Una*, 40 N. J. Eq. 719, 5 Atl. 155; *Fraas v. Barlement*, 25 N. J. Eq. 86. Inability to perform a decree for payment of money, because of the insolvency of the defendant, has been held a sufficient ground on which to refuse an attachment. In *McClure v. Gulick*, 17 N. J. Law, 343, it was declared that upon a proper case made, such as insolvency of the defendant clearly established, attachment might be refused. So, also, in *State v. Gulick*, Id. 436. In *Adams v. Haskell*, 6 Cal. 318, it was held that where, on application for an attachment for not obeying an order to pay money, the defendant proved without contradiction that he had complied as fully as it was in his

power with the order of the court, he could not be imprisoned for neglecting to perform an act which was not in his power, and an order imprisoning him was reversed. I think the prayer of the petitioner must be refused, but without costs as against the petitioner, and without prejudice to a renewal of this application if any additional facts be presented, or the taking by the trustee of any step to enforce the decree by any other mode than the present petition.

(54 N. J. E. 333)

JOHNSON v. CONOVER et al.

(Court of Chancery of New Jersey. July 10, 1896.)

WILLS—DEMONSTRATIVE LEGACY—CHARGE ON LAND.

1. A bequest to a wife of "the sum of \$8,000 invested in stocks, the interest to be paid to her during her life," is a demonstrative legacy.

2. This legacy is not a charge upon the real estate either by reason of an equitable conversion of the realty, inasmuch as the order to sell the real estate is for the purpose of distribution, and not to pay legacies; or by a gift of the residue of the real and personal property in one mass, inasmuch as the last clause of the will contains a gift of all the proceeds of the sale of the real estate.

(Syllabus by the Court.)

Bill by Henry W. Johnson, executor, against Huldah H. Conover and others.

Hawkins & Durand, for complainant. Frank P. McDermott, for residuary legatees. Alfred Walling, for executor of Margaret Conover.

REED, V. C. This bill, although filed in the nature of a bill of interpleader, is in reality a bill by an executor to obtain a decree construing the will of his testator. The first question propounded is whether the bequest of testator's wife of "the sum of eight thousand dollars, invested in stocks, the interest thereof to be paid to her during life," is a specific or a demonstrative legacy. The second question is whether, if it be a general legacy, it is chargeable upon the real estate of the testator.

The facts of the case are these: Peter P. Conover died November 15, 1890. By his will, after directing his debts and funeral expenses to be paid, he proceeded as follows: "Item: I give and bequeath unto my beloved wife, Margaret, the use of all my household goods and furniture of every kind and description during her life, empowering her to distribute the said property, or any part thereof, to such of my children as she shall think proper to give the same; and in case she should die without disposing of the same, then I order the same to be sold, and the proceeds to be disposed of as hereinafter directed. Item: I give and devise to my wife, Margaret, during her life, the use of my dwelling house and lot whereon I now live; also all my other real estate for life; empowering my executors herein named, with the consent of my wife, to sell and dispose of any part thereof, at public or private sale, as they shall esteem for the best interest of my

estate, and invest the proceeds of such sale in bonds and mortgages or government securities, and pay the interest thereof to my wife during her lifetime. Item: I give and bequeath unto my beloved wife, Margaret, the sum of eight thousand dollars, invested in stocks, the interest whereof to be paid to her during life. Item: Whereas, I have, for a nominal consideration (no money being paid), conveyed to my son John H. Conover a house and lot in the village of Keyport, I order and direct my executors not to exact from my son John the payment of any money for said property, he having the right to dispose of the same without accounting to my estate. Item: I give and bequeath unto my wife, Margaret, the interest of all my personal property not hereinbefore mentioned, during her lifetime for her maintenance and support. Item: After the decease of my wife, Margaret, I order and direct that all my real estate not disposed of in the lifetime of my wife be sold by the surviving executor of my estate, and that with proceeds of sale, together with my personal property, he make distribution equally among all my children and my grandchild Peter Frishmuth (excepting my son John), share and share alike, and in event of the death of any of my said children without lawful issue, then I bequeath said share to my children then living, share and share alike. Item: I hereby empower my wife, if she so elect, to devise the sum of eight thousand dollars, the interest whereof I have before directed to be paid to her." The widow, Margaret Conover, died October 1, 1893. She left a will, from which is extracted the following clause: "Second. Whereas, my late husband, Peter P. Conover, in and by his last will and testament, having given and bequeathed to me the interest and income of the sum of eight thousand dollars; and having also, in and by his said last will and testament, empowered me to bequeath and devise the said sum of eight thousand dollars in words as follows: 'Item: I hereby empower my wife, if she so elect, to devise the sum of eight thousand dollars, the interest whereof I have before directed to be paid to her.' Now, therefore, having elected and hereby electing to exercise the said power conferred upon me by said last will and testament of my said husband, I do hereby exercise such power, and in pursuance thereof do dispose of said sum of eight thousand dollars as follows: I give, bequeath, and devise the same unto my daughter, Miss Huldah Conover, and in case of the death of my said daughter before me I do in that event give, bequeath, and devise said sum of eight thousand dollars in equal shares to my two sons, William L. and Elias H. Conover. And I do hereby empower and direct the surviving executor or the legal personal representative of my said husband to pay over and dispose of said sum of eight thousand dollars to the persons to whom I have given, bequeathed, and devised the same as aforesaid." She appointed Alfred Walling as her executor. The will of Peter P. Conover,

already mentioned, was executed June 6, 1878. At that time he seems to have had money invested in stocks. He had 50 shares of Pittsburg, Ft. Wayne & Chicago preferred stock of the par value of \$100 per share. For this stock he had paid \$4,500 in 1868 or 1869, but at the time of the execution of the will it was worth, in the market, \$5,000. He also had at this time three 7 per cent. bonds of the Cincinnati, Richmond & Ft. Wayne Railroad, par value \$1,000 each. The market value in 1878 of this was \$700 per share. It is probable, but not certain, that he had no other stocks. Whether he had any personal property aside from this stock and these bonds in 1878, does not appear in the testimony. It does appear that at the time of his death his personal estate did not amount to \$8,000. He died seised of real estate worth upwards of \$15,000, all of which he had owned from the time of the execution of his will. The value of his real estate at the time he made his will is estimated at \$25,000 to \$30,000. Testator sold the 50 shares of railroad stocks in May, 1888, for \$7,000.

In addition to the testimony taken before the master to show these facts, there was also testimony introduced for the purpose of showing that a part of the testator's estate had come to him through relatives of his wife. Elias Conover, son of the testator, testified that he heard a conversation between his father and his mother, more than 19 years ago. His father, he says, handed his mother a paper, and said, "'Mother, there is the paper that I promised you.' She took it, looked at it, and said, 'It should have been for \$2,000 more;' that it was \$6,000 she got by her father; the \$2,000 she got from her brother, her mother, and her aunt. Father said he had no recollection of anything of that kind about the \$2,000. She kept this paper for \$6,000." This testimony was objected to as incompetent and immaterial. It was material for the purpose of showing an admission on the part of the testator that he recognized his wife's claim against him, of some kind, for at least \$6,000, and therefore as displaying the relations existing between him and his wife in respect to the property at the time he made his will. But it was delivered by Elias Conover, a party to the suit, a son of the testator, and a residuary legatee under the will of his father. His share of the estate, and therefore his claim against the executors, will be affected by the decision of the question at issue in the suit. The executor, it is true, was sworn, but his testimony was not clearly in respect to transactions with or conversations by the testator. So I think the testimony of Elias was incompetent. *Smith v. Burnet*, 35 N. J. Eq. 314.

The first question, as already observed, is whether the bequest of the \$1,000 contained in the third clause of Peter P. Conover's will is a specific or a demonstrative legacy. The importance of this question arises out of the fact that the testator, during his life,

converted the stocks mentioned in that clause, so that at his death they were non-existent as a part of his estate. One of the attributes of a specific, as distinguished from a general, legacy, or a demonstrative legacy, is that, if the property given in specie does not exist at the death of the testator, there is nothing upon which the gift can take effect, and the legacy is necessarily lost. A general legacy is payable out of any personality, or, if properly charged, out of the real estate, of the deceased. In this respect a demonstrative legacy has the quality of a general legacy. It differs from a specific legacy in this respect: that the former bequeathes certain property in specie, while the latter gives generally a sum of money to be primarily raised out of certain specified property. If there is none of the property existing out of which it is to be raised, it becomes a general legacy, payable out of the general estate. If a part of the property is existing, but such part is insufficient to pay all of the demonstrative legacy, the remainder becomes a general legacy. So it is never adeemed by the nonexistence of the specific property out of which it is directed to be raised. If, therefore, the gift in question is demonstrative,—i. e. of a sum of \$1,000, to be raised out of stocks,—then, the stocks not being in existence at the time of Conover's death, it is a general legacy, payable out of his estate as such. If, however, the gift was of the stock in specie, nothing passed to his widow for her disposition by will. On account of this liability to extinguishment contrary to the intention of the testator by the destruction or conversion of the property specifically given, the tendency of courts is to lean towards such a construction of the will as will make the bequest general or demonstrative, rather than specific. *Norris v. Thomson's Ex'rs*, 16 N. J. Eq. 218. The language employed by the testator in making the bequest now in question brings it within a much-discussed class of cases. Of all the nice distinctions which have been drawn in arriving at testamentary intent, there are none finer than those which have been evolved by cases of gifts of money, or of a sum of money, coupled with the words "invested in securities," or "in stocks," or "in shares," or "in bonds." Slight indications in other parts of the will are relied upon to discover whether, by the use of such language, the testator meant to give the stocks, or securities, or bonds, or shares in specie, or whether he merely meant to give a sum of money which happened to be invested in such stocks or bonds, or were to be so invested, and so meant to indicate that the sum of money given was to be paid out of such securities. Perhaps the most cited case in the English court of chancery is *Mytton v. Mytton*, L. R. 19 Eq. 30. A testatrix having £3,000 East India debenture bonds gave a legacy to her executors, in trust to pay to her

nephew "the sum of £3,000, invested in Indian securities." Vice Chancellor Malins held this to be a demonstrative, and not a specific, legacy. In the subsequent case of *Page v. Young*, Id. 501, there was a bequest to "my dear sister" of the interest of £4,500 in the funds, for her absolute use and benefit. This bequest was followed by specific gifts to the same legatee. Then followed the words, "At her death, to M. A. H., the funded property to H. Y." The same vice chancellor who had decided *Mytton v. Mytton* held that this bequest was specific, because, looking at the situation of the testatrix, he was of the opinion that she intended to mean, "my money that is now in the funds." The last reported case decided by the English equity courts of which I am informed is that of *Pratt v. Pratt* (1894) Ch. 491. The bequest in this case was of £800, invested in 2½ consols. Judge North, after a review of many cases, held that this was a specific bequest of the consols. He admits that the only point of difference between this bequest and the one in *Mytton v. Mytton*, supra, consists in the fact that in the former the testator gives "the sum of £3,000," while in the latter he gives, not the sum of, but simply £800. He seems to think that there is a distinction between the gift of "the sum of £——, invested in securities," and of "£——, invested in securities." In *Giddings v. Seward*, 16 N. Y. 363, the bequest was "of the sum of \$1,200, and interest on the same, contained in a bond and mortgage." There was a subsequent provision that the sum was given to the legatee for life, with a limitation over. The New York court of appeals held this to be a demonstrative legacy. Judge Seldon says: "The form of expression is not one that would naturally be chosen to manifest an intention to make a specific bequest of the bond and mortgage itself. The leading subject of the gift is, not the bond and mortgage, but the sum of money mentioned." Little assistance in arriving at testamentary intention in this respect is to be obtained from an examination of the cases in detail. Such an examination would show that in determining whether, by the use of this formula, the testator means to give the sum of money, or to give the specific stock or share or bond in which it is invested, every expression in the will is scanned to arrive at the intention of the testator. When there cannot be found any particular language which can be pressed into use for this purpose, then the courts seem to go upon the ground that the testator is presumed to have intended to make a sensible and equitable disposition of his property; and if the bequest is to a person so related to the testator that the ademption of the gift could not have been anticipated by the testator, then the bequest will be held to be general, to save it from extinction. This seems to

have been the ground upon which *Mytton v. Mytton*, supra, and *Page v. Young*, supra, were decided. If, in the present case, there were no testimony exhibiting the character of the property owned by the testator at the date of the execution of his will, I think it would be clearly inferable that the testator, in using the quoted language, meant \$8,000, which was to be invested in stocks. This would undoubtedly fix upon the gift the character of a general, and not of a specific, legacy. The fact disclosed in the testimony, upon which an argument in favor of regarding it as a specific gift of the stocks is that it seems almost certain that at the time of executing the will the testator held stock and bonds of the nominal value of \$8,000. Therefore, it can be argued, he must have meant to give the sum of \$8,000, then invested in stock. If he had used the form of expression, "now invested in stocks," it would, according to Vice Chancellor Malins in *Page v. Young*, have implied a specific bequest. In *Robinson v. Addison*, 2 Beav. 515, however, the testator owned $15\frac{1}{2}$ shares of the Leeds & Liverpool Canal Company. He gave, in trust, to one legatee, $5\frac{1}{2}$ shares in the Leeds & Liverpool Canal Company, to another 5 shares, and to still another 5 shares. The bequest, it is perceived, was of the exact number of shares owned by the testator at the time of the execution of the will, and yet it was held to be a general legacy. The master of the rolls remarked, "There is no description or reference to show that he meant the particular shares which he had at the date of the will." Looking at the form of words employed in making the present bequest, and at the whole face of the will, it is difficult to say whether the testator meant to give absolutely the sum of \$8,000, or to give the stocks and bonds of the nominal value of \$8,000. It is to be remarked, however, that if he had intended to make a specific gift of the stock and the bonds it would have been easy for him to have given them by name. But by employing the words "the sum of \$8,000," in the first clause, and by repeating it in the succeeding clause, he has left it doubtful whether his intention was not to give the sum of \$8,000, which happened at that time to be invested in what he termed "stocks." It is probable that he had no notion that, in case of the fluctuation in the value of stocks, or from any reason, it should become politic to change these securities, the gift would thereby become extinguished. I shall therefore lean towards that construction which prevents ademption, and hold this to be a demonstrative legacy.

The next question to be resolved is whether this legacy is a charge upon the real estate of the testator. If so, it must be charged by express words or by necessary implication. There are no express words char-

ging it upon the land. But it is claimed that there are several features in the will which display an intention that the legacy shall be paid out of the realty, in default of sufficient personal property. It is insisted that the will provides for an equitable conversion, by which the realty becomes personalty for all the purposes of the will, including the payment of this legacy. In scanning the will it will be perceived that the testator confers upon his executors the power to sell, during the life of his widow, and with her consent, any part of his real estate. This, however, is not a conversion, for the power to sell is a discretionary one, and not a direction to sell. Then there is a further power given. After the death of the widow, the executors are ordered to sell the real estate, and distribute the proceeds to certain persons in certain proportions. This is a peremptory order to sell. But it is apparent that this direction to sell upon the arrival of the period for distributing the estate is only for the purpose of distribution. Now, no rule is more entirely settled than that a conversion directed to be made for a particular purpose transmutes the character of the property only so far as is necessary to effectuate that purpose. If it is for the purpose of paying legacies, it will not throw open the fund to simple contract creditors. 2 Jarm. Willis, 217. But it is said that the object of this conversion is for all the purposes of administration. In support of this the case of *Smith's Ex'x v. First Presbyterian Church of Bloomsbury*, 26 N. J. Eq. 132, is cited. That case, however, is dissimilar in its features from this. There are several particulars in which it differs, and upon these particular features the chancellor relied in holding that the testator intended in that case an out and out conversion for all the purposes of the will. From the will, taken together with the testimony in that case, the chancellor found that it was apparent to the testator at the time he made his will that his personalty was entirely inadequate to pay his debts and legacies. Again, the testator directed a part of his realty to be sold, and out of the price that all debts should be "first paid." This was held to import that legacies should be subsequently paid out of the same fund. Again, the testator expressed an intention to dispose of his whole property, while in fact, if the proceeds of the land were not applicable to the payment of the legacies, it was not disposed of at all by the will. Now, none of these features appear in the present instance. It does not appear that the testator knew that his personalty was insufficient to pay his debts, as well as this legacy. Again, there is no clause ordering his debts to be paid for, first or last, out of the proceeds of any real estate. Again, it does not appear that the testator knew that he would die intestate if this legacy was not paid out of the proceeds of his realty. All the features,

therefore, which were relied upon in the preceding case as the ground of decision are absent from this. It may be remarked also that the clause providing for the sale of land and distribution of proceeds is the same as that found in the will construed in *Leigh v. Savidge*, 14 N. J. Eq. 125. The question in that case was whether certain legacies were chargeable upon the land. It was held that they were, but the direction for sale and the division of the proceeds was not even advanced as a ground for reaching that result. It seems to me that the sale of the real estate, made during the life of the widow, under the discretionary power, as well as the sale ordered to be made at her death, were for purposes other than the payment of this legacy.

But it is insisted that at least the proceeds of the sale of real estate, made during the life of the widow, with her consent, must be regarded as personalty, otherwise the testator died intestate as to the proceeds of such sale; and that, if it be regarded as personalty at all, it is applicable to the payment of this legacy. As already stated, the testator did empower his executor to sell any of his real estate, with the consent of the widow, during her life, and to invest the proceeds thereof, and to pay her the interest arising from the same, during her life. This power was so far executed that there appears to have been sold during this period enough of the real estate to realize the sum of \$2,250. If this sum is to be regarded as real estate for all purposes, then, in respect to it, the testator undoubtedly died intestate. This appears from the last clause of the will, in which he orders his real estate to be sold after the death of his widow, and the proceeds of such sale, together with his personal property, to be distributed. All that was to be distributed, therefore, of his real estate, under this clause, was such as was sold subsequent to the death of the widow. The real estate which produced the \$2,250 having been sold before the death of the widow, these proceeds were unaffected by this clause, unless the testator regarded it as personalty for the purpose of distribution, after his widow's death, as well as for the purpose of investment during her life. In my judgment, this was his intention. He regarded any money, or evidence of debt existing at the arrival of the period of distribution, whether derived from the previous sale of realty or not, as personal property for the purpose of distribution. If this was his intention, then he did not die intestate of any portion of his estate. But, if this view is erroneous, still there is absolutely nothing to show that he expected that any property sold during the life of his widow would be required to pay this legacy, and that by such application intestacy would be prevented. So I conclude there was no conversion of the property, except for the purpose mentioned, which purpose did not in-

clude the payment of this legacy. But the appointee of the widow invokes another rule of construction, which it is claimed charged this legacy upon the land. This doctrine is known as the rule in *Greville v. Browne*, 7 H. L. Cas. 689, adopted by the court of appeals in the case of *Corwine v. Corwine*, 24 N. J. Eq. 579, and followed and explained in *Johnson v. Poulson*, 32 N. J. Eq. 390. This doctrine is that, where legacies are given generally, and the residue of the real and personal property is afterwards given in one mass, the legacies are a charge upon the residuary, real as well as personal property. But there is no blending of a residue of real or personal property in this will; the whole proceeds of the real estate is given in the last clause. I will advise a decree, therefore, that the sum of \$8,000 was given as a demonstrative legacy, but that it was not chargeable upon the real estate of the testator.

LAND TITLE & TRUST CO. et al. v. KOHLENBERG et al.

(Court of Chancery of New Jersey. July 17, 1896.)

EQUITY—MISTAKE—SATISFACTION OF MORTGAGE—REINSTATEMENT.

The attorneys holding a mortgage for foreclosure forwarded to the mortgagee, at its request, an order from the mortgagor, on an insurance company, for the amount supposed to have been agreed on in adjustment of a loss on the property, which, under the policy, was payable to the mortgagee, and a cash payment of the amount remaining due on the mortgage, and, in the belief that it was paid, satisfied the mortgage of record; the cash payment being part of the proceeds of a new mortgage on the property, made by the mortgagor with an understanding that it should be the first lien. The insurance company refused to pay the amount expected, but, as authorized by the policy, tendered full payment of the mortgage, and demanded its assignment. *Held* that, it appearing that the mortgagee had not in fact authorized the satisfaction of the mortgage, it was done through mistake, and the mortgage would be reinstated on repayment of the amount received from the proceeds of the second mortgage, the holder of such mortgage having taken it while the first mortgage stood of record.

Bill by the Land Title & Trust Company, as trustee, against August F. H. Kohlenberg and others, to set aside and cancel the satisfaction of a mortgage. Decree for complainant.

This bill is filed for the purpose of having expunged from the record of the county clerk's office of Camden county the entry of satisfaction of a mortgage. The history of the transaction from which the present litigation springs is this: Kohlenberg had borrowed money from the Mutual Guarantee Building & Loan Association of New Jersey, doing business in Philadelphia and in Camden. To secure the payment of this loan, Kohlenberg and wife gave a mortgage upon property which seems to have been the wife's,

situate in Camden. This mortgage was dated March 1, 1894, and was recorded on March 2, 1894. The building and loan association had previously entered into an agreement with the complainant, the Land Title & Trust Company,—a company organized under the laws of Pennsylvania, and doing business in Philadelphia. This agreement recited that it had been deemed advisable by the building and loan association to keep its loan funds separate from its other funds in the hands of a trustee; therefore it was agreed that the building and loan association should pay to the trust company all sums of money received for subscriptions, except those paid for subscriptions received at its office in Philadelphia. The trust company was to hold the same in trust (among other things), to make investments of the loan fund, under the directions of the said building association, in first mortgages upon real estate, payment for which mortgages should be made by the said trustee only in accordance with an order signed by the president, secretary, and chairman of the loan committee of the building association. All mortgages were to be taken in the name of the "Land Title & Trust Company, trustee of the loan fund of the Mutual Guarantee Building Association." The trustees were to receive payment of all such mortgages, the amount due thereon to be certified by the secretary of the building association. There were a number of other provisions in the agreement which are not material to this inquiry. Among them, the following is pertinent: "The said trustees agree to send, for collection, to any attorney designated by the building association by an order signed by its secretary thereof, any or all mortgages which shall be due by reason of default in payment according to the terms thereof." On July 23, 1894, Mr. Gaffney, the secretary of the building association, wrote to the trust company to send to him the papers in connection with the Kohlenberg mortgage, and the same were so sent. With the mortgage was sent a policy of insurance, issued by the Westchester Fire Insurance Company, insuring Maria Kohlenberg's property for \$1,500. The policy contained what is known as the "New York, Pennsylvania, and New Jersey, Standard Mortgage Clause," by which the loss, if any, was payable to the Land Title & Trust Company, trustee, as its interest might appear. On July 23d, Mr. Gaffney forwarded these papers to Messrs. Bergen & Bergen, who were then attorneys of the building association. Before foreclosure proceedings were begun, the Kohlenberg house was destroyed by fire, of which fact Messrs. Bergen & Bergen informed Mr. Gaffney by a letter under date of August 3, 1894. Now, Mr. McDonald was the local agent of the insurance company, and there seems to have been an agreement entered into, for an adjustment of the loss caused by such fire at the sum of \$1,112. Mr. Gaffney, under date of September 6th, wrote to Messrs. Bergen &

Bergen that Kohlenberg and McDonald had been to see him, and that they were both willing to hand over the insurance money, and that if the building association got this money it might make a new loan to Kohlenberg; that the attorneys should not do anything until further advised. Under date of September 20th, Messrs. Bergen & Bergen, in a letter to Mr. Gaffney, requested him to send a statement of the amount due upon the mortgage, to which letter Mr. Gaffney replied that there was then due \$1,314.10. Mr. Gaffney further wrote that on the receipt of this sum, which must come to the association, the attorneys were authorized to cancel the mortgage. On September 22, 1894, Messrs. Bergen & Bergen wrote to Mr. Gaffney that they understood the insurance company would pay the amount of the adjustment, less a discount of 1 per cent., which Kohlenberg would stand. They also said in that letter, "You can settle with the insurance company in that way, and send in a statement, and we will send balance of the mortgage money to you." To this Mr. Gaffney replied on September 24th "that the manner of adjusting the matter is satisfactory to us. You can send us check for \$213.22, together with a letter from Mr. Kohlenberg authorizing the insurance company to pay to us the amount of claim, less one per cent. discount, and the matter will then be in proper shape." The check and order were sent on September 27th. On September 20th, Kohlenberg and wife had made a mortgage upon the same property to J. Carl D'La Cour, to secure the sum of \$700, which mortgage was recorded on September 21st. Out of the \$700 thus secured was deducted the check of \$213.22 just mentioned, and a portion of the remainder of the sum went for repairs upon the Kohlenberg property. After some correspondence between the insurance company and the trust company concerning the payment of the loss already adjusted, the latter company on November 9th offered to pay the full amount, upon its being subrogated to the position of the trust company by an assignment of the bond and mortgage and the policy accompanying it. In making this offer the insurance company was insisting upon its right under the standard mortgage clause, which is to this effect: "Whenever this company shall pay the mortgagee or trustee any sum for loss or damage under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor exists, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee or trustee the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage, and of all such other securities; but no subrogation shall impair the right of a mortgagee or trustee to recover the full amount of

its claim." The trust company was unable to comply with the condition, for it had not the possession of the mortgage and policy of insurance. On November 13th the mortgage was brought to the county clerk's office, with the seals torn off, and canceled of record. This was done at the instance of Messrs. Bergen & Bergen, who had procured the loan from, and drawn the mortgage to, Mr. D'La Cour.

Lindley M. Garrison, for complainants.
Thos. P. Curley and James Hays, for defendants.

REED, V. C. (after stating the facts). I am entirely satisfied that Messrs. Bergen & Bergen, in directing the entry of satisfaction of the mortgage in question, acted in entire good faith. They supposed, when the mortgage was made to D'La Cour for the purpose of raising the difference between the insurance money and the amount due upon the mortgage held by the trust company, that the insurance money would be promptly paid. Such was the complexion of affairs at that time, that such a belief was entirely rational. Having advised the giving of the D'La Cour mortgage as a first mortgage, these gentlemen undoubtedly supposed that they were authorized by their correspondence with the building association, as well as impelled by their representation to Mr. D'La Cour, to cancel the mortgage. The unexpected hitch occurred by reason of the insurance company insisting upon the assignment of the mortgage and policy. Had it not been for that, all would have been regular and satisfactory. So, therefore, I regard the act of cancellation as one which any attorney, under the same circumstances, would not have been unlikely to execute. Nevertheless, I am of the opinion that the cancellation must be set aside. It is entirely settled that an attorney to whom is intrusted a claim for collection can receive nothing but money in payment of the same, without the clear consent of his client. The cases to this effect are collected in Weeks, Attys. §§ 232, 232a. There was no payment of this mortgage. There was a prospect of payment at one time, but even that had become dependent upon the assignment of the mortgage. Without payment, there was no power in the attorney to cancel the mortgage, unless he was clearly empowered to do so by the association. Now, that Mr. Gaffney did not suppose that he had given such authority is apparent from his letter to the trust company under date of September 28th. But the question is not what he supposed, but what he did. If he conferred such power, its existence must be found in the letters to Messrs. Bergen & Bergen under dates of September 21st and September 24th. Now, in the first of these letters Mr. Gaffney says, "On receipt of \$1,314.10, which amount must come to the association, you are hereby authorized to satisfy the mortgage." Nor does the letter of September 24th modify this express caution.

It only says that upon receipt of an order upon the company to pay, and a check for the balance, the affair will be in proper shape. Mr. Gaffney was speaking of the adjustment of matters, and had expressed his satisfaction with such a method of adjustment, but he did not direct a satisfaction of the mortgage before the adjustment became a finality by the payment of the money by the insurance company. No doubt, he expected at that time that the money would be paid, as did, apparently, all the rest of the parties, except the insurance company. The fact itself that such expectation was defeated by the unexpected insistence of the insurance company that the mortgage should be assigned to it would make the cancellation of the mortgage under such an impression such a mistake that, apart from the question of want of power in the attorneys, a court of equity would lean toward its vacation. Taking into consideration the fact of the existence of the want of authority, it seems entirely clear that the entry of satisfaction should be set aside. That this court has the power to decree a vacation of such entry is too well established for present discussion. *Banking Co. v. Woodruff*, 2 N. J. Eq. 117; *Harris v. Cook*, 28 N. J. Eq. 345; *Building Ass'n v. Thompson*, 31 N. J. Eq. 536. The equity of this action, so far as concerns the trust company and the building association, is clear. Unless the mortgage is re-established, they have no remedy upon it for any claim to the insurance money, because of their want of control over the mortgage. The only person who seems to be in the position to complain of such action is Mr. D'La Cour, who took his first mortgage for \$700 with the assurance that it was to be a first mortgage upon the property. But at the time when he took his mortgage the old mortgage was still on record, and remained so until November 13th. I think he has an equity, but it is only to have the check held by the trust company, of \$213.22, which represents a part of the money which he advanced upon the mortgage, returned to him, he making an indorsement of such an amount as a payment upon his mortgage. So far as Kohlenberg is concerned, if he has a right to the insurance money, I think his position will be unchanged. If he has no such right, then he should not receive the benefit of the payment. When the insurance company attempt to foreclose the mortgage which will be assigned to them under the clause already set out, contained in the contract of insurance, it would seem that the company can only recover the face of the mortgage, less the amount which Kohlenberg is entitled to recover upon his policy. This has been so ruled in the courts of Illinois, upon what I conceive to be correct principle, in *Insurance Co. v. Race*, 142 Ill. 338, 31 N. E. 392. I will advise a decree that the entry of satisfaction be set aside wholly; that the trust company return to Mr. D'La Cour the check of \$213.22; that Mr. D'La Cour indorse the amount thereof as a payment upon his mortgage.

ZURBRUGG v. REED et al.

(Court of Chancery of New Jersey. July 17, 1896.)

EQUITY — DECREE — RES JUDICATA — PARTIES —
MORTGAGE—VALIDITY—INJUNCTION AGAINST
EJECTMENT SUIT.

1. In an action by B.'s devisees and legatees against his executors to annul all deeds made by one of such executors to the other's wife, conveying land of which B. died seised, it appeared that the grantee died testate, and that her husband was her devisee. The court decreed that he held the title to such land as trustee for complainants, and he was ordered to convey to them whatever title he held. Held that, in an action by the grantee of such complainants against such devisee, there was no necessity for a decree that the latter make a deed confirming the title conveyed to complainants by his grantors, since both were bound by the decree in the prior suit.

2. It is improper to compel defendant to make a deed confirming complainant's title to land conveyed by the latter's grantors, when such grantors are not parties.

3. A mortgage of land held in trust by the mortgagor, given to secure an antecedent debt, is invalid as against the cestuis and their grantees.

4. Where, in an action to enjoin a suit in ejectment by the holder of the legal title, defendant insists on his right as owner of the fee in severalty by force of such title, and it appears by decree in a third suit, rendered after the ejectment suit was begun, that he only owns a moiety in fee, and is a tenant in common of defendant's landlord as to the balance of the land, a perpetual injunction will be granted.

Bill by Theophilus Zurbrugg against Nathan S. Reed and Charles T. Colloday to compel defendant Reed to execute a deed confirming complainant's title to certain land, to set aside a mortgage on the land from Reed to Colloday, and to enjoin an ejectment suit by defendant Reed against Carl Seller, tenant in possession. Decree canceling the mortgage, and granting the injunction, without prejudice.

For prior report, see 28 Atl. 264.

The bill states: That on June 19, 1894, Zurbrugg, the complainant, purchased and had conveyed to him by certain devisees of Samuel Bechtold, Jr., their interest in a certain tract of land in Riverside, N. J. That a certain Carl Seller was then in possession of said tract, as a tenant of his grantors. That Nathan S. Reed, one of the defendants, had on March 15, 1894, begun an action of ejectment against said Seller, which suit is now pending. That complainant is informed that said Reed claims title to said tract of land in the following manner, viz.: That one William A. Barnes recovered a judgment against Samuel Bechtold, Jr., in his lifetime, namely, on August 5, 1861; that under an execution issued upon said judgment the said property was sold by the sheriff of Burlington county, and was purchased by Wallace Lippincott; that on June 17, 1872, Lippincott sold the same property to Mary A. Reed, who died leaving a will in which she devised the same to the said Nathan S. Reed. The bill charges that no valid levy was made upon the said

property, nor was the same property advertised by the sheriff. It also charges that Wallace Lippincott, when he purchased the same, was one of the executors of Samuel Bechtold (Nathan S. Reed being the other), and that Lippincott purchased the same for the protection of the Bechtold estate; that he conveyed the same to Mary A. Reed by mistake, supposing that he was making a conveyance to Catherine Bechtold, the widow of said Samuel Bechtold. The bill sets out, also, that in another suit in this court, wherein Henry Bechtold and others, devisees of Samuel Bechtold, Jr., were complainants, and Nathan S. Reed was a defendant, a decree was made on February 11, 1892, that all the land of which Samuel Bechtold, Jr., died seised, and which had been conveyed to Lippincott or Reed, was held in trust by them for the devisees and legatees under the will of said Samuel Bechtold, Jr. The bill charges also that Reed on May 2, 1892, made a mortgage upon said land to one Charles T. Colloday to secure the payment of \$1,500, and that said mortgage was made without consideration. The prayer of the bill is that Nathan S. Reed may be decreed to be a trustee of this land for the benefit of the grantors of the complainant, and that he may be decreed to execute a deed, confirming their deed, to the complainant; also, that the mortgage to Colloday may be set aside, as given without consideration, and as being a fraud upon complainant's grantors; also, that the action of ejectment brought by Reed against Seller, the tenant, may be enjoined. Nathan S. Reed has answered. Colloday has not. In his answer, Reed insists that his title was derived from the sheriff's sale to Lippincott, and Lippincott's conveyance to his wife, and his wife's devise to him is a valid conveyance. He also relies upon a 20-years possession of the land by his wife and himself. He also insists that Carl Seller is a trespasser; that the mortgage to Colloday was given for good consideration, and to secure an indebtedness owing by Reed to the said Colloday.

Joseph H. Gaskill and William C. Mayne, for complainant. Walter A. Barrows, for defendant.

REED, V. C. (after stating the facts). On the hearing the record of the former suit mentioned in the bill was offered in evidence. This suit was brought by certain of the legatees and devisees of Samuel Bechtold, Jr., against Lippincott and Reed, the executors of the estate of Samuel Bechtold, Jr., deceased, for the purpose, among others, of annulling all deeds made by Lippincott to Mary A. Reed. In that suit a decree was made to the following effect: That the said Nathan S. Reed be, and he is, adjudged to hold such title to said premises (the premises now in question) as trustee for the said complainants; and he is ordered, adjudged, and decreed to convey whatever title in or to the same he

may hold as aforesaid to them (the complainants), as devisees under the will of the said Samuel Bechtold, Jr., deceased. The complainants in that suit were the grantors to Zurbrugg, the complainant in this. Reed is the defendant in both suits. The first suit was commenced in 1880. The present complainant, as the assignee of the complainant in the preceding suit, is a privy in estate, whose privy has arisen since the beginning of that suit, and so he and Reed in the present suit are bound by the decree made in the former litigation. The person who purchases property, real or personal, is entitled to all the benefits, and subject to all the disadvantages, which, by the operation of the final adjudication, had attached to the property in the hands of the former owner. *Freem. Judgm.* 2. Again, the decree in the former case conveys a legal title to the present complainant's grantors. *Revision*, p. 115, § 63. By estoppel, therefore, the title passes to the complainant, by force of the deed made to him by such grantors. I am unable, therefore, to perceive the necessity of a decree in this case that Reed shall make a deed confirming the title conveyed to the complainant by his grantors. Besides, those grantors are not parties to this suit, and without them it would be improper to compel a confirmatory deed from Reed to Zurbrugg of property, the legal title to which the former decree vests in the devisees of Bechtold.

Next, in respect to the Colloday mortgage. The evidence makes it entirely clear to my mind that it has been paid. But, inasmuch as this ground for declaring said mortgage a nullity was not stated in the bill, it may be necessary to amend the bill before a decree of cancellation upon this ground can be made. But it seems also to have been given to secure an antecedent debt, and therefore Colloday was not a purchaser for valuable consideration, and his mortgage was not good against the cestui que trust of Reed, the mortgagor. This ground is within the charging part of the bill. The mortgage should be decreed to be canceled.

In respect to the injunction against the prosecution of the action in ejectment, I think it should be made perpetual. It is true that Reed still has a legal title to a two-seventeenths interest in the demised property. One-seventeenth he got by the will of Samuel Bechtold, Jr., and the other one-seventeenth he got by the will of his wife, to whom this one-seventeenth interest had been devised by Bechtold. So Reed was at the time that he instituted the suit of ejectment, aside from the conveyance made to him by his wife, a co-tenant with the other devisees of Bechtold, he owning two-seventeenths, and they owning fifteen-seventeenths, interest in the property. It is also true that one tenant in common can bring an action of ejectment against another tenant in common, or the tenant of the other tenants in common, whenever there has been an actual ouster of the

plaintiff in the action. But this action was not brought upon this ground. The bill charges that it was brought by Mr. Reed as the owner of the fee in severalty, by force of the deed to him from his wife. In his answer he insists upon his right in severalty by force of this deed. Now, at the time the action in ejectment was brought such legal title was in him. The intervention of a court of equity was sought because the law courts could take no notice of the equitable title in the other devisees of Bechtold, which had passed to Zurbrugg. In that suit, looking at the right of Reed as it existed at its commencement, he would be, at law, entitled to recover. It was upon this ground that the preliminary injunction went. It was to await the final determination of the court of equity as to whether the title of Reed was a legal or an equitable title. The court has now decided, and has stripped him of his legal title, and has transferred such title to the devisees of Bechtold, and through them, by their deed, to the present complainant. It would be, therefore, inequitable to permit Reed to set up against the tenant of Zurbrugg, in that action, the legal title which he possessed at its commencement. I think it would be also inequitable to permit him to shift the ground in that action from his original claim to a present claim that he had been ousted from his right to a general possession by Zurbrugg or his tenant. The action will be enjoined, without prejudice to his right of bringing another if he chooses.

(58 N. J. L. 196)

HOBOKEN FERRY CO. v. FEISZT.

(Court of Errors and Appeals of New Jersey.
July 18, 1896.)FERRY—EXITS—COMMON USE—PASSENGERS AND
TEAMS—PERSONAL INJURY—NEGLIGENCE.

1. In a suit for personal injuries, it appeared that, on the arrival of defendant's ferry, plaintiff left the boat by the exit which was used in common by foot passengers and teams, the team way being about 12 feet wide, and elevated 8 inches above the passenger ways on either side; that he proceeded along the passenger way till 15 feet from the street; that here he heard an outcoming horse and wagon, and, without looking, but measuring their distance only by the sound, he turned quickly, and started to run across the team way, intending to go out on the other side; that plaintiff's change of course was so precipitate that the driver of the horse could not avoid the collision; and that plaintiff could have continued along the other side in safety. *Held*, that plaintiff was chargeable with negligence.

2. Ferry exits for common use of foot passengers and for teams and vehicles are places of obvious danger, and passage over them suggests and requires a prudent watchfulness against attendant dangers.

Error to supreme court, before Justice Lipincott.

Suit by Joseph Feiszt against the Hoboken Ferry Company for personal injuries. From a judgment in favor of plaintiff, defendant brings error. Reversed.

Besson, Stevens & Lewis, for plaintiff in error. W. H. & E. G. Davis, for defendant in error.

LUDLOW, J. The defendant in error, Mr. Felszt, was a passenger on a ferryboat of the Hoboken Ferry Company, plaintiff in error, March 29, 1894, coming from New York City, and arrived at the Hoboken side about 3 p. m. He was a resident of Jersey City, living on the Heights, and had often used the defendant's ferry to and from New York. On the afternoon referred to, on his way out to the street, going over the usual ferry exit, he took the north-side passenger way, along-side of the team or vehicle way of the exit. This exit is of the ordinary style, widening out from the step, fan-like, towards the street, with passenger ways on each side of the team way, which is elevated about 3 inches, and is about 10 or 12 feet wide. The passenger way on the south side of the team way is most used, because it leads to the sidewalk; and passengers coming to the exit from the north side generally cross the team way as quickly as they can, having an eye on passing teams or vehicles, and make for this sidewalk outlet of the exit. Passengers going for other points continue on the north side to the open street, as they choose. On the occasion referred to, Mr. Felszt left the north side of the boat, and went towards the street, using the north-side way. He continued on this way for some distance, until he reached a point about 12 or 15 feet from the street opening, when, according to his own testimony, he heard the sound of an on-coming horse and wagon; and, without looking towards the boat to see where this wagon was, he turned quickly to the left, and ran as fast as he could for the south-side gate or outlet of the exit. The instant after his sudden change of course, and as he started across the team way, the on-coming horse and wagon struck him, and must have been at the time he started to cross so near that, as he says, if he had walked, instead of running, he would have walked against the horse. This horse and wagon had been ferried over with him on the same boat, and were in charge of a driver. The wagon was loaded, and the horse was coming down the team way on a fast walk, or slow jog trot; and the sudden change of course of Mr. Felszt was so precipitate that it was impossible to avoid the collision, which took place almost at the moment after Mr. Felszt's change of course. At the time Mr. Felszt changed his course, he was in a place of safety; and, if he had continued on his way as he was then going, he would have reached the street without hurt. The evidence shows clearly, and beyond question, that Mr. Felszt heard the sound of the on-coming horse and wagon, and that he did not look, or pay any heed to their approach, but, measuring their distance by the sound, he made a sudden and

rash movement to cross the team way ahead of the horses then directly on him. The evidence in the case, from the testimony of bystanders who saw the occurrence, proved beyond dispute that the accident to Mr. Felszt was the result of his own thoughtless, careless, and apparently reckless conduct. The suit was brought by Mr. Felszt against the Hoboken Ferry Company and Mendel Samuel, the owner of the horse and wagon, to recover damages for the injury received on the occasion referred to. It was tried at the Hudson circuit, and resulted in a verdict against the Hoboken Ferry Company only, against whom judgment was had on postea, and who brings this writ of error. The other defendant, Samuel, was found not guilty. At the trial on the close of the plaintiff's case, motion was made by the defendants to nonsuit because of plaintiff's failure to show negligence on part of defendants, and because the plaintiff's injury, if any, was the result of his own failure to exercise the ordinary care and prudence of a reasonably prudent man in his situation; and this motion was renewed at the close of all evidence and in each instance such motion was refused by the court, exception sealed, and error is assigned thereon.

It is not necessary to consider any of the several assignments of error in this case, save those on the refusal of the court to nonsuit. The facts do not point to any negligence on the part of the ferry company. Ferry exits for common use of foot passengers and teams and vehicles are places of obvious danger, and passage over them suggests and requires a prudent watchfulness against the dangers attendant upon that use. *Watson v. Railroad Co.*, 55 N. J. Law, 125, 128, 26 Atl. 136 (opinion of chancellor). The facts in this case show beyond question that Mr. Felszt was not observant of his surroundings, and paid no heed whatever to his personal protection or safety, and that his own carelessness was the sole cause of his hurt, and of the collision from which it came. The defendant's motion to nonsuit should have been granted. There was error in its refusal. The judgment below must be reversed, that a venire de novo may issue.

(19 R. I. 606)

SAUTHOF et ux. v. CITY OF PROVIDENCE.
(Supreme Court of Rhode Island. July 27, 1896.)

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—
NEGLECT OF CITY—QUESTION FOR JURY.

In an action against a city for injuries caused by piles of concrete gravel in the street, it appeared that the accident occurred after dark, that during the day the velocity of the wind was from 20 to 28 miles an hour, that at about 5 o'clock p. m. the city caused an old lantern to be hung above the obstructions, and that there was no light at the time of the accident. Held, that whether defendant discharged its duty by placing such lantern on the obstruction was a question of fact for the jury.

Action by George W. Sauthof and Agnes Sauthof, his wife, against the city of Providence, for personal injuries to plaintiff Agnes Sauthof, caused by an obstruction in the street of such city. There was a verdict for plaintiffs, and defendant petitions for a new trial. Denied.

O. A. Aldrich, for plaintiffs. Francis Colwell and Albert A. Baker, for defendant.

TILLINGHAST, J. The facts in this case are substantially as follows: On the evening of November 28, 1894, shortly before 6 o'clock, the plaintiff Agnes Sauthof was driving along Adelaide avenue, in said city, in a carriage, and ran upon a pile of concrete gravel or concrete material, which threw the horse she was driving, and caused her to be thrown from the carriage, whereby she was seriously and permanently injured. At the time of the accident the plaintiff was driving slowly,—just jogging along,—when she saw a team coming in the opposite direction. She thereupon hugged the curbing on the right a little closer than before, when the horse ran upon said obstruction and stumbled. The plaintiff righted the horse at first, when it immediately stumbled again and went down. The plaintiff remembers nothing of the accident after that. There was no light on or near the obstruction at the time of the accident, although a lighted lantern had been suspended to the handle of a shovel stuck into said pile, by one of the workmen employed by the Rhode Island Concrete Company, by whom said gravel or concrete material was placed in said street, said lantern having been suspended over said obstruction at about 5:30 o'clock p. m. of that day. Said pile of concrete gravel had been in said street, substantially the same as it was when the accident happened, for the greater part of said day. It was a very windy day, cold and blustering; the velocity of the wind at Hope reservoir, in said city, being 28 miles an hour at 1 o'clock p. m., 23 at 2 o'clock, 26 at 3 o'clock, 24 at 4 o'clock, 20 at 5 o'clock, and 16 at 6 o'clock, and there were puffs at frequent intervals, during all of said time, when the velocity was 40 miles an hour. Said lantern, according to some of the testimony, was a common old stable lantern, and was rusty and somewhat weatherbeaten. The said obstruction, in fact, consisted of two piles of gravel or concrete material, from 3 to 5 feet apart, the larger one containing about four loads of said material, and being from 3 to 3½ feet high, and the smaller one containing about one load, and being about 1½ feet high; and the obstruction, as a whole, extended from a point near the curbstone out into the street from 10 to 12 feet. The horse first stumbled over the smaller pile, and then, after partially righting himself as aforesaid, immediately came upon the larger one, and fell. It was dark at the time and place of the accident. The city had notice of the obstruction. A police officer, whose duty it was to report the obstruction,

and remove it if possible, saw it as early as 10 o'clock on the day of the accident. He also saw it at 2 o'clock, and again at 5 o'clock, in the afternoon, but took no steps to either remove it or report it. He simply gave instructions to one of the men at work there to hang a light on it at night, and saw one of said workmen in the act of placing a light thereon. At the trial of the case in the common pleas division, the jury found in favor of the plaintiff, and the defendant now petitions for a new trial on the ground that the verdict is against the law and the evidence.

The particular contention of the defendant is that, as the evidence shows that a light was placed upon said obstruction shortly before the accident, it did all that was necessary in the way of protecting travelers from injury by reason of the existence of said obstruction in the highway, and hence cannot be held liable in this case. And in this connection the defendant's counsel argues that the city is not an insurer of the safety of its streets, but is only required to use due care and diligence to keep them in a reasonably safe condition for travelers. This is doubtless so. But whether the city in fact exercises due care and diligence in a given case—in other words, whether it discharges its statutory duty in keeping its highways safe and convenient for travelers—is ordinarily a question of fact for the jury. *Yeaw v. Williams*, 15 R. I. 20, 23 Atl. 33; *McCloskey v. Moles* (R. I.) 33 Atl. 225. Whether, therefore, the defendant discharged its duty in this case by placing, or causing to be placed, a single lantern, like the one shown in evidence, on the obstruction which caused the accident, was purely a question of fact for the jury. They have answered that question in the negative by their verdict, and this court has no right, in the circumstances of the case, to interfere therewith. There is no fixed legal standard of duty in a case of this sort. *O'Neill v. Town of East Windsor*, 63 Conn. 150, 27 Atl. 237. The law does not prescribe specifically what shall be done in order to protect travelers from an obstruction in the highway, but does prescribe generally that highways shall be kept reasonably safe and convenient for travelers at all times. This leaves the method of discharging the duty with the city or town authorities, subject, however, to the judgment of a jury, in case an accident happens, as to whether the method adopted or the thing done was a sufficient discharge of its statutory liability. See *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679; *Traction Co. v. Scott* (N. J. Err. & App.) 34 Atl. 1095. And, this being so, the judgment of the jury, unless it is clearly and palpably wrong,—so clearly wrong that fair-minded men could not honestly differ upon the question at issue,—should prevail. This doctrine is so universally recognized and acted on by the courts, both English and American, that there is no occasion for the citation of authorities in support of it. The condition of the weather, particularly as to the force and velocity of the wind, on the day of

the accident, coupled with the fact that it frequently came in sudden puffs or gusts, was an element for the jury to consider in determining whether a single lantern was a sufficient safeguard, especially in view of the testimony of two witnesses called by the defendant, to the effect that they had known lanterns thus placed to blow out, one of said witnesses testifying that he had known it to happen "oftentimes." In *Watson v. Tripp*, 11 R. I. 98, which was very similar to the case at bar, this court held that, even if there was a light suspended over or beside the obstruction at the time of the accident, the jury may have thought that it was not properly placed, or that, in the particular circumstances, a single light, unless of more conspicuous size and brilliancy, was an insufficient safeguard, and refused to disturb the verdict of the jury. To the same practical effect is *Bowman v. Tripp*, 14 R. I. 242. Petition for new trial denied, and case remitted to the common pleas division with direction to enter judgment on the verdict.

(19 R. I. 584)

TIFFANY v. MONROE et al.

(Supreme Court of Rhode Island. July 21, 1896.)

WILL—BEQUEST OF MONTHLY PAYMENTS—DEFICIENCY OF PERSONAL ASSETS—SALE OF REAL ESTATE.

Where a testator, after specific bequests and devises, gives the residue of his estate, real and personal, to trustees to control during the lifetime of testator's daughters, and till their children shall reach the age of 21, and directs the trustees to pay to each daughter \$50 a month during her lifetime, and expressly declares that, "in case the personal estate shall not be sufficient to satisfy the payments, * * * mysaid trustees shall have power to sell, * * * without the written consent hereinbefore mentioned, so much of my real estate as shall be necessary to supply such deficiency in the personal estate," the trustees may apply the principal to the monthly payments, though the trust estate may be thereby exhausted.

Action by James A. Tiffany against Philip A. Monroe, trustee, and others, involving the construction of the will of Lyman Peirce, deceased. Among other things, the will provided, in substance, that the testator gave all the rest and residue of his estate, real and personal, to A. and B., or the survivor, and the heirs and assigns of them, or the survivor, in trust, to take charge, to control, lease, manage, etc., with power to sell, upon the consent in writing of his daughters; to invest or reinvest the proceeds of sale; to make all repairs, insure, pay taxes, and pay trustees for their own services; to pay \$100 to his widow for payment by her of taxes and insurance on estate to be used by her during her life; to pay \$1,000 to the Church of the Mediator; to pay \$50 a month to each daughter, upon death of any daughter to her children until 21; and, when all grandchildren are 21, to divide the estate among them; this payment to continue until all the daughters are widowed or dead and all the grandchild-

dren are 21; then the property to vest in them or their heirs, according to the statutes of descent then in force. The will expressly provided that, "in case the personal estate shall not be sufficient to satisfy the payments required by the provisions of my will aforesaid, my said trustees shall have the power to sell, according to their own discretion, and without the written consent hereinbefore mentioned, so much of my said real estate as shall be necessary to supply such deficiency in the personal estate." Decree for defendants.

William A. Morgan, for complainant. Warren R. Perce, for respondents.

STINESS, J. This case is within the decision in *Richardson v. Bowen*, 18 R. I. 133, 25 Atl. 908, and is even stronger than that case in the evidence of an intention to give power to the trustees to apply the principal of the trust estate to the monthly payments. An express power to sell is here given, "in case the personal estate of said trust shall not be sufficient to satisfy the payments required by the provisions of my will aforesaid." The provision for a larger sum to be paid to the daughters in case of necessity also seems to imply an intention to give them the sum of \$50 per month in any event. The claim of the complainant that the word "payments" refers only to legacies and payments other than payments to be made by the trustees at stated intervals seems to be too narrow for the provisions of the will, and we see no warrant in its language for such limitation. The argument that the trust estate may thus be exhausted is one that applies to every case of a deficiency of income. The intention of the testator is the test of construction, and it clearly appears that the intention was that the daughters should receive the sum named for life. We are of the opinion that the will authorizes the trustees to apply the principal to such payment, if necessary.

(19 R. I. 597)

WING et al. v. SLATER.

(Supreme Court of Rhode Island. July 24, 1896.)

CORPORATIONS—FILING ANNUAL STATEMENT—STATUTORY LIABILITY—EXISTING DEBTS—CONTRACTS.

1. A debt arising on a contract for the purchase of goods, entered into in November, 1891, but under which there was no delivery until October, 1892, was not, until such delivery, an existing debt, within the meaning of Pub. St. c. 155, §§ 11, 12, providing that, upon the failure of a manufacturing corporation to file a statement of its condition on or before the 15th day of February in each year, the stockholders shall be liable for any debt then existing.

2. The liability of the stockholder under Pub. St. c. 155, §§ 11, 12, is not contractual, but purely statutory, and, being in derogation of the common law, must be strictly construed.

Action brought by Wing & Evans against John W. Slater. Judgment for defendant.

Comstock & Gardner, for plaintiffs. Arnold Green and James Tillinghast, for defendant.

TILLINGHAST, J. This is an action brought by the plaintiffs, who are judgment creditors of the American Wood-Paper Company, to enforce an alleged liability of the defendant, as a stockholder in said company, under Pub. St. R. I. c. 155, §§ 11, 12, which provide as follows:

"Sec. 11. Every manufacturing company included within the provisions of this chapter shall file in the office of the town clerk of the town where the manufactory is established annually on or before the fifteenth day of February a certificate signed by a majority of the directors, truly stating the amount of its capital stock actually paid in, the value as last assessed for a town tax of its real estate, the value of its personal assets and the amount of its debts or liabilities on the thirty-first day of December of the next year preceding.

"Sec. 12. If any of such companies shall fail so to do, all the stockholders of such company shall be jointly and severally liable for all the debts of the company then existing and for all that shall be contracted before such notice shall be given, except as hereinafter provided, unless such company shall have become insolvent and assigned its property in trust for the benefit of its creditors, in which case the obligation to give such notice by the filing of such certificate shall cease."

The pleadings in the case raise three principal questions, viz.: (1) Does the act apply to corporations which have not, and never have had, any manufactory in this state? (2) Did the debt of the American Wood-Paper Company to the plaintiffs arise, as they contend, November 5, 1891, or, as the defendant contends, towards the end of 1892? And (3) does this action at law lie?—It appearing that John D. Wing, one of the plaintiff co-partners, is the real owner of certain stock in the American Wood-Paper Company, standing in the name of William W. Brown, and that he is a naked trustee of John D. Wing as to this stock. As, in our view of the matter, the answer to the second question thus raised will dispose of the whole case, we will consider that only.

Whether the statute upon which the action is based is a penal statute, strictly so called, it is not necessary to decide, although there is good authority for holding that it is. *Sayles v. Brown*, 40 Fed. 8. But that said statute is of a penal character, so far at least as the defendant is concerned, and also that it is in derogation of the common law, and hence to be construed strictly, there can be no doubt. The liability of a stockholder thereunder is not a contractual, but a purely statutory, liability. *Sayles v. Bates*, 15 R. I. 342, 5 Atl. 497; *Sayles v. Brown*, *supra*. In considering a claim not unlike the one before us, *Shaw, C. J.*, in *Gray v. Coffin*, 9 Cush. 199, said: "To create any individual liability of mem-

bers for the debt of a corporation, a body politic, created by law, and regarded as a legal being distinct from that of the members composing it, and capable of contracting and being contracted with as a person, is a wide departure from established rules of law, founded in considerations of public policy, and depending solely upon provisions of positive law. It is therefore to be construed strictly, and not extended beyond the limits to which it is plainly carried by such provisions of statute." This language is quoted and approved by the court in *Dane v. Manufacturing Co.*, 14 Gray, 489. Both of said cases involved the liability of stockholders as such, and not the liability of officers. To the same effect are *Coffin v. Rich*, 45 Me. 507-511; *Libby v. Tobey*, 82 Me. 397, 19 Atl. 904; *Moyer v. Slate Co.*, 71 Pa. St. 293; *Appeal of Mean*, 85 Pa. St. 75-78; *Chase v. Lord*, 77 N. Y. 1, and cases cited. See, also, *Leighton v. Campbell*, 17 R. I. 51, 20 Atl. 14. The question that arises, then, is whether, under the facts set out in the defendant's special pleas, which are demurred to by the plaintiffs, the defendant is liable, under the provisions of said statute. We think this question must be answered in the negative. Said pleas show: (1) That said American Wood-Paper Company has not, and never has had, any manufactory established in this state; that it has, since its incorporation, always had an office in the city of Providence, in this state; that on the 13th day of February, 1892, it filed in the office of the city clerk of said Providence a certificate, signed by a majority of its directors, truly stating the amount of its capital stock actually paid in, the value, as last assessed for a town tax, of its real estate, the value of its personal assets, and the amount of its debts or liabilities on the 31st day of December, 1891. (2) That the indebtedness of said American Wood-Paper Company, whereon the judgment was rendered on which this action is based, was not incurred on the 5th day of November, 1891, as set forth in the plaintiffs' declaration, and was not incurred until October, 1892; that the first delivery was made by the plaintiffs, under the contract set forth in the declaration, in October, 1892; and that no breach of said contract was made by said paper company until after November, 1892.

Pub. Laws R. I. c. 1038, was enacted February 12, 1892, and went into effect immediately. It provides as follows: "Any manufacturing corporation included within the provisions of chapter 155 of the Public Statutes, which has no manufactory established in any town in this state, may file the certificates required by section 11 of said chapter with the town clerk of the town in this state where the office of the corporation is located." It thus appears that, even assuming that said chapter 155 applies to corporations which have not, and never have had, any manufactory in this state, as contended by plaintiffs' counsel (see *Allen v.*

Arnold, 18 R. I. 809, 81 Atl. 268), yet the defendant is not liable, as set forth in the plaintiffs' declaration, unless the making of the contract set out therein had the effect to create a debt against said corporation at the time of the making of said contract, or, at any rate, before the filing of the certificate aforesaid, which we do not think it did. The language of the statute, in case of the failure to file the certificate required thereby, is that "all the stockholders * * * shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such notice shall be given," etc. "The time of the existence of the debt is therefore a material inquiry." *Congdon v. Winsor*, 17 R. I. 237, 21 Atl. 540. We think it is clear that there was no debt existing at the time of the making of said contract, nor was any debt contracted by the making thereof prior to the delivery of the merchandise contracted for. A debt is a liquidated demand, or a sum of money due by certain and express agreement. 3 Bl. Comm. 154; *McElfresh v. Kirkendall*, 36 Iowa, 228. Or a debt may be defined to be a fixed and certain obligation to pay money, or some other valuable thing, in the present or in the future. *Appeal of City of Erie*, 91 Pa. St. 402. In *People v. Arguello*, 37 Cal. 525, the court say: "Whether a claim or demand is a debt, or not, is in no respect determined by a reference to the time of payment. A sum of money which is certainly and at all events payable is a debt, without regard to the fact whether it be payable now, or at a future time. A sum of money payable upon a contingency, however, is not a debt, and does not become a debt until the contingency has happened. * * * So of a covenant to pay rent quarterly. It creates no debt until it becomes due; for before that time the lessee may quit, with the consent of the lessor, or he may assign his term, with his consent, or he may be evicted by a title paramount to that of the lessor, in either of which cases he will be discharged from his covenant." *Wood v. Partridge*, 11 Mass. 488. In *Haynes v. Brown*, 36 N. H. 566, the court held that the statute could not be restricted to debts or liquidated claims. But the statute of that state is much broader than ours, making the stockholders and officers of corporations liable for the debts and contracts of the corporation. For a collection of the authorities on the question of what constitutes a debt, see 5 Am. & Eng. Enc. Law, 143-162. Applying the foregoing definitions to the statute under consideration, it cannot be properly said that there was any existing debt growing out of said contract until after a delivery was made thereunder. In *Garrison v. Howe*, 17 N. Y. 458, which was an action brought against a stockholder on the ground that the whole capital stock had not been paid in, and also because the corporation had not made the report required by

law, the court said: "We do not think a debt for lumber furnished under the contract, subsequent to its execution, can be said to have been contracted when the agreement was signed. That instrument contains mutual stipulations,—by the plaintiff to furnish, and by the defendant to pay for, the lumber,—and there is no debt in existence until lumber has been delivered." In *Jones v. Barlow*, 62 N. Y. 202, which was an action to enforce the liability of the trustees of a corporation for a failure to file the annual report thereof required by law, the court held that they were only liable for debts actually due, and for which a present right of action existed against the corporation. See, also, *Chase v. Curtis*, 113 U. S. 462, 463, 5 Sup. Ct. 554.

In support of the plaintiffs' contention that the defendant's liability attached at the time of the making of said contract, they rely specially on *Byers v. Coal Co.*, 106 Mass. 131. That was a bill in equity against said coal company, and certain persons alleged to be officers thereof, for neglecting to file the annual certificate required by the statute, the language of which is substantially like our own. The debt in that case arose as follows: On April 3, 1886, the plaintiff accepted two drafts for the accommodation of the corporation, drawn by its treasurer,—one payable in five months, and the other in six months, from their date. These drafts were negotiated at or about the time they were accepted, and, at or about their maturity, were paid by the plaintiff. And the question which arose was whether the debt thus created was a debt contracted at the time when the plaintiff paid the drafts, or at the time when he accepted them. The court held that the plaintiff was an accommodation acceptor, and the relation between the corporation and him was that of principal and surety, and that under the decision in *Rice v. Southgate*, 16 Gray, 142, the liability of a principal to indemnify his surety for any payment the latter may be compelled to make to the former takes effect from the time when the surety becomes responsible for the debt of his principal, and that upon payment by the surety his debt is a debt contracted at the time he became responsible, and not at the time of such payment. We do not think the case controls the one before us. There a liability had been incurred by the plaintiff to pay a certain and definite amount of money at a definite time, for the accommodation of the defendant, and the plaintiff was obliged to pay, and did actually pay, the draft when it fell due. And, upon well-settled principles of law, it is clear, as held in *Rice v. Southgate*, supra, "that the contract of a principal with his surety to indemnify him for any payment which the latter may make to the creditor in consequence of the liability assumed takes effect from the time when the surety becomes responsible for the debt of the principal."

pal. . . . No new contract is made when the money is paid by the surety, but the payment relates back to the time when the contract was entered into by which the liability to pay was incurred." No such liability, however, was incurred by the American Wood-Paper Company by the making of the contract aforesaid. No debt was thereby created, in the strict sense of the term, at any rate; nor did any exist until a delivery was made under said contract. "Suppose," as said by the defendant's counsel, "the plaintiffs had never made any deliveries. Could they have sued for anything in February, 1892, eight months before they made any deliveries?" We think it is clear that they could not. It follows, therefore, that there being no debt either due or owing, and no debt contracted by said corporation in favor of the plaintiffs at the time of the filing of the certificate aforesaid, they have no cause of action against him. We are therefore of the opinion that the demurrers to the defendant's special pleas in bar should be overruled, and the pleas sustained. Judgment for the defendant for costs.

(19 R. I. 587)

WHIPPLE v. NEW YORK, N. H. & H. R. CO.
(Supreme Court of Rhode Island. July 24, 1896.)

MASTER AND SERVANT—PERSONAL INJURY—RAILROAD STRUCTURES NEAR TRACK—NEGLIGENCE—NEW TRIAL.

1. A railroad company which maintains a structure in such close proximity to its track as to endanger the lives of employes when in the proper performance of their duties is guilty of negligence, and is liable to an employe injured thereby while exercising ordinary care, and without having voluntarily assumed the risk, with full knowledge or competent means of knowledge of the danger.

2. Plaintiff, a brakeman on defendant's road, was knocked from a freight car, and injured, while climbing a ladder on its side, by striking a telegraph pole which stood about $3\frac{1}{2}$ feet from the rail of the side track, but inclined somewhat towards the track, the space between the pole and the top of the car being about 15 inches, which was sufficient to permit the passage of a man if standing erect, but insufficient by 7 or 8 inches to allow of his passage while climbing a ladder. Held, that the danger was not so obvious as to charge plaintiff with knowledge of it. Stiness, J., dissenting.

3. A new trial will not be granted on the ground of newly-discovered evidence when such evidence goes only to the amount of damages, and the verdict rendered is not excessive even under the facts as shown thereby.

Action by Robert S. J. Whipple against the New York, New Haven & Hartford Railroad Company. Verdict for plaintiff, and defendant moves for a new trial. Motion denied.

Walter B. Vincent, for plaintiff. Frank S. Arnold, for defendant.

MATTESON, C. J. This is an action of the case for negligence. The accident which caused the injuries to the plaintiff occurred about 2 o'clock in the afternoon, on December 22, 1894, in the defendant's freight yard in Providence, where the plaintiff had been employed as a brakeman in the making up of freight trains for two or three months previously. Just prior to the accident, the switching engine, with the plaintiff riding on the footboard on the rear of the tender, had backed down in a southerly direction on a side track to a point opposite the freight house, for the purpose of taking on some cars standing on the side track. The plaintiff stood on the left-hand end of the footboard, as the engine was backing down, looking towards the cars which were to be coupled to the engine. When the engine had reached the cars, the plaintiff made the coupling, gave the signal to the engineer to go ahead, and started to climb onto the top of the car next to the engine; his duty requiring him to be in that position, so that he could transmit to the engineer the signals which should be given to him by the conductor. There was no ladder on the end of the car, and, in order to climb to the top of it, the plaintiff stepped from the footboard onto the drawbar of the tender, thence obliquely to the left onto the corner of the car, at the same time taking hold of a round of the ladder on the westerly side of the car near the end, and swinging himself around the car, and began to ascend the ladder. Meanwhile the train had started, in obedience to the signal given to the engineer to go ahead; and when the plaintiff had so far ascended the ladder that his left hand was on the topmost round, and he was reaching up with his right hand for the handle on the top of the car, his back came in contact with a telegraph pole belonging to the defendant, and used to support some of its signal wires, and he was swept from the ladder, and fell to the ground, receiving the injuries for which he sues. The telegraph pole was 3 feet $5\frac{1}{4}$ inches from the outside of the westerly rail of the side track, and had stood in that location for a number of years. The side of a car such as were in use by the defendant at the time of the accident projected beyond the side of the rail 20 inches, and the ladder on the side of it $3\frac{1}{2}$ inches further. The pole inclined somewhat towards the side track, so that at the height of 11 feet (that being the height of the top of the car) the space between the pole and the ladder was $15\frac{1}{4}$ inches. By experiment, made subsequently to the accident, it appeared that this space, though sufficient for a man to pass without coming in contact with the pole if standing erect on the ladder, was not sufficient by 7 or 8 inches for him to pass the pole without coming in contact with it when in the act of climbing the ladder. The jury in the common pleas division returned a verdict for the plaintiff, and the defendant petitions for a new trial, alleging that the verdict is against the evidence, that the instructions of the court to the jury were erroneous, and because of newly-discovered testimony.

The defendant contends, in support of its

petition, that it had a right to locate its telegraph poles, switch stands, bridge abutments, station platforms, and other similar structures, near to its tracks, although the location and maintenance of these structures in close proximity to its tracks might involve the risk of injury to its employes; that as the danger of contact with such structures is a matter of common knowledge, and as they are objects plainly visible, their presence is at once suggestive of danger; and, therefore, that the risk of being hit by a pole was an obvious danger, and one assumed by the plaintiff when he entered into the defendant's service. There are cases which apparently support these contentions, but they do not commend themselves to our judgment. We do not think that a different rule should be applied to railroad corporations from that which is established in reference to other employers, viz. that the master is bound to take ordinary and reasonable care not to subject his servant to unreasonable danger, by sending him to work on dangerous premises or with dangerous appliances, and that if he falls in this respect, and the servant has been injured in consequence, without fault on his part, and without having voluntarily assumed the risk of the master's negligence, with full knowledge or competent means of knowledge of the danger, he is entitled to recover for the injury sustained. *Thomp. Neg.* 972, 973, and cases cited. In view of this rule, we cannot doubt that the location and maintenance of the telegraph pole in the position in which it stood relatively to the side track was negligence, since the necessary result was to expose brakemen, in the discharge of their duty in the usual manner, to the risk of accident such as befell the plaintiff. *Dorsey v. Construction Co.*, 42 Wis. 583; *Murphy v. Railroad Co.*, 115 Mo. 111, 21 S. W. 862; *Johnson v. Railway Co.*, 43 Minn. 53, 44 N. W. 884; *Railroad Co. v. Swett*, 45 Ill. 197; *Railroad Co. v. Russell*, 91 Ill. 298; *Railroad Co. v. Ostrman* (Ind. Sup.) 41 N. E. 1037.

It is undoubtedly true that a servant assumes all the ordinary risks and perils incident to the employment, and also all risks resulting from the nonperformance of the master's duty of which he has knowledge, or of which he has competent means of knowledge, if he continues in the employment after such knowledge or means of knowledge, unless induced to remain by promises of the master to remedy the defect. But a telegraph pole is not in itself dangerous. It becomes so, and therefore a defective structure, only when placed so near the track that it is a source of danger to the servant in the performance of his duty. If the servant has knowledge of its dangerous proximity, or if, by reasonable observation, he could have ascertained its dangerous proximity, it is undoubtedly to be regarded as an obvious danger, the risk of which is assumed by continuing in the service; otherwise, it is not to be so regarded. In the case at bar, it does not appear that the plaintiff had knowledge of

the dangerous proximity of the pole to the track. Unless, therefore, that fact was sufficiently obvious to have been ascertained by him by reasonable observation, he is not to be held to have assumed the risk of injury from it. We do not think that the fact was sufficiently obvious. The difference between the distance which the pole stood from the track and the distance which would have been safe was only seven to eight inches. The plaintiff had never before the accident, so far as appears, passed, or attempted to pass, the pole on the side ladder of a car. The only opportunities which he had had to judge of its proximity to the track were from passing it on foot, and on the tops of moving cars, in the course of his employment, neither of which situations would be favorable for estimating the distance of the pole from the side of a car moving along the track, with sufficient accuracy to know whether or not the pole was safe,—the margin of safety or danger being so slight a space. Moreover, even after the accident, the testimony shows that experiments were conducted by the defendant for the purpose of determining whether or not the pole was near enough to the track to be dangerous. How can it be said that the proximity of the pole to the track was an obvious defect, when the danger could only be determined by experiment or by measurement and calculation? To the suggestion that the telegraph pole was plainly visible, and that the danger of contact with such a structure is a matter of common knowledge, it is enough to answer that the fact tends, not to prove that the pole is an obvious defect, but rather that the officers of railroads, in the location of such structures, in many instances disregard their duty, and consult expense and their own convenience instead of safety of life and limb.

It is urged that if the proximity of the pole to the track, which made it dangerous, was not sufficiently obvious to the plaintiff to put him on his guard against injury from the pole, it was not sufficiently obvious to the officers of the defendant for them to observe it in the exercise of reasonable care, and hence that it cannot be held that the defendant was negligent in maintaining the pole in its position. But the answer is that the officers of the defendant located the pole; that it was their duty to have so located it as to make it safe; and, consequently, that, if they failed in that respect, the defendant must be held chargeable for their default.

The defendant further contends that the plaintiff was guilty of contributory negligence in attempting to climb the ladder of the car while the train was in motion, without looking to see whether he was in danger from the pole, instead of climbing to the top of the car before giving the signal to the engineer to go ahead, or remaining on the footboard of the tender until the car had passed the pole. But if the dangerous proximity of the pole to the track was not so obvious as to be discoverable by observation, and the plaintiff had no notice

of the danger, we do not think that it can be held, as a matter of law, that he was guilty of negligence in not looking forward to see whether he was in danger from the pole before starting to climb the ladder. If he had no reason to apprehend danger from it, there was no reason why he should have been on his guard against it. He had a right to rely on the presumption that the defendant had performed its duty in locating the pole so that it should not endanger the safety of its employes, until he had been apprised in some way of the contrary. If the exigency of the situation required the placing of a structure in such a position as to make it dangerous, it is not too much to require of a railroad company that it should give notice of the danger to its employes. *Darling v. Railroad Co.*, 17 R. L. 708, 24 Atl. 462; *Scanlon v. Railroad Co.*, 147 Mass. 484, 18 N. E. 209; *Johnson v. Railway Co.*, 43 Minn. 53, 44 N. W. 884; *Hawkins v. Johnson*, 105 Ind. 29, 4 N. E. 172; *Baker v. Coal Co. (Md.)* 35 Atl. 10.

The defendant contends that the common pleas division erred in admitting the testimony of Latham, a civil engineer, for the purpose of proving the distance between the pole and the side of the freight car; the car not being the one on which the plaintiff was at the time of the accident. The plaintiff had no means of identifying the particular car on which he was riding, at the time of the accident, and it is a matter of common knowledge that freight cars are here to-day, and many miles away to-morrow. In the absence of evidence to show that the particular car on which the plaintiff was at the time of the accident was available for measurement, we think that it was proper for the court to admit the testimony, it being shown that the car used for the purpose of measurement was of the same pattern and dimensions as the other.

We do not deem it necessary to examine seriatim the several requests for instructions made by the defendant, and the rulings on these requests by the common pleas division. The requests were inconsistent with the principles which seem to us to govern the decision of the case, and we think that the instructions of the court to the jury were sufficiently favorable to the defendant.

The newly-discovered evidence is all directed to the question of the extent of the plaintiff's injuries. As the verdict was only for \$1,500, and it is not denied that the plaintiff was confined to his bed for five or six weeks, during which time he suffered much pain, we do not think that the newly-discovered testimony, which goes merely to his improved condition subsequent to that period, is of such importance that it would be likely to lessen the verdict if a new trial were granted. New trial denied, and case remitted to the common pleas division, with direction to enter judgment for the plaintiff on the verdict.

STINESS, J., dissenting, on the ground that the pole was an obvious defect.

(19 R. L. 594)

CRANDALL v. NEW YORK, N. H. & H. R. CO.

(Supreme Court of Rhode Island. July 24, 1896.)

RAILROAD COMPANIES—NEGLIGENCE—ASSUMPTION OF RISK BY EMPLOYEE—CONTRIBUTORY NEGLIGENCE.

1. The erection of a telegraph pole by a railroad company so near to a side track as to expose the employes to the risk of injury while performing their duties, is negligence.

2. Injury from a telegraph pole erected dangerously close to a side track is not a risk assumed by a railroad employe, unless he has knowledge of the defect, or competent means of knowing it, and continues in the employment.

3. A passenger conductor, who was ordered to stop his train on a side track to let a freight train pass, went to the first car, to warn passengers against crossing in front of the approaching train, and, when it had passed, signaled the engineer to start ahead, but, in stepping on the car, he was caught between it and a telegraph pole standing within 20 inches thereof. He had never been on the side track before, did not know of the pole, and had only a short time in which to make connections. Held, that a finding that the conductor was not negligent would not be disturbed.

Action by Frank P. Crandall against the New York, New Haven & Hartford Railroad Company to recover for personal injuries. There was a verdict for plaintiff, and defendant petitions for a new trial. Denied.

David S. & Wm. C. Baker, for plaintiff.
Frank S. Arnold, for defendant.

MATTESON, C. J. This is an action of the case for negligence. The accident by which the plaintiff was injured occurred December 8, 1893. The plaintiff had been a conductor of passenger trains, in the service of the defendant, for a number of years. For several years prior to the accident, it had been a part of his duty to run, during alternate weeks, a passenger train, one trip daily, over the Pawtuxet Valley Branch of the defendant's road, from Auburn to Hope, and from Hope to Auburn. On the date named, he left Providence on his train at 2:30 p. m., and, on arriving at Pontiac, was ordered by the telegraph operator at that station to place his train on the side track, a little beyond the station towards Hope, in order to allow a freight train coming from Hope, which was too long to be run onto the side track, to pass on the main track. In compliance with this order, the plaintiff ran his train onto the side track, and, in the performance of his duty, as he alleges, took his position near the forward end of the first car, between the side track and the main track, so that, if any of the passengers on his train should get off, he might warn them against passing over the main track in front of the approaching freight train. When the freight train had passed, he, without looking forward towards the engine of his train, signaled the engineer to start the train, and, when in the act of stepping up onto the steps of the car near which he was standing when he gave the sig-

nal to the engineer, was caught and squeezed between a telegraph pole standing near the side track and the forward end of the car, receiving the injuries for which he sues. After the accident, the telegraph pole was removed to another location, so that its exact position relatively to the side track at the time of the accident cannot be determined. The testimony, however, tends to show that it was so near to the track that it would clear the side of the car by not more than 20 inches. At the trial in the common pleas division, the jury returned a verdict for the plaintiff; and the defendant now petitions for a new trial, on the ground that the verdict was against the evidence, and that the court erred in refusing to admit certain testimony, and in its instructions to the jury.

We do not think that the verdict was against the evidence. The erection and maintenance of the telegraph pole so near to the side track as to expose its employés to the risk of injury while performing their duties was negligence on the part of the defendant. *Whipple v. Railroad Co.*, Index SS, 35 Atl. 305, and cases cited. The question whether the plaintiff was guilty of contributory negligence in not looking forward to see if there was any obstacle that might hit him in attempting to get onto the train, before giving the signal to the engineer to start the train, or in not getting upon the train before giving the signal, was for the determination of the jury. In view of the facts appearing in evidence,—that the plaintiff's duty as a passenger conductor were to a great extent inside of the train, and therefore he did not have the opportunity to familiarize himself with structures along the track; that he did not know the location of this pole; that he had never before been upon the side track; that his attention was directed to the passing of the freight train, and to seeing that none of his passengers, if they should alight from the train, attempted to cross the track in front of the freight train; that the road was a single-track road, and the time for him to run to Hope and back again to Auburn, to make his train connections at that station, was short,—we think that the question whether he was in the exercise of due care was one upon which reasonable minds might differ, and that, therefore, the jury having found that he was not negligent, we ought not to disturb their finding.

We do not think that the plaintiff is to be held to have assumed the risk of injury from the pole. The risk was not one incident to the employment, because the defect—the location of the pole dangerously near to the side track—was a breach of the defendant's duty to so locate the pole that it should not be dangerous to its employés. The risk of injury from such a defect is not assumed by the employé unless he has knowledge or competent means of knowledge of it, and continues in the employment. *Whipple v. Railroad Co.*, Index SS, 35 Atl. 305; *Scanlon v.*

Railroad Co., 147 Mass. 484, 18 N. E. 209; *Lovejoy v. Railroad Co.*, 125 Mass. 79; *Baker v. Coal Co. (Md.)* 35 Atl. 10. As already stated, the plaintiff had never been on the side track, did not know of the location of the pole, and had never had his attention directed to it. As a passenger conductor, his duties were inside of the train, except when at a station; and he did not, therefore, have the opportunity to observe the location of structures along the track which a freight brakeman, whose duties are on the outside of the train, or an engineer, whose attention is directed to objects outside of the train, would have. The only means of knowledge which he could have possessed was from observing it casually, if not busy with his duties, when passing it upon his train along the main track. The familiarity which he could acquire with it in this way was not such that it can be presumed that he had knowledge of its dangerous proximity to the track.

We do not think that the common pleas division erred in excluding the testimony of Edward P. Dawley, a civil engineer in the employment of the defendant, as to other dangerous obstructions on the line of the railroad over which the plaintiff was accustomed to run his trains. It was not proposed to show in connection with it that the plaintiff had knowledge that these obstructions were dangerous; and, for the reasons already stated, we do not think that they were risks assumed by him as incident to the service.

We think the instructions to the jury were sufficiently favorable to the defendant. New trial denied, and case remitted to the common pleas division, with direction to enter judgment on the verdict.

FLAHERTY v. NEW YORK, N. H. & H. R. CO.

(Supreme Court of Rhode Island. July 24, 1896.)

PARENT AND CHILD—DEATH OF SON—EXCESSIVE DAMAGES.

In an action by a father for the death of a son, it appeared that the deceased had attained his majority, and had left home; that the moneys plaintiff had received from the deceased had been received almost wholly while he was living at home, and during his minority; and that the deceased was one of a family of eight children. *Held*, that the probability of the continued receipt of moneys by plaintiff from the deceased was not sufficiently great to warrant a verdict for \$5,000.

Action by Martin Flaherty against the New York, New Haven & Hartford Railroad Company for damages for the death of a son. From a judgment in favor of plaintiff, defendant petitions for a new trial. Granted.

Walter B. Vincent and Dennis H. Sheahan, for plaintiff. Frank S. Arnold, for defendant.

PER CURIAM. We are of the opinion that the principles of the decisions in *Whipple v.*

Railroad Co. (R. I.) 35 Atl. 305, and Crandall v. Railroad Co., Id. 307, are decisive of the right of the plaintiff to maintain his action. We think, however, that the damages awarded are excessive. The deceased was 22 years of age. The sums which the plaintiff had received from him had been almost wholly while he was living at home, and during his minority. We do not think that the probability of the continued receipt of moneys by the plaintiff from the deceased, when it is considered that he had attained his majority, and left home, and that he was but one of a family of eight children, was sufficiently great to warrant so large a verdict as \$5,000. We therefore grant a new trial, unless the plaintiff will consent to reduce the verdict to \$3,500, and take judgment thereon for that amount.

(19 R. I. 805)

COWING v. DODGE.

(Supreme Court of Rhode Island. July 25, 1896.)

WILLS—CONSTRUCTION—ESTATE DEVISED—RULE IN SHELLEY'S CASE.

A devise in trust of a beneficial interest for life, subject to the discretion of the trustee, with power in the beneficiary to direct its disposition by will after his death, and in default thereof to his heirs at law, is within the rule in Shelley's Case, and carries an equitable fee in the estate held by the trustee, and entitles the beneficiary to a conveyance of the legal estate, in the absence of any reason why the trust should be retained.

Action by William O. Cowing against Herbert E. Dodge, trustee, to terminate the trust. Decree for plaintiff.

Arthur Cushing, for complainant. Albert R. Greene, for respondent.

STINESS, J. The will of Martin K. Cowing gave real and personal property in trust to pay two legacies of \$500 each, to pay taxes and make improvements, and to hold the residue to pay from time to time all or such parts of the income of said property as the trustee might think proper to the testator's son, the complainant, and upon his death to convey the property as the complainant should direct in his will, or, in default thereof, to his heirs. The legacies having been paid, the complainant brings this bill to terminate the trust. If the complainant has the equitable fee in the estate, he is entitled to a conveyance of the legal estate, unless there is some reason for its retention. Taylor v. Taylor, 9 R. I. 119. The devise gives to the complainant a beneficial interest for life, subject to the discretion of the trustee, with power in the complainant to direct its disposition by will after his death, and, in default thereof, to his heirs at law. Such provisions are within the rule in Shelley's Case, and carry an equitable fee in the estate held by the trustee. Tillinghast v. Coggeshall, 7 R. I. 383; Angell, Petitioner, 13 R. I. 630. See, also, Sprague v. Sprague, 13

R. I. 701; Bucklin v. Creighton, 18 R. I. 325, 27 Atl. 221; Eaton v. Tillinghast, 4 R. I. 276. No reason appearing in the will, or otherwise, why the trust should be retained, the complainant is entitled to have it terminated by a conveyance of the legal estate held by the trustee, and a decree to that effect may be entered.

(19 R. I. 404)

CONLEY v. BRYANT.

(Supreme Court of Rhode Island. March 18, 1896.)

DISTRICT COURT—ENTRY OF APPEARANCE—EFFEYOT—TRIAL ADMISSIONS.

1. Under Judiciary Act, c. 17, § 3, providing that the entry of appearance by defendant in the district court shall be equivalent to filing a plea of general issue, such plea will, in case defendant has entered appearance, be deemed to have been filed, and to be a part of the record, not only while the case remains in the district court, but where it is certified to the common pleas division on defendant's claim for a jury trial.

2. An admission by defendant's counsel that the debt originally was correct according to the statement of account filed, did not concede that the account constituted a legal claim, but merely dispensed with proof by plaintiff of the items of account as contained in his book of entries.

Action by John C. Conley against Frank Bryant. Judgment for plaintiff, and defendant petitions for a new trial. Granted.

John J. Arnold, for plaintiff. P. H. Quinn, for defendant.

PER CURIAM. We think that the common pleas division erred in holding that the defendant could not avail himself of defenses under the general issue because no plea of the general issue had actually been filed in the case. Judiciary Act, c. 17, § 3, provides that the entry of appearance by the defendant in a case in the district court shall be equivalent to filing a plea of the general issue. This being so, the defendant's entry of appearance in the district court had the same effect as if a plea of the general issue had in fact been filed. The plea of the general issue therefore must be deemed to have been filed, and to be a part of the record in the case, not only while it remains in the district court, but also in the common pleas division, when it has been certified to that division on the defendant's claim for a jury trial. We also think that the common pleas division erred in giving so broad a construction as it gave to the admission of the defendant's counsel that the debt originally was correct according to the statement of account filed. This admission was evidently intended, and was, in effect, the usual admission for the purpose of dispensing with the necessity of proof by the plaintiff of the items of the account as contained in his book of entries. It was not intended to go to the length of conceding that the account constituted a legal claim against the defendant. Defendant's petition for a new trial granted, and case remitted to the common pleas division.

(63 Vt. 289)

STATE v. MAGOON.

(Supreme Court of Vermont. Orange. June 22, 1896.)

LARCENY — EVIDENCE — SILENCE AS ADMISSION — INSTRUCTIONS.

1. The silence of one charged with larceny when questioned about the property by a person to whom he had sold it, and to whom he offered other property for sale, is proper to be shown, as under the circumstances it was incumbent on him to answer.

2. When a defendant and a witness produced by him both testified to a joint transaction between them, the truth of which testimony was controverted by the state, it was not error to charge that, if defendant had produced false testimony, such fact would tend to show that he was guilty.

Exceptions from Orange county court; Rowell, Judge.

Asa Magoon was convicted of larceny, and excepts. Exceptions overruled.

The respondent was tried for the larceny of 11 hens belonging to one Dickenson, and the evidence upon the part of the state tended to show that these hens were stolen April 22, 1895, at Topsham, and were sold to one Pitkin, in Barre, April 24th. The respondent's evidence tended to show that the hens he sold Pitkin April 24th were the property of one Daniel Magoon, and were killed upon the morning of that day. The respondent introduced said Daniel Magoon as a witness, and he testified that the hens sold to Pitkin were his, that he and the respondent had killed them at his house on the morning of April 24th, and that he went with the respondent to Barre that day, when the respondent sold the hens to Pitkin. The evidence of the state tended to show that this was not true. The court instructed the jury that, if the respondent had produced false testimony, that fact would tend to show that he was guilty. There was no evidence indicating that he had produced any other false testimony than that of Daniel Magoon. It appeared that about a week subsequent to April 24th the respondent was again at the store of Pitkin for the purpose of selling some more hens, and Pitkin testified that the following conversation then took place between him and the respondent: "Mr. Magoon fetched me in some chickens a week after that,—I should think about a week after that,—and I asked him if he stole those chickens. He said, 'No,' but he expected that somebody would come in and claim them; and I says to him, 'Those chickens were killed this morning, weren't they?' and he says, 'Yes, they were;' and I says, 'Those other chickens wan't.' Q. What did he say? A. I couldn't say as he said anything. Q. The other chickens,—what chickens were they? A. Those were the ones that were fetched in the first day; those he had trouble about." To which respondent excepted.

John W. Gordon, for appellant. J. G. Harvey, State's Atty., for the State.

MUNSON, J. The interview with Pitkin, in which the respondent failed to reply to a remark suggestive of his guilt, was legitimate evidence. It is properly contended that mere silence affords no ground for an unfavorable inference, unless the circumstances are such as to call for a reply. *Vall v. Strong*, 10 Vt. 457, 463. But we think the circumstances of this interview were such that the respondent was called upon to reply. The situation did not leave him at liberty to treat the remark as idle or impertinent. The conversation was with one to whom he was then offering chickens for sale, and to whom he had previously sold the chickens claimed to have been stolen. If Pitkin suspected the respondent's honesty, it became him to ascertain whether he was being made the purchaser of stolen property; and when the honesty of the respondent's dealing was questioned by one who had this interest in the matter, the respondent was called upon to meet any unfavorable intimation made in regard to it. The respondent and a witness produced in his behalf both testified that the respondent had the chickens of the witness, and that the two killed them at the house of the latter on the morning of the day they were sold to Pitkin. The evidence of the state tended to show that this testimony was false, but outside of this there was no evidence that the respondent had procured the giving of false testimony. The court charged that, if the respondent had procured a witness to testify falsely in his behalf concerning a matter material to his defense, it was evidence tending to show that he was guilty of the crime charged. It is said that this instruction authorized the jury to infer the respondent's procurement of false testimony from the fact that false testimony was given, and to infer his guilt from the fact of this procurement; and that this was in conflict with the rule which forbids the basing of an inference upon an inference. We think, however, that the respondent's procurement of false testimony was not, in this case, an inference from the fact that false testimony was given, but a matter which appeared directly from the testimony itself, if found to be false. If the testimony of the respondent's witness was false, the respondent must have known it, for it purported to be the recital of a transaction in which the two were jointly engaged; and the appearance of both upon the stand in support of a fictitious recital of this nature afforded evidence of concerted action. The character of the testimony bore directly upon the question of the respondent's accountability for its production; and when the false testimony afforded this inherent evidence of its intentional use, the jury might well be permitted to draw from it an inference of guilt. The evidence introduced by the state was wholly circumstantial. It does not appear

what circumstances were testified to. The respondent excepted to the failure to charge "that every link in the chain of circumstances tending to establish guilt should be made out beyond a reasonable doubt." In now presenting the respondent's claim it is said the jury should have been told that all the circumstances made the basis of conviction were to be established beyond a reasonable doubt. In discussing the subject of circumstantial evidence, the court said to the jury that "the true test is whether the facts and circumstances proved produce a condition of guilt to the exclusion of all reasonable doubt." It can hardly be doubted that this sentence, in connection with the instructions presumed to have been previously given as to the measure of proof required in criminal cases, conveyed to the minds of the jury all that the respondent now contends that he was entitled to. In any event, the respondent was not entitled to a charge in the language presented to the court. While it is not to be supposed that counsel intended more than the claim as now stated, it is certain that his language was of broader scope, and covered a proposition clearly erroneous. It covered not only the circumstances found essential to a conviction, but all the circumstances which tended to establish guilt. The respondent's conviction did not depend upon the completion of the chain as the state undertook to establish it. It was for the jury to put together the links upon which the verdict was to depend. If certain facts were established, which were of such potency in their relation to one another and to the matter in issue as to leave in the minds of the jurors no reasonable doubt of the respondent's guilt, nothing further was required. If the respondent was entitled to a special instruction of the nature indicated, it was not with reference to all the circumstances which tended to establish guilt, but with reference only to as many of them as the jury found essential in reaching their conclusion. Judgment that there is no error in the proceedings, and that the respondent take nothing by his exceptions.

(68 Vt. 222)

AMSDEN v. ATWOOD.

(Supreme Court of Vermont. Windsor. Dec. 5, 1895.)

LANDLORD AND TENANT—HOLDING OVER—PLEADING—STATUTE OF FRAUDS—CONTRACTS—BREACH.

1. The holding over of a tenant, after the termination of his lease, under an oral agreement, invalid as within the statute of frauds, ripens into a tenancy from year to year by the election of the landlord to receive rent for a full year, and allowing the tenant to enter upon another year, subject to the terms and conditions imposed by the original lease.

2. The decision on a prior appeal is, the facts being the same, in legal effect, conclusive on a second appeal.

3. A complaint basing the right of recovery on a written extension of a lease is not sup-

ported by proof, admitted under objection, of an oral agreement of extension, which was within the statute of frauds.

4. Where a person, who is under contract to saw logs for another, when requested to do so, notifies the latter that he refuses to saw any more logs for him, the latter is not required to actually tender the logs to be sawed, to entitle him to recover for breach of the contract.

Exceptions from Windsor county court; Taft, Judge.

Action by Rollin Amsden against John Atwood. Verdict and judgment were for plaintiff, and both parties except. Reversed.

The plaintiff sought to recover for 89 items, but no question was made in reference to any of them, except those for rent and power under the lease hereinafter mentioned. It appeared that August 19, 1883, the plaintiff and one Loren Atwood entered into a written lease for the use of the premises in question. A copy of this lease appears in the count in offset, which is hereafter given. Loren Atwood entered into possession, and continued to occupy under this instrument until April, 1890, when the plaintiff and the defendant, John Atwood, entered into another written agreement, by the terms of which the former lease was to be extended, in favor of John Atwood, for one year from November 1, 1890, with the option to the defendant of still further extending the lease for a period of five years from November 1, 1891, provided said option was exercised in the manner specified. A copy of this last agreement also appears in the plea in offset, being dated April 1, 1890. By virtue of this writing the defendant entered into the possession of the premises, and continued to occupy them until December 20, 1892. About September 1, 1891, the plaintiff and defendant had a conversation in reference to the continued occupation of the premises by the defendant. The parties were agreed that the defendant then notified the plaintiff that he should not exercise the option of extending the lease for five years. The plaintiff claimed that the defendant was to remain in the possession of the premises as a tenant at will after November 1, 1891, while the defendant insisted that he was to remain as a tenant from year to year. The court submitted to the jury to find whether the oral agreement of September 1st was as claimed by the plaintiff, or whether it was as claimed by the defendant; and the jury found for the defendant,—that he was to continue as a tenant from year to year. By the terms of the instrument extending the lease, the rent was payable in quarterly installments. The defendant occupied, under that agreement, two full years; paying the rent for that term, and from November 1 to December 20, 1892. One of the questions was whether the plaintiff could recover this unpaid rent from November 1st to December 20th; the plaintiff claiming that he could, because the tenancy was at will, and the defendant insisting that he could not, because the tenancy was from year to year, and therefore not terminable at the will of the plaintiff. The original lease

also contained a stipulation that the plaintiff should saw the logs of the defendant, in his mill, at an agreed price per hour, which was to be indorsed upon the lease, and this condition was extended by the written agreement of extension. The defendant claimed that this stipulation was binding upon the plaintiff, that the plaintiff had refused to saw his logs, and that he was entitled to damages on that account. The plaintiff maintained that defendant could not recover under this condition, since, the tenancy being at will, the condition ended with the holding of the defendant. This phase of the case was before the court in 31 Atl. 448, 67 Vt. 289, and it was there held that, upon facts substantially as above described, the defendant had become a tenant from year to year; that his holding would be upon the terms and conditions of the written lease, as modified by the instrument of extension; that, if the plaintiff terminated the tenancy, he could not have the rent from November 1st to December 20th; and that the defendant might recover damages for the failure of the plaintiff to saw his logs. Upon the present trial the plaintiff objected to the admission of all evidence upon the part of the defendant tending to support his plea in offset, upon the ground that the contract therein set up was within the statute of frauds, and the evidence was admitted subject to this exception. The plaintiff insisted that there was no evidence tending to show that he had refused to saw the logs of the defendant, so as to entitle the defendant to maintain an action for a breach of that stipulation in the lease. The court so held, and to this holding the defendant excepted. The evidence of the defendant upon that point was, in substance, that he had in his employ a man by the name of Cross, who was indebted to the plaintiff, and that the plaintiff told the defendant that he must either discharge Cross, or quit the occupation of the premises; that the defendant declined to discharge Cross; that upon getting to the mill on the morning of December 20, 1892, the foreman told him that he had received instructions not to saw any more logs for him without further orders; that the defendant thereupon went to the office of the plaintiff, and asked him whether he was intending to saw any more logs, and the plaintiff, in answer, informed the defendant that he must either discharge Cross, or secure his bill, and that unless he did one or the other he should decline to saw any more logs; that thereupon the defendant notified the plaintiff that he should hold him responsible in damages. The evidence further showed that at the time the defendant had a quantity of logs in the mill yard, and some logs upon the roll way, ready to be sawed, and that he was present for the purpose of assisting in the sawing of the logs, as he usually did, when the foreman of the plaintiff notified him that no more would be sawed. No price for sawing the logs had ever been indorsed upon the lease, but the plaintiff had charged, and defendant had paid, a given price for this service.

The first special plea in the offset was as follows:

"That the plaintiff, before and at the time of the commencement of this suit, was indebted to the defendant in the sum of one thousand dollars, for that the said plaintiff and one Loren Atwood, at said Windsor, on the 19th day of August, A. D. 1885, by their indenture under seal, made, entered into, and mutually executed a contract, of which the following is a copy: 'This indenture, made this 19th day of August, 1885, between Rollin Amsden, of Windsor, Vt., and Loren Atwood, of Charlestown, N. H., witnesseth that said Amsden, in the consideration of the rents and agreements hereinafter stipulated to be paid and performed by said Atwood, doth hereby lease to said Atwood twenty-five feet in length of the first floor and basement of the north end of his sawmill building, on the east side of Ascutney street, in said Windsor, being the portion of said building now partitioned off on the first floor for box-making, and the same sized room in the basement under it, to be used and occupied by said Atwood for manufacture of chair stock, together with room in the mill yard sufficient to accommodate said Atwood in storage of logs, lumber, and stock of his business. Said Amsden agrees to partition off said section of the basement, and put in a proper floor and windows in the east side thereof, sufficient to properly light the same; to allow said Atwood to use the cutting-off saw in said building, where, and as it now is, when necessary in his business, and, if said Atwood wishes to have a larger or wider belt to run the same, he may, at his own expense, furnish and put them into the place of the saw and belts now in use; also, to saw said Atwood's logs into lumber, as desired, at a price per hour, to be agreed and indorsed hereon, which shall be less than the regular price; also, to lengthen the main shaft in said building, and carry the same into said part occupied by said Atwood, and furnish said shaft with proper driving pulleys to drive said Atwood's machinery; also, to furnish said Atwood with power from the water wheels of said mills sufficient to run in said Atwood's premises three knife turning lathes for turning chair stock, one back saw, and two or three bench saws, and to the amount in all of twenty-five horse power per day of twelve hours, each workday, during the term of this lease, and, if plenty of water for both, said Atwood may run fourteen hours per day, and, when the other machinery in the building is not running, said Atwood may use more than twenty-five horse power, if desired, during the hours aforesaid, and said Atwood shall have the first right to power from said water wheels to amount of said twenty-five horse power; but said Amsden is not to be held responsible for failure to furnish said power caused by unavoidable accident. To have and to hold said granted premises, rights, and privileges for the term of five

years from the first day of October, 1885, for the rent of four hundred dollars per year, payable in equal quarterly installments of one hundred dollars each, on the first days of January, April, July, and October each year during said term; the first installment being payable January 1st, 1886. Said Amsden further agrees to forthwith build a dry house, proper and sufficient for said Atwood's use in his business, as near said mill as he can, and not affect the rate of insurance thereon, and allow said Atwood to use same during said term for the rent of eight per cent. per year on the actual cost of said dry house; said eight per cent. to be paid in equal quarterly installments at the time with the rent of the rooms in the mill; said Atwood to furnish and put in place at his own expense all heating apparatus and piping required, the same to be put up with care; and said Atwood has the right to remove all fixtures put in said mill building or dry house by him during said term, at the expiration of this lease. It is further agreed that if, by reason of dry weather, water should fail so that said Amsden cannot furnish sufficient power to run any part of said Atwood's machinery, then, while said lack of power exists, the rent above reserved shall be reduced one-half. And said Atwood agrees, on his part, to pay rent of four hundred dollars per year, in equal quarterly installments of one hundred dollars each, on the first days of January, April, July, and October in each year during said term, the first payment to be made on the first day of January, 1886; and will also pay said rent of eight per cent. on the actual cost of said dry house, in equal installments, at the same time of the payment of the other rent above reserved; that he will not allow or permit any waste upon the premises; that he will take good care of stoves and stove pipes on the premises, and keep the same in good and safe condition, and take proper care of all ashes taken from the stoves thereon; that the lessor may enter to view, make improvements, and expel the lessee, if he fail to pay his rent or perform his agreements herein; and that at the expiration of this lease he will peaceably quit and surrender up the premises to the lessor or his representatives, in as good order and condition as the same are now or may be put into by said lessor during said term, reasonable use, and also damage by fire or other unavoidable casualty, excepted. It is agreed that if the premises, or any other part thereof, during said term, be destroyed or damaged by fire or other unavoidable casualty, so that the same shall be rendered unfit for use, then the rent hereinbefore reserved, or a just and proportionate part thereof, according to the nature and extent of the injuries sustained, shall be suspended or abated until said premises shall have been put in proper condition for use by said lessor, or these presents shall be determined and ended at the election of said lessor or his legal representatives.'

"And the defendant avers that the said Loren Atwood, who was a manufacturer of chair stock, entered into possession of said premises described in said contract, and of all the rights and privileges specified therein, and continued in the use, occupation, and exercise of the same, manufacturing chair stock, till the 1st day of April, 1890, during all which time the plaintiff and said Loren Atwood kept and performed all stipulations required of them, respectively, as specified in said contract, each party being governed by the terms and provisions of said contract; that on the 1st day of April, 1890, the plaintiff and defendant, with the concurrence and consent of the said Loren, made, entered into, and executed a contract, of which the following is a copy: 'Articles of agreement made this first day of April, A. D. 1890, between Rollin Amsden, of the first part, and John Atwood, of the second part, and both of Windsor, in the state of Vermont, witnesseth that whereas, said John Atwood has taken the place of Loring Atwood in a contract of indenture dated the 19th day of August, 1885, executed by and between Loring Atwood and the said Amsden; and whereas, certain modifications and extensions of said contract or indenture have been mutually agreed upon by and between said Amsden and said John Atwood, which it is deemed desirable to put in writing: Therefore, be it known that the said Amsden, for a valuable consideration, doth hereby extend the lease set forth in said contract or indenture of August 19th for the term of one year from the first day of November, A. D. 1891, at the option of the said John Atwood, provided he shall give to said Amsden notice in writing, at least three months prior to November 1st, 1891, of the number of years for which he shall elect to hold and enjoy such extended term; and the said John Atwood, in consideration of the foregoing, doth hereby covenant and agree to and with the said Rollin Amsden that he will pay, in equal quarterly installments of one hundred nine and ⁴⁴/₁₀₀ dollars, on the first days of January, April, July, and October, for such extended terms, as the rent thereof, except so far as said rent may be reduced under the provisions of said indenture of August 19, 1885, and that he will in all respects fulfill all the contracts and agreements of the said Loring Atwood therein contained. It is further mutually agreed and covenanted that if the said John Atwood does not have logs so as to run his chair works from the first day of April to the first day of November, A. D. 1890, then the rent is to be reduced one-half for such time only between said dates as said shortage of stock may exist. Witness our hands and seals the day and year above written.'

"And defendant avers that said defendant entered into possession of said premises at the date of said last-named contract, and continued in the occupation and enjoyment and exercise of all the rights and privileges contained

in said contracts until the 20th day of December, A. D. 1892, and during all that time manufacturing chair stock as aforesaid, making no option under the terms of the last-named contract. The said plaintiff all that time recognizing the said defendant as occupying said premises agreeably to the terms, provisions, and stipulations contained in said contracts, keeping and performing during all said time all the stipulations and agreements by him to be kept and performed, contained in said contracts, including the stipulation to saw the defendant's logs as specified in said contracts, and the defendant during all time last aforesaid faithfully kept and performed all the stipulations contained in said contract by him to be performed and kept, each party recognizing and being governed by the terms of said contracts. And said defendant further avers that said plaintiff, at said Windsor, to wit, on the 20th day of said December, 1892, the plaintiff not regarding his said contract, willfully and without cause, absolutely refused to keep and perform his agreements in said contracts specified, to wit: The plaintiff absolutely refused to saw Atwood's logs as stipulated in said contracts, and absolutely refused to allow the defendant to further occupy said premises agreeably to the terms of said contracts, whereby defendant was deprived of all useful or beneficial use or occupation of said premises, and was unable to further carry on his said business of manufacturing chair stock, and was thereby deprived of divers great gains and profits which otherwise would have accrued to him from manufacturing said stock, and though defendant further avers that at the time of such wrongful refusals, on, to wit, the 20th and 26th days of said December, at said Windsor, he had a large amount of chair stock in the log, to wit, forty cords in his mill yard specified in said contracts, which he was intending to manufacture into chair stock, and had already contracted for a large amount of logs, to wit, two hundred cords, suitable for chair stock, that in consequence of the wrongful act of the plaintiff as aforesaid the defendant was compelled to sell and did sell said forty cords of chair stock at a great loss, and was compelled, at a great expense, to draw and load the same in cars, and was forced to cancel his contract for logs as aforesaid. The defendant further avers, at the time of the wrongful actions of the plaintiff as aforesaid the defendant had various orders and contracts for the delivery of stock, which, by reason of the plaintiff's wrongful acts as aforesaid, he was obliged to cancel, or otherwise provide for; that at the time of said wrongful acts of the plaintiff as aforesaid the defendant had a large amount of machinery for the purpose of manufacturing chair stock on said premises, and a large force, to wit, six men, engaged in the manufacture of said chair stock therein; that, in consequence of said wrongful acts of the plaintiff as aforesaid, he was obliged to discharge the said workmen, and said machinery laid idle for a long time, and said defendant

was thrown out of business, and lost and was deprived of divers great gains and profits which otherwise would have accrued to him in the manufacture and sale of such stock, all of which was to the damage of the defendant of one thousand dollars, which said sum so due and owing from the plaintiff to the said defendant, though often requested to pay, the said plaintiff has refused, and still does refuse, to pay, which said sum of money so due and owing from the plaintiff to the defendant exceeds the amount due from the defendant to the plaintiff in his declaration mentioned, for which this suit is brought, and this the defendant is ready to verify; and thereupon, out of the said sum of one thousand dollars so due and owing from the plaintiff to the defendant, he (the defendant) is ready and willing, and hereby offers, to set off and allow the plaintiff the full amount of the said debt in the plaintiff's declaration described. And the defendant further says that there is due to the defendant from the plaintiff from said sum of money, to wit, the sum of one thousand dollars, and the sum of nine hundred and fifty dollars more than sufficient to satisfy the debt due the plaintiff in said declaration mentioned, which last-named sum, by virtue of the statute in such case made and provided, the defendant claims and demands to recover of the plaintiff in this suit."

Gilbert A. Davis and W. B. C. Stickney, for plaintiff. J. C. Enright and J. J. Wilson, for defendant.

ROWELL, J. As the facts now appear, the tenancy in question does not differ in legal quality from what it was as the facts appeared when the case was here before. 67 Vt. 289, 31 Atl. 448. It then appeared that the defendant held over by constructive consent after the expiration of his lease for years, which holding was held to be a tenancy at will in its inception, but to have ripened into a tenancy from year to year, for that the plaintiff elected, by taking rent, to recognize the defendant as his tenant for a full year, and allowed him, without objection, to enter upon a second year. Now, it appears that the defendant continued in possession after the expiration of his said lease, under an oral agreement between the parties, made before its expiration, that he should occupy as a tenant from year to year under and according to the provisions and conditions of his written lease. In other respects the facts appear in substance as they did before. Under the statute, said oral agreement created a tenancy at will only. V. S. § 2218. It makes no difference whether the tenancy at will arose from a holding over by constructive consent, or resulted from the express oral agreement found; for in either case it was equally a tenancy at will in its inception, and equally capable of ripening into a tenancy from year to year.

It is objected that the finding of the oral

agreement is vitiated by the admission of oral testimony to support it. But if it is, on the ground that the statute of frauds is as applicable when rights resulting from and dependent upon the contract are sought to be enforced as when the contract itself is relied upon for recovery, yet the case would be the same; for there would still be a tenancy at will, resulting, as it appeared before, not from an express oral agreement, but from a holding over by constructive consent. This being so, the former decision that the tenancy at will had ripened into a tenancy from year to year must stand; for the court will not reconsider a decision made by it in the same case on a state of facts not different in legal effect. *Stacy v. Railroad Co.*, 32 Vt. 551.

It is claimed that the defendant cannot stand on his declaration in offset, for that the first count declares upon the written agreement, whereas an oral agreement is found, and for that the second count declares upon an extension of the written agreement, which, being found to have been done orally, brings the case within the statute of frauds. But, although the first count recites the written agreements which constituted the written lease between the parties, it does not count upon them as the cause of action, but upon a state of things to which said agreements are but inducements, alleged, in effect, to have taken place by tacit consent after the expiration of the written lease, which, as matter of law, it is claimed, continued obligatory upon the plaintiff, to and including the time of its alleged breach, the stipulation in the lease to saw the defendant's logs; and, if the legal result of the things alleged is as claimed, the finding of the oral agreement makes no difference, for the same result would follow without it.

The second count, to show that the stipulation to saw was obligatory on the plaintiff at the time of its alleged breach, on December 20, 1892, alleges an extension of the written lease, with all its stipulations, for the term of one year from November 1, 1892, by mutual agreement of that date, and an entry by the defendant, and occupancy thereunder, until the time of the alleged breach. The agreement alleged was not proved, and, if oral, was not provable under objection, as it would be within the statute of frauds; and, if proved, it would not be effective to extend the lease a year, as it would create a tenancy at will only, and if it had been alleged to be oral the count would be demurrable. The defendant cannot, therefore, stand on this count, under an oral agreement of the character alleged.

The original lease contained a stipulation that the plaintiff would saw the lessee's logs into lumber, as desired, at a price per hour, to be agreed and indorsed on the lease, which should be less than the regular price. On April 1, 1890, which was before the expiration of the lease, the defendant took the

place of the lessee, and by a paper writing of that date, for that purpose, executed by the plaintiff and the defendant, the lease was somewhat modified, and the term extended to November 1, 1891, with an option on the part of the defendant, which he declined to exercise, of a further extension. It is claimed that, as the price agreed for sawing was never indorsed on the lease, no usage or practice between the plaintiff and defendant before the making of the oral agreement found by the jury is of any force, and that the sawing done after November 1, 1891, was wholly outside and independent of the two written agreements, and that the defendant had no legal claim on the plaintiff to have any sawing done. But the things alleged in the first count to show the continuance in force of the stipulation to saw are the things that were held before to have ripened the tenancy at will into a tenancy from year to year, which last-mentioned tenancy is as effective to keep that stipulation on foot without an indorsement of the agreed price as was the agreement of April 1, 1890, which was held to have extended the lease, with all its covenants, except so far as they were thereby changed. The tenancy is thus effective, because, when a tenant holds over without a new agreement, and the landlord recognizes him as still his tenant, the holding is taken to be on the terms and conditions of the original lease. The same result would follow if effect is given to the oral agreement found, for by that the occupancy was to be under and according to the provisions and conditions of the two written agreements. It follows, therefore, that the stipulation in question was in force at the time of its alleged breach, and the question arises whether there was any evidence tending to show a breach, the court below having ruled that there was none. The testimony tended to show that on December 20th the plaintiff refused to saw defendant's logs unless he would comply with a request that he had no right to make, and with which the defendant refused to comply, and that at the time the defendant had logs on the log way that he desired to have sawed then, to the knowledge of the plaintiff; but he did not actually tender any logs at the saw, nor formally request that the sawing be done. It is claimed that each party was to perform at the same time, and that the defendant must have actually brought and tendered logs at the saw before it was the duty of the plaintiff to saw them. But such is not the law. When concurrent acts in the nature of mutual conditions precedent are to be performed, readiness and willingness to perform on the part of one party are sufficient to impose the duty of performance on the other party. This doctrine is so well stated in *Smith v. Lewis*, 26 Conn. 110, that we quote from the opinion of the chief justice in that case: "Some misapprehension or confusion

appears to have arisen from the mode of expression used in the books in treating of the necessity of a tender or offer by the parties as applicable to the case of mutual and concurrent promises. The word 'tender,' as used in such a connection, does not mean the same kind of offer as when it is used in reference to the payment or offer to pay an ordinary debt due in money, when the money is offered to a creditor who is entitled to receive it, and nothing further remains to be done, and the transaction is completed and ended; but it means only a readiness and willingness, accompanied with an ability, on the part of one of the parties to do the act that the agreement requires him to perform, provided the other will concurrently do the things that he is required by it to do, and a notice by the former to the latter of such readiness. Such readiness, ability, and notice are sufficient evidence of—and, indeed, imply—an offer or a tender, in the sense in which those terms are used in reference to the kind of agreements we are now considering. It is not an absolute, unconditional offer to do or transfer anything at all events; but it is, in its nature, conditional only, and dependent on, and to be performed only in case of, the readiness of the other party to perform his part of the agreement." In *Morton v. Lamb*, 7 Term R. 125, *Grose, J.*, says that it is difficult to reconcile all the cases on the subject, but that the good sense to be extracted from them all is that, if one party covenants to do one thing in consideration of the other party's doing another, each must be ready to perform his part of the contract at the time he charges the other with non-performance. The same doctrine is stated in *Swan v. Drury*, 22 Pick. 485, and in *Smith v. Lewis*, 24 Conn. 624, and aptly illustrated by the case of *Cort v. Railway Co.*, 17 Q. B. 127, which was for the breach of a contract to manufacture and supply goods of a special kind, to be delivered in certain quantities monthly, and the buyer, after accepting a portion of the goods, gave notice to the seller that it had no occasion for more, and would not accept or pay for them; and it was held that the seller might claim for a breach of contract without manufacturing and tendering the rest of the goods. From this case we deduce the principle that the promisee may treat a renunciation made in the course of performance as a discharge from further performance on his part, and thereupon bring an action, although such performance would otherwise be a condition precedent to the liability of the promisor. And this proposition is sustained by the cases generally. *Derby v. Johnson*, 21 Vt. 17; *Dugan v. Anderson*, 36 Md. 567; *Parker v. Russell*, 133 Mass. 74. But if this is not a case in which concurrent acts in the nature of mutual conditions precedent were to be performed, but a case in which performance by the defendant was a condition

precedent to performance by the plaintiff, yet actual performance by the defendant is not necessary, but that which is equivalent to performance, or an excuse for nonperformance, is sufficient. 1 Chit. Pl. 326; *Gould*, Pl. c. 4, § 13.

It is not necessary for present purposes to consider the effect of the plaintiff's notice to the defendant of December 26th, and the latter's claimed action thereunder. Judgment reversed and cause remanded.

(68 Vt. 319)

FOSTER v. HANCHETT.

(Supreme Court of Vermont. Windsor. March 14, 1896.)

BREACH OF MARRIAGE PROMISE—DEFENSE.

It is a good defense to an action by a woman for the breach of a promise of marriage to prove that she was unchaste, and that defendant was ignorant of that fact when he made the promise.

Exceptions from Windsor county court; Taft, Judge.

Action by Abbie M. Foster against Henry H. Hanchett for breach of a promise to marry. Plea, the general issue. Trial by jury at the May term, 1895. To a judgment in favor of plaintiff, defendant excepts. Reversed.

Tarbell & Whitham, Dillingham, Huse & Howland, and J. J. Wilson, for plaintiff. Hinton & Stickney and W. E. Johnson, for defendant.

ROWELL, J. This is an action for the breach of a promise of marriage. No question was made but that a contract of marriage was entered into between the parties, but the defendant claimed that it was conditional, while the plaintiff claimed that it was absolute. The defendant introduced testimony tending to show that the plaintiff was of loose and immodest character, and had been improperly and immodestly intimate with one Fuller, who was a married man; that the plaintiff disclosed nothing of this to him; and that he did not know of it until after he made the promise; and that, when he learned of it, he canceled the engagement by reason thereof. In the charge, the court limited this testimony to the mitigation of damages, and denied it effect as a defense, because not pleaded. The plaintiff concedes that, if matter of defense, it need not have been pleaded; but she insists that it is not matter of defense, because she says the exceptions do not mean that the testimony tended to show that she was loose and immodest in the sense of being sexually impure, but only as being such in behavior. But it is quite obvious that the first is what is meant. A loose woman—a woman of loose character—is an unchaste woman, in the ordinary signification of those terms. By an unchaste woman is meant a sexually im-

pure woman, ordinarily; and that is what the testimony tended to show the plaintiff to be. This being so, it is very clear that it was a defense, if made out and the defendant was ignorant of it when he made the promise. Abbott, C. J., said in *Irving v. Greenwood*, 1 Car. & P. 350, 11 E. C. L. 412, that if any man has been paying his addresses to one whom he supposes to be a modest person, and afterwards discovers her to be a loose and an immodest woman, he is justified in breaking any promise of marriage that he may have made to her. Here the word "loose" is used in the sense of "unchaste," for the defendant claimed that the plaintiff had had a child by another man. The doctrine of this case is adopted everywhere. *Capehart v. Carradine*, 4 Strob. 42; *Von Storch v. Griffin*, 77 Pa. St. 504; *Berry v. Bakeman*, 44 Me. 164; *Espy v. Jones*, 37 Ala. 379; *Burnham v. Cornwell*, 63 Am. Dec. 643, note. In *McCarty v. Coffin*, 157 Mass. 478, 32 N. E. 649, the offer was to show that the plaintiff "had had an intimacy with several different men." The word "intimacy" was held to mean nothing more than close and familiar acquaintance, and hence that the testimony offered was not admissible for any purpose. The case of *Cole v. Holliday*, 4 Mo. App. 94, is not at all opposed to the general doctrine above stated, as will be seen on examination. But general reputation of bad character in respect of chastity is no bar. In order to bar, the defendant must prove that the plaintiff is in fact what she is reputed to be. *Butler v. Eschleman*, 18 Ill. 44. Reversed and remanded.

(68 Vt. 303)

HANCOCK v. CLARK.

(Supreme Court of Vermont. Orleans. March 14, 1896.)

Sale and Transfer of Stock—Construction of Contract.

Plaintiff sold defendant 12 shares of bank stock. Defendant paid \$210 cash, and gave an obligation to pay a like sum annually thereafter, and providing that all dividends declared on unpaid shares should be in lieu of the interest on the same; but if at any time between the declaring of dividends any shares were paid for, the interest on such shares should be such a part per share of six dollars as the time bears to the whole year. *Held*, that the intention was to give plaintiff the dividends on the shares unpaid for, in lieu of interest; and, if defendant elected to pay for any shares between the declaring of dividends, as he had the option to do, he was to pay interest on such shares from the time of the last dividend.

Exceptions from Orleans county court; Start, Judge.

Assumpsit by Eliza S. Hancock against W. F. Clark to recover dividends declared on certain shares of bank stock sold and transferred by plaintiff to defendant. There was a judgment entered on a verdict in favor of plaintiff directed by the court, and defendant excepts. Affirmed.

December 24, 1887, the plaintiff sold and transferred to the defendant 12 shares of Barton National Bank stock, and received from the defendant the following writing: "Glover, Vt., Dec. 24th, 1887. For value received, for twelve shares of Barton Nat'l Bank stock, I promise to pay Mrs. E. S. Hancock, or bearer, twelve hundred and sixty dollars as follows: Two hundred and ten dollars on delivery of said stock to me, and the same amount each year, or before, thereafter, until the whole is paid. The sum of all dividends declared each year on all shares unpaid shall be in lieu of the interest on the same; but if at any time between the declaring of such dividends such shares are paid for, the interest on such share or shares shall be such a part per share of six dollars as the time bears to the whole year." At the date of the transfer the defendant paid the plaintiff \$210, and on February 29, 1888, paid to the plaintiff \$1,050 more; making in all the sum of \$1,260. It appeared that January 2, 1888, and July 8, 1888, there had been declared a dividend of three dollars on each of said shares at each of these dates, that the defendant received these dividends, and that no part of the same had ever been paid by the defendant to the plaintiff.

W. W. Miles, for plaintiff. Cook & Redmond, for defendant.

ROSS, C. J. The only contention in this court is in regard to the construction to be given to the contract between the parties of December 24, 1887. At that date the plaintiff sold and transferred to the defendant 12 shares of the capital stock of the Barton National Bank, for which the defendant paid then \$210, and gave his obligation to pay the plaintiff \$1,050 additional, payable one-fifth each year, or before, thereafter, until the whole was paid. Then follows this provision: "The sum of all dividends declared each year on all shares unpaid shall be in lieu of the interest on the same; but if at any time between the declaring of such dividends any shares are paid for, the interest on such share or shares shall be such a part per share of six dollars as the time bears to the whole year." The defendant contends that because of the words, "sum of all dividends declared each year," the parties intended that interest should be reckoned on the shares unpaid for at their par value from the time of declaring the January dividends each year to the end of that year, and the dividends made that year are to be added together, and their sum applied as a general payment, first to liquidate the interest then due, and the balance, if any, is to be applied on the principal. We do not think the language used evidences such an intention. No interest is reserved except on shares paid for between the times of declaring dividends. It is clearly expressed that the dividends on the unpaid shares are to be in lieu of interest on the

same. Whether dividends would be declared, and, if so, of what amount, was doubtful, and subject to contingencies. If interest was intended to be reserved, we should have expected it would be upon the amount agreed to be paid per share, and not upon the par value. We think the parties clearly intended to give the plaintiff the dividends on the shares unpaid for in lieu of interest. The plaintiff was to take the risk of the dividends on the shares not paid for being sufficient to pay the interest on her capital invested in them. This being the general provision between the parties, there follows the provision commencing with "but," to meet a condition which was likely to occur, inasmuch as the contract left the time of payment optional with the defendant; and of which he availed himself. If the defendant elected to pay for any of the shares between the declaring of dividends, then he was to pay interest on such shares from the time of the last dividend. Nor does this construction render the contract usurious, as contended by the defendant. There is no reservation of interest above 6 per cent. by the terms of the contract, nor by any understanding of the parties. It was wholly uncertain whether the dividends would be more or less than 6 per cent. per annum. Because the defendant happened to select a time to pay for the shares which gave the plaintiff more than 6 per cent. does not render the contract usurious. The sale of these shares was shortly before an expected dividend. It was practically a sale with the dividends reserved to the plaintiff. No doubt the price agreed to be paid per share was less than it otherwise would have been but for the fact that by the terms of the contract the plaintiff was to have the dividend which was expected to be made in a short time thereafter. If this dividend had not been made, the plaintiff would have failed to receive anything for the use of her investment since the dividend next before the making of the contract. Judgment of the county court is affirmed.

(68 Vt. 306)

CITIZENS' SAV. BANK & TRUST CO. v. GRAHAM.

(Supreme Court of Vermont. Orleans. April 25, 1896.)

MORTGAGE BY INSOLVENT—SECURING COUNSEL FEES.

A mortgage by an insolvent to procure the \$30 required to be deposited with his petition in the court of insolvency, and to secure reasonable fees to his counsel for services in making his petition and in procuring his discharge, is valid, and may be enforced. Munson, J., dissenting.

Appeal in chancery, Orleans county; Start, Chancellor.

Bill by the Citizens' Savings Bank & Trust Company against Horace F. Graham, assignee, and others. Decree for the orator for the full amount claimed against the other de-

fendants, and for \$30 and interest against defendant Graham. The orator brings exceptions. Reversed.

Bates & May, for orator. Cook & Redmond, for defendant Graham.

THOMPSON, J. January 23, 1894, the defendant Conner was an insolvent debtor, and contemplated voluntary proceedings in the court of insolvency to procure himself to be adjudged such a debtor, and thus secure to himself and his creditors the rights and benefits accorded by law. At that time there was a suit pending in the supreme court in favor of I. T. Patterson against him and others, in which judgment had been rendered against the defendants for about \$1,000 and costs of suit, and a certified execution granted against all the defendants. If this judgment was affirmed, it would take all of Conner's property to pay it. It was understood that Patterson and those in interest in that suit would oppose Conner's discharge if he should be adjudged an insolvent debtor. He had no money to pay the \$30 required to be deposited with his petition in the court of insolvency. Matters standing thus, Conner on January 23, 1894, executed and delivered to his attorneys, Bates & May, his note for \$100, payable, with interest, to their order, in six months, and the mortgage in question, securing the same, for the purpose of raising money for the deposit of \$30, and \$70 for their services in making his petition and schedules in insolvency, and attending to the matter in the court of insolvency so far as was necessary on the part of Conner to secure his discharge. On the same day, Bates & May procured the note to be discounted by the orator, who, the master finds, took it in good faith, in due course of business, while current, and paid therefor \$100. Bates & May made Conner's petition and schedules in insolvency, and deposited \$30 of the money received by the discount of the note with the court of insolvency for the district of Orleans, on the same day, at which date the petition was filed in that court. Such proceedings were had thereon that Conner was adjudged to be an insolvent debtor, February 12, 1894; and, on the same day, defendant Graham was duly appointed assignee of his estate, accepted the trust, and duly qualified therefor. Bates & May appeared for all the defendants in the case of Patterson against defendant Conner and others in the supreme court. After Conner had been adjudged an insolvent debtor, they suggested the proceedings in insolvency, and moved for a continuance under V. S. § 2071, until the question of his discharge should be determined. This motion was sharply contested, but was granted by the supreme court. 30 Atl. 2. Mr. May has been to Newport once or twice since to attend hearings in said insolvent estate, where matters incidentally connected with Conner's discharge were involved. The master finds that the \$70 retained by Bates & May is a reasonable compensation for these

services, and for such as they are likely to have to render hereafter in aiding Conner to obtain his discharge. Counsel for defendant Graham admits in argument that it is a reasonable compensation for their services already rendered. The assignee contends that the note and mortgage are void at his election, because they are in violation of V. S. § 2142, prohibiting transfers of property with a view to prevent its coming into the hands of the assignee.

Under the United States bankruptcy acts, it seems to have been well settled that a person intending to file a voluntary petition in bankruptcy had a right to pay counsel in advance for services to be rendered in procuring his discharge, and was not limited to such services as were necessary to get the property into the hands of the assignee. In *re Rosenfeld*, 2 N. B. R. 116, Fed. Cas. No. 12,057; In *re Keefer*, 4 N. B. R. 389, Fed. Cas. No. 7,636. The provision of the insolvency law of Massachusetts in respect to transfers of property to prevent its coming into the hands of the assignee is like ours. In *Re Parsons*, 150 Mass. 343, 23 N. E. 50, it was held that a mortgage executed in good faith, by a person about to file a voluntary petition in insolvency, to his attorney, to secure him a reasonable compensation for services to be rendered in procuring a discharge in insolvency, is valid. The purpose of our insolvency laws is twofold, viz. to provide for an equal distribution of the debtor's estate among his creditors, and to discharge him from his debts, and thus permit him to start his business life anew, and retrieve his fortune if he can. They are remedial and humane in their spirit and purpose. Clearly, this note and mortgage were valid, to the extent of the \$30 deposited with the court. If Conner had had the money, the law required him to deposit the \$30. Not having it, he could raise it by mortgaging his property. Under the English bankruptcy law, the assignee cannot recover money bona fide paid by a debtor to his solicitor to defray counsel fees and other legal expenses in opposing proceedings in bankruptcy that have been commenced against him, although adjudication follows, and the solicitor knew of the acts of bankruptcy on which the proceedings were based. In *re Sinclair*, 15 Q. B. Div. 616. In that case the court said, "It is right that a man should have legal advice and assistance against a bankruptcy petition, but, if a solicitor has to refund money paid him for such a purpose, a man would be left defenseless,—nobody would act for him." Under our insolvency law the insolvent debtor is clearly interested in the settlement of his estate, in everything which may affect his discharge; and we think he may give a mortgage of his property, in good faith, to secure a reasonable compensation to his attorney for preparing his petition and schedules, securing an adjudication of insolvency, and procuring the debtor's discharge. Such an act carries out the intent and spirit of the law, instead of defeating it. Such services ordinarily would not be onerous, and the compensation would be

small. If the mortgage should be found to be a device to defeat creditors, it would not stand. If the mortgage is foreclosed in equity, what is a reasonable compensation to the attorney can be determined by the court of chancery. If the mortgaged premises are sold under V. S. § 2076, the amount of the lien can be determined by the court of insolvency, if it has power to do so. If its powers are inadequate, resort can be had to equity. It is urged that courts of insolvency will make extravagant allowances to attorneys, under this holding. To this it need only be said that it is our duty to declare the law as it is, and that it is to be presumed that all courts will act honestly and with sound discretion in its administration. If abuses arise in the courts of insolvency, the legislature can correct them. As we construe the report, the services rendered and to be rendered by Bates & May relate only to assisting the debtor to be adjudged an insolvent debtor, and to procuring his discharge; hence it is not necessary to consider what would be the result if the note and mortgage embraced services of a broader kind, so that it might be invalid in part, or altogether. Decree reversed and cause remanded, with mandate that decree be entered for orator for amount of note and costs.

MUNSON, J., dissents.

(68 Vt. 297.)

In re FITTON.

(Supreme Court of Vermont. Windsor. June 22, 1896.)

HABEAS CORPUS—DECISION ON APPEAL—CRIMINAL LAW—JURISDICTION.

1. Relator, while under arrest, instituted habeas corpus proceedings in the circuit court of the United States. On the hearing he was discharged, with protection from arrest for one day. He appealed, and gave bail pending appeal, but upon failure to prosecute his appeal was dismissed. *Held*, that by the dismissal of the appeal the jurisdiction of the circuit court terminated, and relator became amenable to process from the state court, even though his bail in the circuit court had not been discharged or forfeited.

2. Relator, having been arrested under an indictment for perjury, was discharged on habeas corpus for irregularities in the arrest. Subsequently, while in jail on a warrant issued in proceedings for contempt, he was again committed on a charge of jail breaking, and upon conviction was sentenced to the state prison. After this, and while in the county jail, and without being again arrested, he was tried and convicted under the indictment for perjury. *Held*, that the failure to rearrest was at most an irregularity, which would not render the proceedings void for want of jurisdiction of the person.

Petition by Robert Fitton for a writ of habeas corpus. Remanded.

Robert Fitton, pro se. W. W. Stickney and J. G. Sargent, for the State.

MUNSON, J. The relator was indicted for perjury at the December term of the Windsor county court in 1887, was tried on said

charge at the May term of that court in 1891, and on conviction thereof was sentenced to the state prison at Windsor, where he was confined. The relator claims that his detention is unlawful, because of illegalities in the proceedings by which he was brought to trial. It appears that after this indictment was found the relator absented himself from the state, but that he came into the state at Bennington in January, 1891, as John Rice, and was afterwards at Troy, in the state of New York. It being claimed that a larceny had been committed at Bennington by the person known as John Rice, a demand for the surrender of such person was made by the governor, but his requisition was not complied with. The relator, understanding that there were some informalities in the papers which required correction and would cause delay, consented to return to this state, upon receiving from the office a written statement that he was taken only upon the charge of larceny. He was held to bail upon this charge at Bennington, and, upon giving satisfactory surety for his appearance therein, was arrested upon a charge of intoxication, and was held upon that charge until he was taken on a *capias* issued by the clerk of the Windsor county court upon the above indictment. Upon being committed to the Windsor county jail on this arrest, the relator obtained a writ of habeas corpus from the United States district judge, which writ was taken into the circuit court, then in session, and upon a hearing in that court the relator was discharged from custody, with protection from arrest for one day. 45 Fed. 471. An appeal from this decision was taken to the supreme court by both the relator and the state, and the relator was released on giving bail for his appearance to abide the decision of that court. The case was taken up on the relator's appeal, and on his failure to prosecute the same the cause was dismissed April 22, 1891, the mandate being filed in the circuit court April 28th. The petition shows further that on July 12, 1891, the relator was brought into the circuit court on a writ of habeas corpus, and that proceedings were then had in regard to his bail. In April, 1891, the relator was in Windsor county jail upon a warrant of commitment issued in proceedings for contempt, and while so in confinement he was again committed in default of bail upon a charge of jail breaking. He was brought to trial upon this last-named charge at the May term, and upon conviction was sentenced, June 13th, to confinement in the state prison. After this, the relator being thus in the Windsor county jail, he was brought into court, and put to trial upon the indictment for perjury above mentioned, protesting, however, that he was not legally called upon to make answer thereto. There was no rearrest of the relator upon the charge of perjury.

It is claimed by the relator that he was under the jurisdiction of the circuit court by

reason of his bail until July 12th, and so was not amenable to the state court at the time of his trial. This position cannot be sustained. The dismissal of the appeal by the supreme court was a final disposition of the matter, and left the judgment of the court below in full force. When the mandate of the supreme court was filed in the circuit court, the judgment of that court became complete, and was thereupon to be carried into effect. The relator could then have delivered himself in discharge of his bail, or have departed without relieving his bail. The existence of the bail did not prevent his being proceeded with in the state court after the expiration of the time for which he was given protection. This point was made on habeas corpus in the circuit court in 1893, and was decided against the relator. In *re Fitton*, 55 Fed. 271. We know of no ground on which a different conclusion can be reached.

But the relator's principal objection is that he was tried without having been rearrested. It is well settled that the writ of habeas corpus cannot be given the effect of a writ for the correction of errors or irregularities. One who is detained upon a sentence following conviction will not ordinarily be entitled to relief, unless the defect is such as to render the proceedings void. *Ex parte Siebold*, 100 U. S. 375. It has been said by this court that, to entitle a relator to discharge, the process must be void, and not merely erroneous. *Ex parte Kellogg*, 6 Vt. 509; In *re Greenough*, 31 Vt. 279. The inquiry ordinarily resolves itself into one regarding jurisdiction. A want of jurisdiction will render void a proceeding which is entirely legal in form. But if the court has jurisdiction of the subject-matter and the person, and renders such a judgment as it would be authorized to render in some circumstances in cases of that class, the proceedings will stand the test of this writ, however irregular they may have been. See *Com. v. Lecky*, 28 Am. Dec. 40, note. It is apparent that the question here is whether the court had jurisdiction of the person of the relator in the perjury proceeding. He clearly was not before the court by virtue of the arrest made at Bennington, for he had been discharged from that arrest by competent authority. It is not claimed that any other paper for his arrest or detention in that case was ever issued. But being in the custody of the sheriff upon another charge, he was brought into court, and put upon trial. An arrest in a criminal case is defined to be the apprehending or detaining of the person in order that he may be forthcoming to answer an alleged crime. In this case the person was forthcoming for trial, although the detention which kept him within reach of the court was upon another charge. He was, in fact, before a court which had jurisdiction to try persons charged with that offense. He was put to trial upon an indictment pending in that court. The utmost regularity required no action from any one other than the court

and its officers. The objection urged would have been obviated by having the clerk hand the sheriff a warrant of arrest. We think the action of the court in proceeding without this was at most but an irregularity, and not such a defect as would render the proceedings void. Relator remanded.

(68 Vt. 315)

STANLEY v. TURNER.

(Supreme Court of Vermont. Franklin. March 14, 1896.)

LANDLORD AND TENANT—ASSUMPSIT—COMMENCEMENT OF SUIT—RENTS—RECOVERY—SET-OFF—PLEADING.

1. In an action for rent the recovery is limited to rents due at the commencement of the suit.

2. The service of the writ is the commencement of a suit to recover rents.

3. Where suit is brought to recover rent, payable monthly, the rent for a month cannot be so divided as to allow plaintiff to recover rent for four days of the current month, which had elapsed when the writ was served.

4. A demand necessary to perfect a right to sue for rent is sufficient if it precede the service of the writ, though the writ is then in the hands of the officer.

5. Where defendant performed work for plaintiff while his tenant, and it was understood that the price of the work was a payment of so much of the rent, and plaintiff received it as such, and nothing further was to be done by either party before the item was to become a payment, the law will make the application in a suit by plaintiff to recover the rent.

6. Where defendant has not filed any plea or declaration in set-off, he cannot recover items of mutual deal found due him from plaintiff, whose action is assumpsit.

Exceptions from Franklin county court; Munson, Judge.

Assumpsit for rent by H. I. Stanley against S. Turner. Plea, the general issue and payment. Heard upon the report of a referee at the September term, 1895. To a judgment in favor of plaintiff both parties except. Reversed.

Rustedt & Locklin, for plaintiff. A. K. Brown, for defendant.

ROSS, C. J. 1. The plaintiff's contention that he can recover rent falling due after the commencement of the suit cannot be sustained. *Waterman v. Buck*, 58 Vt. 519, 3 Atl. 505. He excepted to the judgment of the county court, because it limited his right of recovery of rent to the date of the writ. By this holding the date of the writ is treated as the commencement of the suit. The writ is dated July 6, 1891, but was not served until August 1, 1891. The service of the writ is the commencement of the suit for the recovery of damages, and for most purposes, except for interrupting the running of the statute of limitations. *Hall v. Peck*, 10 Vt. 474; *McDaniels v. Reed*, 17 Vt. 674; *Hawley v. Soper*, 18 Vt. 320; *Strong v. Edgerton*, 22 Vt. 249; *Day v. Lamb*, 7 Vt. 426. Until its service, no jurisdiction is acquired over the defendant. Until then the defendant is not

called upon to reply, but should then be compelled to reply to all claims then due the plaintiff properly declared for. Hence, when demand must be made to perfect a right of action, it is sufficient if it precede the service of the writ, although the writ is then in the hands of the officer. But where it is incumbent upon the plaintiff to take some action to save his right from becoming barred by delay or by remaining at rest, then, when he sues out his writ, although it be not served immediately, if service thereof is made within the time limited by law, the action is deemed to have been commenced, so far as regards the plaintiff. The referee has found that the defendant was to pay the rent commencing to accrue May 1, 1891, monthly, at the rate of three dollars per month. The plaintiff could recover only for the full month's rent which had accrued when he served his writ. He could not divide the rent for the month of August, and recover rent for the four days of that month which had elapsed when his writ was served. But he could recover rent for the months of May, June, and July, and for the use of the land; in all, \$14. The court erred in limiting the plaintiff's right of recovery of rent to the date of the writ.

2. The defendant excepted to the judgment, "for that, upon the findings of the referee, the item of \$13.50 should be treated as a payment." This item is for team work done by the defendant for the plaintiff on April 30th and on several days in May, 1891, as found by the referee, "to apply on the rent of the plaintiff's premises, and it was so expected by the plaintiff." Before the earliest date the defendant was in occupation of the plaintiff's premises, for which he was to pay the rent monthly. The rent was to commence to accrue May 1, 1891. This agreement was made when the work was performed, at a time when the tenancy was existing. If the finding makes this item a payment in advance on the rent, it operated to extinguish the rent as it became due from month to month. We have quoted all which the referee has found directly upon whether this work was a payment on the rent. He neither finds that the parties did or did not agree upon the price per day for the work. He allows a smaller price per day than charged by the defendant, and says his allowance is reasonable. Whether by this he means that the parties did not, at the time the work was done, agree upon the price per day for the work, but impliedly left the price to be fixed as the law will determine it, when no price is agreed upon, at a reasonable price, he has not informed us. But he has clearly found that the defendant did the work, not to be applied at some future time, but to apply on the rent, and that the plaintiff so expected it to apply. We think this finding makes this item a payment on the rent. The defendant understood that the price of the work, whatever it might be, was a payment of so much on the rent of the

premises of which he was then in occupation, and the plaintiff received it as such payment. Nothing further was to be done by either party before its application as a payment on the accruing rent was to be made. Where, by the understanding of the parties, something further is to be done or transpire before the item is to become a payment, the law will not apply it as such. *Strong v. McConnell*, 10 Vt. 231; *Chellis v. Woods*, 11 Vt. 466; *Brooks v. Jewell*, 14 Vt. 470; *Cushman v. Hall*, 28 Vt. 656; *Bronson v. Rugg*, 39 Vt. 241; *Jewett v. Winship*, 42 Vt. 204. *Bronson v. Rugg* apparently holds, where only an agreement exists to apply a sum when it shall be received on a debt, and the party collects the debt after receiving it without making the application, that he cannot set up his failure to fulfill his agreement to defeat the other party's right to recover for the item. But *Lapham v. Kelly*, 35 Vt. 195, clearly holds that in such a case, if the party receiving the money agrees to apply it in payment of a subsisting debt when he brings suit to enforce collection of the debt, the party making the payment may insist upon the application being made. The other items of mutual deal found due the defendant from the plaintiff cannot be recovered by the defendant in this action, which is *assumpsit*. The defendant has not filed, as he might, any plea or declaration in set-off. For this failure these items are not considered. This sustains the exceptions of both parties. Judgment reversed. Judgment for the plaintiff to recover 50 cents, with interest from August 4, 1891, and no costs to either party in this court.

(68 Vt. 294)

TOWN OF SPRINGFIELD v. TOWN OF CHESTER.

(Supreme Court of Vermont. Windsor. June 22, 1896.)

POOR AND-POOR LAWS—LIABILITY FOR SUPPORT—PAUPER—WHAT CONSTITUTES.

1. Acts 1892, No. 55 (V. S. § 3171), provides that, if a person is in need of assistance for himself or family, the overseers shall grant relief on application. *Held*, that the liability of a town for medical attendance on a married man was not affected by the fact that his wife owned land with a house thereon, unless it afforded him means to provide such attendance.

2. In an action by one town against another to recover \$2.50 paid by plaintiff for medical attendance on a married man, it appeared that he and his wife lived on an acre of rocky land belonging to her, having a poor house on it, all worth about \$80, and mortgaged for \$13; that they had no money, and no personalty except scanty furniture; that his health was poor, and at times she required his care; and that he always raised a few potatoes on the place, and generally earned \$25 or \$30 during the summer. *Held*, that he was not able to provide for his needs.

Exceptions from Windsor county court; Taft, Judge.

Action by the town of Springfield against the town of Chester for the expense of providing medical attendance for an alleged

pauper. There was a judgment for plaintiff, and defendant excepts. *Affirmed*.

Gilbert A. Davis and Jerome W. Pierce, for plaintiff. L. M. Read, for defendant.

MUNSON, J. The plaintiff had judgment below for the sum of \$2.50 expended in providing medical attendance for one John P. Wiley subsequent to the passage of No. 55, Acts 1892. Wiley and his wife lived together upon premises belonging to the wife, worth from \$60 to \$100, and mortgaged for \$13. The place consisted of a poor house, upon an acre of rocky land. They had no personal chattels, other than a scanty supply of household furniture. Wiley's health was not good, and at times Mrs. Wiley's condition was such that she required his care; but he always managed to raise a few potatoes on the place, and generally earned from \$25 to \$30 during the summer. At the time the above assistance was rendered they were without money. The statute provides that if a person is poor, and in need of assistance for himself or family, the overseer of the poor shall relieve such person or his family, when application for such assistance is made. Acts 1892, No. 55 (V. S. § 3171). This statute further provides that if such person has not resided in the town for three years, supporting himself and family, and is not of sufficient ability to provide such assistance, the town furnishing the same may recover the expense thereof from the town where he last resided for three years, supporting himself and family. The defendant contends that it is not liable under this provision, because of the ownership of the place above described. It is true, as claimed by the defendant, that under the pauper law existing prior to 1886 the wife could not have been removed from her freehold estate, and that the husband could not have been separated from her. But we think the irremovability of a person under the old law is not determinative of the right to recover under the statute above recited. The system of settlements and removals was entirely swept away by the law of 1886. This court afterwards decided that the law of 1886 did not permit a recovery for assistance given to an actual resident. *New Haven v. Middlebury*, 63 Vt. 399, 21 Atl. 608. The legislature thereupon passed the act of 1892, which was the same in substance as V. S. § 3171. This enactment permits a recovery if the person relieved has not acquired the statutory residence, and is not of sufficient ability to provide the assistance. No exception is made in terms, and we find nothing to justify us in holding that one was intended. In coming to this conclusion, we are not unmindful of the fact that the provisions of the former law in regard to the care and control of paupers chargeable to the town are still retained. R. L. § 2815 (V. S. § 3169). It is provided by the section cited

that overseers of the poor shall see that indigent persons, as long as they remain at the charge of their respective towns, are suitably relieved, supported, and employed, either in the poorhouse provided by the town, or in such other manner as the town directs, or otherwise at the discretion of the overseers, and that overseers shall take effectual measures to prevent such persons from strolling into other towns. It may be true that an overseer could not assume any control of a pauper which would interfere with his residence upon the freehold of his wife, and that a construction of V. S. § 3171, which makes a town liable for assistance rendered to a pauper thus circumstanced, limits in this respect the effect of V. S. § 3169. But, if this be so, we think the general provisions of this section must yield to the plain letter of the subsequent enactment. So this piece of land cannot affect the question of liability, unless upon the ground that it afforded the husband sufficient means to provide the required attendance. It is not necessary to consider whether an equity of the amount would meet the requirement of the statute, for this property belonged to the wife, and could not be disposed of by the husband. The husband could live upon the land, but it was not otherwise available for his relief. Having no disposable interest in the real estate, he clearly was not of sufficient ability to provide for his needs. Judgment affirmed.

(68 Vt. 333)

NEW ENGLAND TROUT & SALMON CLUB
v. MATHER.

(Supreme Court of Vermont. Windham.
March 17, 1896.)

FISHING RIGHTS—BOATABLE WATERS—PRIVATE AND PUBLIC WATERS—WHAT CONSTITUTE—WATERS OF COMMON PASSAGE—QUESTION FOR JURY—CONSTITUTIONAL LAW—TAKING PROPERTY FOR PRIVATE USE.

1. Const. c. 2, § 40, provides that the inhabitants of the state shall have liberty, in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed, and in like manner to fish in all boatable and other waters (not private property) under proper regulations, to be provided by the general assembly. *Held*, that "boatable waters," within the meaning of the constitution, are waters that are of "common passage" as highways. Thompson, J., dissenting.

2. Whether a pond which is a natural body of water, from 10 to 30 feet deep, covering about 75 acres, and which was not reserved in the original grant to a town of land of which it is a part, constitutes waters of common passage as highways, is a question of fact, and not of law.

3. Const. c. 2, § 40, provides that inhabitants of the state shall have liberty, in seasonable times, "to fish in all boatable and other waters (not private property) under proper regulations, to be hereafter made and provided by the general assembly." *Held*, that a natural pond covering about 75 acres, not reserved in the original grant to a town of land of which it is a part, is private property, and not "public waters," unless its waters are boatable, within the meaning of the constitution; and this,

though Acts 1892, No. 80, §§ 1, 31, provide that a natural pond of not more than 20 acres, owned by a common owner, is a "private preserve," and that all waters over which the state has jurisdiction, except "private preserves" and "posted waters," are "public waters," the crossing of uncultivated land to reach which, for the purpose of fishing, is not actionable, unless damage is done.

4. Acts 1892, No. 80, provides that all waters over which the state has jurisdiction, except "private preserves" and "posted waters," are "public waters," the crossing of uncultivated land to reach which, for the purpose of taking fish, is not actionable, unless actual damage is done. *Held*, that such statute, in so far as it undertakes to authorize the crossing of private lands to reach public waters, is unconstitutional, as authorizing the taking of private property for private use.

Exceptions from Windham county court; Taft, Judge.

Action by trespass *quare clausum* by the New England Trout & Salmon Club against George Mather. There was a verdict in favor of defendant, directed by the court, and plaintiff excepts. Reversed and remanded.

Waterman, Martin & Hitt and J. K. Batchelder, for plaintiff. Haskins & Stoddard, for defendant.

ROWELL, J. Marlboro South pond is a natural body of water, from 10 to 30 feet deep, except around the edges, where the water is shallow, and it covers about 75 acres. It has no inlet, but a small brook forms its outlet. The town of Marlboro was a New Hampshire grant, having been chartered by Benning Wentworth, in the name of the king, in 1751, without reservation of any ponds or streams. The plaintiff claimed, and its testimony tended to show, that at the time in question it was the sole owner and the exclusive possessor and occupant of a strip of land around said pond, four rods wide most of the way, and of a piece of land at the north end of several acres, and of the land covered by the water of the pond, and of the pond itself; that it purchased the property for the purpose of propagating fish there for its own use and benefit, and had thereon erected buildings, and expended more than \$10,000, and stocked the pond with trout; and that the premises were inclosed and posted according to law, to the knowledge of the defendant, who entered thereon on May 9, 1893, which was in the open season, and fished on divers parts of the pond, some of which were covered by particular description in some of the deeds in plaintiff's claim of title. As the court directed a verdict for the defendant, all that the plaintiff's testimony tended to show must be taken as proved.

Our constitution provides that "the inhabitants of this state shall have liberty, in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed; and in like manner to fish in all boatable and other waters (not private property) under proper regulations, to be here-

after made and provided by the general assembly." Chapter 2, § 40. The defendant claims that, as this pond is boatable in fact, it is boatable within the meaning of the constitution, and that, therefore, he had a right to fish therein when he did, as he contends that the words "not private property" qualify "other waters" only, and not "boatable" waters; so that our inhabitants have liberty, in reasonable times, to fish in all waters boatable in fact, whether private property or not. The plaintiff, on the other hand, contends that the words, "not private property" qualify "boatable" as well as "other waters," but, if not, that it is not enough that waters are boatable in fact; that, to be boatable under the constitution, they must be of such volume and size that they can be advantageously used by boats at certain seasons of the year, for transporting the products of the surrounding country, the products of the mines, the fields, and the forests.

By the law of Rome, all rivers and ports were public; and therefore the right of fishing therein was common to all men. Just. Inst. lib. 2, tit. 1, 2. But, by the common law of England, there is a public right of fishing only in navigable waters; and no waters are deemed navigable in law except tidal waters. "The narrow sea adjoining the coast of England is part of the waste and demesnes and dominions of the king of England, whether it lies within the body of any county or not. * * * In this sea the king hath a double right, namely, a right of jurisdiction, which he ordinarily exerciseth by his admiral, and a right of property or ownership. * * * The right of fishing in this sea and the creeks and arms thereof is originally lodged in the crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is lord, or as the right of fishing belongs to him that is owner of a private or inland river. * * * But though the king is the owner of the great waste, and as a consequence, of his propriety, hath a primary right of fishing in the sea and the creeks and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea or the creeks and arms thereof, as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places, creeks, or navigable rivers where either the king or some particular subject hath gained a propriety exclusive of the common liberty." 1 Harg. Law Tracts, pt. 1, c. 4. Nontidal waters are not deemed navigable in law, though navigable in fact; and there is no public right of fishing therein. *Reece v. Miller*, 8 Q. B. Div. 626. It is obvious that the status of navigability cannot of itself carry with it a public right of fishing, for the two things have no necessary connection between them. *Mussett v. Burch*, 35 Law T. (N. S.) 486. The soil under tidal waters is not owned by private individuals,

whereas the soil under nontidal waters, though navigable in fact, is thus owned in England; and on this is based the distinction between them in respect of fishing, for the right of fishing in nontidal waters by one not the owner of the soil thereunder is not an easement, but a right of profit, in the land of another (*Lloyd v. Jones*, 6 C. B. 81; *Bland v. Lipscombe*, 4 El. & Bl. 714, note), which cannot exist by custom, except in the case of a copyhold tenant against his lord, nor by dedication, but only by grant or prescription (1 Saund. 341, note 3; *Cobb v. Davenport*, 33 N. J. Law, 223). "Fresh rivers, of what kind soever, do, of common right, belong to the soil adjacent, so that the owners of the one side have, of common right, the propriety of the soil, and consequently the right of fishing, usque ad flum aquæ, and the owners of the other side the right of soil or ownership and fishing unto the flum aquæ on their side. And, if a man be owner of the land of both sides, in common presumption he is the owner of the whole river, and hath the right of fishing according to the extent of his land in length. With this agrees the common experience. * * * But special usage may alter the common presumption; for one man may have the river, and another the soil adjacent; or one man may have the river and soil thereof, and another the free or several fishing in that river." 1 Harg. Law Tracts, pt. 1, c. 1.

But the distinction between tidal and nontidal waters in respect of fishing does not distinguish them in respect of a public right of passage and transportation, for the public have such right in both, for Lord Hale says that, "as the common highways upon the land are for the common land passage, so these kinds of rivers, whether fresh or salt, that bear boats or barges, are highways by water; and, as the highways by land are called the 'king's highways,' so these public rivers for public passage are called 'royal streams,' not in reference to the propriety of the river, but to the public use." De Jure Maris, c. 2. Again, he says (chapter 3): "There be some streams or rivers that are private, not only in propriety or ownership, but in use, as little streams or rivers that are not of common passage for the king's people; and there be other rivers, as well fresh as salt, that are of common or public use for the carriage of boats and lighters, and these, whether they are fresh or salt, whether they flow and reflow or not, are, prima facie, publici juris, common highways for man or goods, or both, from one inland town to another. Thus, the rivers of Wey, Severn, of Thames, and divers others, as well above the bridges and ports as below, as well above the flowings of the sea as below, and as well where they have come to be of private propriety as in what part they are of the king's propriety, are public rivers, juris publici." Thus, it appears that, to determine whether a nontidal river is public or

private in use (for none of them are public in ownership), the common-law test is whether it is "boatable" as a highway, as distinguished from "navigable," in its technical and legal sense.

The law applicable to nontidal rivers in England is also applicable to inland lakes and ponds, however large, and in them the crown has no *de jure* right of soil nor of fishery. *Bristow v. Cormican*, 3 App. Cas. 641. Such was the common law of England before and at the time of the adoption of our constitution, in 1777, in which the provision in question was substantially the same as now, and was taken from the Pennsylvania constitution of 1776, in which the language was "boatable waters and others not private property." The framers of our constitution must be presumed to have been familiar with the common law, for the inhabitants of the state had been and were "habituated to conform their manners to the English law, and to hold their real estates by English tenures." Preamble to the act adopting the common and statute law of England, passed in 1782, State Papers, 450. Knowing that law, they undoubtedly regarded it inapplicable in respect of fishing to the local situation and circumstances, for under it we had no waters in which fishing was or would be free as against private ownership, for none of them were navigable, not even Lake Champlain, within the common-law meaning of that term; and that was the only meaning with which they were acquainted, for then the doctrine that waters navigable in fact are navigable in law had not been announced in this country, much less developed and generally established, as now, and hence a change of the common law was necessary in order to insure a common of fishery to any extent, and therefore, when they came to draft the section in question, they could not say that the inhabitants should have liberty to fish in all navigable waters, but were compelled, in order to accomplish their purpose, to employ some other word, and so they employed "boatable,"—an apt word to express the common-law status of nonnavigable waters, public in use, though private in ownership; that is, common highways. Ang. *Water Courses* (8th Ed.) p. 729, has the distinctive head of "The common-law distinction between rivers boatable and navigable, and how far the distinction has been recognized in this country." We regard it unwarrantable to say that "boatable," as used, was intended to embrace all waters boatable in fact, though private in use as well as in ownership; for the common law, with reference to which the framers are presumed to have acted, did not give such waters the status of boatability, but classed them by themselves as "private, not only in propriety or ownership, but in use, as little streams or rivers that are not of common passage for the king's subjects." *De Jure Maris*, above

quoted. We also regard it unwarrantable to say that by recombining the words of that part of the section under consideration, and placing "waters" after "other," instead of after "boatable," as it was in the Pennsylvania constitution, the framers intended to alter the provision by making the words "not private property" qualify "boatable" also, which they did not do in the Pennsylvania constitution, for such extended qualification would to their minds have nullified the provision, as, by the common law as they knew it, all the waters of the state were, or might and probably would, under governmental grants, become, "private property," within the meaning of those words as they used them; and by that law, as we now administer it, such extended qualification would practically nullify the provision, for under it most of our waters are equally private property in ownership, though many of them are public in use. We hold, therefore, that boatable waters, within the meaning of the constitution, are waters that are of "common passage" as highways.

The rule by which to determine whether waters are of "common passage" as highways or not is variously stated, but clearly enough defined. The test of navigability of a river is, as stated by the supreme court of the United States, whether it can be used in its ordinary condition as a highway for commerce, conducted in the customary mode of trade and travel on water; and they constitute navigable waters of the United States when they form in their ordinary condition, by themselves or by uniting with other waters, a continuous highway over which commerce is or can be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water. *The Daniel Ball*, 10 Wall. 557. If, however, they do not thus form such continuous highways, but are navigable only between places in the same state, they are not navigable waters of the United States, but only of the state. *The Montello*, 11 Wall. 411. Hence the capability of use by the public for the purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be carried on, it is navigable in fact, and therefore becomes, in our law, a public river or highway. *The Montello*, 20 Wall. 430. It is not, however, as Chief Justice Shaw said in *Rowe v. Bridge Co.*, 21 Pick. 344, "every small creek in which a fishing skiff or a gunning canoe can be floated at high water that is deemed navigable; but, in order to have this character, it must be navigable to some purpose useful to trade or agriculture." The supreme court of Maine, where timber abounds, has frequently had this question before it, and given it much consideration, first and last. In *Wadsworth*

v. Smith, 11 Me. 278, it is said that the general principle of the common law is that, above the flow of the tide, rivers become private, either absolutely so, or subject to the public right of way, according as they are small or great; that those that are sufficiently large to bear boats or barges, or to be of public use in the transportation of property, are highways by water, over which the public have a common right; but that such little streams and rivers as are not floatable—that is, cannot in their natural state be used for the carriage of boats, rafts, or other property—are wholly and absolutely private, not subject to the servitude of the public, nor to be regarded as public highways by water, because they are not susceptible of use as a common passage for the public. In *Brown v. Chadbourne*, 31 Me. 9, a leading case on this subject, much cited in other jurisdictions, it is said that the distinguishing test between rivers that are entirely private property and those that are private property subject to public use and enjoyment, consists in whether they are susceptible or not of use as a common passage for the public; that the true test whether a highway or not is whether the stream is inherently and in its nature capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts, or logs; that, when a stream possesses such a character, the easement attaches, leaving to the owners of the bed all other modes of use not inconsistent therewith. In *Morgan v. King*, 35 N. Y. 454, the true rule is said to be that the public have a right of way in every stream that is capable, in its natural state and its ordinary volume of water, of transporting, in a condition fit for market, the products of the forests or the mines or the tillage of the soil upon its banks. In the recent case of *Heyward v. Mining Co.* (S. C.) 19 S. E. 963, 20 S. E. 64, the question is fully considered, and the test said to be navigable capacity, and not that the surroundings should be such that the stream may be useful for the purposes of commerce; for it is said the stream may not be useful for commerce at one time, and yet circumstances may make it so at another time. The cases generally are to the same effect. And they all agree that it is not necessary to the right that the stream should have been used as a highway. It is enough if it is capable of such use. Nor is it necessary that it should have that capacity at all seasons of the year. It may be subject to periodical fluctuations in the volume and height of its water, attributable to natural causes, and recurring with the seasons; yet, if its periods of high water ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement. But the easement is not confined to business merely. It extends to pleasure as well, the same as does the easement of a highway by land. Attorney General v. Woods, 108 Mass. 436. As a general proposition, waters above the tide are, *prima facie*,

private in use as well as ownership, and he who asserts the contrary must prove it. *Rhodes v. Otis*, 33 Ala. 578; note to *Railway Co. v. Ramsey* (Ark.) 22 Am. St. Rep. 201 (13 S. W. 931); Ang. Water Courses, § 535. And whether such waters are, in the given case, inherently capable of use as common passage for the public, is a question of fact; and he who asserts that they are must prove it, unless the court can take judicial notice that they are, as, perhaps, it can in some cases. This proposition is applicable to the waters in question, as they were not reserved in the original grant of the town, neither expressly nor by legal implication, and are therefore capable of being private property, both in use and in ownership.

Although this pond is inherently capable of floating "a fishing skiff or a gunning canoe," no claim is made that it is inherently capable of use to any extent beneficial to trade or agriculture; and the reason may be because it is thought that no such claim can well be made. But, however that is, we cannot say, as matter of law, that it has not such capacity. All we can say is that, as the case is presented, it does not appear to have. A natural pond of not more than 20 acres, owned by a common owner, is, by statute, a "private preserve." All waters over which the state has jurisdiction, except "private preserves" and "posted waters," are "public waters," the crossing of uncultivated land to reach which, for the purpose of taking fish, is declared not to be actionable, unless actual damage was done. Acts 1892, No. 80, §§ 1, 31. It is therefore claimed that the waters in question are public waters, for that it is inferable, from the enactment that a natural pond of not more than 20 acres is a private preserve, that a larger natural pond is public water, and that it cannot be assumed that the legislature intended that great ponds and lakes can be inclosed, and thereby made private property, and an exclusive right of fishing therein established, in derogation of rights under the common law; and that, therefore, the defendant had a right to fish in said pond, and is not liable for crossing plaintiff's land to reach it, as it does not appear that the land was cultivated, nor that actual damage was done. But the constitution itself, in the provision under consideration, affords the test by which to determine over what waters the state has jurisdiction *de jure* thus: "And in like manner to fish in all boatable and other waters (not private property) under proper regulations, to be hereafter made and provided by the general assembly." Thus was jurisdiction expressly reserved to the state over boatable waters and other waters not private property. *State v. Norton*, 45 Vt. 258; *Drew v. Hilliker*, 56 Vt. 641. Such waters, therefore, are "public waters," within the statutory definition of that term. Hence, unless the waters in question are boatable, they are not public, but private, and the state has no jurisdiction over them.

But if they are boatable, and therefore public, yet the defendant is liable in trespass for crossing the plaintiff's land against its will to reach them, though for the purpose of taking fish therefrom, notwithstanding the statute of 1892 to the contrary, for otherwise this would be taking private property for private use without consent of the owner, and without compensation, which the constitution does not allow to be done, even with compensation. On this ground, the flowage acts of 1866, 1867, and 1869 were held unconstitutional in *Tyler v. Beacher*, 44 Vt. 648. On the same ground, the drainage act of 1868, No. 26, was held unconstitutional in the unreported case of *Abbott v. Ware*, in Orange county, decided at the March term, 1874, I think. I remember that Judge Pierpont said, in disposing of that case, that the legislature could as well pass a law that he might pasture his cow in his neighbor's pasture as to pass one that he might drain his swamp across his neighbor's meadow. So, in this case it may with equal propriety be said that the legislature could as well pass a law that any private property may be crossed against the will of the owner for the purpose of reaching a highway by land as to pass one that it may be thus crossed for the purpose of reaching public waters for the purpose of taking fish therefrom. The right of eminent domain can never be exercised for any merely private purpose, however much the public utility or convenience may be thereby subserved. Judge Isaac F. Redfield says that "the owner of one rood of land may stand in the way of any private enterprise, however much the general utility may be thereby hindered, and no human power in a free country, where the principles of *Magna Charta* prevail in their full force, can compel him to budge one step." Note to *Allen v. Inhabitants of Jay*, 12 Am. Law Reg. (N. S.) 497. Judgment reversed, and cause remanded.

TYLER, J., did not sit in the case.

THOMPSON, J., dissents on the question of boatable waters, and would hold that all waters boatable in fact are boatable within the meaning of the constitution, on the ground that this has been the practical construction acted upon since the adoption of the constitution.

THOMPSON, J. With all due deference to the opinion of the majority of the court, I most emphatically dissent from their holding in respect to what constitutes boatable waters, within the meaning of section 40, c. 2, of the constitution of Vermont. This is solely a question of construction. Cooley, in his work on *Constitutional Limitations* (4th Ed.), states some rules applicable to the solution of this question. He says: "The object of construction, as applied to a written constitution, is to give effect to the intent of the people adopting it. In the case of all written laws, it is

the intent of the lawgiver that is to be enforced. But this intent is to be found in the instrument itself. It is to be presumed that language has been employed with sufficient precision to convey it, and, unless examination demonstrates that the presumption does not hold good in the particular case, nothing will remain except to enforce it. 'Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.' Possible or even probable meanings, when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere. * * * In interpreting clauses, we must presume that words have been employed in their natural and ordinary meaning. Says Marshall, C. J.: 'The framers of the constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have understood what they meant.' This is but saying that no forced or unnatural construction is to be put upon their language; and it seems so obvious a truism that one expects to see it universally accepted without question; but the attempt is made so often by interested subtlety and ingenious refinement to induce the courts to force from these instruments a meaning which their framers never held that it frequently becomes necessary to redeclare this fundamental maxim. Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government. * * * It is a maxim with the courts that statutes in derogation of the common law shall be construed strictly,—a maxim which we fear is sometimes perverted to the overthrow of the legislative intent; but there can seldom be either propriety or safety in applying this maxim to constitutions. When these instruments assume to make a change in the common law, the change designed is generally a radical one; but as they do not go minutely into particulars, as do statutes, it will sometimes be easy to defeat a provision if courts are at liberty to say that they will presume against any intention to alter the common law further than is expressly declared. A reasonable construction is what such an instrument demands and should receive; and the real question is what the people meant, and not how meaningless their words can be made by the application of arbitrary rules." Cooley, *Const. Lim.* 68, 69, 72, 74, and notes and cases cited.

The phrase "boatable waters" had no fixed, technical meaning at common law, nor does it appear that these words were used by the common law in declaring the rights of the public or individuals to fish in or to use the waters subject to its jurisdiction. Hence we are

not called upon to give it a technical meaning because of such use at the time of the adoption of the constitution. In its natural, ordinary sense, the phrase "boatable waters" means waters boatable in fact, without regard to the use to which such waters may be put for commercial or other purposes. Clearly, the words are as susceptible of this meaning as they are of the interpretation put upon them by the majority of the court, which is that they mean "waters of common passage as highways," limiting the meaning of the words of "common passage" by the cases and wealth of learning invoked by the learned judge who pronounced the opinion of the majority. As thus limited, this provision of the constitution is applicable to only a very small part of the waters of the state. It is conceded that, by incorporating this provision into the constitution, its framers intended to change the rule of the common law in respect to the right of the inhabitants of the state to fish in its waters. It is difficult to perceive how, as suggested by the majority, it is "unwarrantable to say that 'boatable,' as used, was intended to embrace all waters boatable in fact." If they were as familiar with the common law and its apt language as is stated in the opinion of the majority, had the framers of the constitution intended that the words "boatable waters" should not include all waters boatable in fact, they would have used, instead of these words, the apt phraseology of the common law, and said "waters that are of common passage as highways"; for their knowledge of the common law must have made them familiar with the meaning of the expression "streams or rivers that are of common passage for the king's people." The fact that they did not use such language, but, instead of it, used the common language of the people, and said "boatable waters,"—words pregnant with meaning to the minds of the early settlers of this state, and conveying the idea, in their natural and ordinary sense, of waters boatable in fact, and no others,—conclusively shows that they did not intend to use the words in the sense that the majority impute to them. To give the meaning that the court reads into these words, it is compelled to go outside of the plain language of the constitution, and attempt to construe them in the light of extraneous circumstances. This is a departure from the principles of constitutional construction cited from Cooley, and laid down, by the best-considered cases, because there is no ambiguity in the language used. There is no pretense that, at the time of the adoption of the constitution, the words "boatable waters" had a settled and well-known signification in law, and a different meaning in popular use, or that they were then used in more senses than one. But, if we go outside the instrument itself to ascertain its meaning, then this provision of the constitution is to be read in the light of the circumstances and surroundings under which it was adopted, keeping in mind the evils it was intended to pre-

vent, the rights intended to be conveyed, and the habits and customs of the people, and the times in which they lived. This provision has existed substantially as it now is from the time of the adoption of the constitution of 1777. In the midst of the throes of the Revolutionary War, our fathers founded a free republic in this state. They were then smarting under the oppression and inequalities of the English system, under which individual development among the common people was impeded and often prevented, and the rights and enjoyments of the many were subjected to the pleasure of a favored few. Among the instrumentalities used to bring about this undesirable condition of life were the iniquitous fish and game laws of England, enacted by the ruling class for their own enjoyment, and which led to a system under which the catching of a fish or the killing of a rabbit was deemed of more consequence than the happiness, liberty, or life of a human being. The framers of our constitution knew that the English system of fish and game laws had been a most fruitful source of crime and misery, and I think it was their purpose to so provide that this state should never be cursed by a like system. They believed that the raising of men was of more importance than the breeding of fish for sport or for profit. I think they intended to use language so plain "that the wayfaring man, though a fool," could understand it, and that by the words "boatable waters" they meant all waters boatable in fact, without regard to whether such waters could be utilized for conveying to market the products of the farm, the forest, the mine, or the factory. In that early day, and prior thereto, boats and canoes were among the principal means of locomotion in this state. In passing from one part of the state to another in those early times, the streams and ponds, great and small, were utilized, the boats or canoes being carried overland from one to the other, where connection could not be made by water. Thus, the phrase "boatable waters," at the time of the original adoption of the constitution, conveyed to the minds of its framers and to the inhabitants of the state the idea of waters boatable in fact. Such has been the continuous and universal construction given to these words, and acted upon by the inhabitants of this state for more than a century. Until St. 1892, No. 80, § 1 (V. S. § 4562), defining a private preserve to be a natural pond, of not more than 20 acres, belonging to a common owner, such, too, was the construction put upon these words by the legislature ever after the adoption of the constitution, as is evidenced by repeating enactments respecting fish in particular ponds, which, under this decision, must be private waters and private property, in which the public have no right to fish.

It has been repeatedly held by the supreme court of the United States in respect to the constitution of the United States that an interpretation of it, contemporary with its adop-

tion, practiced and acquiesced in for years, conclusively fixes its construction. *Stuart v. Laird*, 1 Oranch 299; *Martin v. Hunter's Lessee*, 1 Wheat. 304; *Cohens v. Virginia*, 6 Wheat. 264; *Cooley v. Board*, 12 How. 299; *Pollock v. Steamboat Co.*, 114 U. S. 411, 5 Sup. Ct. 881; *Cooley, Const. Lim.* (4th Ed.) 81-86. This court has also recognized this doctrine repeatedly. *Huntington v. Bishop*, 5 Vt. 186; *State v. Keyes*, 8 Vt. 57; *State v. Bosworth*, 13 Vt. 402; *State v. Haley*, 52 Vt. 476; *State v. Magoon*, 61 Vt. 45, 17 Atl. 729; *Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592. In the last-named case this court said: "In view of the 'immemorial practice of proceeding to trial without a jury,' in this form of action, and the other reasons which we have suggested in the course of this discussion, we hold that, under the constitution of this state, a party in an action of book account is not entitled to a trial by jury on the merits of the case." In *Boyden v. Town of Brookline*, 8 Vt. 284, it was held that the contemporaneous construction of a statute, and long-established practice under it, has the force of a judicial determination, and that "such has always been the deference paid by courts to such an exposition of statute or constitutional law." In *Rogers v. Goodwin*, 2 Mass. 475, the court was urged to give a construction to a statute different from that which the people had given it for many years in their business transactions under it, but the court said: "We cannot shake a principle which in practice has so long and extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision is now supported is that long and continuous usage furnished a contemporaneous construction, which must prevail over the mere technical import of the words." Discussing a similar question, it was said in *Packard v. Richardson*, 17 Mass. 122, that "a contemporaneous is generally the best construction of a statute. It gives the sense of a community of the terms made use of by the legislature. If there is ambiguity in the language, the understanding and application of it, when the statute first comes into operation, sanctioned by long acquiescence on the part of the legislature and judicial tribunals, is the strongest evidence that it has been rightly explained by practice. A construction under such circumstances becomes established law; and, after it has been acted upon for a century, nothing but legislative power can constitutionally effect a change." So far as I can learn, no construction has ever been suggested for the words "boatable waters," except that for which I contend, by either the bench, the bar, or the inhabitants of the state, or any one else, until quite recently. Under the decisions, this construction, contemporaneous with the adoption of the constitution, and practiced for nearly 119 years, conclusively determines the meaning of these words to be as they have been so long construed and understood; and this court should now hold that

"boatable waters," as mentioned in the constitution, are all waters boatable in fact.

It is a matter of common history that, within a very few years last past, there have been, and now are, a few persons resident in this and other states who have anxiously sought for some way by which they could convert into private fish preserves, controlled by themselves, many streams and ponds in this state, boatable in fact, and in which its inhabitants have fished as public waters ever since the adoption of the constitution of 1777. The idea that "boatable waters," to the minds of the fathers of this state, meant "waters of common passage," was originated and first broached by these persons thus seeking to obtain control of the waters of this state. At the time of the adoption of the constitution of 1777, the common law had not been adopted by this state by legislative enactment. The state was not then a member of the federal union, and therefore was not precluded from passing laws or constitutional provisions impairing the obligation of contracts. The power of this state was then as omnipotent as that of the parliament of Great Britain, which could take private property for public use without compensation. *Potter, Dwar. St. 44*. It, therefore, had the power, notwithstanding any provisions in the New Hampshire or other grants to the contrary, to make waters boatable in fact, free to all its inhabitants for the purpose of fishing, under such proper regulations as might thereafter be provided by the general assembly. I am not prepared to say that, by this section of the constitution, there was not reserved to the legislature the power of granting the right to our inhabitants, at suitable seasons of the year, to pass over private property, to reach such waters for the purpose of fishing therein. The opinion of the majority is based upon English cases and the decisions of the courts of states having no constitutional provision like Vermont, and which follow the English cases, and upon the theory that the rule as enunciated by those decisions is the common law of this state. By this assumption, the fact is ignored that this state has only adopted so much of the common law of England as is applicable to the local situation and circumstances, and is not repugnant to the constitution or laws of Vermont, and that such adoption was subsequent to the adoption of the constitution of 1777. If the construction of the constitution for which I contend is correct, the principles of the common law upon which the decision of the court is based are repugnant to our constitution, and therefore have never been adopted as a part of the common law of Vermont. *St. 1779 and St. 1782*, in *Slade's State Papers*, 287, 450; *V. S. § 898*; *State v. Burpee*, 65 Vt. 1, 25 Atl. 964; *Morrill v. Palmer*, 68 Vt. 6, 83 Atl. 829.

There is another circumstance which bears upon this question. "It is a notorious fact

that, when the country was new, all our waters swarmed with fish of various kinds." *Thomp. Vt. Natural Hist. Div. 128.* The early settlers, as a rule, were poor, and were often in great straits to procure the bare necessities of life. On this account, the early inhabitants of the state often resorted to the fish abounding in its waters as a means of subsistence. For this reason, also, I think the framers of the constitution intended that the right to take fish in the waters of the state should be limited only by the fact that the waters in which they were found were not boatable in fact.

When we consider the crime and misery in England during the last century resulting from its private fish and game preserves, protected by its system of fish and game laws, and then consider how free from such crime and misery this state has been during the same time, it is apparent that this provision of the constitution, as construed by the people, was one of the wisest that could have been made. This decision is most far-reaching in its consequences. Hitherto in our history as a state, our people, young and old, rich and poor, have fished, as a matter of right, in all the waters of the state which were boatable in fact. This freedom to associate with and enjoy nature has borne fruit in the independent, liberty-loving character of our people, and has had its influence in forming a type of manhood that has had a potent influence in making Vermont to-day, in many respects, the ideal republic of the world. The result of this decision is to change a large portion of such waters into private fish preserves, and to exclude the inhabitants of this state from the rights which hitherto they have so freely enjoyed. The holding of the court, as I understand it, is that only such waters are boatable, within the meaning of the constitution, as may be utilized in conveying to market the products of the farm, the forest, the mine, and the factory, and for transportation, or, in other words, only such waters as may be utilized for the purposes of commerce and travel. If they may be so utilized, then they may also be used for pleasure. The only door of escape left open by this decision is the holding that in each case the jury is to determine whether the waters in question can be so utilized. It may be that, in this way, juries, moved by what an ancient law writer quaintly terms "pious perjury," may preserve the rights of the people as they have been understood and enjoyed for more than a century. In my judgment, a decision that tempts such a course on the part of the jurors to preserve what are supposed and believed to be ancient and constitutional rights is a calamity much to be regretted. In arriving at the conclusion to which it has come, it seems to me that the court has made a departure from the sound and well-established principles of constitutional construction. I further deem

its holding as contrary to sound public policy, not conducive to good morals, and, in effect, a change of the constitution as it was intended by its framers, and has been understood and acted upon by the inhabitants of this state throughout its entire history as a state. The people must zealously guard their constitutional rights, especially of the kind involved in this case, if they would perpetuate them. If they lose such rights, it usually occurs by their being frittered away by legislative action, or unintentionally by judicial decision, without the extent of such action or decision being fully understood by the people. Believing this decision to be an infringement on and an impairment of their constitutional rights, I have deemed it to be my duty to express my dissent, feeling that I should be derelict in my duty if I failed so to do.

(68 Vt. 311)

BUGBEE v. BOYCE et al.

(Supreme Court of Vermont. Caledonia, June 22, 1896.)

FALSE IMPRISONMENT—SUFFICIENCY OF WARRANT.

Under Acts 1884, No. 127, providing that, when one convicted of intoxication shall refuse to disclose where the liquor was purchased, he may be committed to jail, etc., a warrant reciting that the defendant was charged with having been found intoxicated, "and the fact being found that the said [defendant] had been intoxicated," was valid, as containing a sufficient recital of conviction. Munson, J., dissenting.

Exceptions from Caledonia county court; Tyler, Judge.

Action brought by Ella Bugbee against O. B. Boyce and others for false imprisonment. There was judgment for defendants, and plaintiff excepts. Affirmed.

The first warrant under which the plaintiff was confined was as follows: "State of Vermont v. Ella Bugbee. State of Vermont, Caledonia County. To Any Sheriff or Constable in the State, Greeting: Whereas, Lorenzo Warren, special prosecutor for the town of Burke, on the eleventh day of May, A. D. 1892, at Burke, in said county, brought before me, Wendell Silsby, a justice of the peace within and for said county of Caledonia, said Ella Bugbee, charging her, the said Ella Bugbee, with having been found intoxicated on the fifth day of May, A. D. 1892, and the fact being found by me that the said Ella Bugbee had been intoxicated, she was by me ordered to disclose under oath the place where, the person of whom, the liquor producing intoxication was obtained, and the attending circumstances, agreeably to the law relating to the traffic in intoxicating liquor; and, the said Ella Bugbee having neglected and refused so to do, therefore, by the authority of the state of Vermont, you are hereby commanded to take the body of the said Ella Bugbee, and her commit to the keeper of the jail in St. Johnsbury, in the county of Caledonia aforesaid, within the

said prison, who is hereby commanded to receive the said Ella Bugbee, and her safely keep until she makes such disclosure, or is discharged by me, or otherwise by order of law. Hereof fail not, and due return make. Given under my hand this 12th day of May, A. D. 1892. Wendell Silsby, Justice of the Peace."

Alexander Dunnett, for plaintiff. Harry Blodgett and W. P. Stafford, for defendants.

MUNSON, J. The justification of the defendants depends upon the sufficiency of the warrants under which the plaintiff was committed. An officer is justified in executing a process that is good upon its face. *Gage v. Barnes*, 11 Vt. 195; *Churchill v. Churchill*, 12 Vt. 661. It is not claimed that the case discloses any ground on which the magistrate can be held liable, if the warrants are sufficient to justify the officer. It appears from the warrants that the plaintiff was brought before the defendant Silsby, a justice of the peace, on the 11th day of May, 1892, by the defendant Warren, as special prosecutor, charged with having been found intoxicated on the 5th day of that month. This recital indicates that the proceeding against the plaintiff was under R. L. § 3812, as amended by No. 36, Acts 1888, and that her disclosure was required by virtue of No. 127, Acts 1884. It certainly fails to show a summary arrest under R. L. § 3814, and a disclosure under R. L. § 3816. The difference between the proceeding under R. L. § 3812, and that under R. L. § 3814, is explained in *Re Pierce*, 46 Vt. 374. The form of a warrant of commitment given in R. L. § 3864, was prepared for use upon a refusal to disclose under the requirements of R. L. § 3816, and is not entirely applicable to a case of refusal under No. 127, Acts 1884. The magistrate made use of this form in drawing the warrants in question, omitting such parts as refer to a disturbance of the public peace. But if the warrants fairly show an authority to commit for a refusal to disclose after a conviction under R. L. § 3812, they are a sufficient justification. The statements in the warrants that the plaintiff was charged with having been found intoxicated embodies a correct designation of the offense punishable under R. L. § 3812. If the warrants fairly show a legal conviction of that offense, they show that the magistrate had authority under No. 127, Acts 1884, to commit the plaintiff for a refusal to disclose. The plaintiff claims that both warrants are defective, in that they fail to show this conviction. The court is authorized to require this disclosure when the person is "convicted." The plaintiff contends that a conviction consists in a judgment of the court that the respondent is guilty. The judgment rendered against the defendant in a criminal proceeding is that which declares his punishment, and it is usually denominated the

"sentence." *Rap. & L. Law Dict.* tit. "Judgment," § 23; *Bouv. Law Dict.* tit. "Sentence"; 1 *Chit. Cr. Law*, *701 et seq. While the term "conviction" may refer to the judgment or sentence of the court, it ordinarily refers to the ascertainment of the respondent's guilt. *Rex v. Turner*, 15 East, 570; *Com. v. Lockwood*, 109 Mass. 323. The judgment on verdict, or other judicial declaration, which sometimes precedes the sentence, is not needed to complete the finding of guilt. That is ascertained whenever a plea or verdict of guilty is accepted and entered of record. So these warrants are not made defective by their failure to recite the rendition of a judgment, unless the statute requiring a disclosure upon conviction be held to refer to the judgment. But the term "convicted," as here used, evidently refers to the ascertainment of guilt, and not to the judgment of the court. The ground for requiring a disclosure regarding the procurement of liquor is complete when the fact of intoxication is established. There is nothing involved in the disclosure, nor its consequences, that depends upon a previous rendition of judgment. It is sufficient, then, if the warrants fairly disclose a conviction, in the usual sense of the term. A conviction could be had only by an admission of guilt, or the verdict of a jury. R. L. § 1612. The first warrant recites a finding by the justice that the respondent had been intoxicated. A majority of the court think the fair meaning of this is that the plaintiff was adjudged guilty by the court upon proceedings previously had in due course. The writer of the opinion is unable to concur in this view, and would hold the first warrant insufficient. But to the second warrant there is a preliminary recital that the respondent had pleaded guilty to the charge of intoxication. Upon this recital, the further statement of her having been found by the justice to have been intoxicated could not be taken to disclose an illegal trial. Judgment affirmed.

(25 Vt. 290)

POWERS v. NEW ENGLAND FIRE INS. CO.

(Supreme Court of Vermont. Windham.
March 14, 1896.)

INSURANCE—ACTION ON POLICY—VARIANCE—
PROOF OF LOSS—NOTICE—ESTOPPEL—ACCOUNT
STATED—JUDGMENT ON APPEAL.

1. A declaration stated that plaintiff was insured for \$1,000. The policy provided that he was insured not to exceed \$1,000. Held no variance, as, if his loss amounted to \$1,000, then he was insured for that sum.

2. A declaration stated the loss was "to be paid 60 days after proofs," etc. The policy provided that loss was not payable till 60 days after proofs of loss had been furnished defendant. Held no variance.

3. A declaration on a fire policy need not notice collateral stipulations and agreements annexed to the contract.

4. A declaration set forth a contract to insure property generally, without reference to

its location, while the policy confined the insurance to the building while located in N., or while located and occupied by plaintiff in N. *Held* a variance.

5. Notice of loss given an insurance company through the agents through whom the policy was issued is sufficient, though the company was not informed in express terms that they were acting at the request or in behalf of insured, if in fact they were doing so.

6. Failure to furnish proofs required by the policy to be furnished in 30 days cannot be relied on as a defense, the company having, on immediate notice of the fire, written that it would have the attention of their adjuster in the near future, and again written within the 30 days that the adjuster would go and settle the loss the next week, stating why he had not been before, no demand for proofs of loss having been made before or after the 30 days.

7. A company, from its home office, may waive a provision for proofs of loss, though the policy provide that no officer, agent, or representative of the company shall be held to have waived any conditions unless the waiver be indorsed on the policy.

8. Recovery can be had on a count for an account stated, though the account stated is for a single item.

9. To recover for an account stated it is unnecessary to show the nature of the original debt, or prove the items constituting the account, but it must appear that at the time of the account a certain claim existed, of and concerning which an account was stated.

10. Where a recovery cannot be had under a special count, because of variance, and the judgment is for more than plaintiff is entitled to on his general count for an account stated, not only will the judgment be reversed, but, plaintiff not having asked for judgment on his general count, it will be inferred he does not want one.

Exceptions from Windham county court; Tyler, Judge.

Assumpsit by Lafayette C. Powers against the New England Fire Insurance Company on a fire policy. Plea, the general issue. Verdict and judgment for plaintiff. Defendant excepts. Reversed.

The declaration contained the general counts and a count upon an account, stated in the following words: "And also in the like further sum of money found to be due from the defendant to the plaintiff upon an account due before that time stated between them." The plaintiff testified that after the fire the adjuster of the defendant came to where he was, for the purpose of settling the loss, and that at that time the said adjuster agreed that the company should pay \$200 on account of the personal property; that being the entire amount of insurance upon personal property. One other witness testified to substantially the same conversation between the plaintiff and adjuster, and beyond this there was no evidence upon that point.

C. C. Fitts and Waterman, Martin & Hitt, for plaintiff. Butler & Moloney, for defendant.

TAFT, J. This is an action to recover upon a fire insurance contract. The declaration contains the general counts in assumpsit, and a special count declaring upon the policy. When the policy was offered in evidence, objection was made that the contract evidenced by it

varied from the one set forth in the declaration.

1. The first claimed variance is that it is stated in the declaration that the party was insured to the amount of \$1,000, while the provision of the contract is that the party was insured not to exceed \$1,000. If his loss amounted to \$1,000, then he was insured for that sum. In this respect there was no variance. The contract in evidence was, in substance, the contract declared upon. The party was insured against all loss or damage by fire, such as he might incur, not to exceed \$1,000. The case, in this respect, is similar to *Bates v. Leclair*, 49 Vt. 229, in which the declaration was to recover upon a note payable in six months from date, the note offered in evidence being payable on or before six months from date. The court held there was no variance.

2. It is further claimed that there was a condition precedent in the policy that was not set forth in the declaration. This is not true in fact. By the terms of the contract the loss was not payable until 60 days after proofs of loss had been furnished the defendant. In the description of the contract in the declaration it is alleged that the amount of the loss was "to be paid sixty days after proofs," etc. The contract set forth in the declaration, and the contract offered in proof, in respect to this condition were identical.

3. All of the other claimed variances (save one) are in respect to collateral stipulations and agreements which are annexed to the contract. It has been held that it is unnecessary, in framing a declaration upon such a contract, to set them forth, or to notice them in any respect. To a great extent, in all cases, they are conditions subsequent, and, in that respect, need not be noticed. *Tripp v. Insurance Co.*, 55 Vt. 100; *Coolidge v. Insurance Co.*, 67 Vt. 14, 30 Atl. 798.

4. The remaining point in respect to variance was well taken. If a contract is conditional, it should be declared upon as conditional, not as an absolute one. The allegation in the declaration sets forth a contract to insure the property generally, without reference to its location. The policy in evidence confines the insurance to the building while located in Newfane, or while located and occupied by the plaintiff in the town of Newfane. This condition, as was held in the *Coolidge Case*, should have been alleged in the declaration, and the omission of such allegation requires a reversal of the judgment. After the testimony in the case was closed, the defendant did not desire to go to the jury on any question involved in the case. The plaintiff, therefore, had the right to have regarded as established all the facts that his testimony tended to show.

5. It was claimed by the defendant that there could be no recovery, because the plaintiff did not forthwith give notice of the loss to the company in writing. The plaintiff claimed that he had given such notice. His testimony tended to show that immediately after the fire he gave notice of it to the defendant

through Sherman & Jenne, the agents through whom the policy was issued. There is no question but that the testimony of the plaintiff tended to show that notice was given immediately after the fire by Sherman & Jenne, and that the plaintiff was informed of the reply of the company. It was immaterial whether the defendant was informed in express terms that Sherman & Jenne were acting at the request or in behalf of the plaintiff, if in fact they were doing so.

6. The defendant also claimed that proofs of loss were not furnished it within 30 days after the fire, as the contract required. The plaintiff claimed that the production of such proofs was waived. The testimony tended to show such facts as estop the defendant from defending upon the ground that the proofs were not furnished. Upon the receipt of the first notice of loss the company wrote Sherman & Jenne, in reply to their letter notifying them of the loss, that the same would have the attention of their adjuster in the near future, and within 30 days from the time of the fire they again wrote him that the adjuster would go to the place, and settle the loss, the following week, stating the reason why he had not been before. When notified of this loss, and they promised to send the adjuster for the purpose of settling it, the plaintiff was justified in not making the proofs, and awaiting the arrival of the adjuster for the purpose of a settlement, and the defendant could not afterwards say, as a reason for nonpayment, that the proofs of loss had not been furnished. If they intended at the time to take this position, they should have said to the plaintiff, "Comply with the terms of your policy by furnishing the proofs of loss." Instead of doing that, they said, "We will go to the place, and settle the loss." While this might not have relieved him from furnishing the proofs if they had been subsequently demanded, either before or after the 30 days, the plaintiff had the right to rely upon the fact of their promise of settlement without being prejudiced by not furnishing them within the required time.

7. The defendant relies, in respect to this point, upon a condition annexed to the policy, "that no officer, agent, or representative of the company shall be held to have waived any printed or written, condition of this policy, * * * or any forfeiture thereof, unless such waiver shall be clearly and specifically indorsed hereon in writing"; and in support of this claim cites *Smith v. Insurance Co.*, 60 Vt. 682, 15 Atl. 353. We have no disposition to depart from the authority of that case. That relates to the power of any of the officers named, acting without reference to the company; but the conditions inserted in a policy for the benefit of the company may be waived by the company itself, and we consider the waiver which the testimony in this case tended to show the act of the company, and not that of the secretary. The notice of the loss was given to the defendant at its of-

fice in Rutland. The reply to the notice was the reply of the company, written, as the exhibits indicate, at Rutland, and was not the act alone of the writer of the letter. This point, therefore, is not ruled by the case cited of *Smith v. Insurance Co.*, supra.

8. It is insisted by the plaintiff that he has a right to recover under the general counts,—that one of the general counts which is called the count for an account stated. If the plaintiff has no right to recover upon the special count, the question arises whether he can upon the count for an account stated. It is declared "for money found to be due from the defendant to the plaintiff on account stated between them." It is unnecessary, in order to support this count, to show the nature of the original debt, or prove the specific items constituting the account, but it must appear that at the time of the account a certain claim existed, of and concerning which an account was stated. A recovery can be had when the account stated is for one item only. It is not essential that there should be cross accounts, or reciprocal demands. It has been held that a recovery can be had for an account stated for one item of standing trees after they have been felled and taken away; that a recovery can be had of a trustee for the sums due in equity after the account of such sums has been stated. The testimony tends to show that the loss on personal property, amounting to \$200, was arranged between the parties, and the account in respect to it stated, and for this sum the plaintiff has a right to recover under the count for an account stated, but there can be no recovery under this count in respect to the other items. As the special count is defective by reason of the variance, the judgment must be reversed. As the plaintiff does not move for a judgment upon the count for an account stated, we infer he does not desire one. Judgment reversed, and cause remanded.

(38 Vt. 397)

MARTYN v. CURTIS.

(Supreme Court of Vermont. Orange. July 28, 1896.)

BOUNDARIES—EVIDENCE—JURY TRIAL—QUALIFICATION OF JUDGE.

1. To entitle a party to trial by jury, he must set the case for trial under county court rule 22; failing in which it is for trial by court, if the adverse party so sets it for trial.

2. A judge is not disqualified to try a case because he has tried a case in trespass concerning the same property.

3. Though one of the three judges sitting in a case is disqualified, it will be presumed that the judgment was rendered by the other two.

4. In a suit to determine boundary between individual property, declarations of a former owner of land in controversy, made after his ownership ceased, are not admissible, except that declarations of deceased persons as to the location of ancient boundaries, made on the ground before the controversy arose, are admissible when such persons are shown to have had knowledge, but no interest. *Wood v. Willard*, 37 Vt. 377, followed.

5. Admission of testimony of a surveyor as to a boundary cannot be held error, though in running the line he began his survey outside the land in controversy, the circumstances and facts relative to the lines and adjoining lots not appearing.

Exceptions from Orange county court; Rowell, Judge.

Ejectment by A. S. Martyn against Francis Curtis. Plea, the general issue. Judgment for defendant. Plaintiff excepts. Affirmed.

One David Adams owned a portion of the property in dispute from 1805 to 1823. In 1860, Adams died. The plaintiff offered to show that some few years before his death, and after he had ceased to have any interest in the land, one Harriman, who was then the owner of the land, had a talk with Adams, in the course of which Adams told him that he should not have bought the 10-acre piece, which was a part of the plaintiff's land, had it not been necessary to do so in order to obtain water from the brook. This evidence tended to show that the corner in dispute was as claimed by the plaintiff. The court excluded the testimony, and the plaintiff excepted.

John W. Gordon, for plaintiff. R. M. Harvey, for defendant.

TAFT, J. The plaintiff insists upon four questions:

1. That he was denied a trial by jury. To entitle a party in a civil cause to a trial by jury, he must set the case for trial, under county court rule No. 22. Failing this, the cause is for trial by the court, if the adverse party so sets it for trial. *Jones v. Spear*, 21 Vt. 426. The cause was set for trial by the court, by the defendant, and he was entitled to such trial.

2. One of the assistant judges who sat in the trial below was a member of the court which tried a case in trespass concerning the property in question in this suit, and objection was made to his sitting in the trial below in the case at bar. There is no rule or principle that disqualifies the judge of a court from sitting in different causes in which the same legal rules and questions of fact, or either of them, are presented for consideration. In many instances, causes involving the same questions are tried by the same judges. Were it otherwise, much delay would result. If the assistant judge was disqualified, it does not appear that the plaintiff was harmed by his participation in the trial; for the other two judges could render the judgment in question, and we must infer they did, rather than presume error.

3. The plaintiff offered in evidence the declarations of one Adams, a former owner of the land in question, made 30 years after his ownership had ceased. Such declarations are sometimes admissible, and sometimes not. To make them admissible, they

must be brought within the rules laid down in *Wood v. Willard*, 37 Vt. 377, and *Powers v. Slisby*, 41 Vt. 288. It does not appear that the declarations were within the rules referred to, and therefore no error is shown by their rejection.

4. The testimony of a surveyor was admitted, under exception by the plaintiff. In running the line, he began his survey two lots west of the land in controversy. The objection made was that so beginning was "going off into somebody else's land, and, besides, the corners may have been changed." Lot lines are often determined by the relative situation of adjoining lots. Without a knowledge of the circumstances and the facts relative to the lines and the adjoining lots, this court cannot say that the court erred. Judgment affirmed.

(68 Vt. 403)

MCGAFFEY v. MATHIE.

(Supreme Court of Vermont. Orleans. July 28, 1896.)

PAYMENT—APPLICATION ON SEVERAL NOTES— CONSENT OF DEBTOR.

A finding that a payment was properly divided, and a part applied on each of three different notes by the holder, will be sustained, where there was evidence tending to show that such application was made with the consent, or by the direction, of the debtor.

Exceptions from Orleans county court; Leforrest H. Thompson, Judge.

Action in assumpsit by George W. McGaffey against John W. Mathie. Judgment for defendant, and plaintiff excepts. Affirmed.

F. W. Baldwin, for plaintiff. W. W. Miles, for defendant.

TAFT, J. The court found that the plaintiff, on May 3, 1886, gave the defendant three notes for \$400, for money loaned, and that the same have never been paid, except the sum of \$100 paid by the plaintiff on May 3, 1890, to apply on all of said notes, and that the defendant received that sum as a payment on said notes. If the payment was made on that date, to apply on all the notes, a recovery of the amount due thereon is not barred by the statute of limitations. The only exception before us is the one taken "on the ground that there was no evidence tending to support such finding," i. e. the finding that the payment of the \$100 was made to apply on all the notes. The plaintiff insists that it should be applied upon one, and not upon all, of the three notes. The court found the fact that the payment was made "to apply on all of said notes." Whether the evidence tended to support the finding is the precise question before us. The defendant testified that the money was paid to be indorsed "on the three notes I held against him" (the plaintiff), and that the plaintiff directed its application "on the three notes." This testimony tended to support the finding

that the payment was made to apply on all of said notes. If some of the defendant's testimony might bear a different construction, it was for the court to say what part of the testimony should be credited, and what facts should be found from it, and its finding is conclusive. The fact that the payment was made upon all the notes renders inapplicable the cases cited by the plaintiff's counsel, of *Ayer v. Hawkins*, 19 Vt. 26, and *Wheeler v. House*, 27 Vt. 735; for in each of those cases the debtor gave no direction as to the application of the payment, and the court held that in the absence of such directions a sum paid by the debtor could not be split, and applied upon several distinct notes, in part payment of each. Judgment affirmed. All concur.

(33 Vt. 400)

MARSH v. GRAVES et al.

(Supreme Court of Vermont. Bennington.
July 28, 1896.)

PETITION FOR LEAVE TO ENTER APPEAL—MOTION TO DISMISS.

A petition for leave to enter an appeal is not open to motion to dismiss because not stating a meritorious case. Demurrer is the remedy.

Exceptions from Bennington county court; Loveland Munson, Judge.

Petition by George M. Marsh for leave to enter an appeal from an order of the probate court. George F. Graves and L. A. Graves moved to dismiss. Motion overruled. Petitioners except. Affirmed.

W. B. Sheldon, for petitioners. O. M. Barber, for petitioner.

ROWELL, J. This is a petition for leave to enter an appeal from the decision and report of commissioners on the estate of Luther R. Graves. The petition alleges the seasonable taking of an appeal by the petitioner, but avers that the probate court, by accident or mistake, did not direct the manner of giving notice of the appeal in time to enable the petitioner to give seasonable notice thereof, and that, therefore, the petitioner did not, nor could seasonably, enter and docket the same in the appellate court. It further alleges that at the time the appeal was allowed the petitioner supposed and believed, and from the probate court understood, that said court would seasonably direct the manner in which notice of the appeal should be given, and seasonably issue the proper process to carry such direction into effect, and seasonably cause said appeal to be entered and docketed in the appellate court, which it did not do, and that the petitioner learned for the first time when it was too late to enter his appeal that the law required it to be entered and docketed within 21 days after it was taken, and that notice thereof had not been given. The sufficiency of the petition is challenged by a motion to

dismiss, for that the allegations thereof do not make a case entitling the petitioner to the relief prayed for, nor warranting the court in granting it. The defendants claim that the case thereby made is that the judge of probate forgot to do what the petitioner understood he was to do, and that his forgetfulness is imputable to the petitioner as negligence on his part, and therefore disentitles him to relief. But the petition does not allege that the judge forgot, nor why otherwise he did not act. Whether the petition is defective in this respect, we need not inquire; for, if it is, it is a defect in that part of the pleading that is answerable to a declaration, independent of any reference to the rest of the process or its service, and so is the subject of a demurrer, and not of a motion to dismiss, which is not usable to test the right of recovery on the merits, but only to impeach the process for the purpose of abating the action. *Alexander v. School Dist. No. 3*, 62 Vt. 273, 19 Atl. 995. Judgment affirmed, and cause remanded.

TAFT, J., being engaged in county court, did not sit.

(68 Vt. 387)

A. H. BERRY SHOE CO. v. DESCHENES.

(Supreme Court of Vermont. Franklin. June 27, 1896.)

PLEADING—ACTION ON BOOK ACCOUNT—JURISDICTIONAL FACT—DEBTOR SIDE OF PLAINTIFF'S BOOK.

1. In an action of book account, the fact that plaintiff in a county court writ claims less than \$200 is not equivalent to a statement that the debtor side of his book is less than \$200. Hence, under the provisions that justices have exclusive jurisdiction of all civil actions, with certain exceptions, "where the debt or other matter in demand does not exceed \$200," but that in actions on book accounts "the matter in demand" shall be the debtor side of plaintiff's book, an allegation of which is in no way provided for by the statutory form of declaration prescribed, a want of jurisdiction is not apparent on the face of plaintiff's writ, though there is no allegation of the jurisdictional fact. *Bates v. Downer*, 4 Vt. 178, overruled.

2. The apparent jurisdiction is not controlling, and the jurisdiction will ultimately depend on what may appear as to the debtor side of plaintiff's book.

Exceptions from Franklin county court; Tyler, Judge.

Action of book account by the A. H. Berry Shoe Company against Edmund Deschenes. Heard on defendant's motion to dismiss at April term, 1895. Motion sustained and writ dismissed. Plaintiff excepts. Reversed.

Adams & Mott, for plaintiff. E. A. Ashland, for defendant.

MUNSON, J. This is an action of book account, brought originally to the county court, in which the plaintiff declares for \$50 to balance accounts, and places the ad damnum at \$50. The county court dismissed the suit on motion. This disposition of the case was in

accordance with the holding in *Bates v. Downer*, 4 Vt. 178. This case was unfavorably commented upon in *Paul v. Burton*, 32 Vt. 148, and we think it should now be overruled. The county court has "original and exclusive jurisdiction of all original civil actions, except those made cognizable by a justice." Justices are given jurisdiction of all civil actions, with certain exceptions, "where the debt or other matter in demand does not exceed two hundred dollars." The amount of the demand is thus made the test of jurisdiction. But it is further provided that in actions on book accounts the "matter in demand" shall be the debtor side of the plaintiff's book. The statute also prescribes the form of declaration to be used in book-account actions, and this declares for the sum which the plaintiff claims is due from the defendant to balance book accounts between them. When this declaration is inserted in the form prescribed for the writ, it is followed by a statement of the amount of damage which the plaintiff claims to have sustained, and for the recovery of which he brings suit. This clause is so often determinative of the jurisdiction that we ordinarily speak of the *ad damnum* as the test of jurisdiction, but the statute does not declare it to be the test. It frequently becomes such because of its being taken in a statement of the matter in demand when the amount of the demand is not determined with certainty by the declaration. But the amount declared for as due, whether derived from the declaration or the *ad damnum*, is not, in this action, the test of jurisdiction. The jurisdiction here is to be determined by the debtor side of the plaintiff's book, an allegation of which is in no way provided for by the forms prescribed. The *ad damnum*, which is sometimes taken to represent the actual matter in demand, cannot be held to represent what is here arbitrarily declared to be the matter in demand. It may be that the setting up in a justice writ of sums exceeding the jurisdictional limit would afford ground for the dismissal; for, if over \$200 is required to balance accounts, the debtor side of the book must be over \$200. But the fact that the plaintiff in a county court writ claims less than \$200 is not equivalent to a statement that the debtor side of his book is less than \$200. So there is nothing in this writ to show that the plaintiff's claim is not within the jurisdiction of the county court. As to whether the writ should affirmatively show the jurisdiction of the county court, it is sufficient in this case to say that the writ is prescribed by statute, and that no allegation of the jurisdictional fact is required. So it cannot be said that a want of jurisdiction is apparent from the face of the writ, either in the allegations contained, or from the want of further allegation; and the writ should not have been dismissed. Of course, this apparent jurisdiction is not controlling, and the jurisdiction will ultimately depend upon what may appear as to the debtor side of the plaintiff's book. Judgment reversed and cause remanded.

(88 Vt. 405)

STATE v. CHASE.

(Supreme Court of Vermont. Orleans. July 28, 1896.)

MURDER—EVIDENCE TO SHOW MOTIVE—FLIGHT.

1. Evidence of adulterous intercourse between a defendant charged with murder and the wife of the murdered man is admissible to show motive.

2. Evidence of flight, concealment, or disguise on the part of a defendant after the commission of the crime with which he is charged is admissible.

Exceptions from Orleans county court; Laforrest H. Thompson, Judge.

William Chase was tried for murder, and convicted of manslaughter, and brings exceptions. Exceptions overruled.

O. S. Annis, State's Atty. W. W. Miles, for respondent.

ROWELL, J. This is an indictment for the murder of John E. Holloway by poison on March 9, 1895. All the exceptions now relied upon except two relate to the admission of testimony concerning the relations that existed between the prisoner and Holloway's wife before and at the time of the homicide, and to their relations with the deceased during the same time. This testimony commenced with the prisoner's first acquaintance with Mrs. Holloway at the Barton fair in the fall of 1894, and traced them step by step from that time till the homicide. It showed how their intimacy sprang up; how it grew and increased by the things it fed on, until it became and continued to be adulterous; how, in course of time, and on several occasions, they together tried to induce the deceased to agree to a separation between him and his wife, and a division of the property, which, two days before the homicide, he refused to do on terms as to property satisfactory to them. It showed that the deceased was largely cognizant of how things were going on between the prisoner and his wife, whereat he was much displeased; that frequent quarrels took place between him and them concerning it, in some of which the prisoner inflicted blows upon him. It strongly tended to show that the prisoner had a consuming passion for the woman, and so desired to possess and enjoy her that he determined to overcome all obstacles that stood in the way of it; and that, as her husband was the chief obstacle, and could not be otherwise removed, he slew him. Some of the testimony, standing alone, might not have been admissible; but when it is all reviewed together, as it must be, each part is so closely and naturally connected with every other part, and so explains and characterizes what might otherwise have been equivocal or indifferent, that all was properly and logically framed together, and constituted a harmonious whole, with the tendency indicated, and some of it also tended to show malice on the part of

the prisoner towards the deceased. The main ground urged against its admissibility is that it was not competent to show an adulterous intercourse between the prisoner and the woman for the purpose of showing motive, for that the admission of such testimony for such a purpose is confined to cases in which a husband or wife is accused of murdering the other. But the law makes no such distinction. Whatever tended to show motive was admissible; and that such a thing as this not only may, but often does, supply motive, cannot be doubted. The admissibility of such testimony to show motive was expressly ruled in *Pierson v. People*, 79 N. Y. 424, 435, and we have no doubt of its entire correctness. There are other cases to the same effect.

All the minor objections to this testimony have been considered, and none of them found to be at all tenable. Take, for instance, the objection to the testimony of the witness Gilman that he stayed at the Holloway house several nights between October 1, 1894, and the time of the homicide, and slept with the deceased, and that on all the nights that he stayed there, the door between the deceased's bedroom and the prisoner's bedroom was fastened on the prisoner's side, against the will of the deceased. The objection is that it did not appear that the prisoner had anything to do with fastening the door. It appeared that there were but three bedrooms on the second floor of the house, and that they were in a row; that the deceased occupied one of the end rooms and his wife the other, while the prisoner occupied the middle room; that there was a door from the prisoner's room into the wife's room, as well as one from his room into the deceased's room, but that the deceased could not get from his room into his wife's room without going through the prisoner's room. It further appeared that the prisoner told the witness that the deceased accused him of locking the door, and that they had a row about it, and came to blows, whereupon he went away from there. This testimony and these circumstances, in connection with the testimony concerning the relations of the prisoner and the woman, furnished ample proof that the prisoner did have to do with the fastening of that door; and they also furnished ample proof that his object and purpose was thereby to better his chances for undetected intercourse with Mrs. Holloway. The testimony that early in the morning of the homicide the prisoner ran away in the road from the place where it was committed, and was called to to come back, and came, was properly admitted. That it appeared from the cross-examination of one of the state's witnesses that Mrs. Holloway said on that occasion that she wanted some one to go to Glover and get Magoon to do her chores, and that thereupon the prisoner started off, went to the weight, not to competency, of the testimony. The question still was whether or not his

running away, in the circumstances, was indication of conscious guilt.

It appeared that the prisoner, knowing he was suspected of complicity in the murder, and being recognized to appear as a witness against Mrs. Holloway and Gilman, who stood charged with it, fled to Canada, where he passed under an assumed name, disguised himself in divers ways, and remained until arrested and brought back on this charge. It is objected that it was error to allow the fact of his disguise to be shown. But flight, concealment, disguise, and the like, are deemed relevant by the law, and it is every-day practice to receive them. Judgment that there is no error in the proceedings of the county court, and that the respondent take nothing by his exceptions.

(176 Pa. St. 341)

ROBBINS et al. v. ROBINSON et al.

(Supreme Court of Pennsylvania. July 15, 1896.)

GUARANTY—CONSTRUCTION—DISCHARGE.

1. Plaintiffs agreed to extend a line of credit to a watch company, of a certain amount, for a certain time, on condition that defendants go their security for that amount, with provision that the line of credit be reduced a certain amount each year by quarterly payments, to be distributed on notes as they fell due; agreed "to accept a note or notes of said company in payment of our statement rendered about the first of each month"; and agreed to renew and extend any or all notes that might fall due, provided the money owed by the company did not exceed the line of credit, or the amount to which it had then been reduced. Defendants' guaranty recited, "Having carefully read above contract, we guaranty to protect any bill the company may buy." Held, that the guarantors' undertaking was that the bills should be actually paid, and their liability did not end with the mere giving of notes by the company, and was not necessarily discharged by a change of notes, either by renewal or extension of the company's notes, or by acceptance of notes of other makers.

2. Under defendants' guaranty "to protect any bill the watch company may buy" of plaintiffs, defendants are liable, though the watch company might be relieved from liability on its bills by Act May 10, 1889 (P. L. 183), amending Act June 2, 1874 (P. L. 271), under which it was formed, providing that no liability greater than \$500 shall bind the association, unless reduced to writing and signed by two managers.

3. Where defendants guarantied to plaintiffs the bills of a watch company for goods bought by it of plaintiffs, with provision for the giving of notes by the company, with right of renewal or extension, and the company suspended operations, and turned over its entire assets and business to a new corporation, which assumed the company's liabilities, including its notes given to plaintiffs, and the notes, when they came due, were apparently renewed in the name of the new corporation, as if in pursuance of the prior contract with the company,—the same persons, to a large extent, being concerned in both companies,—the question whether there was a novation, discharging defendants, depends on whether plaintiffs gave up their original debtor, and accepted its successor in its place, or merely treated the notes of the new company as evidences and means of payment, without intending to discharge the first company, and without doing any act which would discharge the guarantors, by prejudicing their interests.

Appeal from court of common pleas, Philadelphia county.

Action by Royal E. Robbins and others against Joseph W. Robinson and others. Judgment of nonsuit, and plaintiffs appeal. Reversed.

The agreement and guaranty were as follows:

Agreement: "We hereby agree to extend the Philadelphia Optical & Watch Co., Limited, a line of credit, not to exceed forty thousand dollars (\$40,000.00), upon condition that Jos. W. Robinson and A. H. Williams & Sons go their security for that amount. We do further agree that said forty thousand dollars (\$40,000) line of credit shall extend over a period of four (4) years, with the understanding that it be reduced at the rate of ten thousand dollars (\$10,000.00) each year, paid in quarterly payments of two thousand five hundred dollars (\$2,500) every three (3) months. Distribute \$2,500 on notes as they fall due. We further agree to accept a note or notes of the said Philadelphia Optical & Watch Co., Limited, in payment of our statement rendered about the first of each month for all goods bought during the preceding month, granting the usual five per cent. thirty-days discount from statement rendered, in consideration of the fact that our notes bear legal interest (six per cent.). We further agree to renew and extend any or all notes that may fall due, provided the money owed us by the Philadelphia Optical & Watch Co., Limited, does not amount to more than the forty thousand dollars (\$40,000.00) above mentioned, or the amount it may have been reduced to in the meantime according to contract. We accede to above in consideration of the subjoined guaranty and payment for first bill of \$20,000, one-half cash; all future purchases exceeding the credit to be paid for in cash. [Signed] Robbins & Appleton, by F. R. A. Dated September 24th, 1890."

Guaranty: "Having carefully read above contract, we guaranty to protect any bill the Philadelphia Optical & Watch Co., Limited, may buy of Robbins & Appleton, to an amount not exceeding forty thousand dollars (\$40,000.00), provided said liability of the Philadelphia Optical & Watch Co., Limited, be reduced at the rate of ten thousand dollars (\$10,000.00) a year; so that, for one year from signing of articles, we are liable to said Robbins & Appleton for goods purchased by the Philadelphia Optical & Watch Co., Limited, to the extent of forty thousand dollars (\$40,000.00). After the first year shall have elapsed, and from then on until the second year shall have elapsed, we are liable only for thirty thousand dollars (\$30,000.00); after the second year shall have elapsed, and until the end of the third year, we are liable only for twenty thousand dollars (\$20,000.00); and after the third year, on until the fourth year shall have elapsed, we stand liable only

for ten thousand dollars (\$10,000.00), after which time we will not agree at present to hold ourselves responsible. [Signed] Jos. W. Robinson. Arthur H. Williams & Sons."

Joseph Savidge and E. Hunn Hanson, for appellants. B. Frank Clapp and David W. Sellers, for appellees.

MITCHELL, J. The learned judge below gave too narrow and strict a construction to the word "payment" in the agreement of the plaintiffs with the debtor, the watch company, limited. According to this construction, all that the guaranty of defendants amounts to is that when the watch company, limited, should buy a bill of goods, they should give a note for it, and that should end the guarantor's liability. The futility of such an immaterial guaranty is manifest, and the whole tenor of both writings shows that such was not the intent of the parties. The first agreement for giving the credit does state that plaintiffs agree "to accept a note or notes of the said company in payment of our statement rendered about the first of each month," etc., but that this should be construed to mean "in temporary and conditional settlement" is not only in accordance with the presumption of law when notes are given for a debt, but is also shown to be the meaning of the parties by the further provision for a renewal or extension of such notes, and the specific agreement as to how much the actual payment shall be when they fall due. But a conclusive reason against the view of the court below is that the defendants' guaranty is not of the notes at all, but of the debt. The language is, "Having carefully read above contract, we guaranty to protect any bill the watch company may buy," etc. To "protect a bill" for the seller means, in any reasonable business construction, to be answerable for its payment,—not merely that a note should be given by the debtor for it, or that such note or its renewal should be paid, but that the bill should be paid. The notes not being the thing guaranteed, but only evidence, or, in a certain sense, security for the thing guaranteed, i. e. the debt, a change of notes, either by renewal or extension by the same makers, or by acceptance of notes of other makers, whether the new corporation, or the "trade paper" so called, cannot of itself, as a purely legal consequence, discharge the guarantors. Two rules on this subject are well established: First, that any material variation of the contract between the creditor and the debtor will discharge the latter's surety, whether he is injured thereby or not. He has a right to stand on his own contract strictly as he made it. Secondly, that a release or loss of mere securities by the creditor will only discharge the surety to the extent he is injured thereby. The contract between the plaintiffs, as vendors, and the watch company, limited, as purchasers, was for a credit of \$40,000 for a

period of four years, beginning in September, 1890, with the agreement that the debt should be reduced \$10,000 each year. This is the contract which the defendants state that they had "carefully read," and the bills to be bought under which they agreed to guaranty. It does not appear that any change was made in this contract. The purchases now sued for were made, as we understand, by the watch company, limited, under this contract, and within the time named,—in fact, within three months after the date of the guaranty. Nothing therefore appears, so far, to make the first rule above quoted applicable to the case.

Notes were given by the watch company, limited, and were renewed from time to time. The ordinary rule that a creditor who gives a binding extension of time to his debtor thereby discharges the surety does not apply to this case, because the agreement specifically provides for such renewals. But in July, 1892, the watch company, limited, seems to have suspended operations, turning over its entire assets and business to a new corporation, which assumed its liabilities, including the notes due to plaintiffs; and when these notes came due they were apparently renewed in the name of the new corporation, as if in pursuance of the prior contract with the watch company, limited. The two companies were, of course, legally distinct, but the assets of the first were transferred bodily to the second; the same persons, to a large extent, were concerned in both; and the business seems to have gone on with very little apparent change. How far these appellees were parties to this course of dealing, and to what extent, if at all, their interests were prejudiced by it, is not sufficiently clear to be determined as a matter of law. Under the circumstances, these are questions for the jury.

The same reply must be made to the argument that the act of the plaintiffs in giving up the notes of the watch company, limited, and taking those of the watch company, incorporated, was a novation, and discharged the defendants. That depends on the facts,—whether the plaintiffs gave up their original debtor, and accepted its successor in its place, or merely treated the notes of the new company as evidences and means of payment, without intending to discharge the first company, and without doing any act which would discharge the guarantors, by prejudicing their interest. This, so far as appears, depends on a number of circumstances, and a course of conduct which make it a question for the jury.

There remains one question which is not without difficulty. The watch company, limited, was formed under the act of June 2, 1874 (P. L. 271), the amendment of May 10, 1889 (P. L. 183), to which provides that no liability greater than \$500 shall bind the association, unless reduced to writing, and signed by at least two managers. Whether the

orders for goods which created the debt in the present case were signed by two managers, or not, does not appear in the evidence; but it is argued for the appellees that, the notes not having been shown to have been so signed, there was no legal liability of the watch company proved, and therefore no such liability on the part of the sureties. Very important questions might arise, in view of the purpose of that requirement of the statute being for the protection of the members of the limited partnership, whether it could be treated as mandatory if all the managers did in fact authorize the debt, though not in writing, and, further, whether any one but the association itself could raise the objection, which it has not done in the present case. But it is not necessary to decide either of these questions, as, even conceding them to the appellees, the latter would not necessarily be relieved of liability. As already said, the guaranty of the defendants was not of the notes, but of "any bill the watch company may buy," and its fair meaning is that if the watch company should not pay the guarantors would. The plaintiffs showed that the watch company did buy, did receive the goods, and had not paid. This made out a prima facie case of breach of the warranty, and called upon the guarantors to show a defense, if any they had. It was not essential that the debtor should be legally bound. If the proposed sale had been to an infant, or a married woman prior to the recent enabling acts, and on a guaranty of any bill which either might buy, the vendors had parted with their goods, the liability of the guarantors would be clear, though there was no legal liability of the principal debtor. It is a question of the intention of the parties, and the language of the present guaranty, "to protect any bill the watch company may buy," is broad enough to cover any failure of the watch company to pay, no matter what the reason, unless it went to the merits of the plaintiffs' claim. Judgment reversed and procedendo awarded.

(177 Pa. St. 17)

In re SMITH'S ESTATE.

(Supreme Court of Pennsylvania. July 15, 1896.)

SALE OF DECEDENT'S PROPERTY — DISCRETION OF ORPHANS' COURT.

There being no necessity for immediate sale of property to pay decedent's debts, the orphans' court should not order sold that property on which testator, by codicil, charged his debts, till final determination of an action, by the devisee of such property, to set aside such codicil, on the ground of undue influence of the devisee of the other property, who was the executor.

Appeal from orphans' court, Juniata county.

On petition of William G. Smith, executor of George W. Smith, deceased, of Juniata county, land of deceased was ordered sold for payment of debts. From a decree confirming

the sale, and overruling exceptions of Darwin C. Smith, devisee of the land sold, he appeals. Reversed.

D. W. Woods & Son, B. F. Burchfield, and J. Howard Neely, for appellant. Atkinson & Pennell, for appellee.

DEAN, J. On May 31, 1895, George W. Smith, of the borough of Mifflintown, died, leaving a will dated January 11, 1883, to which was a codicil executed April 20, 1894. At both dates, he was the owner of a valuable farm, of 90 acres, in Delaware township, also of a house and lot in Mifflintown. He was also the owner of some personal property, and was indebted about \$1,200. By the will, he devised the farm to his son William, and the house and lot to his son Darwin C. To his widow he bequeathed property or cash to the amount of \$300, in lieu of her exemption, and the interest of one-third of his real estate annually. Afterwards, by the codicil, he charged whatever debts were not paid out of his personalty on the house and lot, and cut down the devise to Darwin to a life estate, with remainder to his children. After his death, it turned out that the bequest of \$300 to the widow wholly exhausted the personalty, leaving the entire amount of indebtedness a charge on the devise to Darwin and his children; and, if payment be enforced, it is doubtful if anything over \$500 would be left for father and children. Thus, without the codicil, the whole of the real estate, farm, and lot are answerable for the debts, but, with it, the lot alone. This was the situation on November 9, 1895, when Darwin entered an appeal in the office of register of wills from the decree of the register admitting the codicil to probate; and, December 2d following, he presented his petition to the orphans' court, averring the making of the codicil was procured by fraud and undue influence on the part of William, who, by reason of it, became almost the sole beneficiary under the will. On this, the court awarded a citation to William, devisee and sole executor, to appear and show cause why an issue devisavit vel non should not be directed; and on December 17, 1895, the court appointed an examiner to take testimony. On the same day, William, as executor, presented his petition for an order to sell the house and lot for payment of debts, and an order of sale was immediately made as prayed for. On 31st December, following, Darwin presented his petition to Judge Lyons, at chambers, setting forth the facts, and averring great injustice would result to him from a sale of the property before the event of the appeal to determine the validity of the codicil, and praying that proceedings to sell be stayed until a judgment was had on the appeal. This prayer, the same day, the judge refused. The executor proceeded with the sale, and on the 29th of January, 1896, sold the house and lot for \$1,725 at public sale. Of this sale, he made return to the court on

9th of March, following, and asked that it be confirmed. Darwin C. filed exceptions to the confirmation, setting out the facts, and that great injustice would be done him by confirmation before the determination of the appeal. The court, after hearing, dismissed the exceptions, and confirmed the sale; and from that decree we have this appeal by Darwin C. Smith, assigning for error the dismissal of exceptions to confirmation of sale.

The power of the orphans' court over proceedings by either executor or administrator to sell lands of a decedent for payment of debts cannot be doubted; nor do we think the time will ever come when that court will be powerless to spur the indolent officer to promptness, or to stay and control the hand of the reckless and arbitrary one. While the act of 1834 directs that the officer shall proceed without delay to sell or mortgage the lands of a decedent for payment of his debts where the personal property is insufficient, these words are to have a reasonable construction. The twentieth section of the act expressly says that the officer shall sell "under the direction of the orphans' court." By its decree, that court has, in effect, decided the codicil valid before the question was properly before it. Excluding the codicil, and taking the writing made 10 years before as the will, the debts are not charged specifically upon any portion of the land. In that writing, the testator himself says that he does not wish the house and lot of Darwin to be charged with any portion of his indebtedness to William, for the farm he has given to William is more valuable than the house and lot given to Darwin. We here have, under this first expression of his intention, not only no specific charge upon Darwin's property, but the desire to relieve it from the burden of debts, because less valuable than that given his brother. What effect this would have on the mind of the court were it called upon to direct a sale or mortgage of any part or all of the real estate, after a final judgment setting aside the codicil, if that be the event, we do not know; nor can the court below know until that question is before it. It cannot exercise a legal discretion now, because the facts on which the discretion must be based are unknown, and cannot be known until the final determination of the appeal. Nor is there before us a single fact to justify the hurried sale of Darwin's property. In less than four months from the testator's death, the executor and devisee of the farm sought to mortgage the lot for payment of debts. Falling in this, within four months more, he obtained the order of sale, and, with what looks very like unseemly haste, sold it. We say unseemly, because it periled his brother's interests, and enhanced his own, when no creditor could have been endangered by reasonable delay.

It is argued by appellee that, in making the order for and confirming the sale, the court but exercised a discretion which is not reviewable in a court of error, except for a plain

abuse of that discretion. Ordering and confirming the sale of Darwin's lot for the payment of debts, for only a small part of which it might, after the judgment on the appeal, be held liable, was either a mistaken exercise of power, or an abuse of discretion. If the court supposed it could make Darwin whole out of William's farm for any loss sustained by the hurried sale, it was without power to make the order, for no court has the power to direct the sale of one man's property to pay another's debt, merely because the wronged party may thereafter have a vexatious remedy against some other who ought to have paid in the first instance. The question of contribution between the brothers, as we have seen, could not be decided at that time, because the material facts were impossible of ascertainment. If the court merely assumed that Darwin would lose his case on the appeal, then the decree was an arbitrary exercise of power, which is an abuse of discretion. In either view, the decree is not sustainable, for, in either, what appellee seems to term "discretion" is mere despotism,—the exercise of power by one in authority, without basing the exercise of it on established fact or recognized principle. The decree is reversed and set aside, at costs of appellee.

(67 Conn. 445)

MCADAM v. CENTRAL RAILWAY & ELECTRIC CO.

(Supreme Court of Errors of Connecticut.
March 26, 1896.)

MASTER AND SERVANT—NEGLIGENCE OF MASTER—ELECTRICITY.

1. An electrical street railway and light company constructed its railway in such a manner that the support and span wires, which passed over the trolley wire, might become dangerous by contact with the trolley wire, unless properly insulated. Plaintiff, a lineman of the company, received an electric shock from taking hold of a support wire, due to the fact that a span wire, which was not insulated, had come in contact with the trolley wire. *Held*, that a finding that the company was guilty of negligence rendering it liable for the injuries received by plaintiff was proper.

2. An electrical railway company, operating its cars by the overhead trolley system, is required to use every reasonable precaution, known to those possessed of the knowledge requisite for the safe treatment of electricity as a motive power, to provide against the danger of injuries to its employes.

Appeal from superior court, Hartford county; Ralph Wheeler, Judge.

Action by Hugh A. McAdam against the Central Railway & Electric Company. There was a judgment for plaintiff, and defendant appeals. No error.

Frank L. Hungerford, for appellant. John P. Healy and Frank E. Healy, for appellee.

HAMERSLEY, J. The defendant corporation maintained in the city of New Britain an electrical plant, with two separate branches,—one for operating an electric street railway under the overhead trolley

plan, and the other for furnishing electric lights. The plaintiff was a lineman employed in the electric light department. It was a part of his duty, when specially directed, to make some changes in the lines of the railway department. He had been specially directed to ascend a pole used in connection with the railway, for the purpose of removing a telephone wire fastened to the top of the pole, and used by the defendant. Attached to this pole were span wires and support wires belonging to the railway plant. The span wires passed over the main trolley wire, and might become dangerous by contact with that wire, unless protected by artificial insulation. In the construction of the railway the wires were so arranged that occasional contact between the span wires and the trolley wire was likely to occur. The span wires were understood to be insulated from the main trolley wire by proper artificial insulation. Pursuant to his directions, the plaintiff ascended the pole by a ladder to the height of about 16 feet, with the expectation of climbing from that point to the top of the pole. Before leaving the ladder, and for the purpose of steadying himself as he was about to ascend, he took hold with his left hand of an eyebolt connected with a support wire which ran from the pole to the next pole, and reached his right hand to take hold of an eyebolt to which was fastened a span wire. The support wire in some way made a ground connection. The span wire was not insulated, and was in contact with the trolley wire charged for use for railway purposes. As his right hand touched the eyebolt, he received a severe shock, which caused him to fall to the ground, whereby he was injured. Several days prior to the accident the defendant had its attention called to a dangerous condition of the wires at this point, and it made no effort to discover the cause. The court below found that the defendant was guilty of gross negligence, and that the plaintiff was not guilty of contributory negligence, and gave judgment for the plaintiff to recover substantial damages.

The reasons of appeal seem to be a summary of the defendant's argument upon the trial, and apparently the errors mainly relied on are the alleged erroneous conclusions reached by the court upon questions of fact. In its brief, however, the defendant claims that, in finding gross negligence in the construction of the defendant's wires, the court erred in measuring the legal duty of the defendant by an erroneous standard. The trolley wire, as used by the defendant, is charged with an agency of exceeding danger to life, and is capable of communicating such deadly quality to any wire or conductor of electricity that may come in contact with it. When the legislature authorizes a corporation to use such an agency in the public streets, the law implies a duty of using a very high degree of care in the construction

and operation of the appliances for the use of that agency, requiring the corporation to employ every reasonable precaution known to those possessed of the knowledge and skill requisite for the safe treatment of such an agency, for providing against all dangers incident to its use, and holds it accountable for the injury of any person due to the neglect of that duty, whether the person injured is or is not one of its own employes. This standard of duty was correctly applied to the facts as found by the court below. The method of construction in connection with the failure to insulate the span wire was a violation of the duty imposed on the defendant by law.

The defendant also claims in its brief that the court did not hold the plaintiff up to the degree of care fixed by law for persons engaged in hazardous undertakings. In so far as this claim implies that the court, while applying the legal standard of care for persons engaged in dangerous undertakings, erred in its finding, from all the circumstances of this case, that the plaintiff in fact did not neglect to use such care, it does not present a question which this court should review; and, if it were open to review, the facts, as detailed in the record, would compel us to reach the same conclusion. In so far as the claim implies that the court did not recognize nor apply to the facts as found the legal standard of care, it is not consistent with the record. The court made no ruling adverse to the defendant in respect to the standard of care required by law. The finding gives a minute and clear recital of the circumstances of the accident. The conclusion of the court that the defendant was guilty of negligence was demanded by its plain violation of a legal duty; and the finding shows that the conclusion that the plaintiff was not guilty of contributory negligence was an inference from the special facts and circumstances peculiar to this case as found by the court from the evidence, and it does not appear from the finding, and is not assigned as error in the reasons of appeal, that in drawing such inference the court violated any rule or principle of law applicable to the facts as found. Such a conclusion cannot be reviewed in error. Discussion of this point is barred by many recent decisions of this court. There is no error in the judgment of the superior court. The other judges concurred.

(67 Conn. 433)

CONNECTICUT TRUST & SAFE-DEPOSIT CO. v. SECURITY CO.

(Supreme Court of Errors of Connecticut.
March 28, 1896.)

DISTRIBUTION—WIFE'S PERSONALTY—LIMITATION OF ACTIONS—ADMINISTRATION.

1. Gen. St. 1866, p. 303, § 19, provides that the personality of a married woman shall vest in the husband, in trust for the wife, and on the death of the husband shall vest in the wife

if living, or, if she has deceased, in her devisees, legatees, or heirs at law, in the same manner as if she had always been a feme sole. Gen. St. § 2792, vests the property in the husband in trust, and provides that upon his decease the remainder of such trust property shall vest in the wife, if living; otherwise as the wife, by will, may direct, or, in default of a will, in those entitled by law to her intestate estate. *Held* that, if the wife has deceased intestate, her personality, on the subsequent death of her husband, vests in her administrator, who is entitled to the possession thereof.

2. The husband being a trustee of an express trust as regards the personal property of the wife, the statute of limitations or of nonclaim does not apply, though the husband so mingled her property with his own as to lose its identity.

3. The fact that the administrator of the wife delayed for 18 months after the death of the husband in applying for letters of administration does not prevent, on the ground of laches, his recovery of the personality of the wife from the administrator of the husband, the delay not having resulted in any injury to the latter.

4. Where the husband has been appointed administrator of his wife, and no administration on her estate is had, the administrator appointed for her estate, on the death of the husband, may sue his administrator, for the wife's personality received by the husband as statutory trustee.

Appeal from superior court, Hartford county.

Action by the Connecticut Trust & Safe-Deposit Company, administrator, against the Security Company, administrator. There was a judgment for plaintiff, and defendant appeals. No error.

George G. Sill, for appellant. Henry C. Robinson, for appellee.

FENN, J. The material facts in this case may be stated briefly. The plaintiff sues as administrator de bonis non of the estate of Susan M. Welles. The defendant is the administrator of the estate of her husband, Thomas G. Welles. They were married in 1873. She died in 1880, intestate, leaving two children, issue of the marriage. Both have since died, minors, intestate, and unmarried; one before, the other since, their father. Thomas G. Welles died in 1892. During the marriage he received personal property of the wife. He invested it in his own name. The trust fund, so invested, in property mingled with that of Thomas G. Welles, and not capable of being separately traced and identified, came into possession of the defendant, as administrator of his estate. The plaintiff demanded it in the form of a sum of money out of the property, equal to the trust fund. The defendant refused to deliver it. The plaintiff brought the present action at law. The superior court rendered judgment in his favor. The defendant appealed to this court.

The statute, as it stood in 1873 (Gen. St. 1866, p. 303, § 19), provided, as to the personal property of a married woman married since June 22, 1849, that it should vest in the husband, in trust for the wife, and upon the decease of the husband "shall vest in the wife, if living, or if she has deceased, in her devisees, legatees, or heirs at law, in the same

manner as if she had always been a feme sole." The present statute (Gen. St. § 2792) is somewhat changed in phraseology. By it the property vests in the husband in trust for the uses specified, "and upon his decease, the remainder of such trust property shall vest in the wife, if living, otherwise as the wife may by will have directed, or in default of such will in those entitled by law to succeed to her intestate estate." We agree, however, with what the defendant has said in its brief, "Changes in the phraseology of the statute have not changed its original meaning and purpose." On the contrary, such changes make more clearly distinct and apparent what such original meaning and purpose was. The same is also true of the act passed in 1887 (chapter 40, now Gen. St. § 2795). Under the statute then, the vesting in the husband is of the legal estate, as trustee of an express trust, with no other ultimate property, right, or beneficial interest in himself than such as is specifically given to him by such statute, namely, the receipt and enjoyment of the income during his life; and even this is subject to duties and charges imposed. Upon the husband's decease, his life trust estate, being his only estate in the property, determines. Nothing derived from him passes to those who represent him, or claim title under him. It vests in the wife, in law, in right of possession, as it was vested in equity in right of property; that is to say, it vests, divested of the trust, in the wife, if living, but, if she be dead, then as she may by will have directed; but if, as in the present case, she has died intestate, it vests in those entitled by law to succeed to her intestate estate. But who shall determine who are so entitled? Gen. St. § 628, expressly provides: "It shall be the duty of the court of probate to ascertain the heirs and distributees of every intestate estate." This, however, is but an affirmation and statutory declaration of the pre-existing law. But, in order that the court of probate may do this, it is plainly essential that such an estate should be pending for settlement in said court in the orderly and prescribed way. The prior duty provided by Gen. St. § 565, in every case where a person dies intestate, to grant administration, must have been performed. Then the administrator so appointed is entitled to the possession of the personal property, so that he may be enabled to administer it under the direction and by the authority of the court of probate. That was what the statute of 1866, in existence at the time of the marriage of Mrs. Welles, expressly stated, in providing that the property should vest, upon the death of the husband, after the prior decease of the wife, "in the same manner as if she had always been a feme sole." That is what the present statute means equally. In this case an administrator of the wife has been appointed. He has demanded the property of the administrator of the husband. We agree

with the court below that it should have been delivered to him.

But the defendant insists that the object of this suit is, and its effect, if successful, would be, when the time of distribution comes, to stamp the property with the title of the wife, and give color to the claim that it shall be distributed as her estate, to her collateral relatives, and not to the representatives of her sons who survived her, but are now dead. We think the defendant is unnecessarily apprehensive. But, in view of the fear expressed, we will say that no inference whatever can with justice to this court be drawn from our present action in any subsequent proceeding, in the court of probate or elsewhere, concerning a matter, namely, who is entitled by law to succeed to this intestate estate, not before us, and not within our jurisdiction at this time to consider.

But, besides the main question which we have examined, the defendant has presented other claims. It insists that the plaintiff is not entitled to recover, because it neglected to present its claim against the estate of Thomas G. Welles within the time limited by the court of probate for the presentation of claims against it as a solvent estate. The defendant admits what is clearly true (*Cone v. Dunham*, 59 Conn. 145, 20 Atl. 311),—that here was an express trust at its inception, and that neither the statute of limitations nor of nonclaim applies to such a trust. But it asserts that the character of an express trust was lost when the funds themselves lost their identity. We cannot accede to this claim. The character of the trust upon which the property was received and held was not changed by the conduct of the trustee. The claim upon the defendant by the plaintiff, as for "money in the hands of Thomas G. Welles as statutory trustee," was correct in form. The property, in whatever shape, was so held. This is not a "mere money demand" in the sense in which the defendant uses that expression. It is a claim for trust assets in the hands of the trustee of an express trust.

The defendant further says that the plaintiff was guilty of laches in delaying for more than 18 months in applying for letters of administration. It is not claimed that this delay resulted in any injury to the defendant, who "had notice of the claim on the property at an early day"; and in view of the finding of the court no laches can be imputed in law, or held to have existed in fact.

The defendant also says: "An administrator de bonis non cannot maintain an action against his predecessor, or his administrator, except for effects in specie; nor can such administrator sue a preceding administrator of his intestate for sums claimed to be due on a devastavit or for an accounting." If this be granted, the application to the case before us is not apparent. The finding shows that Thomas G. Welles, upon the death of his wife, was appointed administrator of her es-

tate. But it also shows that her estate "was not taken and held by him as administrator, and there was no actual administration of her estate in the court of probate before his decease." The present is not such an action as the defendant asserts could not be maintained. It is a suit against the administrator of a person who, up to the time of his death, held personal property as the statutory trustee,—not as the administrator of his wife,—who had refused to deliver it, upon demand, to her administrator, in order that it might be administered upon and finally disposed of according to law. There is no error. The other judges concurred.

MAYOR, ETC., OF BOROUGH OF BRIGANTINE v. HOLLAND TRUST CO.

(Court of Chancery of New Jersey. July 15, 1896.)

DEDICATION—ACCEPTANCE OF STREET—MUNICIPAL CORPORATION—EXERCISE OF CHARTER POWERS—INJUNCTION.

1. While a formal acceptance of a proffered dedication of a street is necessary before the duty is imposed on the public to repair and maintain it, such acceptance is not essential to consummate the dedication, so as to cut off the rights of the owner of the land.

2. Where, by its charter, a municipality is given power to pass ordinances declaring what shall be considered a nuisance in the street, and to remove nuisances and obstructions therein, it must exercise such power in the manner prescribed.

3. A preliminary injunction will not issue at the suit of a municipal corporation to restrain the running of an electric wire across a street at a height of 25 or 30 feet from the ground, where the maintenance of such wire is not prohibited by any ordinance, and will not interfere with the use of the street by the public for street purposes.

Bill by the mayor and common council of the borough of Brigantine against the Holland Trust Company for an injunction. Heard on bill, answering affidavits, and rule to show cause. Injunction denied.

A. B. Endicott, for complainant. W. B. Williams, for defendant.

GREY, V. C. This bill was filed by the borough of Brigantine against the Holland Trust Company, seeking an injunction to restrain the defendant "from erecting poles or stringing wires in, along, or over Division avenue or Brigantine avenue in said borough." At the hearing of the cause, the defendant filed its affidavits in response to the complainant's bill, in which it denied that it was contemplated by the defendant company to erect any poles in either First street south (which was shown to be the same as Division avenue), or on Brigantine avenue. It was, however, admitted that it was intended to run wires from poles already erected on Division avenue, connecting with the wires already stretched along the poles on Division avenue, and running from those poles across Division avenue, to

the hotel of the defendant, for the purpose of carrying an electric current to that hotel, to supply electricity to electric lights. The counsel who appeared for the defendant company declared, without any qualification, that there was no purpose or intention on the part of the defendant company to erect any poles whatever on either Division avenue or on Brigantine avenue. The affidavit annexed to the bill, so far as it specifies the acts of the defendant upon which the claim for injunction is based, mentions only acts incidental to the stretching of wires upon poles, and does not state any facts which go to show any intention to set up additional poles. This comports with the affidavit filed by the defendant, and with the declarations of the defendant's counsel at the hearing, that there is no design on the part of the defendant to erect poles within the streets of the complainant.

As the complainant does not show any purpose on the part of the defendant to erect poles in the street, and the defendant fully denies such an intent, it remains that the only question to be determined in this matter is whether a preliminary injunction should issue, restraining the defendant from stretching a wire across the street of complainant without first obtaining the authority of the complainant to do so. The affidavits filed on the part of the defendant admit that it is the intention of the defendant company to stretch a wire across Division avenue, which shall connect with wires already stretched on the poles now standing in Division avenue, and to run the new wire across that avenue to the hotel of the defendant company, for the purpose of supplying it with electric lights. The wires already stretched on the poles on Division avenue are stated by the affidavits to be at an elevation of from 20 to 25 feet, and that they did not in any way interfere with the traffic upon Division avenue. To connect with these, the new wire must be of the same height. It is further stated that Division avenue itself is a stretch of land covered by water during a large portion of the year, except in specially dry seasons; that it has not been curbed or flagged or graded by the borough, or by anybody else; that it is not passable for vehicles or pedestrians, except on one side, where the defendant has erected a raised platform, some four to six feet above the surface of the ground; and that it is only over this that the guests of the hotel can get access to it. There is no contradiction of this explicit statement of the actual condition of Division avenue, except the general allegation in the bill, and the general affidavit that the contents of the bill are true. It was substantially admitted on the hearing that there had been a proffer of dedication of the streets in question, Division avenue and Brigantine avenue; but it was claimed that there had been no acceptance by the borough, and that no authority over the streets could be asserted on behalf of the public until actual acceptance of the dedication. Whether there was or was not actual accept-

ance remained a matter of dispute, neither party showing proof of a conclusive character. But the affidavits do show, with the map admitted to be descriptive of the premises exhibited at the hearing, that there has been a proffer of dedication, such as would cut off the donor from the power of retraction; so that whenever, in the estimation of the local authorities, the wants and convenience of the public require the street proffered for the public use, the dedication could be consummated. The actual acceptance by a formal adoption is by our courts held to be necessary to impose on the public the duty of repairing and maintaining, but is not essential to consummate the dedication, so as to cut off the rights of the owner of the land. *Hoboken Land & Imp. Co. v. Mayor, etc., of Hoboken*, 36 N. J. Law, 540. I think that the act of dedication is so far complete that, if this were the only obstacle, the municipality would have power to bring a suit to assert and protect the public right in the dedication proffered, although it may not have heretofore obligated itself to maintain or repair the street.

It was stated on the hearing, and not questioned, although it does not appear by the bill of complaint, that the borough of Brigantine obtained its municipal franchise under the borough act of April 5, 1878 (Laws 1878, p. 403). It was the powers thus obtained which are sought to be enforced by this bill. By the act referred to, the mayor and council of the borough were declared to have power "to pass, enforce, alter, or repeal ordinances to take effect within the limits of said borough for the following purposes, to wit: (1) To declare what shall be considered a nuisance in the streets, roads, lots, and places in said borough, and to prevent and remove all obstructions, incumbrances, and nuisances in and upon any street, road, lot, sidewalk, inclosure, or other place in said borough." There is no proof before the court that any ordinance had ever been passed which declared the stringing of wires or any like acts to be nuisances, or to prevent or remove such an obstruction or incumbrance. So far as any action by ordinance is concerned, there is nothing to show that any ordinance on the subject has ever been passed, or that the power above recited has been exercised. By the statute by which the legislature granted to the borough the power to declare what were nuisances, and to remove obstructions and incumbrances, it also prescribed the mode by which the borough should act in exercising the power. When the legislature creates the power, and by the same act directs the mode in which it shall be exercised, the municipal authority is, I think, bound to exercise it in the mode prescribed.

Municipal corporations have been sustained in ejectment suits brought to recover, for the benefit of the public, rights of way, public parks, etc. *Den v. Dummer*, 20 N. J. Law, 86; *Methodist Episcopal Church v. Mayor, etc., of Hoboken*, 33 N. J. Law, 13; *Hoboken Land*

& Improvement Co. v. Mayor, etc., of Hoboken, 36 N. J. Law, 543. But these suits were brought in the assertion of general rights vested in the public, and not for the enforcement of powers specifically given, with a prescription of the mode in which they should be exercised. Where the act sought to be done is clearly one of those which the legislature has directed to be accomplished in a specified mode, the municipal corporation, in seeking to do the thing which it is authorized to do, should follow the mode prescribed.

But if it be conceded that the omission to act by ordinance, as directed by the incorporation act, does not preclude the municipality from asking this court to grant a preliminary injunction, it must, at least, be shown that there is a present exigency which makes this extraordinary remedy a necessity to prevent actual, and not merely theoretic, harm, and that the injury which is threatened is irreparable. This calls for an examination of the authority of the borough over the streets within its territory, and also an ascertainment of the extent of public right in those streets, their present condition, and the threatened intrusion, and whether such a case is shown as calls for a preliminary restraint. I think that whatever control over the public streets as highways may be exercised by anybody the borough may exercise, under the grants of power proffered in the act under which it was incorporated. What the extent of the public right upward above the surface of the highway may be is a much more extensive question. In our state, the thing taken from the abutting owner is a right of way over land, without any specification of how far up or down the right extends. There seems to be no reason that any more should be taken than the public can enjoy. If a supposed intrusion does not appear to interfere in any way with the uses which the public may make of the way, why deny to the abutting owner the use of that which the public cannot use?

In the case of *Wandsworth District Board of Works v. United Telephone Co.*, 13 Q. B. Div. 904, the English court of appeal construed the "Metropolitan Management Act," which provided that "all streets, being highways, * * * shall vest in and be under the management and control of the vestry or district board," etc., "in which such highways are situate." The question presented was whether a preliminary injunction should issue to restrain the stringing of telephonic wires over a street at an elevation of 30 feet above the ground. Sir Fitz James Stephen, in the court below, was of opinion that the wire in question was not a nuisance to the highway, and that, apart from the question of property rights, the plaintiff was not entitled to have it removed; but he held that the act above quoted gave an absolute proprietary right in the streets to the plaintiff, and on that ground he allowed the injunction asked for, but directed that it should not is-

sue until the determination of an appeal to be brought by the defendants. In the court of appeal, the law laid down by Judge Stephen was accepted, save his construction of the effect of the act above quoted; the court of appeal holding that the act vested the title to the street in the public only to the extent that it was or might be used as a street, and now usque ad coelum; that the question as to the meaning of the word "street" must be determined as a practical one at the time when the remedy was applied for; and that if the supposed intrusion upon the street was not, and was not likely to be, a danger to the street as such, no injunction ought to be granted merely on the ground that the stringing of the wire was a trespass on the property of the public. This case was thoroughly considered, and, although it arose under the provisions of an act of the English parliament,—and parliament is not limited by constitutional restraint, as is our legislature,—still, I think, the declaration of the law is very enlightening of the subject now before the court. The holding is that the right of the municipality in the street goes to the extent which the necessities or convenience of the public in the use of the street may require; that the stringing of a wire 30 feet above the surface of the street was not shown to be an intrusion upon any use which the public were making or might make of the highway; that the rule of absolute ownership usque ad coelum did not apply to the public streets, even where parliament had vested the street in the municipality.

In the case in hand, Division avenue, the street in question, is shown to exist almost wholly in the contemplation of the mind. It is covered by water during a considerable part of the year. It has not been curbed, flagged, nor graded; is not passable either for vehicles or pedestrians, except over a raised platform erected by defendant, which is from four to six feet above the surface. No buildings, except the defendant's hotel and a casino, appear, by the bill and affidavits, to have been erected on the avenue. If it were shown that the proposed stringing of a wire was in breach of any reasonable ordinance passed by the municipality regulating the use of the street, or if it occasioned any actual appreciable danger to the public or to the traffic in the street, this court might properly be asked to restrain the defendant by a preliminary injunction; but no such condition is exhibited.

In the case of *Roake v. Telephone Co.*, 41 N. J. Eq. 35, 2 Atl. 618, an abutting owner filed his bill to restrain a telephone and telegraph company in erecting poles and stretching wires over lands in the avenue, in front of his lot, at a height of 25 feet above the ground. The defendants claimed to have acted under statutory and municipal authority. No special damage was in that case alleged, and the complainant seemed to rest his case solely upon his rights as owner. The

court held that his rights, as exhibited by him, were debatable, and that a preliminary injunction should not be allowed.

I am of opinion that inasmuch as the bill of complaint does not exhibit the threatening of any present danger by the proposed erection of this wire, and does not show that any ordinance has been made as to the obstruction or incumbrance of the streets of the borough of which the stringing of these wires would be a breach, the complainant has not shown such case as would justify the issuing of a preliminary injunction, which should only go when the rights of a complainant are clear, and when the injury threatened is immediate and irreparable.

The rule to show cause and the restraining order must be dissolved.

(54 N. J. E. 379)

IVORY v. KLEIN.

(Prerogative Court of New Jersey. July 25, 1896.)

ESTATES—LIABILITY OF LIFE TENANT.

Where there is an estate for life, and a remainder in fee, and there exists an incumbrance, binding the whole estate on the land, and no special equity exists between the life tenant and the remainder-men, the former is bound to pay the interest accruing upon the incumbrance during the continuance of his estate.

(Syllabus by the Court.)

Appeal from orphans' court, Mercer county; Woodruff, Yard, and Wright, Judges.

From an accounting of Kate J. Klein, executrix and trustee under the will of John F. Klein, deceased, Mary Ida Ivory appeals. Modified.

John F. Klein, late of Trenton, in this state, died on the 21st of August, 1882, testate, leaving, him surviving, his widow, Kate J. Klein, and four children,—two by a former wife, to wit, Mary Ida Ivory and William F. Klein, the latter of whom died on the 12th of April, 1892; and two by his widow, Kate J. Klein, to wit, Gertrude Klein, at his death 19 years of age, and Marguerite Klein, then 11 years of age. The last-named child became 21 years of age on the 21st of April, 1892. The decedent left three parcels of property, all of which were in the city of Trenton, to wit, his residence, on Hanover street, with its furniture, business property on State street, and other business property on Green street. His residence was incumbered by a mortgage for \$3,000, held by one Deats; the State street property was incumbered by two mortgages, one for \$5,000, held by one Wilson, and the other for \$3,000, held by one Green; and the Green street property was incumbered by a mortgage for \$10,000, held by one Wilkinson. He did not leave any personal estate beyond his household furniture in his dwelling, on Hanover street. By his will, dated on the 4th of September, 1875, he constituted his wife the executrix thereof, and gave and devised to her, in lieu of dower, his dwelling on Hanover street, with its furni-

ture, in fee. By the same instrument, he provided that the State street property should be sold by the executrix, as soon as conveniently might be, at public sale, to the highest bidder, "and," following the language of the will, "that from the proceeds of said sale all my debts, including all mortgages which may exist on any and every property I may own, be paid off and extinguished; debts other than mortgages on other properties to be paid first, and other mortgages afterwards, if sufficient balance remains for that purpose. If, at the time of such sale, any of my mortgages are not yet due, and the holder of said mortgage or mortgages refuses to receive the payment thereof, then and in such case, if such balance remain a sum sufficient to pay the probable indebtedness when the same falls due, it shall be retained by my executrix, and invested subject to such payment. The balance of the proceeds of said sale, if any, remaining after the payment of all my debts, book accounts, mortgages, and provisions for payment of mortgages as aforesaid, I give and bequeath to my son William F. Klein and my daughter Mary Ida Ivory, to be equally divided between them." He then devised the Green street property to his wife in trust, using this language: "In trust to the following uses and purposes, that is to say: Upon trust to permit and suffer, authorize and empower, my wife, Kate J. Klein, to have, take, and receive the rents, issues, and profits thereof, therefrom to pay for the repairs required on said property, and for all public taxes and assessments imposed thereon, and further to meet and pay for the general support and education of herself and our children until the youngest surviving child has arrived at the age of twenty-one years, when and at which time, or as soon thereafter as conveniently may be, to sell the said property at public auction to the highest bidder; and I hereby and herein authorize and empower my executrix to make such sale, and to divide the proceeds thereof among all my children, in such manner and in such parts that, by crediting my said two children before named, William F. Klein and Mary Ida Ivory, with the amount, if any, received by them from the proceeds of the sale of the State street property, as directed in Item No. 1, all my children shall receive an equal division and share of the total proceeds of the sales of said two properties (the State street and the Green street properties aforesaid)." He further provided for a trust of a \$3,400 mortgage held by him when the will was made, but not existing at his death, in his widow, for her benefit for life, the principal, at her death, to be disposed of by her appointment in her will, and that, if his son, William, should die before distribution should be due to him under the will, his portion should be divided among the children of the testator surviving at that time. The residue of his estate was devised and bequeathed to his wife. The executrix proved the will on the 1st of September, 1882, and letters testamentary were issued to her. She

then took possession of the three properties, occupying the Hanover street property, and receiving the rents of the State and Green streets properties. From the rent of the State street property, she paid debts of her husband, and interest on the four mortgages mentioned. On the 1st of April, 1884, she sold the State street property for \$20,000, and, on the 17th of the same month, paid to Mr. Wilson \$5,138.83, and to Mr. Green \$3,118.75, in satisfaction of their respective mortgages. These payments and the payment of the remainder of her husband's unsecured debts left in her hands, from the proceeds of the State street property, \$5,843.37, out of which, on May 10, 1884, she paid \$3,183.32 in satisfaction of the mortgage on the Hanover street property, the fee of which was devised to her. The remainder of the \$5,843.37 she retained, and expended in the payment of interest from time to time on the \$10,000 mortgage, on the Green street property. In July, 1892, after her youngest child became of age, she sold the Green street property, subject to the mortgage on it, and received therefrom, as the proceeds of sale, \$15,000, out of which she has been allowed credit for further payment of interest on the \$10,000 mortgage. The income from the Green street property was used by her in the payment of taxes assessed against that property for repairs to it, and for the support of herself and the support and education of her two children. It was sufficient to have paid for taxes, repairs, interest on the \$10,000 mortgage, and something towards the support of the widow and her children. Upon the accounting of the executrix, the orphans' court, by its decree, apportioned the \$5,843.37, balance of proceeds from the State street property, between the Hanover street and Green street mortgages; so that three-thirteenths, or \$1,348.49, of that sum, was allowed to the executrix because of the Hanover street mortgage, and ten-thirteenths, or \$4,494.88, remained for her to account for. No objection is made to the decree in this respect. The appellant's sole objection is because the court allowed the executrix some \$5,400, interest upon the mortgage on the Green street property out of the moneys which were realized from the proceeds of the sale of the State street and Green street properties; her contention being that the interest upon that mortgage should have been wholly paid from the income of the Green street property, upon the ground that it was the duty of the life tenants to pay that interest, which is not a charge against the remainder-men, as in effect it is made by the decree of the orphans' court.

James Buchanan, for appellant. Levi T. Hannum, for respondent.

McGILL, Ordinary (after stating the facts). In the case of Moseley v. Marshall, 22 N. Y. 200, Judge Denio stated the principle which governs the solution of the question presented in these words: "It is a well-established principle that where there is an estate for

life, and a remainder in fee, and there exists an incumbrance, binding the whole estate in the land, and no special equities between the remainder-man and the tenant for life can be shown, the latter is bound to pay the interest accruing during the continuance of his estate, and the owner of the future estate is to pay off the principal of the lien." In that case the crucial question was, as it is in the case considered, whether the will evinced an intention that the interest upon the mortgage should not be charged to the life tenants, and thus gave a right against the remainder-men. In the case considered, testator had two children by his first wife, both of full age, and emancipated from his control and care, and two children by his second wife, both of whom were under age, and yet needed education and his maintenance. The scheme of the will was that the testator's widow, the mother of his infant, dependent children, should take his dwelling on Hanover street, with its furniture, in fee, in lieu of her dower, and, in addition thereto, should have the income from his \$3,400 mortgage for her life; that the State street property should satisfy his debts, including the mortgages on all his properties; and that the net income of the Green street property should be devoted to the education and maintenance of his infant children until the youngest should become of age; and, to the end that, through a community of interest, the mother's home and care might be secured for them, she also, during the minority, was to have the benefit of this providence. The other children had passed their minority, presumably having had his care and assistance. If there should be a surplus in value of the State street property above the payment of debts, those older children were to take that surplus immediately. When the majority of the youngest surviving child should be reached, that surplus and the proceeds of a sale then to be had of the Green street property would together be reckoned as a fund for division among the four children, in order to determine how much of the proceeds of the sale of the Green street property then in hand to be divided each would have, the two older children's share being credited with their receipt, if any, from the proceeds of the State street property. It was the testator's intention to create three funds,—one for the payment of his debts, with a possible surplus for his children; one for his widow, in lieu of her dower; and a third to yield support and education for his infant children and their mother, in care of them during their minority, and, in corpus, be preserved for ultimate division among all his children. He was uncertain as to the sufficiency of the first of these funds. It might be more than enough to pay his debts, and in that event he disposed of the surplus of it. Yet it might not be enough to pay the debts, and therefore he specified a preference of debts to which it should be applied. But, while he established

such preference of debts, he failed to specially provide for the disposition of any balance of the fund there might be after payment of the preferred debts which might be insufficient to fully satisfy the remaining debts, or to provide how those remaining debts should be satisfied. Passing from this fund and that designed for the widow, he created the third. He put it in trust for years, specifying three purposes to which its income should be devoted: (a) Payment for repairs to the property constituting it; (b) payment of taxes and assessments levied on that property; and (c) the support and education of his wife and infant children. A surplus of income was not contemplated. That he expected to realize enough from the sale of the State street property to pay all his debts is indicated by his provision for the disposition of a balance of proceeds of such sale after their payment. It is true that he also contemplated that the proceeds of such sale might not be sufficient to pay his debts. Such contemplation is evidenced by his preference of debts in such contingency. But that such contemplation was regarded by him as a mere possibility, I think, is clearly demonstrated by his neglect to pursue the event of such contingency by specific direction, either concerning the application of any balance there might be of proceeds of sale after the payment of the preferred debts, or concerning the payment of such debts as should not be satisfied, together with the interest thereon.

Now, it is argued by the respondent that the enumeration in the will of charges upon the income of the Green street property, for repairs, taxes, and assessments, and the support of the widow and younger children, indicates a purpose to exclude any charge upon that income for interest on the mortgage upon that property, or, at least, to postpone it to the full accomplishment of the three purposes expressed. If the will exhibited that the testator had it in mind that question as to the charge of interest on the mortgage would probably arise, I would, perhaps, because of the importance of specific direction as to the payment of interest, attach greater weight to this argument; but I think that the will evinces that the testator regarded, in the first place, that the insufficiency of the proceeds of the sale of the State street property to pay all his debts was a possibility only, and, in the second place, that his preferment of the unsecured debts made adequate provision for such contingency, by leaving his mortgages a charge upon the properties respectively burdened by them. In view of the whole situation, I do not perceive more reason for holding that the testator's specification of some charges upon the income of the Green street property excludes all other charges than I do for holding that the testator intended in that specification, but failed, to mention all charges that were necessary to fully protect the corpus. It appears to me that his object was to devote the net income of a portion of

his estate to the assistance of his second family while such assistance should be most needed, and at the same time to preserve the corpus for equal distribution among all his children beyond that period, and not to permit a sacrifice of it, and with it a sacrifice of the interests of his elder children, to produce a larger temporary income. I conclude, therefore, that the will does not signify an intention to give any right to the life tenants which justifies a charge of the interest in question upon the corpus. The decree of the orphans' court will be reversed for correction in this particular; otherwise, it was rightly made.

(68 Vt. 421)

LINDLEY v. LINDLEY.

(Supreme Court of Vermont. Bennington.
July 29, 1896.)

DIVORCE—ADULTERY—MEASURE OF PROOF REQUIRED.

A preponderance of the testimony, only, is required to establish the fact of adultery in a proceeding for divorce, weighing the presumption of innocence in favor of the party accused.

Exceptions from Bennington county court; Munson, Judge.

Petition for divorce by Della A. Lindley against James S. Lindley. Judgment for plaintiff, and defendant brings exceptions. Affirmed.

C. H. Darling, for petitioner. W. B. Sheldon, for defendant.

ROSS, C. J. The only question presented is the measure of proof required, in a divorce proceeding, to establish the cause of adultery. It is a civil proceeding to determine the relation and the rights of the parties under and to the marriage contract. The violation of it, charged, is a crime, under the laws of this state. Whatever may be the measure of proof required to establish such a charge in a civil proceeding in other jurisdictions, for many years, in this state, the measure of proof required has been that adopted by the county court,—a preponderance of the testimony, weighing the presumption of innocence in favor of the party accused. *Bradish v. Bliss*, 85 Vt. 326; *Stanton v. Simpson*, 48 Vt. 628; *Weston v. Gravin*, 49 Vt. 507. We do not understand that any different measure of proof is announced in *Gould v. Gould*, 2 Aiken, 180. If so, it has never been followed, in practice, to the recollection or knowledge of any member of this court. But the rule there announced, as we understand it, not to grant a divorce on the uncorroborated testimony of the petitioner, or admissions of the petitionee, has always been followed, and especially when the cause alleged is a crime, in opposition to which the presumption of innocence is to be weighed. This rule rests upon the reason there stated,—that the public, and frequently minor children, are interested in proceedings affecting marital relations, and also upon the ground

that in such proceedings, generally, the trial court hears only the petitioner's side of the case. *Foster v. Redfield*, 50 Vt. 285; *Richardson v. Richardson*, Id. 119. Judgment affirmed.

TAPT, J., being absent in county court, did not sit.

(68 Vt. 426)

REYNOLDS v. HASKINS et al.

(Supreme Court of Vermont. Lamolle. July 28, 1896.)

ATTACHMENT—BONA FIDE PURCHASER—NOTICE—LEVY—REASONABLE DILIGENCE.

1. The lien of a creditor acquired by attachment of real estate, the title to which is in his debtor, although the attachment is made without notice that his debtor has conveyed it to a bona fide purchaser, is defeated by actual notice of such conveyance, received before he levies his execution thereon, or has lawfully applied it to the satisfaction of his debt.

2. A rule which would require every purchaser of real estate, under the presumption that the description in the deed is *prima facie* erroneous, to examine not only the chain of title of his grantor, but the title of all surrounding lands, aided by an expert conveyancer and a town clerk who is familiar with the plans and land records of the town, is too onerous for application.

Appeal in chancery, Lamolle county; Start, Chancellor.

Bill by O. W. Reynolds against Calvin Haskins and others to have a deed reformed. Heard upon the report of a master at the December term, 1895. From a decree in favor of the orator, the Terrills, defendants, appeal. Affirmed.

P. K. Gleed, for orator. M. A. Bingham and J. J. Monahan, for defendants L. F. and G. A. Terrill.

ROSS, C. J. This is a bill to have a deed reformed. The orator purchased, for full consideration, and received a warranty deed, from defendants Haskins and wife, among other lands, a lot described as "No. 65 in the fourth division of lots in Underhill." At the time of the execution of the deed the grantors owned and were in possession of lot numbered 66 in this division, and did not own, nor claim, lot 65. These lots adjoined. It is found that the parties intended to convey lot 66 instead of 65. This deed was in 1877. The grantee leased the premises conveyed to the grantor, who continued to occupy the same, including this lot, to February 13, 1890. That day the error in the description was discovered, and to correct it the grantors executed to the orator a deed conveying lot 66. Shortly before, the defendants Terrill discovered that the deed to the orator did not include lot 66, and brought a suit against defendant Haskins, attached among others this lot, and caused a copy of the writ to be lodged in the town clerk's office on the same February 13th, shortly before the orator left his deed of that date for record. The Terrills had no actual

notice of the mistake in the description of the deed of 1877 before causing the attachment. They obtained judgment against Haskins in their suit. Before levying the execution on lot 66, this bill was brought, and they were enjoined. The mistake in the description of the deed of 1877 is confessed by the Haskinses and found by the master. The contention is whether the Terrills had acquired such an interest in the lot as will prevent a reform of the deed as against them. The cases relied upon by them, *Sanger v. Craigue*, 10 Vt. 555, and *Bigelow v. Topliff*, 25 Vt. 288, especially the last-named case, hold that an attaching creditor's right, if the attachment was made without notice, is equal to that of a bona fide purchaser, and that, as between such attaching creditor and such purchaser, the doctrine, "the first in time is first in right," applies. But this case is, in this respect, overruled by the later case of *Hackett v. Callender*, 32 Vt. 109, in which it is held that the lien of an attaching creditor, acquired by attachment of real estate, the title to which is in his debtor, although the attachment is made without notice that his debtor has conveyed it to a bona fide purchaser, is defeated by actual notice of such conveyance, received before he levies his execution thereon, or has lawfully applied it in satisfaction of his debt; that until such application he has parted with nothing on faith of the title being in his debtor, and stands in the rights of his debtor. The doctrine of this case has since been frequently approved, and not departed from, by this court. *Hart v. Bank*, 33 Vt. 252; *Abell v. Howe*, 43 Vt. 403; *Morrill v. Morrill*, 53 Vt. 74. On this principle the orator is entitled to the relief prayed for against these attaching creditors. They had notice of his right to have the deed corrected before they had taken the lot in satisfaction of their debt.

These defendants further contend that the orator should not have relief against their attachment, because he did not exercise reasonable care and diligence in discovering the error in the description and in having it corrected. The doctrine of reasonable care and diligence, or of negligence, is applicable only where the party applying for relief owes a duty of care and diligence to the other party. From a statement of the principle governing these decisions it is difficult to discover any ground for the application of the doctrine of reasonable care and diligence. But, if applicable, the master reports that he "does not find that there was a want of reasonable care on the part of the orator when he took the deed" containing the description. Nor is this finding changed by the finding relied upon by these defendants, viz.: "Had Reynolds been suspicious that all might not be right, and had he made a careful and critical examination of the records of all deeds in any way connected with the land he was about to take a deed of, assisted by a good, sharp expert conveyancer, and aided by the town clerk, who might be familiar with the records of

deeds of land in the vicinity of that about to be conveyed, it seems to the master that he could hardly have failed to discover the mistake and error which, on examination, appears so patent now." This finding is based upon the supposition that every person taking a deed must be suspicious that the description in the deed is *prima facie* erroneous, and that he is under a duty to some unknown creditor of the grantor to examine not only the chain of title of his grantor, but the title of all surrounding lands, aided by an expert conveyancer, and a town clerk who is familiar with the plans and land records of the town. No such rule of care and diligence on the part of a purchaser of real estate has ever been recognized, and is too onerous for application. Decree affirmed, and cause remanded.

(68 Vt. 410)

GREGORY v. TOMLINSON.

(Supreme Court of Vermont. Chittenden.
July 28, 1896.)

LEASE—AGREEMENT TO FURNISH—LIVE STOCK AND FARMING TOOLS—ASSUMPSIT—RECOURSEMENT.

1. Defendant let his farm to plaintiff for a year, and agreed "to furnish 20 cows and all the farming tools." Twenty cows were furnished at the beginning of the term, but four of them afterwards died, and the lessor refused to furnish others. The only tools furnished were those which were on the farm when the lease was executed. *Held*, that the word "furnish" imposed an obligation on defendant as continuous as the lease, and hence he was bound to replace with others any cows which died during the term, and to furnish whatever farming tools were reasonably necessary to carry on the farm.

2. In assumpsit for failure to perform conditions of a lease the lessor pleaded the general issue with notice of a defense that plaintiff did not carry on the farm properly, specifying instances wherein he was negligent. *Held*, that the matter of bad husbandry was a proper subject of recoupment under the general issue, and defendant could show that plaintiff's negligence extended to matters not specified in the notice.

Exceptions from Chittenden county court; Taft, Judge.

Assumpsit by Hiram E. Gregory against Harley E. Tomlinson under a contract of letting. The plea was the general issue, with notice of special matter. Trial by jury at the September term, 1895. Plaintiff had a verdict and judgment, and defendant excepts. Reversed.

V. A. Bullard and L. F. Wilbur, for plaintiff. R. E. Brown and C. F. Clough, for defendant.

ROWELL, J. Defendant let his farm to the plaintiff for a year on equal shares, and agreed "to furnish twenty cows, one horse and harness, all the farming tools, including the dairy utensils." There were 20 cows on the farm at the time, and these the defendant furnished at the commencement of the term, and they were the ones that plaintiff expected to have. Four of them died during the term, and defendant did not furnish others in their stead. Nor did he, as the plain-

tiff's testimony tended to show, furnish a horse during the last three months of the term, nor at any time a suitable plow, harrow, cultivator, horse rake, grindstone, nor double wagon. Defendant claimed that he was not bound to furnish cows in place of those that died, nor any farming tools other than such as were on the farm when the lease was executed; and he offered, but was not permitted, to show, "with a view of construing the lease," that before its execution the plaintiff looked over the farm, the stock, and the farming tools. But the court charged that the defendant was bound to furnish, within a reasonable time, cows in place of those that died, and to furnish whatever farming tools were reasonably necessary to carry on the farm. If this was a mere letting of the cows and the tools, the court was probably in error. But we think it was more. It is manifest that the cows were the tenant's principal source of income. It was natural, therefore, that the contingency of death or other deprivation of them without his fault should be provided against. It was provided against, we think, by the word "furnish," used by the parties. This word imposed an obligation upon the defendant as continuous as the lease. By it he undertook to supply the plaintiff with 20 cows, not only at the commencement of the term, but during the term. No other construction would do justice between the parties. *Brown v. Burrington*, 36 Vt. 40, favors this construction. There the landlord was "to find a yoke of oxen to do the work on the farm." The oxen were sold during the term by consent of the tenant, and partly for his benefit; but it was held, nevertheless, that the landlord was under obligation to continue to furnish a team when necessary. "To find" a team and "to furnish" a team are the same thing. "To find" 20 cows and "to furnish" 20 cows are the same thing. This is also an answer to the claim of error in the charge as to the farming tools. The testimony excluded would not aid to give the lease a different construction from what we give it, but rather the same construction. It does not appear that the court charged that a wagon is a tool, within the meaning of the lease.

The defendant gave notice under the general issue, among other things, that he would give in evidence, and rely upon in defense, that the plaintiff did not carry on the farm in a good, husbandlike manner, did not cut and harvest the hay in a good, husbandlike manner, and did not take proper care of the corn and the potato crop. He claimed on trial that the plaintiff did not carry on the farm in a good, husbandlike manner, and had violated the lease to such an extent that ejectment could have been maintained against him; and offered to show how much land he plowed, if any, how much he harrowed, and the manner in which he did the haying. Defendant was permitted to give evidence as to all matters of which he complained in his

notice that the plaintiff was negligent, but no further, and he did not therein complain about the plowing and harrowing. The matter of bad husbandry was a proper subject of recoupment under the general issue. *Allen v. Hooker*, 25 Vt. 137; *Keyes v. Slate Co.*, 34 Vt. 81, 84. Giving notice of that defense, and therein specifying the particulars in which it was claimed to consist, did not abridge the defendant's right to show it under the general issue, and that it also consisted in other things than those specified in the notice; for the notice must be treated as a pleading, and cannot be regarded as a specification, and therefore a limitation of the proof. Pleading specially what is admissible under the general issue does not abridge the scope of the proof under the general issue. It was said in *Bowen v. Hall*, 20 Vt. 232, 244, that the fact that the defendant attempted to justify the alleged slander by pleading the truth of the words ought not to be allowed to abridge, in any degree, his rights under the general issue in respect of showing in mitigation of damages the general bad character of the plaintiff in regard to the offense imputed. Judgment reversed, and cause remanded.

(68 Vt. 423)

SEAEVER v. WILDER.

(Supreme Court of Vermont. Orleans. July 28, 1896.)

ASSUMPSIT—INTERLOCUTORY JUDGMENT—DAMAGES—EVIDENCE—ADMISSIBILITY—ACCORD AND SATISFACTION.

1. Where the court has rendered an interlocutory judgment for plaintiff, and referred the assessment of damages to the clerk, the parties are limited to such assessment, and defendant cannot show accord and satisfaction.

2. Accord and satisfaction is a special matter of defense, and not available unless specially pleaded, or unless, when pleading the general issue, defendant gives notice in writing that he will give it in evidence under the general issue, and rely upon it as a defense of the action, as provided by V. S. §§ 1149, 1150.

Exceptions from Orleans county court.

Assumpsit by E. T. Seaver against Arthur Wilder, in the common counts. The pleas were the general issue, payment, and offset. At the February term, 1895, plaintiff had an interlocutory judgment, and the case was referred to the clerk for the assessment of damages. At the February term, 1896, upon the report of the clerk, plaintiff had judgment in the sum found due, and defendant excepts. Affirmed.

O. S. Annis, for plaintiff. W. W. Miles, for defendant.

ROSS, C. J. This is an action of assumpsit in the common counts. The defendant pleaded nonassumpsit and payment, and filed a declaration in set-off. While the pleadings were standing thus, the court rendered an interlocutory judgment for the plaintiff, and referred the assessment of damages to the clerk. On the assessment before the clerk, against the exception of the plaintiff, the de-

fendant was allowed to introduce testimony which he contends establishes an accord and satisfaction of the cause of action found by the clerk to exist in favor of the plaintiff. The interlocutory judgment conclusively established the right of the plaintiff to recover upon the pleadings, as they then existed. Only the question of damages was open. On this question the parties were, by the judgment, limited to the use of such evidence as was admissible in the ascertainment of the damages. *Collins v. Smith*, 16 Vt. 9; *Webb v. Webb*, 16 Vt. 638; *Hyde v. Moffat*, 16 Vt. 271; *Bradley v. Chamberlin*, 31 Vt. 468; *Sweet v. McDaniels*, 39 Vt. 272; *Chamberlin v. Murphy*, 41 Vt. 110; *Morey v. King*, 49 Vt. 304. The judgment of the county court on the facts reported by the clerk, in assessing the damages, disregarded the defendant's claimed accord and satisfaction of the cause of action. To this judgment the defendant excepted. This exception raises the question whether an accord and satisfaction of the cause of action could be shown under the pleadings. If it could not be shown under the pleadings, it is immaterial to inquire whether the facts found by the clerk establish an accord and satisfaction of the cause of action. Accord and satisfaction is special matter of defense, and not available to the defendant unless specially pleaded, or unless, when pleading the general issue, the defendant gives notice in writing that he will give it in evidence under the general issue, and rely upon it as a defense of the action. V. S. § 1149, allows a defendant, under the plea of the general issue, to give in evidence special matter in defense or justification, by giving notice in writing, with the plea, of such special matter, and that he will rely upon it, and provides, "No special matter shall be allowed in evidence except such as is particularly mentioned in such notice in writing." Then V. S. § 1150, provides that in actions of assumpsit, "If the defendant pleads the general issue, but relies on special matter of defence, or payment, release, accord and satisfaction," etc., "he shall file with such plea * * * a notice in writing specifying the intended matter of defence under such plea." The defendant neither pleaded the special matter which he now claims to establish an accord and satisfaction of the cause of action, nor gave notice in writing thereof, as required by these sections of the statute. If no interlocutory judgment had been rendered under these provisions of the statute, the defendant could not lawfully give in evidence any facts tending to establish an accord and satisfaction of the cause of action. Inasmuch as the evidence on this subject was admitted by the clerk wrongfully, and against the exception of the plaintiff, the county court properly disregarded all facts found by the clerk from such evidence, in rendering the final judgment. Disregarding such facts, no error in the judgment is claimed. Judgment affirmed.

(68 Vt. 414)

STATE v. SHERWOOD.

(Supreme Court of Vermont. Rutland. July 28, 1896.)

BIGAMY—EVIDENCE OF MARRIAGE—INFORMATION.

1. While a presumptive marriage, based on cohabitation and repute, cannot be established to defeat a subsequent marriage in fact, yet cohabitation and reputed marriage are facts receivable in proof of a marriage in fact, and a man charged with bigamy is entitled to show that the woman to whom he was first married had previously claimed, and was reputed, to be married to another man, with whom she lived and cohabited for a number of years, and who was still living at the time of her marriage to defendant, as evidence in support of his claim that his first marriage was void.

2. Evidence that a defendant was told and believed that his marriage was void, and in such belief contracted a second marriage, is no defense to a prosecution for bigamy if the first marriage was in fact legal.

3. An averment in an information charging a defendant with having two women, named, "as and for wives at one and the same time," is legally sufficient.

Exceptions from Rutland county court.

Clinton L. Sherwood was convicted of bigamy, and excepts. Reversed.

The evidence of the state tended to show that the respondent was married to one Nellie E. Barry on August 25, 1891, at Montpelier, Vt., and that he continued to reside with her as his wife in the town of Newport, N. H., until about January, 1896; that April 8, 1896, he was married to one Matie E. Barney, at Rutland, Vt. The respondent claimed that Nellie E. Barry was a married woman at the time of his marriage to her, and that, therefore, said marriage was void. As tending to support this, he offered the evidence set forth in the opinion of the court in reference to her marriage with one Charles Palmer. The respondent also offered to show that in January, 1896, shortly before his marriage with the Barney woman in April, the said Nellie E. Barry had told him that she was the wife of the said Charles Palmer at the time of her first marriage with the respondent in 1891, but that since then she had procured a divorce from said Palmer, and that she was willing to re-marry him, the respondent, and that the respondent relied upon this in contracting his last marriage with Mrs. Barney. This testimony was excluded. The respondent moved in arrest of judgment for that the information was bad. It contained two counts which were in substance as follows: (1) "That Clinton L. Sherwood, of the city of Rutland, in said county at the city of Rutland, aforesaid, on the 8th day of April, A. D. 1896, did marry and have for his wife one Matie B. Barney, and at the time of said marriage of the said Clinton L. Sherwood to the said Matie B. Barney he, the said Clinton L. Sherwood, had a lawful wife then living." (2) "That Clinton L. Sherwood, of the city of Rutland, in the county of Rutland, on the 25th day of August, A. D. 1891, at Montpelier, in the county of Washington, did marry and have for his wife one Nellie E. Barry, and afterwards, while the said Nellie E. Barry was

living, did, on the 8th day of April, A. D. 1896, at the city of Rutland, in said county, marry and have for his wife one Mattie E. Barney, and afterwards, on the 18th day of April A. D. 1896, at the city of Rutland, aforesaid, did unlawfully and feloniously have both the said Nellie E. Barry and the said Mattie B. Barney for his two wives at one and the same time."

J. C. Jones, State Atty. Butler & Moloney, for respondent.

ROWELL, J. This is an information for bigamy. A marriage in fact was proved between the prisoner and the woman Barry on August 25, 1891, and a later marriage in fact between the prisoner and the woman Barney. The prisoner offered, but was not permitted, to show that about 1880 the woman Barry lived some two years at Springfield, Vt., and during all that time cohabited as his wife with one Palmer, who was still alive; that they were reputed to be husband and wife, and introduced each other as such, during all that time; that she kept house for him, and acted and held herself out as his wife, and claimed to be such, and that he so claimed; that since 1891 she declared that she had procured a divorce from Palmer, which was not true; that for about eight years after they lived at Springfield they resided at Newport, N. H., and there lived and cohabited as husband and wife, occupied the same room, held themselves out as husband and wife, and were reputed to be such, and as such were known and received in that community, and that during nearly all that time her mother and son lived with them; that prior to their going to Springfield, as aforesaid, they lived at said Newport, and were reputed to be unmarried; that they went away, returned in a short time, and said they were married, and thereafter lived together as husband and wife till they went to Springfield. If at the time she married the prisoner she was the wife of another, the marriage was void by statute, and the prisoner's subsequent marriage was not bigamous. Thus "A. takes B. to husband in Holland, and then in Holland takes C. to husband, living B., and then B. dies, and, living C., she marries D., this is not marrying a second husband, the former being alive, for the marriage to C., living B., was simply void, and so he was not her husband; but, if B. had been living, this had been felony to marry D. in England." Lady Madison's Case, 1 Hale, P. C. 663, ruled about 1648. This has been the law ever since. *Halbrook v. State*, 34 Ark. 511. When a marriage in fact or a fact of marriage is proved, the mere legal presumption of marriage arising from cohabitation and repute is not sufficient to establish a marriage set up to defeat it, but the marriage thus set up must also be proved as a fact, like the other. *Poultney v. Fairhaven*, Brayt. 185; *Waddingham v. Waddingham*, 21 Mo. App. 609; *Jenkins v. Jenkins*, 83 Ga. 238, 9 S. E. 541; *Appeal of Reading Fire Ins. & Trust Co.* (Pa. Sup.) 6 Atl. 60, note 57 Am. Rep. 454; 1 Bish. Mar., Div. & Sep. § 1034. This is be-

cause there are conflicting presumptions of innocence; the presumption of marriage arising from cohabitation and repute, drawn by the law in favor of innocence, being antagonized by the presumption of freedom from the guilt of bigamy. 1 Bish. Mar., Div. & Sep. § 1023, and following; *Jones v. Jones*, 48 Md. 891. Though every marriage is, in a general sense, a marriage in fact, or a fact of marriage, yet that expression, as used in the books, has acquired a technical meaning in the law, and signifies the fact proved by direct testimony, by the marriage register, or by any other evidence the effect of which is not derived from the presumed innocence of a cohabitation reputed matrimonial. 1 Bish. Mar., Div. & Sep. § 1062. There is a distinction between presuming a marriage from cohabitation and repute and proving a marriage by circumstantial evidence. Bishop makes this clear in the chapter from which the last citation is taken. See, also, *Jenkins v. Jenkins*, above cited. Keeping this distinction in mind, a marriage in fact is always provable by circumstantial evidence as well as by direct evidence, for direct evidence is not primary and circumstantial evidence secondary, but both are of the same degree; though one may, in a given case, be more satisfactory than the other. 1 Bish. Mar., Div. & Sep. §§ 1032, 1064. But no formula of the circumstantial evidence relevant to this issue is possible. Whatever is admissible on general principles, and satisfies the trier of the fact to the requisite degree of certainty, is sufficient (Id. § 1045), and proves a marriage in fact, or a fact of marriage (Id. § 1064), valid and formal under the law (Steph. Dig. Ev. art. 53). And herein there is no distinction between civil and criminal cases, for as to the kinds of proof they are alike, differing only in the measure required.

The question is, therefore, whether the testimony offered by the prisoner was competent to go to the jury on the question of a marriage in fact between the woman Barry and Palmer. If it contained nothing but cohabitation and repute, it was not competent, because not sufficient of itself, in the circumstances of this case, to establish such a marriage. But, although in such cases there is withdrawn from cohabitation and repute their consequence as affording a basis of a presumption of law, they are, nevertheless, relevant to the issue of a marriage in fact, and are receivable among the proofs of such a marriage, for they explain and give character to the more effective testimony. 1 Bish. Mar., Div. & Sep. §§ 1025, 1059; *Jenkins v. Jenkins*, and *Holbrook v. State*, above cited. Thus, in *Mitchell v. Mitchell*, 11 Vt. 134, a divorce case, in which it was probably regarded necessary to prove a marriage in fact, the court admitted reputation, accompanied with proof of the death of the celebrating magistrate, and that no record of the marriage could be found. The offer to show that before the woman and

Palmer went to Springfield to live they lived in Newport, and were reputed to be unmarried, and went away, and returned in a short time, and said they were married, and thereafter lived together as husband and wife till they went to Springfield, was an offer of testimony that tended to show marriage; and as it did not derive its probative force from the presumed innocence of a cohabitation reputed matrimonial, it tended to show a marriage in fact. The same is true of the offer to show that they introduced each other as husband and wife, and claimed to be such, and held themselves out to the world as such, for their declarations and conduct in this respect were a part of the *res gestæ* of cohabitation, and therefore admissible. 1 Bish. Mar., Div. & Sep. §§ 937, 1155; In re Taylor, 9 Paige, 611, 617. That they were treated and received as husband and wife among their friends and neighbors is another proof derived from the doctrine of the *res gestæ*. 1 Bish. Mar., Div. & Sep. § 938; 1 Greenl. Ev. § 107. Thus it appears that the testimony offered by the prisoner was legally competent to go to the jury on the question of a marriage in fact between the woman Barry and Palmer. It ought, therefore, to have been received for what it was worth, and submitted with proper instructions. We do not regard V. S. § 5060, as affecting this question particularly, as it relates only to proving the fact of the marriage of a respondent. It is based upon the general principle that the inculpatory acts and declarations of a respondent are evidence against him. That the woman told before and at the time of their marriage that she was divorced, which he believed to be true, was no defense, and properly excluded.

The motion in arrest was properly overruled. The first count is justified by V. S. § 5061. The second count conforms to the precedent suggested by Bishop in his *Directions and Forms* (section 882). It is said that it is legally impossible for a man to have two wives at one and the same time, and so it is; but he can, as matter of fact, have two women as and for wives at one and the same time, and this is what the count alleges that the prisoner did. Judgment reversed, verdict set aside, and cause remanded for a new trial.

(33 Md. 549)

STATE v. COWEN et al.¹

(Court of Appeals of Maryland. July 22, 1896.)

Concurring opinion. For majority opinions, see 35 Atl. 161.

McSHERRY, C. J. I assented to an affirmance of the order appealed from for the reasons I am now about to set forth. With one of the views expressed in both the opinions that have been filed I find myself wholly unable to agree, and upon another ques-

tion I go much further than the judges who concurred in the opinion prepared by Judge FOWLER. With the most profound deference and respect for the judgment of all my brothers, I am, after a patient and thorough examination of the whole case, driven to a conclusion on that branch of it relating to the priorities of the liens on the canal which is diametrically opposite to the determination reached by all the other judges who sat in the case; and this, too, in spite of a strong inclination on my part to yield my own views to their better and much more reliable judgment. As every suitor is entitled to have each judge who hears his case investigate and pass upon it to the utmost of his ability, I feel no reluctance in stating what the convictions resulting from my investigations are, and in setting forth somewhat at length the reasons which led me where I stand. That I may be in error and that my brothers may be right upon the question of priorities, is entirely likely; but as neither the arguments at the bar, nor the discussions in the consultation room, nor my own reflections have enabled me to see to my satisfaction that I am wrong, I feel bound to adhere to my own conclusions, arrived at after much thought and deliberation, rather than to tacitly acquiesce in a determination which I cannot persuade myself is right.

If the bonds issued under Act 1844, c. 281, and secured by the mortgage of June 5, 1848, are entitled to a priority over the liens held by the state of Maryland, then a decree directing the sale of the canal without making provision for the payment of those bonds as a preferred lien would obviously be erroneous; and as both opinions hold that those bonds are subordinate to the mortgages executed to the state, and as I entertain the directly opposite view, I could not concur in a reversal of the order appealed from without consenting to a sale of the canal free and discharged of the very lien which, as between the state and the bondholders of 1844, I believe to be the paramount lien, and therefore the lien entitled, at law and in equity, to be first paid and satisfied before the state could justly claim a dollar. Consequently, but not for that reason only, I united with Judge FOWLER, Judge ROBERTS, and Judge RUSSUM in affirming the order extending the time allowed the trustees of the bondholders of 1844 to hold possession of and to operate the canal. To have done otherwise would have resulted not only in dispossessing the trustees, but in stripping them of that which, in my estimation, is their just priority.

Are, then, the bonds issued under Act 1844, c. 281, a lien on the entire canal, and entitled to payment, in the event of a sale, in preference to the claims held by the state of Maryland under her mortgages? To intelligently answer this inquiry it is absolutely essential, it seems to me, that we should look back

¹ For supplemental dissenting opinion, see 35 Atl. 581.

briefly into the history of the canal from its origin, know the powers the company possessed under its charter, appreciate the struggles encountered in the progress of its construction, understand its financial condition before and at the time the bonds were issued, and learn the expectations and hopes shared by its friends and projectors as to the ultimate benefits which its completion to Cumberland, it was confidently predicted, would realize. In a word, we ought to consult the contemporaneous understanding of all the parties to the transaction, as evidenced by their acts, in seeking for the meaning of the contracts under which the bonds were issued. Informed by these means of those things which more than half a century ago influenced the conduct and shaped the judgment of the individuals who, as representatives of the state, and as the officers of the canal company, engaged in consummating the contracts about to be considered, a safer and surer guide for interpreting the meaning of those contracts will be afforded than there can possibly be obtained when, unaided by foreign circumstances, "their naked language," written more than 50 years ago, alone is looked to and construed. It may not be uninteresting to observe at the outset that the project of a claim of internal improvements by way of the Potomac river and across the mountains to the navigable waters which flow into the Ohio originated with Gen. Washington, probably anterior to 1774. At all events, he obtained from the legislature of Virginia in that year a law authorizing such persons as were disposed to undertake the scheme to open the Potomac so as to render it navigable from tide water to Wills' Creek; and, notwithstanding the legislature of Maryland interposed objections to a concurrence in the law, some progress had been made when the battle of Lexington turned the attention of all the colonists to the struggle which finally resulted in our independence. After the revolutionary contest had ended, Gen. Washington again took up the subject of the improvement of the navigation of the Potomac up the north branch, or to Ft. Cumberland, and at his suggestion deputies were appointed by the legislatures of Virginia and Maryland in 1784 to confer and agree upon the provisions of a bill having that object in view. Such a bill was accordingly prepared, and was adopted by the legislature of Virginia in October, 1784, and by the legislature of Maryland at the November session of the same year, and on the 17th of May following the Potomac Company was duly organized. By the tenth section of its charter it was provided "that the said river and the works to be erected thereon, in virtue of this act, when completed, shall forever thereafter be esteemed and taken to be navigable as a public highway, free for the transportation of all goods, commodities or produce, whatsoever, on payment of the tolls imposed by this act."

And this language, changing the word "river" into "canal," was incorporated in the fourteenth section of the charter of the Chesapeake & Ohio Canal Company. Gen. Washington became the Potomac Company's first president, and continued to hold that position until called to fill the exalted station of president of the United States. The time limited in the acts of incorporation for the completion of the work having expired, and the work not having been finished, various extensions were granted by the legislatures of the two states that had chartered the company, until finally, in 1820, after Maryland had passed five and Virginia ten different acts extending the period for constructing the work, and after 37 years of labor and experience and the expenditure of over a half million of dollars, it became evident that the river could not be so improved as to answer the purpose intended. But a strong sentiment as to the feasibility of a continuous canal to the Ohio had grown up, and was fortified by the report of the civil engineer of Virginia; and the project was commended in a report of a committee of congress in May, 1822. As a result of this sentiment and the impetus it had received from the sources just named, public meetings were held in various places, and delegates were selected from Virginia, Maryland, Pennsylvania, and the District of Columbia to assemble in convention. The convention met, and drafted memorials to the legislatures of the states named and to the congress of the United States seeking an incorporation of a company for the construction of a canal from the tide water of the Potomac by way of Cumberland to the mouth of Savage river, and ultimately to the navigable waters of the Monongahela or Ohio rivers, and asking the assistance of these states and of congress in providing the requisite means to construct the work. On the 27th of January, 1824, an act incorporating the Chesapeake & Ohio Canal Company was passed by the legislature of Virginia, but its vitality was made to depend upon the assent of the legislatures of Maryland and Pennsylvania and the congress of the United States. On the 31st of January, 1825, the legislature of Maryland passed an act reciting and setting forth in full the Virginia act, and confirming it, but at the same time declaring that it was not intended by the legislature of Maryland to deny to congress the constitutional power to legislate on the subject of roads and canals. On the 3d of March, 1825, the congress of the United States ratified and confirmed the act of the Virginia legislature. The application to Pennsylvania was twice rejected, but finally, on February 9, 1826, a confirmatory act was passed. Various other acts were procured, numbering 16 with those already mentioned. The legislative history of the company is traced step by step in the lucid and exhaustive opinion delivered by Chief Justice Buchanan in *Chesapeake & O.*

Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. 1. Thus the Chesapeake & Ohio Canal Company stood incorporated by three sovereign states and by the federal government, the outgrowth of their concurrent action; and on the 4th day of July, 1823, John Quincy Adams, then the chief magistrate of the republic, in the presence of a vast and enthusiastic concourse of citizens, dug the first spadeful of earth from the site located for the channel of the canal. The capital stock of the company consisted of \$6,000,000, with power of future enlargement, and authority was given to take payment of subscriptions in the certificates of the stock of the Potomac Company, not exceeding the sum of \$311,111.11, and in claims held by creditors of that company not exceeding \$175,000; and on the 15th day of August, 1823, the Potomac Company, by deed duly executed, and under authority duly obtained, surrendered to the Chesapeake & Ohio Canal Company its charter and all its property, rights, and franchises, and thenceforth ceased to exist as a separate entity. The powers acquired by the Chesapeake & Ohio Canal Company under its charter and in virtue of the surrender made to it by the Potomac Company were large and liberal, and the duration of its existence was without limit. Its objects were more than merely local in their character, for, besides stimulating the development of the coal fields of Alleghany, and throwing open a means of transportation for the products of a vast agricultural region, it was, as declared in the preamble to its charter, designed "to establish a connected navigation between the eastern and western waters, so as to extend and multiply the means and facilities of internal commerce and personal intercourse between the two great sections of the United States; and to interweave more closely all the mutual interests and affections that are calculated to perfect the vital principle of union." And President Monroe, in his annual message to congress on December 2, 1823, adverted to the projected measure as one intended to connect "the Atlantic with the Western country in a line passing through the seat of the national government," which "would contribute essentially to strengthen the bond of union itself." With these extensive objects in view, and to perfect the organization of this great undertaking, the legislature of Maryland at the December session of 1825 passed an act authorizing a subscription to the company's capital stock to the full amount of stock owned by the state in the Potomac Company and of the debts due to the state by the same company, and, in addition, a half million of dollars, payable in current money. Under an act of congress approved May 24, 1828, the general government subscribed \$1,000,000 to the capital stock; and by another act, passed the same day, congress authorized the cities of Washington, Georgetown, and Alexandria to subscribe to the stock.

Accordingly, Washington city subscribed one million, and Georgetown and Alexandria each a quarter of a million of dollars. Subsequently the general government liquidated the bonds issued by these cities to pay their respective subscriptions, and became, in 1836, possessed of their shares of stock. Besides these subscriptions, the corporation of Shephardstown took 20 shares of the par value of \$2,000, and individuals subscribed for 6,074 shares, of the par value of \$607,400. In February, 1833, the state of Virginia subscribed for \$250,000 of the company's stock. On the 14th of March, 1834, the state of Maryland subscribed for \$125,000 of additional stock, payable in 5 per cent. bonds of the state. The total stock subscriptions up to this period aggregated \$3,984,400, with the controlling interest in the general government and the city of Washington. Up to June, 1834, \$4,062,991.25 had been expended, and though scrip, supported by pledges of stock, had been resorted to for raising additional funds, the company was without sufficient means to open navigation beyond a point 107 miles west of Georgetown, and only 86 miles of this distance had been actually finished. Seventy-eight miles of the work extending eastward from Cumberland, and covering some of the heaviest sections between Georgetown and Cumberland, remained untouched. In its straitened condition, resort was again had to public meetings, and committees were appointed to memorialize congress and the legislatures of Maryland, Virginia, and Pennsylvania and the corporate authorities of Baltimore city for the necessary means to complete the work to Cumberland. When it became apparent that aid could be expected from no other quarter, and that the burden of providing for the completion of the canal had fallen on Maryland, her legislature promptly met the emergency, and on the 18th of March, 1835, passed an act (Act 1834, c. 241) appropriating \$2,000,000 for the completion of the canal; that being the estimated amount required to finish the work. This aid was not given, as on previous occasions, by way of a subscription to the capital stock, but was put in the form of a loan by the state to the company, coupled with a requirement that a mortgage be executed on the whole of the net revenues, lands, property, and water rights of the company to secure the repayment of the loan and the quarterly interest to accrue thereon. On April 23, 1835, the mortgage was executed. Up to the passage of this act the total amount invested by the state in the canal was, apart from the sum represented by the Potomac Company's stock and debts, but \$625,000, and the whole funded debt of Maryland was something less than \$2,000,000. Her credit was high, and the stock issued by her to raise the two millions for the loan was sold by the state treasurer for \$116.40. The aid thus furnished fell far short of completing the work, and con-

sequently at the next session of the general assembly additional help was solicited. After many vicissitudes, an act was passed on June 4, 1836, it being chapter 395 of the Acts of 1835, and known as the "Eight Million Bill." It authorized subscriptions to the capital stock of several internal improvement companies, including the Baltimore & Ohio Railroad Company and the canal company. The amount directed to be subscribed to the latter was three millions of dollars, coupled with a requirement that a written instrument should be given to the state guarantying a dividend of 6 per cent. after the expiration of three years, to be paid out of the net profits of the canal and its works. The aid thus given was in the form of a subscription to the capital stock, and secured to the state from thenceforth, as the majority stockholder, the control and government of the company. Owing to the financial embarrassments which then affected the money markets of Europe and America, and the suspension of specie payments by the New York banks in May, 1837, quickly followed by the other banks throughout the country, it was found impossible to float the bonds of the state at the high premium fixed by the act of 1835, and hence, under joint resolutions passed by the legislature of 1837, but \$2,500,000 in bonds were turned over to the canal company in full of the \$3,000,000 subscription, and \$500,000 of the bonds were retained by the state treasurer. The bonds delivered to the canal company in payment of the state's subscription were hypothecated for loans by the company, and by this means the work on the canal was measurably kept up. By Act 1838, c. 386, \$3,200,000 of 5 per cent. sterling bonds were authorized to be issued by the state treasury in exchange for the \$2,500,000 of 6 per cent. certificates or bonds delivered to the company under the act of 1835 and the \$500,000 of bonds retained by the state treasurer. By another act of the same session (chapter 396) a further subscription by the state to the capital stock of the company to the amount of \$1,375,000, payable in 5 per cent. sterling bonds, was authorized. This act, as did the act of 1835, required a guaranty of 6 per cent. dividends on the stock subscribed for, payable out of the net profits of the work, after the expiration of three years. This was the last subscription ever made to the stock of the canal company. The total amount of all the stock ever subscribed was \$8,350,400, and of this aggregate the state of Maryland took and became the owner of \$5,000,000. At the December session of 1839 another application was made by the company to the legislature for aid, but without success. In the meantime the financial affairs of the company were growing desperate. The bonds issued by the state to the company in payment of the state's subscriptions were disposed of at forced sales; scrip was issued, without any provision being made for its redemption, and was ac-

tually received in payment for tolls; by which ruinous methods the company was compelled to submit to heavy sacrifices, and was deprived of much of the available means upon which alone it could rely for keeping the canal in operation. At the extra session of 1841 and at the regular December session of the same year renewed applications were made to the general assembly for aid, but without avail, and by the close of the year 1841 there was not a solitary laborer employed between dam No. 6 and Cumberland, nor was work again resumed until some considerable time after the passage of Act 1844, c. 281, under which were issued the bonds held by the persons for whom the appellees are the trustees; and these are the bonds now claimed to have a priority over the liens of the state.

In August, 1843, Gen. James M. Coale was elected president of the canal company, and under his wise, broad, and sagacious management the work was completed to Cumberland in October, 1850. At the period of his election the company had reached its lowest depth of depression. It was utterly overwhelmed with difficulties, was without means and without credit, and, in addition to its enormous liabilities to the state, it was beset and borne down with debts and obligations evidenced by scrip, certificates of debt, ordinary bonds, and open accounts stated by the treasurer on October 1, 1843, to aggregate \$1,174,566.31. Assistance, though sought in all directions, could be obtained from no quarter whatever, and the company was powerless to extricate itself, and had nothing to depend on to sustain its feeble existence but the small annual revenues derived from tolls and water rents collected between Georgetown and dam No. 6. At this critical period of its history a special report, prepared by Gen. Coale, and submitted to the stockholders on November 16, 1843, suggested the feasibility of procuring legislation from the general assembly waiving the state's liens under her mortgages, and authorizing the company to issue its own bonds to the extent of \$2,000,000, with preferred liens on the tolls and revenues. It was then estimated that it would require \$1,545,000 to complete the canal from dam No. 6 to Cumberland. I quote from the special report of November 16th as follows: "In order, however, to give full strength to the credit of the company, so as to enable it to procure the required sum upon fair and advantageous terms, it will be indispensably necessary to waive the state liens to a much larger amount, so that a broad and tangible basis may be presented for the bonds to rest upon. * * * The better fortified the bonds are, the greater will be their value; and, as no more will be issued than will be necessary to finish the work and pay the interest on the cost thereof, in aid of the net tolls of the canal, until they become sufficient for the purpose, together with a small outlay for repairs and improvements on the finished por-

tion of the line, it will be the interest of the state to leave a broad margin to the credit of the company. With this view, and to provide against all contingencies, we would recommend a waiver of the state liens to such amount as may be found necessary for those purposes, not exceeding the sum of two millions of dollars." Report, p. 15. But the legislature of 1843 adjourned without acting on this suggestion. It was renewed at the next session, and after a long and arduous struggle, led by William Cost Johnson, of Frederick county, in the house of delegates, the act waiving the liens of the state was passed, and under that act the canal was ultimately completed to Cumberland. The act to which I refer is Act 1844, c. 281, and it was passed on March 10, 1845, the last day of the session. Upon its terms and provisions, interpreted in the light of the events that preceded, surrounded, and influenced its adoption, and upon the terms of the mortgages made in pursuance of it, turns the question whether the bonds which it authorized to be issued have a lien that is prior to the liens held by the state on the canal or on the proceeds of a sale of the canal should the canal be sold. I have sketched this imperfect outline of some of the events in the canal's history that the inquirer of to-day might be placed in possession of the facts which were familiar to the persons who procured this legislation and made the mortgages to the state and in behalf of the bondholders; and, being thus placed, that he may look at the question of priorities from the same standpoint, as nearly as may be, that they occupied.

By the first section of the act of 1844 the canal company was authorized and empowered "to borrow or raise upon the bonds of the said company, with preferred liens on its revenues as hereinafter mentioned, to secure the payment of the same and the interest to accrue thereon, such sum or sums of money as may be required to pay for the completion of the Chesapeake and Ohio Canal to Cumberland," provided that the whole amount of bonds authorized to be issued shall not exceed the sum of \$1,700,000. The second section, after prescribing the denominations of the bonds, and the mode of attestation, provided: "And the said bonds so issued as aforesaid shall appear on the face of the same to be preferred liens on the revenues of the company and * * * shall be preferred liens on the revenues and tolls that may accrue to the said company from the entire and every part of the canal and its works between Georgetown and Cumberland, which are hereby pledged and appropriated to the payment of the same and the interest to accrue thereon. * * * Provided the president and directors shall have the power to use and apply such portion of said revenues and tolls as in their opinion may be necessary to put and keep the canal in good condition and repair for transportation," etc. By

the fourth section it was enacted: "That the rights and liens of this state upon the revenues of the Chesapeake and Ohio Canal Company shall be held and considered as waived, deferred and postponed in favor of the bonds that may be issued under the foregoing sections, so as to make the said bonds and the interest to accrue thereon preferred and absolute liens on said revenues, according to the provisions of the second section of this act until said bonds and interest shall be fully paid." And by section 7 it was provided: "That the Chesapeake and Ohio Canal Company shall execute to this state and deliver to the treasurer of the Western Shore of Maryland, a further mortgage on the said canal, its lands, tolls and revenues, subject to the liens and pledges by the foregoing provisions of this act made, created or authorized, as an additional security for the payment of the loan made by this state to the said company under the act of December session, 1834, c. 241, and the interest due and in arrear, and which hereafter may accrue thereon." Prior to the year 1845, the power of the company to borrow money had been gravely questioned, and the validity of its mortgages to the state securing the \$2,000,000 loan had been seriously doubted; but by an amendment to the charter, passed by Virginia on January 20, 1844, confirmed by Maryland on February 8th of the same year, and ratified and assented to by congress on February 7, 1845, all questions and doubts on this subject were finally set at rest. After the conditions upon which the effectiveness of Act 1844, c. 281, was made to depend had been fully complied with, and a contract for the completion of the canal had been executed, the bonds were issued in payment for the work done as it progressed, and they subsequently found their way into the hands of the present holders. But for these bonds, the canal would not, it may fairly be assumed, have been completed at all, and the state's large interest, then amounting, with accrued interest added, to nearly \$11,000,000, would, in all probability, have been lost a half a century ago. Before the bonds were all issued, a mortgage to the state, drawn under the seventh section of the act of 1844, was executed. It bears date January 6, 1846, and, after reciting the several provisions of the act, conveyed in mortgage the lands, tenements, revenues, tolls, and property of the canal to the state, "subject, nevertheless, to all and singular the liens and pledges by the provisions of the before mentioned act of 1844 (chapter 281), made, created, or authorized, or that have been or may hereafter be made, created, given, or granted, by the said Chesapeake and Ohio Canal Company, or the president and directors thereof, under or in pursuance of the provisions of said act, which said liens and pledges are in no wise to be lessened, impaired, or interfered with by this deed, or by anything herein contained, and subject also to all the other provisions of

said act." The mortgage securing the bonds issued under the act of 1844 was executed to named trustees on June 5, 1848, and conveyed the revenues and tolls of the entire and every part of the canal and its works between Georgetown and Cumberland in fee and in mortgage to secure the payment of the interest on the bonds and ultimately the principal of the bonds themselves. And it was further provided that if the company failed to pay the interest as it fell due, and failed to provide a sinking fund for the redemption of the bonds at their maturity from any cause, except a deficiency of revenue arising from a failure of business without fault on the part of said company,—the fault to be made to appear by the grantees,—the grantees might demand and take possession of the canal, and appropriate the tolls and revenues in the manner provided in antecedent clauses.

Now, the statutory lien created by the act of 1844 and reiterated in the mortgage of 1848 was a preferred lien on the revenues and tolls that might accrue from the entire and every part of the canal and its lands between Georgetown and Cumberland; and those revenues and tolls—that is, the whole and entire, and not merely the net, revenues and tolls—were pledged and appropriated to the payment of the bonds and the interest thereon, though the right was reserved to the company by the second proviso in the second section to apply such portions of these same revenues and tolls as might be necessary to keep the canal in condition for transportation. The mortgage of 1848 "doth give, grant, bargain, sell, and convey" to the named trustees "the revenues and tolls of the entire and every part of the canal and its works between Cumberland and Georgetown." What estate or interest, then, was pledged, or upon what estate and interest did the lien fasten? "It is an established rule," said Lord Chief Justice Tenderden, "that a devise of the rents and profits is a devise of the land." *Doe v. Lakeman*, 2 Barn. & Adol. 42. And in *Washburn on Real Property* it is laid down with respect to grants that it is not "necessary that the deed should, in terms, convey the land or thing intended to be granted, if such grant is implied from what is described. Thus a grant of the rents, issues, and profits of a tract of land is the grant of the land itself. If the grant be of the uses of and dominion over land, it carries the land itself." Volume 3, c. 5, § 4, pl. 23. "A devise of the rents and profits or of the income of lands passes the land itself both at law and in equity; a rule, it is said, founded on the feudal law, according to which the whole beneficial interest in the land consisted in the right to take the rents and profits," 2 Jarm. Wills (Am. Ed.) 403; Lord Cranworth in *Blann v. Bell*, 2 De Gex, M. & G. 781. "But if a man, seised of lands in fee, by his deed granteth to another the profit of those lands, to have and to hold to

him and his heirs, and maketh livery secundum formam chartæ, the whole land itself doth pass; for what is the land but the profits thereof? for thereby vesture, herbage, trees, mines, and all whatsoever, parcel of that land, doth pass." 1 Co. Litt. 4b, *200. To the same effect, *Johnson v. Trust Co.*, 79 Md. 18, 28 Atl. 890; *Cassilly v. Meyer*, 4 Md. 11; *Reed v. Reed*, 9 Mass. 372; *Blanchard v. Blanchard*, 1 Allen, 225; 29 Am. & Eng. Enc. Law, 404, and the numerous cases collected in note 1. See, also, *Pollock v. Trust Co.*, 157 U. S. 420, 15 Sup. Ct. 673, and particularly the opinion of Mr. Justice Field, wherein, after quoting from *Washburn*, *Jarman*, *Coke*, *Lord Tenterden*, *Lord Chancellor Hardwicke*, and after referring to many adjudged cases, he observes: "Similar adjudications might be repeated almost indefinitely. One may have the reports of the English courts examined for several centuries without finding a single decision, or even a dictum of their judges, in conflict with them." And in the brief of Mr. Joseph H. Choate filed on the reargument of *Pollock v. Trust Co.*, 158 U. S. 601, 15 Sup. Ct. 912, many authorities to the same point are cited. The case of *Railway Co. v. Jortin*, 6 H. L. Cas. 424, is strikingly analogous. Obviously, then, according to this firmly settled and long established doctrine, the pledge, by the statute of 1844 and by the mortgage of 1848, of the whole and entire revenues and tolls, was a pledge or mortgage of that out of which the revenues and tolls issued or were to issue,—that is, the canal, the land, the works, the physical structure; and as the state waived, deferred, and postponed its prior liens to let in this pledge as a preferred and absolute lien, this lien took precedence over the others, and became by virtue of the state's own deliberate and solemn act the first and predominant lien upon the whole and entire canal. The right to the rents and profits of land involves and carries with it all the beneficial interest of every kind which can possibly exist in the land, and hence when there has been granted to one person all the revenues derivable from land there is, of necessity, no beneficial interest of any kind left in that particular land for any one else. Consequently, when the state, with outstanding mortgages on the land, the property, and the revenues of the canal company, with a view of enabling the great work to be completed so that the vast amount invested by her in its construction might yield her treasury some return, unequivocally declared by the act of 1844 that she thereby waived, deferred, and postponed all her rights and liens upon all the revenues of the company in favor of the bonds to be issued under the same act of assembly; and when she further declared that those bonds should be preferred and absolute liens on those same revenues until the bonds and the interest thereon were fully paid,—she necessarily and in unmistakable terms proclaimed that while those bonds

were unpaid she would and could have no beneficial interest whatever in, or right to, the property out of which those very revenues so pledged were to issue. This is inevitably true, unless the grant of the rents and profits of land does not carry the land. The seventh section of the act of 1844 strengthens this conclusion. Doubts having arisen as to the validity of the state's mortgage made in 1835 to secure the \$2,000,000 loan under Act 1834, c. 241, as already stated, the seventh section of the act of 1844 provided that the canal company should, as additional security for the payment of that loan, execute to the state a further "mortgage on the said canal, its lands, tolls and revenues, subject to the liens and pledges by the foregoing provisions of this act made, created or authorized," etc. By the terms of this section the mortgage to the state on the canal, its lands, tolls, and revenues was to be subject to the liens made, created, and authorized in favor of the bonds of 1844; and if the state's mortgage on the canal and its lands was to be subject to the lien of these bonds, the lien of the bonds must of necessity have been considered, and intended to be, a lien on the canal and its lands by reason of being the first and preferred lien on the revenues and tolls that issued and were to issue from and out of the same canal and its lands. It was not possible for the state's mortgage on the canal and its lands to be in law or in fact subject to the lien of the bonds, if the lien of the bonds was not a prior lien on the canal and its lands. This provision of the act of 1844 is an express declaration that the lien of the state on the canal and its lands—on the physical structure as well as on the revenues and tolls—was designed to be subject (that is, subordinate) to the lien of the bonds of 1844; but how could the state's mortgages be subject or subordinate to the lien of those bonds as respects the physical structure if the bonds were not liens on the same physical structure at all, and the state's mortgages were a first and only lien on the canal and its lands apart from the revenues and tolls? The bare fact that the state's mortgage on the canal and its lands is expressly declared to be secondary to the bondholders' lien is equivalent to a declaration that the latter lien is a prior lien on the very things on which the state's mortgage is made a secondary or subordinate lien. By providing that the pledge made to the state should be subject or subordinate to the pledge made to the bondholders, the state in express terms affirmed that the thing—the property—she claimed a lien on was already included in an antecedent or prior lien, and, being so included, was included by virtue of the language used in the creation of that antecedent lien; because for one lien to be subject to another lien, the latter must, in the nature of things, be prior to it, and upon the same property. If one lien be upon one piece of property, and another lien be upon

a different parcel, though both properties be owned by the same individual, neither lien can be said to be subject to the other; but when both are on the same estate or thing, and they are not coincident in date, or contemporaneous, one must be subject to the other. Had the legislature designed to distinguish between a lien on the revenues and tolls as a separate thing from that which has been called the "corpus" of the canal, it would assuredly have said that the lien of the state should be subject to the lien of the bondholders in so far as the revenues and tolls were concerned, instead of employing the broad and comprehensive language which was used in the second and seventh sections of the act of 1844.

While it was conceded on behalf of the state that, as a general rule, the grant of the rents and profits will carry the land out of which they issue, yet it was insisted that there were exceptions to the doctrine. It was accordingly contended that whenever it distinctly appears there was no intention to grant more than the rents and profits, nothing but the rents and profits will pass. And it has been further maintained that in the case at bar it was the evident design of the act of 1844, and of the parties to the contract which its terms contain, to grant no lien to the bondholders except a lien on the revenues and tolls, reserving to the state a separate, distinct, and paramount lien on the property out of which those revenues and tolls were to issue. I admit it has been held that, though ordinarily the devise of the rents and profits will pass the real estate absolutely, yet such construction will not obtain when the intention of the testator appears from the whole will to be different. *Cooke v. Husbands*, 11 Md. 492; *Magruder v. Peter*, 4 Gill & J. 323. I do not understand these cases to be in conflict with those hereinbefore cited. The question is one of intention, and the grant of the rents and profits is held to be sufficient to carry the estate, because by granting them the intention to convey the estate is manifested, unless the instrument making the grant or devise shows a different purpose on the part of the testator if there be a will, or on the part of the contracting parties if there be a conveyance or other like instrument to be interpreted. But I am wholly unable to perceive how it can be maintained that the design of the act of 1844, and the intention of the parties to the contract, which its provisions embrace, manifest a purpose to restrict the pledge of the revenues and tolls to the revenues and tolls alone, and to exclude the property from which those revenues and tolls were to issue. In a word, I see no reason for holding that the grant of the revenues and tolls was not intended to carry, in accordance with the general rule, the whole beneficial interest and estate of the canal company in the property that was expected to yield the revenues and tolls that were pledged. On the contrary, my reading of the

act of 1844, looking at it as I do in the light of the "foreign circumstances" (*Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. 152), which may legitimately be consulted for the purpose of discovering its real meaning, leads me, in spite of my disinclination to differ from my brothers, to the fixed conclusion that the purpose of the act of 1844 was to give a lien to the bondholders upon the whole and every part of the canal, and not simply on its revenues and tolls. By reference to the various reports of the president and directors of the canal company, and the numerous and voluminous documents accompanying them, which, though not printed in the record, are by agreement a part of it, the design that the officers and stockholders of the company had in view in seeking the passage of the act of 1844, and the sense in which these officers and these stockholders, including the state herself as the holder of a majority of the issued shares, understood its terms after its passage, will, I think, clearly appear. In the special report of November 16, 1843, from which I have already quoted, the subject of waiving the state's liens is considered and discussed. An estimate of the cost of completing the work to Cumberland had been made, but the officers of the company, fearing that the sum named might fall below the actual amount ultimately needed, say in the report: "In order, however, to give full strength to the credit of the company, so as to enable it to procure the required sum upon fair and advantageous terms, it will be indispensably necessary to waive the state liens to a much larger amount [than the sum estimated] so that a broad and tangible basis may be presented for the bonds to rest upon." Further on, in discussing the proposed sale of the state's interest,—a subject then much agitated and therefore directed by act of assembly, to be made at a designated price,—the report proceeds: "But, even if the policy of authorizing an immediate sale be adhered to, a waiver of the liens to an amount necessary to complete the canal and pay the accruing interest on the cost of completion to the extent and for the time mentioned, can in no way prejudice the measure." Then, after showing that, even should the state's interest be sold, the purchaser would have either to advance to the company the sum necessary to finish the canal, and take a secondary lien, which to him would be the same thing as a preferred lien, or he would have to waive his lien so as to enable the company to borrow money elsewhere, it continues: "In either event, the existing liens,"—that is, the liens held by the state,—*"must and will be regarded by capitalists, in estimating their value, as of a deferred or secondary dignity to the sum that may be necessary to complete the canal."*

* * * There can, then, we think, be no shadow of objection to an immediate postponement of the state liens in favor of the required amount, so as to enable the company

at once to enter into a fair and properly guarded contract to finish the work." Report, p. 21. On August 28, 1843, Gen. Coale, then but recently elected president of the company, wrote to Baring Bros. & Co., bankers of London, inquiring whether, if the state's liens were removed, a sufficient sum to complete the canal could be secured on the company's bonds. He asked whether these bankers would be able to negotiate the loan "provided the legislature of Maryland at its next session will waive its liens so as to enable the company to give preferred liens on the net revenues and tolls of the entire canal to secure the payment of principal and interest." And he continued, showing his and the directors' understanding of the effect of the proposed legislation: "The Maryland state liens on the canal would become, by this arrangement, secondary liens." Going back to a still earlier date,—June 28, 1843,—the president and directors, by resolution adopted on that day, declared "that whenever the priorities of the state shall be waived and postponed, and the company be thus placed in a condition to exercise exclusive control over the revenues and property of the company, the board will promptly enter into a contract for the completion of the work." And in the report of the agents representing the state, made to the legislature of Maryland on February 5, 1844, it was said: "That a pledge of all the revenues of the company cannot be construed to mean merely the net revenues is too plain to admit of argument;" while in concluding the report, which was signed by Samuel Sprigg, A. B. Davis, and John Van Lear, Jr., and in referring to the special report of November 16, 1843, the state agents say: "That it is therein [the report of November 16th] made manifest that the work can now be completed if the liens of the state are postponed, as has been asked for." In a communication addressed by the president of the company to the house of delegates on February 24, 1844, in explanation of the views of the company's officers respecting the scope and purposes of the act of assembly then pending before the legislature, and providing for a waiver of the state's liens, it was stated: "It must be borne in mind that the state is not now appropriating money, nor authorizing an issue of state bonds, as heretofore, nor pledging the faith and credit of the state for the repayment of the money that may be raised. She does nothing more than postpone her present unavailable liens, so as to enable the company to give a preferred lien upon the prospective revenues of the canal for the repayment of the bonds that may be issued to complete it, and render it productive." In January, 1844, the company presented a memorial to the legislature of Virginia seeking an amendment of the charter in several respects, but particularly asking that express authority to borrow money be conferred. The memorial, after suggesting that the authority should be given in such

terms as not to be susceptible of being construed into an interference with existing liens, proceeded in these words: "We feel confident, however, that if this be done, Maryland will waive and postpone her claims upon the company by a separate law, as that is the only mode now remaining by which the work can be finished," etc. While the act of 1844 did not allow the issue of bonds to the limit requested, viz. \$2,000,000, it did permit an issue to the extent of \$1,700,000 upon a pledge, not of the net revenues and tolls, but of all the revenues and tolls from the entire canal, precisely as had been asked for; and such a pledge was obviously understood, when the state waived, deferred, and postponed her liens, to mean a prior or first lien on the property out of which the revenues and tolls were to arise, because in no other way, as the lawyers of that day perfectly understood, could the state's liens become by this arrangement secondary liens, or be regarded "as of a deferred and secondary dignity to the sum that may be necessary to complete the canal." It was the manifest understanding of the stockholders and officers of the canal company that to the extent of \$1,700,000 and accruing interest these bonds were to be prior in all respects to the liens of the state, and the bondholders unequivocally entertained the same view. In a lengthy and able report made by William H. Swift and Nathan Hale for Thomas W. Ward, agent of Baring Bros. & Co., in February, 1846,—after the act of 1844 had been passed,—that act was thus interpreted: "The state of Maryland thus releases its claims upon the canal company for all advances made to it, and the interest thereon, so far as to give a preference to this loan." Again: "It is now proposed to pledge the whole property, with its entire income, after deducting the necessary expenses of repairs and management, as security for the loan still necessary to complete the canal." And the understanding which the legislature must have had, with all the sources of information which it possessed before it, is correctly set forth, I think, in the second and seventh sections of the act of 1844. From these events and expressions, some immediately preceding, some accompanying, and some following the passage of the act of 1844, which embodied language whose legal significance was thoroughly understood when it was used, it appears to me clear that the state of Maryland through her legislature, the canal company through its stockholders and officers, and the persons who subsequently became holders of the bonds, designed and intended that the lien of the bonds should extend to the "whole property" as well as to "its entire income." Assuming, without conceding, that there is a doubt as to the meaning of the terms of the contract embodied in the act of 1844 and in the mortgage of 1848, I have just above, as is permissible in such instances, invoked the construction which all the parties interested in that con-

tract put upon it, because the construction which the parties themselves adopted is entitled to great consideration. *Insurance Co. v. Doll*, 35 Md. 89; *Mitchell v. Wedderburn*, 68 Md. 145, 11 Atl. 760. It seems to me, then, from this very imperfect review of the history of the canal, its objects and purposes, the difficulties that beset its construction and which had to be surmounted to secure its completion, the expected benefits which the state looked forward to the realization of from her large investments in the enterprise, and the clear and consistent construction placed by the state, the stockholders, and the bondholders upon the terms of the act of 1844, that the legislature did not design, when waiving the state's liens and permitting bonds to be issued on a pledge of the revenues and tolls, to draw the distinction which is now advanced, to the effect that the bondholders have a lien only on revenues and tolls, and the state a paramount lien on what the attorney general calls the corpus of the canal.

Apart from all that I have said, the act of 1844 on its face furnishes a strong reason why the lien of the bonds was placed on the entire property through the medium of the revenues, rather than by any other mode of description. This reason, and the grounds in support of it, are so ably and forcibly set forth by that distinguished and accomplished lawyer, Mr. Bernard Carter, in his brief filed in the case of *State v. Brown*, 73 Md. 484, 21 Atl. 374, that I take the liberty of quoting some passages from it: "The state of Maryland in chartering the canal company, and in assisting with the large sums of money it had spent on it, was moved by large expectations of great benefit to the state and its people, by the construction of what in those days was looked upon as a great public work; and it was well known that, even when completed, it might, in its early history, have to struggle with difficulties which might prevent prompt payment of the interest on the bonds about to be issued. This is apparent on the very face of the act of 1844. Therefore the state determined that it would, while waiving all beneficial interest or ownership on its part in the property of the canal company by giving to the bonds to be issued to complete the canal an absolute and preferred lien on all the revenues of the company, at the same time make such provision that every opportunity should be given to the company to live, and under its management, controlled by the state, through its ownership of the majority of the stock, to serve the great public purposes for which it had been created. Acting upon this view, there was incorporated those provisions in the act of 1844, which declared that, while all the revenues of the company should be devoted to the payment of the interest on the bonds, and eventually to the payment of the principal, yet enough of these revenues should, in the first place, be taken for the purpose of paying the expenses and repairs necessary to keep

the canal in operation and as a going concern; in other words, that as long as the canal company could, from its earnings, pay its expenses, and keep its works in repair, so as to keep open and in operation this great (as it was expected to be) waterway, it should be so kept open and in operation; and if it took all its earnings to do so, so that there was nothing left of said earnings to be applied to the interest and principal of said bonds, the bondholders must be content, as long as the canal was thus running, to go without payment; provided, always, such failure of earnings was not owing to want of business caused by faulty management by the company. The two great objects which the state sought to accomplish in the plan embodied in the act of 1844 (and which are apparent on its face) were: First, to get the canal completed to Cumberland; second, to so arrange matters that the highway should be kept in operation to subserve the great public benefit which it was supposed it would be to the state at large and her people, and that it should be in charge of the company, in which she had a controlling voice; and, provided any persons could be found to advance the money on terms which would accomplish these two objects, she was perfectly willing, in their favor, to subordinate all pecuniary claims which she had in the property of the company, under her mortgages. Therefore, in pursuance of this plan, and to accomplish these objects, the bondholders were not given a mortgage on the land and works of the company, which, if accompanied with the rights usually attendant on such mortgages, would have given the mortgagees the right, on default, to sell the canal property, and thus oust the company and the state from its control; but a first and absolute lien was given on the entire revenues derivable from the property of the company, which as effectually transferred to them all the beneficial interest in the property of the canal held by the state, until their debts were paid, and yet retained the control of the management of the canal in the company, and so, under the control of the state." Obviously, then, the form of the mortgage that was executed in 1848 was adopted for the purpose of preventing the mortgagees from disturbing the management of the company by the state,—the majority stockholders,—at least until the maturity of the bonds; rather than the usual mortgage under which the mortgagee could foreclose upon a default and destroy the state's interest. This was the reason that induced the legislature to fasten the lien on the canal through the revenues and tolls, and the creation of the lien by the pledge of the revenues and tolls was consequently not designed to restrict the scope of that lien simply to the revenues and tolls divorced from the property out of which they were to issue.

But assuming I am altogether wrong in supposing that the lien of the bonds of 1844 extends to the canal itself, and conceding that it does not, but that the state alone has a lien

on the physical structure, I come to another question, upon which my views go much further, and are perhaps more radical, than those expressed by Judge FOWLER. That question is: Would a decree ordering a sale of the canal under existing conditions, and directing the proceeds of sale to be distributed to the state in preference to the bondholders of 1844, impair the obligation of the contract under which the bonds of 1844 were issued and are held? To answer this question intelligibly it will be necessary to allude briefly to the origin and progress of the litigation which led up to the decision in *State v. Brown*, 73 Md. 484, 21 Atl. 374, and incidentally to recur to some of the facts narrated in an earlier part of this opinion. The great and disastrous flood which caused such widespread and appalling destruction in the spring of 1889 completely wrecked and demolished the canal as a navigable waterway. Navigation upon it was suspended, and the company was utterly bankrupt. It was not only receiving no revenues and tolls, but it was wholly unable to earn them; for little of the great work, whose construction spanned a period of 22 years, and cost \$11,071,178, was left when the swollen waters of the Potomac subsided. Being hopelessly insolvent, the company was without means to make repairs, or even to arrest the progressive decay which disuse promoted and accelerated. In this condition of things a bill setting forth these facts was filed on the equity side of the circuit court for Washington county on the last of December, 1889, by the trustees of the bondholders of 1844, against the Chesapeake & Ohio Canal Company and the trustees named in the mortgage of 1878, praying that a receiver be appointed to take charge of the property and works of the company, and to repair and operate the canal for the purpose of raising revenue with which to pay off the debts of the company; and also praying for general relief. In January, 1890, the trustees under the mortgage of 1878 filed their answer. A few days afterwards the canal company answered, protesting against the appointment of a receiver, but urging and insisting on an immediate sale of the entire property. On the same day the attorney general of Maryland, acting under authority of joint resolutions adopted by the legislature on the preceding day, made application to the court for leave for the state of Maryland to become a party defendant, and, upon leave being granted, he filed in behalf of the state an answer resisting the appointment of receivers, and insisting on a sale of the canal and all the property of the company. In the meantime—that is, on January 15, 1890—the trustees under the mortgage of 1878 (which I have not thought it necessary to allude to heretofore because it has no bearing on the questions I started out to discuss) filed a bill in the same court against the canal company and the trustees of the bondholders of 1844 praying for the appointment of receivers and for a foreclosure of the mortgage of 1878 and a sale of the canal and

all its property. This bill was answered by the defendants, and the state also became, after leave, a party defendant. The cases were subsequently consolidated, and on March 3, 1890, the circuit court appointed three receivers, with instructions to make an examination and report upon the condition of the canal, and the probable cost of repairing it, for such further action as the court might deem necessary. The receivers made their report with great particularity and thoroughness. In August, 1890, the attorney general amended the answers filed in behalf of the state by inserting the following paragraph: "The state now, by its attorney general, prays the court to pass a decree in this case for the sale of the canal and all the franchises and property of the canal company, as described in the three mortgages from the Chesapeake and Ohio Canal Company to the state of Maryland; the first bearing date on the 23d day of April, 1835, the second dated the 15th day of May, 1839; and the third dated the 8th day of January, 1846." Copies of these mortgages were filed with the answers. Thereafter the trustees of the bondholders of 1844 filed a petition asking to be allowed to take possession of the canal under their mortgage of 1848, so that they might reconstruct and restore the canal as a waterway, and then operate it. This was resisted by the state. On the 2d of October a decree was passed for a sale of the canal, but by the fifth clause of that decree it was provided that the "decree of sale shall be stayed and suspended" for four years from May 1, 1891, upon certain conditions therein named, which need not be repeated here. By the sixth clause it was declared that if at the end of four years there shall not have been tolls and revenues collected from the canal to liquidate the amount expended in restoring the canal, such deficiency (unless the time be extended by the court for good and sufficient cause shown) shall be deemed conclusive evidence that the canal cannot be operated so as to produce revenue, "and the right and power is hereby reserved to this court to order and direct the execution of the foregoing decree of sale." From this part of the decree suspending the sale the state of Maryland appealed, and, after an elaborate argument in this court, the decree was affirmed. *State v. Brown*, 73 Md. 494, 21 Atl. 374. Before the four years elapsed, the trustees made application for an extension of the stay under the sixth clause above referred to, and the circuit court for Washington county further postponed the sale for a period of six years accounting from the 1st of May, 1896. The state again appealed, and this appeal brings up the question of the priorities of the liens, and presents the other inquiry I am now considering, viz. the right of the state to insist on or to ask for a sale of the canal under existing circumstances. By virtue of the decree and under the provisions of the mortgage of 1848 the trustees of the bondholders of 1844 took possession of the dismantled and wrecked canal, and at an ex-

pense of \$435,000 restored the waterway, and placed it in a better condition than it had been, perhaps, since its completion in 1850. These trustees are earning revenues and tolls, and the record discloses the fact that the receipts are steadily and largely increasing, and that a recently organized transportation company has alone guaranteed \$100,000 of tolls and revenues annually.

What, then, is it that the state proposes to do? She denies that the holders of the bonds of 1844 have any lien except upon the revenues and tolls. She insists that, if there should be no revenues and tolls payable to the company by reason of a sale of the property at the state's instance, then the holders of the bonds of 1844 are entitled to nothing, and the state would be entitled to the whole proceeds of sale after the bonds of 1878 shall be paid. And she demands a sale under her mortgage (which expressly stipulates that the lien of the bonds of 1844 is "in no wise to be lessened, impaired, or interfered with by" that mortgage, "or by anything" therein contained), even though the result of such a sale would, according to her own contention and concession, render the bonds of 1844 absolutely worthless. In the contract made under the mortgage of 1848 between the bondholders of 1844 and the company, whose canal it was declared by the three states that chartered it "shall forever be esteemed and taken to be navigable as a public highway," there was a specific power and authority given to the trustees to enter and take possession of the canal and receive its revenues "upon the default of the company to fulfill its engagements in the premises," subject to the condition that, so long as the company complied with its agreement by paying all the interest on the bonds of 1844 as that interest fell due, and by providing an adequate sinking fund, it should retain the management of the canal, but, if it failed "to comply with these conditions from any cause except a deficiency of revenue arising from a failure of business, without fault on the part of said company, then the grantees (the trustees) may demand and shall thereupon receive possession and shall appropriate all said tolls and revenues in the manner" provided in the mortgage. By the act of 1844, which embodied a contract between the state and the prospective bondholders, it was expressly provided that the liens of the state shall be held as "waived, deferred, and postponed" in favor of the bonds of 1844, so as to make the bonds "preferred and absolute liens on the revenues" "until said bonds and interest shall be fully paid." And in the mortgage of January 8, 1846, given to the state, and accepted by it, as already set forth, the grant to the state was made distinctly subject to the provision that the liens and pledges made in behalf of the bonds of 1844 are "in no wise to be lessened, impaired, or interfered with by this deed, or anything herein contained." This mortgage to

the state, approved by her then attorney general, was executed and delivered 2½ years before the mortgage of June 5, 1848, securing the bonds of 1844, was signed. Can the state of Maryland now, by these or any other proceedings, impair the obligation of these contracts?

The decree for a sale of the canal, when passed, was properly passed, because the canal was at that time a total wreck. But conditions have changed by reason of the reconstruction of the canal and its restoration as a navigable highway by the trustees of the bondholders of 1844 in the early part of the four years during which the execution of the decree for a sale was suspended. The right of the state to insist on a sale under its mortgage of 1848, as she now does through her attorney general on this appeal, must be measured by the circumstances as they exist to-day, and not by those that surrounded the question in 1890. A state can no more impair the obligation of her own contract than she can impair the obligation of an individual's contract. In entering into a contract a state lays aside her attributes of sovereignty, and binds herself substantially as one of her citizens under his contract; and the law which gauges individual rights and responsibilities gauges, with few exceptions, those of the state. *Hartman v. Greenhow*, 102 U. S. 672; *Polindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 962; *Keith v. Clark*, 97 U. S. 454; *Canal Co. v. Beers*, 2 Black, 448; *Fletcher v. Peck*, 6 Cranch, 87. In *Insurance Co. v. De Bolt*, 16 How. 416, the supreme court said: "The sound and true rule is that, if the contract when made was valid by the laws of the state as then expounded by all the departments of its government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of legislation of the state or decision of its courts altering the construction of the law." It is thus held that the obligation of a contract may be impaired by the decision of a state court of last resort, but when no state statute or constitutional provision affecting a contract is upheld by a state court of last resort, a mere decision on the contract is not, according to the recent cases, within the meaning of the federal constitution, a law whose enforcement will, of itself, confer jurisdiction on the supreme court to review the state court's ruling; but, if jurisdiction exists in the supreme court on other grounds, such ruling may be reviewed. *New Orleans Waterworks Co. v. Louisiana Sugar-Refining Co.*, 125 U. S. 18, 8 Sup. Ct. 741; *Brown v. Smart*, 145 U. S. 454, 12 Sup. Ct. 958. It must be the constitution or some law of the state which impairs the obligation of a contract, or which is otherwise in conflict with the constitution of the United States; and the decision of the state court must sustain the constitution or the law of the state in the matter in which the conflict is supposed to exist, or the case for the supreme court does

not arise. *Railroad Co. v. Rock*, 4 Wall. 177; *Knox v. Bank*, 12 Wall. 379. I will recur to this line of cases later on.

I take it, then, that the state can no more impair, through her judiciary, her own contract, than she can impair the obligation of the same contract through her legislature, though a mere decision impairing the obligation of a contract will not authorize the supreme court to review that judgment. But this phase of the case does not rest here. There is a preliminary difficulty in the path of the state which I wish to allude to now. The joint resolutions adopted by the general assembly on January 30, 1890, after reciting that it was "necessary that the rights and interests of the state should be represented in" the proceedings pending in the circuit court for Washington county, instructed the attorney general to intervene in said proceedings in the name of the state of Maryland, and "take such steps, after consultation with the board of public works, as may be necessary to resist the appointment of receivers and the creation of any additional debt to take precedence over the claims and liens of this state." This resolution, in my judgment, gave the attorney general no authority to apply for a sale of the canal, and conferred upon the board of public works no power to direct the attorney general to pray for the passage of such a decree. It gives neither to the attorney general nor to the board of public works authority to take the pending appeal, or to ask that the order extending the period of the trustees' possession be reversed. Its object obviously was, not to procure affirmative relief by way of a sale, but to prevent the doing of what was sought by the bondholders of 1844,—the appointment of receivers, and the issue of receivers' certificates to defray the expense of repairing the canal. Limited, as the scope of the resolution was, to a mere resistance of the relief asked by the 1844 bondholders, the application for a sale went far beyond its terms, and was consequently unauthorized. The application for a sale was unauthorized, because the state of Maryland had not, through her legislature, directed a foreclosure of the mortgage, and no other department of the state government was clothed with authority to determine whether there should be a foreclosure and sale at the instance of the state. I have before me all the minutes of the proceedings of the board of public works relating to the Chesapeake & Ohio Canal Company between January 1 and December 31, 1890, and there is not, as I read them, a single resolution instructing the attorney general to ask for a sale of the canal. The attorney general has, therefore, no authorization from the state to ask this court now to reverse the order appealed from, and to remand the case that a sale may be had. Consequently the state is not in reality rightfully on the docket as the appellant, and hence ought not to be heard to complain of the order extending the period of the trustees' possession.

But if I be wrong in placing the construction I have on the joint resolutions of 1890, and if it be said that the question as to what those resolutions did in fact authorize has been settled by the decree passed on the 2d of October, 1890, upon the prayer of the state for a sale, then the joint resolutions must have been interpreted as meaning that the attorney general, under the direction of the board of public works, was empowered to ask a foreclosure of the mortgage of 1846. That such was the understanding of its import by the board of public works is quite apparent from the fact that there is no pretense the attorney general had any other authority from the legislature to ask for a sale, and from the further fact that the state appealed from the suspension of the decree for a sale by direction of the board of public works, adopted on November 26, 1890, and through the attorney general insisted on an immediate sale; and has again appealed from the order extending that suspension till 1901, and again insists on a sale. There is no statute or resolution passed by the legislature and now in force directing any steps to be taken for the foreclosure of the state's mortgages, and it must have been upon the assumption that this particular joint resolution of January 30, 1890, did contain such a direction that the decree was asked for and obtained, and that the immediate execution of that decree is now so vigorously pressed. If this be so, then the joint resolutions, while not in express terms directing a sale to be applied for under the state's mortgages, are, in effect, a law which, in its construction and practical execution, impairs the obligation of the bondholders' contract, and is forbidden to be passed. "Any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state, within the meaning of the clause cited, relating to the jurisdiction of this court." *Williams v. Bruffy*, 96 U. S. 176. That these joint resolutions do impair the obligation of the 1844 bondholders' contract if they authorize the attorney general to ask for a sale is scarcely open to dispute. Upon the hypothesis that these bondholders have no lien on the property of the canal (and this is what the state insists on), any action by the state, under legislative authority, which results in depriving these bondholders of their lien on the revenues and tolls by a sale of the canal, at her instance, directly impairs the obligation of the contract made by the state in the fourth section of the act of 1844, wherein her rights and liens were waived, deferred, and postponed in favor of these bonds, "until said bonds and interest are fully paid." And such a proceeding at the suit or instance of the state would likewise invade the contract made by the state in the mortgage of 1846, because by that mortgage the state explicitly covenanted that the lien of the bonds of 1844 "are in no wise to be lessened, impaired, or interfered with by this deed, or by

anything herein contained," whereas it is by virtue of that very deed that a sale is asked for, and a sale would, as conceded by the state, and as contended for by her, wipe out and sweep away the bonds of 1844, and would result in the proceeds of sale being turned over to the state after the bonds of 1878 were first fully paid. There could scarcely be suggested a more flagrant breach of a contract than this would be. In order to come within the provision of the constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the acts of administrative or executive boards or officers or the doings of corporations or individuals. *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 8 Sup. Ct. 741. Nevertheless an ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation, having all the forms of law within the municipality, that it may properly be considered a law within the meaning of the constitutional prohibition. *U. S. v. New Orleans*, 98 U. S. 381. Thus, in *Murray v. Charleston*, 96 U. S. 432, it appeared that the city council of Charleston, upon which the legislature of South Carolina, by the city charter, had conferred the power of taxing persons and property within the city, passed ordinances assessing a tax upon bonds of the city, and thus diminishing the amount of interest which it had agreed to pay, the supreme court held such ordinances to be laws impairing the obligation of contracts, for the reason that the city charter gave limited legislative power to the city council, and when the ordinance was passed under the supposed authority of the legislative act its provisions became the law of the state. Now, while an independent action by the board of public works, based on no legislative authority at all, and directing the attorney general to institute proceedings for the foreclosure of the state's mortgages, would not have been, technically speaking, a law of the state within the meaning of the federal constitution as interpreted by the decisions alluded to, yet the joint resolution empowering the attorney general to take steps for the protection of the state's liens, under the supervision of the board of public works, was a delegation, to some extent at least, of legislative authority. And if under that resolution, as construed by the board of public works, that board authorized an application to be made for a sale under the state's mortgages, it would be difficult to maintain that the resolution was not a law impairing the obligation of the state's contract. Were this otherwise, it would be the simplest thing in the world for a state to evade the provisions of the federal constitu-

tion, and to destroy a contract with perfect impunity by just such a resolution as that of January 30, 1890. If by refraining on the face of a legislative enactment to direct a prohibited thing to be done, while intrusting to an executive board, by the same enactment, a masked discretion and authority to do that very forbidden thing, the thing can be done without a violation of the federal constitution, substance would be sacrificed to form, and the most solemn obligations could be broken down in the teeth of the paramount law that protects them from impairment. See *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. 109.

There were but three of the parties to the consolidated cases who asked for a sale of the canal, and they were the canal company itself, the bondholders of 1878, and the state of Maryland. As to the canal company, it can scarcely be heard, since the restoration of the canal as a subsisting waterway, to ask that the property be sold, when the result of such a sale might, and probably would, be the discontinuance or abandonment of the canal, notwithstanding the declaration in its charter that it should forever be a navigable highway; and certainly would culminate, at the instance of the debtor company, in a deliberate violation of a formal and explicit contract between it and its creditors, the bondholders of 1844, who furnished, upon the faith of its perpetuation, the means for the completion of the work at a time when the state of Maryland, whose credit was so impaired that her securities were selling in the money markets of Europe at 50 cents on the dollar, was, though largely interested as stockholder and creditor, powerless to render further assistance. No count of equity ought to heed the appeal of a debtor for the sale of his incumbered property, under judicial process, when by such a sale his creditor, who resists and protests against it, would, according to the debtor's own contention, be stripped of the only lien he has. Such a proceeding would permit the debtor, through a court of conscience, to repudiate his most binding obligations. This can never be tolerated. The bondholders of 1878 are eliminated from the case. They have parted with their bonds, which are now held by the trustees of the bonds of 1844, and these trustees are subrogated to all the rights of the 1878 bonds. Instead of a sale being asked for in the interest of the bondholders of 1878, the present holders of those bonds are now vigorously resisting a sale. The state of Maryland is, consequently, the only party seeking a sale. She is the only party appellant in the cause, and no one else demands a sale of the canal, or resists a further suspension of the decree of October, 1890. Her legislature has not directed that an application for a sale should be made in the state's behalf, nor has she made the request in any way except through her attorney general. Now, the attorney general was either authorized by the

legislature to press for a sale, or he was not. No other branch of the state government besides the legislative possessed or possesses authority to direct a foreclosure of the state's liens on the canal. If you say the attorney general was not authorized by the general assembly to ask for a sale, then the state is not now properly in court demanding a foreclosure. And if she is not properly in court for that purpose, a sale at her request cannot be ordered. If, on the other hand, you say the attorney general was authorized to press for a sale, there is no pretense that he was given that authority by any other enactment than the joint resolutions of January 30, 1890; and if you concede that these resolutions conferred upon him the right to urge, in the name of the state, a sale, then you must admit that the resolutions are an enactment by the legislature that impairs the obligation of a contract, and are, therefore, wholly inoperative and void. In neither event, then, could a sale now be ordered at the suit of the state; and as no other party to the cause, save the bondholders of 1878, can insist on a sale, and as the present holders of those bonds are protesting against a sale, a sale cannot now be ordered at all. And as a sale cannot now be ordered at all, it would be an utterly nugatory and meaningless form to reverse the order appealed from, and to remand the case to the court below.

There is one other view that I take of the subject, to which I wish briefly to make allusion. By the provisions of the decree of October, 1890, under which the trustees of the bondholders were placed in possession of the canal for the limited period of four years, it was declared that the trustees should repair the canal at their own proper cost and expense. Estimates of the probable cost of such repair (and very careful estimates) had been made by the exceedingly accomplished receivers, Messrs. Joseph D. Baker, Richard D. Johnson, and Robert Bridges, but because of subsequent freshets and other unforeseen causes the actual expense incurred in restoring the waterway was largely in excess of those estimates. The trustees of the bondholders undertook the work in good faith, and pushed it forward as rapidly as was possible, but unavoidable delays occurred, whereby many months of the four years allotted to the trustees as the term of their possession elapsed before navigation was reopened. They expended \$435,000, as I have already mentioned, and the four years expired before they were able to repay from the earnings of the canal this large sum of money. While it is true they took the risk, under the strict and literal letter of the decree, of getting back in four years from the tolls and revenues the money thus expended to reconstruct the canal, it is equally true that this very money placed the canal in a condition of repair which, should it be sold, would cause it to bring a vastly higher price than it could possibly have sold for had it been left in the

wrecked and broken state which the flood of 1889 produced. To the extent that this money, so expended, strengthened the liens of all the creditors, the trustees, by its expenditure, benefited the lienholders; and if the state be conceded to have a priority over the bonds of 1844, though deferred to the bonds of 1878, the state would be greatly benefited in the event of a sale by reason of the enhanced value of the property; enhanced at the expense of the very people who, according to the contention of the state, would in all human probability get no part of the proceeds of sale, because of their lien being so far deferred as to be beyond reach in the distribution of the purchase money likely to be bid and paid for the canal. It seems to me, then, notwithstanding the terms of the decree, if a sale were now ordered, the plainest precepts of equity and justice dictate that these bondholders or persons who advanced the \$435,000 to reconstruct the canal should be refunded, out of the proceeds of sale, the money they expended, in the highest good faith, to give the canal a salable value. Because no provision of this sort was assented to, I could not (even had I not entertained the other views I have expressed on other branches of the case) have consented to a sale of the canal.

The reasons I have set forth in this opinion are the ones that influenced me to concur in an affirmance of the order extending the time during which the trustees of the bonds of 1844 may continue to hold possession of and operate the canal.

(68 Vt. 475)

MERRILL v. FISH.

(Supreme Court of Vermont. Rutland. July 28, 1896.)

MASTER AND SERVANT—CONTRACT OF HIRING—ACQUIESCENCE IN TERMINATION.

Where a servant quit the employment of his master before the expiration of the term for which he had contracted, and the employer, with knowledge of such fact, stated that he would not pay him any more wages until the expiration of the term, such statement is equivalent to a promise to pay at that time, and is a waiver of the breach of the contract by the employé, which entitles him to recover the contract wages for the time he worked.

Exceptions from city court of Rutland.

Action by Ransom Merrill against William G. Fish. Judgment for defendant, and plaintiff excepts. Reversed.

Exceptions from the city court for the city of Rutland. The action was general assumpsit; the plea, the general issue; and the trial by court. The evidence of the plaintiff tended to show that he contracted with the defendant to work for him for a term of 12 months from the 15th day of November, 1894, for the sum of \$165, and that the defendant was to pay him his wages from time to time as they were earned; that he worked for the

defendant until June 25, 1895, and at that time quit work, for the reason that the defendant would not pay him as fast as he desired. The defendant claimed that he was to pay the plaintiff his wages from time to time as he could, and that he had, upon every occasion when the plaintiff had demanded any money, paid him what he could, up to the time that the plaintiff left. It was conceded that on or about July 1st the plaintiff made a demand upon the defendant for the balance due him for labor, and that the defendant replied by letter that he would not pay the plaintiff anything more until the end of the time for which the contract for labor was made, viz. November 15, 1895. The defendant admitted that on the 6th day of July, when he made this reply to the plaintiff, and before plaintiff commenced this suit, he had \$400 in cash, which he then deposited to his own credit in the savings bank. It appeared further that the defendant was a man of considerable means, and the owner of a valuable farm. The court found as a fact that the contract as to payment was as claimed by the defendant, and, further, that there was due the plaintiff, at the contract rate, for labor performed, at the time he quit work, \$27.86. Upon these facts the court rendered judgment for the defendant, and the plaintiff excepted.

Butler & Moloney, for plaintiff. A. G. Coolidge, for defendant.

TAFI, J. The plaintiff agreed to work for the defendant one year, beginning November 15, 1894, for \$165. The defendant agreed to pay him from time to time as he could. The plaintiff abandoned the defendant's service June 25, 1895, and, about the 1st day of July following, demanded the amount he claimed was due him under the contract. The defendant, in response to the demand, wrote him that he would not pay him any more until the year of the hiring had expired. We construe this as a promise to pay at that time at the contract price. This is sufficient evidence that the defendant assented to the plaintiff's leaving. An offer to pay for services performed, at the contract price, in case the laborer has left the employer's service, is a waiver of the forfeiture of the wages, if there was one. In such case the laborer recovers for his services pro rata. *Rogers v. Steele*, 24 Vt. 513; *Painote v. Sanders*, 41 Vt. 66; *Boyle v. Parker*, 46 Vt. 343. The defendant consenting to a termination of the contract, the plaintiff is entitled to recover according to the terms of the contract. The defendant was to pay as he could. It appears by the exceptions that prior to the bringing of the suit the defendant could pay. The plaintiff is entitled to recover the amount due him under the contract, with interest since the date of the writ, viz. \$29. Judgment reversed, and judgment for the plaintiff.

MEIS v. MEIS et al.

(Court of Chancery of New Jersey. Aug. 25, 1896.)

WILLS—CONSTRUCTION—GIFT ON CONDITION.

1. Under a will bequeathing \$2,000 to each of testator's daughters, and thereafter giving to his son his interest in a firm business, the interest in the firm personally so given to the son is not liable to be applied to payment of the legacies to the daughters.

2. A gift of testator's half interest in a firm business to his son, with direction that the son immediately take testator's place as partner, and continue the business, with a gift of his estate, after his son's death, to the son's children, or, if the son dies leaving no children, then to the children of testator's daughters, though not a gift of a life estate, is, notwithstanding the implied powers to sell the firm's interest in the property for the benefit of the firm, a gift of an estate on a contingency, with in Revision, p. 582, § 8, providing that when any personal property is bequeathed to a person for life or on a condition or contingency the executor shall not be compelled to deliver the property to the legatee till security shall be given to secure the interest of the persons entitled in remainder.

Bill by August Meis' executors against August Meis, Jr., and others.

This bill is filed by the executors of August Meis to get a judicial construction of the will under which they were appointed. The terms of the will are as follows: The testator, in the first place, provides for the payment of his just debts and funeral expenses, and bequeaths to his wife, Barbara, all his household furniture, carpets, beds, bedding, etc. He then bequeathed to his daughters Eliza Coegel and Julia Heinz each the sum of \$2,000. Then follows the fifth clause: "I give, bequeath, and devise unto my son August Meis, Jr., with conditions hereinafter mentioned, all my real estate, and also my undivided one-half interest in the tannery business corner of 17th avenue and Lillie street, in the city of Newark, and now carried on under the firm name of Meis & Egner, for the manufacture of leather. And further it is also my will, and I hereby order and direct, that after my decease, my son August Meis, Jr., shall immediately enter into said business firm, and to take my place as partner with Henry W. Egner, my present partner; and the said business shall be carried on without delay, hindrance, or interruption of any person or persons whomsoever; and now I do hereby order and direct the following conditions: First. That my son August Meis, Jr., is hereby directed and compelled to allow to my beloved wife, Barbara Meis (née Matheus), the right and privilege to remain in my dwelling house (homestead) Nos. 139 and 141 Belmont avenue, during her life, and that she can occupy one-half of said house, and my son August Meis, Jr., can use one-half of said house; and, further, in case either of the parties should move out of the said house, the party so moving is not allowed to put other tenants in their respective places, but that the party

remaining shall then have the privilege to occupy the whole house, and for their own use only and not for tenants. Second. I further hereby direct and order my son August Meis, Jr., to pay to my wife, Barbara Meis (née Matheus), the sum of four dollars every week for her support during her life; and that he, the said August Meis, Jr. (my son), must pay all the expenses for keeping the house in good order and repairs, pay all taxes, assessments, water rents, insurances, etc., and he shall not be allowed to put any mortgage on said dwelling house, nor sell the same. The said homestead shall remain clear and free of any incumbrance whatsoever. Third. My son August Meis, Jr., is also prevented of selling any part of the business property on which the tannery is located, unless by consent of my partner, Henry W. Egner, whom I also appoint as one of my executors. After the decease of my son August Meis, Jr., I give my estate to his children in equal shares; and in case he, my son August Meis, Jr., should die and leave no children, I then bequeath and give the same to the children of my two daughters Julia Heinz (née Meis) and Eliza Coegel (née Meis) in equal shares." He then appoints Henry W. Egner and John F. Zimmerman to be the executors of his will. The bill states that the complainants, as executors, have filed an inventory, which shows personal estate to be \$10,909, \$6,157 of which represents the interest of the deceased in the partnership of Meis & Egner; leaving a balance of \$4,752 as representing the other personal estate, including the household furniture specifically bequeathed to the wife. The bill then states that according to the belief of the executors, this balance of personal estate is insufficient to pay the debts, the costs of administration, and the two legacies of \$2,000 each to Eliza and Julia; that they are advised that the two legacies must abate to the amount of the deficiency; that they are advised that if the last-mentioned balance should happen to be more than sufficient to pay the debts and expenses of administration and the two legacies, then the surplus remaining would represent personal estate of which the testator died intestate. The bill then states that the said Eliza and Julia insist that their legacies must be paid in full out of the whole estate in general. The bill then proceeds to state that August Meis, Jr., claims that the will gives him all the interest of the testator in the partnership property absolutely, while the executors are advised that there is doubt of the proper construction of the will in respect to the interest of August Meis, Jr., in this property, and desire judicial instruction whether they are required to take from August Meis, Jr., a bond, under the provisions of the eighth section of the act concerning legacies, which required such bond on delivering personalty to a legatee for life. The bill then states that August Meis, Jr., is married, but has no child or children; that

Julia Heinz has three children, all infants. The prayer is that the court may construe the will, and direct the executors in what manner to proceed with the execution of their duties under said will with respect to said estate, and particularly said partnership interest; that the rights and interests in the several parties in the said estate may be settled and adjudged by the order and decree of the court; and that in particular whether they are bound to require a bond from August Meis, Jr.

Guild & Lum, for complainant. Charles Borchertling, for defendant Eliza Coegol. Schuyler B. Jackson, for defendant Julia Heinz.

REED, V. C. (after stating the facts). The questions propounded by the pleadings are three: First, whether the interest in the firm personality given to August Meis, Jr., is liable to be applied to the payment of the legacies to the daughters; second, whether the testator died intestate of all his personal property except his interest in the firm personality; third, whether the interest which August Meis, Jr., takes in the firm personality is an absolute interest or such a limited interest as comes within the provisions of section 8 of the legacy act.

In respect to the first question, the answer is plain. The legacies of \$2,000 each, in the event of the personality (other than that invested in the partnership) proving insufficient to pay debts and legacies in full, must abate ratably. There is no charge of these legacies upon the realty. The gift of the personality invested in the partnership to August Meis, Jr., is specific. It therefore cannot be depleted for the purpose of paying the pecuniary legacies.

The second question, in the light of the statements in the bill, is unimportant, because all the personal estate (other than partnership personality) will be exhausted in paying the pecuniary legacies. If the testator died intestate of any of his estate, it can be only of an interest in this personality during the life of August Meis, Jr., or thereafter if he leaves no children, and there are no children of his sisters. The remainder of all his estate, after the death of Meis, Jr., is expressly given to the children of Meis, Jr., if he dies leaving children; and, in default of such children, then to the children of his two daughters. During the life of Meis, Jr., the interest in this part of the personality is not touched by the terms of the will, and it belongs to the next of kin.

The third question is whether August Meis, Jr., takes the father's interest in the firm personality absolutely, or whether his interest is such as to entitle the executors of the testator to require a bond pursuant to section 8 of the act concerning legacies (Revision, p. 582) before delivering the property to him. This section provides that whenever any personal property is bequeathed to any person for life,

or for a term of years, or for any other limited period, or upon a condition or any contingency, the executor or administrator cum testamento annexo shall not be compelled to pay or deliver the property so bequeathed to the person having any such life interest or other interest as aforesaid until security shall be given to the orphans' court in such sum as shall sufficiently secure the interest of the person or persons entitled in remainder. Is the interest which August Meis, Jr., takes limited so that it falls within this provision? The gift of the interest in the tannery business is, in the first instance, absolute. It is cut down (if at all) by the limitation over, namely, that in case he should die and leave no children, then to the children of testator's two daughters. This language, since the act of 1851, means a definite failure of issue, and so the limitation over is saved. The effect of this language is not to cut down the interest of August Meis, Jr., to a life estate. He has a qualified interest, which may become absolute upon his leaving children at the time of his death. *Condict's Ex'rs v. King*, 13 N. J. Eq. 377. Apart from the statute, the first legatee is entitled to receive the property without giving security. *Rowe's Ex'rs v. White*, 18 N. J. Eq. 411. While the interest of the first legatee under this language of the will is not an estate for life, it is an estate given upon a contingency, within the meaning of the act. If the language of the testator providing for a limitation over on the death of the first taker without children is valid, then Meis, Jr., can be compelled to give security. But the main point to which the argument was directed, was whether this limitation over was not so repugnant to the character of the interest first given to Meis as to be void. The gift is of the testator's interest in the partnership of which he died a member. The partnership property consisted of both real and personal property. The gift was coupled with an order that after the decease of the testator said August Meis, Jr., should immediately enter into said firm, and take the testator's place with the surviving partner. Now, the question to be answered is whether the power of disposition conferred upon Meis, Jr., by the direction that he should use the personality in the firm business was such as to give him an absolute interest. It is entirely settled as a rule of construction that in case of a gift or devise to one for life with a limitation over upon the first taker's dying without issue the life estate will not be enlarged by adding to the gift a power to sell. The power to sell will be deemed to mean a power to sell the life interest expressly given. *Pratt v. Douglas*, 38 N. J. Eq. 516; *Downey v. Borden*, 36 N. J. Law, 460; *Theob. Wills*; *Wooster v. Cooper* (N. J. Err. & App.) 33 Atl. 1050. But a devise or bequest generally with the power to dispose of the gift absolutely, renders a gift over void. *Theob. Wills*; *Annin's Ex'rs v. Vandoren's Adm'r*, 14 N. J. Eq. 135-142; *Armstrong v. Kent*, 21 N. J. Law,

509. The direction in the will that the son should immediately take his place as partner and continue the business implied that the firm property should be used in the business. It therefore conferred upon Meis, Jr., all the power of a partner over the partnership property. The power of a partner to sell the firm property in the transaction of the general business of the firm is absolute and unquestioned. T. Pars. Part. *163. This power, however, as between the partners themselves and as to purchasers with notice, may be limited by the articles of co-partnership. So the sales, in any instance, must be made for the firm, and not for the individual partner. If it is apparent to the purchaser that the sale is made for the benefit of the individual, the transaction is void. So it follows that the implied power of sale conferred upon Meis, Jr., was a power to sell as a part of the firm business. 'The firm is supposed to receive the consideration resulting from the sale. I have reached the conclusion that this is not the absolute unlimited power of disposition which is essential to confer an absolute estate in Meis, Jr., and so defeat the limitation over in case he shall die leaving no children. The power is limited by the scope and purpose of the firm business. The power is not to sell his interest in the firm, but it is a power which devolves upon him, as agent of the firm, to sell the firm's interest in specific property for the benefit of the firm's business. The gift contained in the will is of the father's undivided one-half interest in the business. That interest Meis, Jr., has no implied or express power to sell. I think the bequest is within the terms of the statute, and that Meis, Jr., cannot compel a delivery of his father's interest in the firm personality without giving the statutory bond.

(54 N. J. R. 439)

HUTCHINSON v. VAN VOORHIS et al.
(Court of Chancery of New Jersey. Aug. 20, 1896.)

EQUITY—ACCOUNTING—CROSS BILL—PLEADING—
IMPERTINENCE.

1. Where the object of a bill in equity is to secure an accounting of a terminated agency, the agreement for which agency contemplated that the agent should be paid for his services, it is proper for the defendant agent, by cross bill, to demand payment for his services, and have such demand adjusted with the accounting, so that by its decree the court may give complete relief between the parties, in respect of the agency.

2. Facts stated in an answer which are not material to a decision of matter put in litigation by the bill are impertinent, and, if reproachful, are scandalous.

(Syllabus by the Court.)

Bill by Archibald A. Hutchinson against Isaac Van Voorhis and Thomas B. Hutchinson for an accounting. Motion to strike out portions of the answer filed by the defendant Van Voorhis. Granted in part.

On motion to strike out portions of the answer filed by the defendant Van Voorhis.

The bill alleges that on the 19th of April, 1888, the complainant (then of Pittsburg, Pa.) constituted the two defendants his attorneys in fact, under a duly-executed power of attorney in writing, a copy of which is annexed to the bill, as "Schedule A," and made part of it. That writing gives power to the defendants to demand, recover, and receive moneys, debts, merchandise, and effects due, payable, or coming or belonging to Archibald A. Hutchinson; to sell his goods, merchandise, and effects; to purchase for his account goods, merchandise, specie, and other commodities, and sell them again for his benefit; to ship and transport goods, and barter and sell them when at their destination, upon his account; to insure his property; to accept bills of exchange or orders, make and indorse notes, bonds, etc., and execute drafts, checks, recognizances, and bonds, in legal proceedings, etc., for him; to grant, bargain, sell, exchange, assign, or dispose of his bonds, mortgages, stocks, and securities, executing in his name necessary instruments for that purpose; to purchase real estate, executing necessary contracts, etc., touching the same; to mortgage his property; to settle and adjust his partnership accounts; to settle his disputes with others, submitting to arbitration when expedient; to substitute his securities for others; to compound for debts or demands owing to him; to execute releases, compromises, compositions, etc.; to discharge debts due to him; to take possession of lands to which he should be entitled; to distrain for rent; to bring suits to enforce his rights; to confess judgments for him; to arbitrate and compromise suits; to receive securities impounded in legal proceedings, executing bonds of indemnity where necessary; "and generally to do and perform all matters and things, transact all business, make, execute, and acknowledge all contracts, orders, deeds, writings, assurances, and instruments," in and about his affairs, and substitute one or more attorneys under them. The bill also alleges that the complainant agreed with the defendants that their compensation as his attorneys under the power should be \$1,200 per annum, and also that on the 28th day of April in the same year the complainant left America and went to Europe, where he remained until the 2d day of April, A. D. 1893, and that during his absence the defendant Van Voorhis acted under the power of attorney principally alone. It prays that the defendants may account as the agents of the complainant, and that payment of whatever balance may be found to be due to the complainant may be enforced in his behalf. The defendant Thomas B. Hutchinson, who is the brother of the complainant, has appeared in the suit by solicitors, but has not answered. The defendant Isaac S. Van Voorhis was served with subpoena at Atlantic City. Upon motion in his behalf, based upon the affidavit of his phy-

sician that he is now of unsound mind and incapable of managing his affairs, Barton B. Hutchinson was appointed his guardian ad litem in this suit, and in his behalf has filed the answer which is now objected to. The answer admits the making of the power of attorney referred to in the bill, and at the same time denies that any amount was agreed upon as the annual compensation of the attorneys, and, on the contrary, alleges that it was understood between Van Voorhis and the complainant that Van Voorhis was to be paid for his services whatever they should reasonably be worth. It further admits the absence of the complainant in Europe, and that Van Voorhis acted under the power of attorney. And, going further, it alleges that Van Voorhis had been the complainant's lawyer and confidential adviser, and that Thomas B. Hutchinson was his brother; that it was designed that Van Voorhis should be the real agent, and that the brother should be co-agent for the purpose, merely, of observing and inspecting the acts of Van Voorhis, and keeping complainant advised with respect to them; also, that Van Voorhis acted alone in whatever he did, but with the full knowledge and approval of Thomas B. Hutchinson. It further alleges that, while complainant was absent, Van Voorhis, from time to time, sent him itemized accounts in writing, which the complainant received as satisfactory, and had every opportunity, through his brother, to verify. It then proceeds in this language: "That at a time just preceding the said agency this complainant was so overwhelmed with litigation and other matters requiring legal services, as herein below more particularly specified, and was so alarmed by the danger therefrom to his property and character, that he was unwilling to face the responsibility of his acts before the courts of Pennsylvania, and felt obliged to find some person to whom to intrust his property and the management thereof, and, after finding such person, to at once leave for Europe; and it was to this end that he appealed to this defendant, his attorney and trusted friend, to not only manage his law business, but to take charge of his property and other business as his attorney in fact; that it was to this end, also, that he prevailed upon this defendant to protect him, and that he executed the instrument in the bill of complaint set forth; that this defendant was so conscious of the said dangers to the reputation and property of his friend, the complainant, and was driven to such extremities, and incessant labor, worry, and anxiety, to find legitimate means of protecting him, and the burden of obligations assumed thereby was so greatly increased by the said agency, that after successfully defending him, the said complainant, in the courts, in most of the matters herein below specified, and in all of those which so endangered complainant's character and for-

tune, and after accumulating the profits hereinafter specified for the complainant, and being of a very sympathetic nature, the entire burden proved too great for his strength of body and mind." It then proceeds to allege that in March, 1893, the defendant Van Voorhis was removed to a hospital for treatment, and that in 1895 his mind became permanently deranged, and he became incapable of understanding any business, or of making an account of the affairs of his agency, and of giving instructions to that end; also, that the complainant, by Thomas B. Hutchinson, had access to his books and papers, and took some of them away, so that enough of them are not left to enable the defendant Van Voorhis to render an account; also, that on the 6th of March, 1893, Van Voorhis and the complainant stated an account between them, which shows Van Voorhis to be indebted to the complainant in the sum of \$21,166.75, which, by credits, is reduced to \$10,727, which balance was agreed by them to be subject "to future litigation and adjustment," having reference to the claim of Van Voorhis for compensation; also, that out of the balance the defendant is justly entitled to \$6,300 for his service under the power of attorney. The answer then continues as follows: "That since the said 6th day of March, 1893, while this defendant remained (with the exception of a few months) within the jurisdiction of the courts of Pennsylvania, and while the witnesses necessary to his more complete defense were subject to the jurisdiction of said courts, and while records and data were complete, the complainant did not deem it wise to enter into any litigation in said state with this defendant concerning said amount in difference, and that when, in the greatest extremities of bodily and mental illness, this defendant was, under the instructions of his physician, removed to Atlantic City, in this state, for medical reasons and purposes, the complainant procured the service of the writ in this cause upon said defendant. The complainant, for the reasons above set forth, is not entitled to any further accounting; and the simulation of such right at a time when this defendant is, in the various ways above stated, deprived of all chances or possibility of such accounting, is for the purpose of embarrassing him, and preventing him from enforcing his claim against the complainant for amount still due him for services rendered as attorney in fact and attorney at law as aforesaid. And the purpose of this complaint in simulating a right to an accounting of matters of which the complainant is already fully informed is to force the friends of this defendant to procure a waiver of the just and reasonable claims of this defendant, in order to avoid such disturbance of this defendant, in his enfeebled condition, as may result fatally to him." The answer asks that the defendant may have

the same benefit from the account stated, and his inability to account by reason of his loss of books and papers, and his mental condition, as if he had pleaded these matters in defense. It then proceeds, by way of cross bill, to first allege that the complainant is still indebted to the defendant in the sum of \$6,300 for services under the power of attorney, and then to specify services as attorney at law meriting enough consideration, according to his claim, to absorb the remainder of the balance of the \$10,727 shown upon the alleged account stated, and to pray that such compensation as he merits for all such services as attorney in law and attorney in fact may be allowed, and paid to him by the complainant. The complainant now moves to strike out the portions of the answer which are above quoted, as scandalous and impertinent, and to strike out so much of the answer as is by way of cross bill, upon three grounds: First, because it "is not necessary to the defense of the said defendant"; second, because "the matters and things therein stated are alleged by the defendant and sought to be used by him as a means of obtaining relief against the complainant in respect to a cause or causes of action distinct from, and wholly unconnected with, the complainant's cause of action"; and, third, because the matters and things in said answer in the nature of a cross bill alleged afford no ground for equitable relief."

Charles L. Carrick and B. K. McElheny, Jr., for the motion. R. V. Lindabury and S. D. Oliphant, Jr., opposed.

MCGILL, Ch. (after stating the facts). The bill contemplates an accounting for the dealings of two attorneys in fact under the power of attorney. That power does not contemplate that either of the agents appointed shall perform the services of an attorney at law. Incident to the performance of their duties, they had authority to employ the subordinate agency of an attorney at law, but no direct agency of that kind was created by the instrument. The answer, on the other hand, alleges that the employment of the defendant Van Voorhis was a single matter, in which he acted in two capacities,—as attorney in fact under the power of attorney, and as attorney at law,—and that in both those capacities he was to act alone; it being agreed that Thomas B. Hutchinson was merely to supervise, understand, and approve that which should be done under the power of attorney. Under this allegation of the answer, the power of attorney did not deal with the entire employment. Its purpose was not to circumscribe the limits of the employment, but to confer such power as could be conferred only by such an instrument, and which was requisite to the performance of the duties required of Van Voorhis in his capacity as attorney in fact. The answer de-

nies that a fixed rate of compensation was agreed upon, and avers that the understanding was that Van Voorhis should be paid what his services should be reasonably worth. The object of the cross bill is to secure for him, in the accounting invoked by the complainant, payment for all his services,—not only for those rendered as attorney in fact, but also for those rendered as attorney at law,—and thus enable the court to decree complete relief to him, as well as to the complainant, in respect of the whole agency. If the allegations of the answer be true,—and I so take them upon this motion,—I deem the filing of the cross bill to be a necessary step by the answering defendant to obtain the complete determination of all the matters involved in the litigation which the original bill inaugurated. Such object is a legitimate use of a cross bill. *Kirkpatrick v. Corning*, 39 N. J. Eq. 136; *Krueger v. Ferry*, 41 N. J. Eq. 432, 5 Atl. 452, on appeal 43 N. J. Eq. 295, 14 Atl. 811; *Shearman v. Morrison*, 149 Pa. St. 386, 24 Atl. 313.

Proceeding to the consideration of the three portions of the answer which are objected to for scandal and impertinence, I find that the first of them alleges that the complainant, overwhelmed with litigation and other matters which required legal services, and alarmed by the danger therefrom to his character and estate, was unwilling, in person, to face the courts of his state, and felt obliged to secure the services of some one to whom he might intrust the management of his property and affairs, and then go to Europe; that Van Voorhis had been and was his attorney and trusted friend, and hence he was appealed to, in the emergency, to assume the burden of that management, involving as it did both business and legal services; that Van Voorhis was conscious of the dangers, and actuated by his apprehension of them, and by his sympathy with his friend, he bestowed such incessant labor, and was subjected to such worry and anxiety, in the successful performance of the duties required, that he broke down in body and mind. It is insisted that this passage of the answer is material and relevant upon the question of the value of the services which Van Voorhis rendered. In *Woods v. Morrell*, 1 Johns. Ch. 108, Chancellor Kent said: "As to impertinent matter, the answer must not go out of the bill to state that which is not material or relevant to the case made out by the bill. Long recitals, digressions, stories, conversations, and insinuations tending to scandal, are of this nature. Facts not material to the decision are impertinent, and, if reproachful, are scandalous; and perhaps the best test by which to ascertain whether the matter be impertinent is to try whether the subject of the allegation could be put in issue, and would be matter proper to be given in evidence between the parties." *Wilkinson v. Dodd*, 42 N. J. Eq. 234, 647, 7 Atl. 327, and 9 Atl. 685. Applying the test thus stated, I

think that it is clear that the delicacy and difficulty of the services rendered, and the peculiar fitness of Van Voorhis to render them, his devotion to them, and the success of his efforts, are all matters pertinent to an inquiry as to the value of these services. Although I think that the pleader might safely have omitted this portion of the answer, or might have stated its substance in language which would more succinctly and clearly, and less reproachfully, have defined the character of the services, I am of opinion that the motion to strike out, in this particular, should not prevail.

The remaining portions of the answer quoted should be stricken out. Under the test above applied, they are both scandalous and impertinent. They allege a baseness of purpose in the complainant which is not a defense, and complain of a delay in prosecution which was contemplated between the parties in March, 1893, when an unsettled balance was admitted to exist, as a matter for future litigation, and which does not present a case of laches which should induce this court to withhold from the complainant such relief as he may be entitled to at its hands. The allegation of the answer is that in March, 1893, this reservation for future litigation was agreed upon, and that in the same month Van Voorhis went to a hospital because of ill health, which has resulted in the permanent derangement of his mind. It would seem to be a legitimate inference from such allegations that delay in litigation was contemplated by the parties, and suffered by the complainant, to admit of the recovery of Van Voorhis, and was not terminated until the impossibility of that recovery became manifest, and was not to subserve the base and dishonest purpose suggested by the answer. The motion will be denied as to the first portion of the answer objected to, and the portion by way of cross bill, but, as to the other portions of the answer, will be granted.

(54 N. J. E. 591)

SMALLEY v. SMALLEY et al.

(Court of Chancery of New Jersey. Aug. 7, 1896.)

WILL—CONSTRUCTION—PROCEEDING FOR POWER OF EXECUTOR TO SELL.

1. A proceeding by one for construction of a will, with prayer for decree that he sell testator's real estate, should be by bill, not by petition.

2. Power to sell testator's real estate is not given his executors by the provision of his will: "I give, devise, and bequeath all of my property, both real and personal, to my six children, as follows, that is to say: After the settlement and payment of all my just debts, then the residue of my estate, both real and personal, to be gathered into one general fund, and divided into six equal parts, as follows: * * * Each of them [the children] to receive a one-sixth share, which I give to them;" or by a codicil reciting decease of one of them, indebted to testator, and providing that "all sums due me and unpaid at the time of my decease from * * * his

[the deceased child's] estate be deducted from any distributed share that his heirs would be entitled to"; but the division is to be of realty and personality.

Petition by Morgan R. Smalley against Gideon W. Smalley and others.

Charles L. Moffet, for petitioner. Steele & Meehan, for defendants.

STEVENS, V. C. The petitioner files a petition for the construction of the will of John Smalley, and prays that he, as executor, be decreed to make sale of testator's real estate. The proceeding is fatally defective, in that it should be by bill, and not by petition. *Receiver of State Bank v. First Nat. Bank of Plainfield*, 34 N. J. Eq. 457.

Outside of this objection, however, it is clear that the executor is not only under no obligation to convert the real estate into money, for the benefit of testator's children, but that he has no power to do so. The second paragraph of the will reads as follows: "Second. I give, devise, and bequeath all of my property, both real and personal, to my six children, as follows, that is to say: After the settlement and payment of all my just debts, then the residue of my estate, both real and personal, to be gathered into one general fund, and divided into six equal parts, as follows: To my six children, Susan Maria Dunham, William H. Smalley, Samuel Smalley, Morgan Smalley, Rachel Henderson, and Gideon W. Smalley; each of them to receive a one-sixth share, which I give to them and to their heirs, forever." No express power of sale of testator's real estate is conferred by this clause, and I have not been able to discover that it contains any implied power. By the direction that the residue of his estate, both real and personal, shall be gathered into one general fund, I understand testator to mean that, after his debts and personal expenses are paid, the amount and value of the real and personal property shall be ascertained, and, when ascertained, divided among the six children, in shares of equal value. The division is, in terms, to be a division, not only of personality, but of realty; and it is to take place "after"—that is, immediately after—the settlement and payment of all the just debts. There is here no gift to the executors in trust; no direction to them to invest and ultimately pay over; no indication that the children are to take the proceeds of the sale of the real estate, rather than the real estate itself. On the contrary, the testator uses language technically appropriate to carry his real estate to his children in specie. "I give, devise, and bequeath all my property, real and personal," is the language of the gift. There is absolutely no indication of an intention on testator's part to put it in the power of his executors to change the nature of his property before it reaches its destination. The fact that the testator directs his estate after payment of

debts to be gathered into one general fund is of no consequence, because into that so-called "fund" he himself puts the real estate, as well as the personalty, and not the proceeds of the sale of it. The so-called "fund" or "mass" which is to be divided is a fund or mass composed of both realty and personalty. So far, therefore, as the will itself is concerned, I see no ground for supposing that a power of sale by implication is given.

The testator provides, in the second codicil to his will, that whereas, since the making of it, his son Samuel had died, indebted to him, therefore his will and intention is "that all sums due me and unpaid at the time of my decease from my late son Samuel Smalley or his estate be deducted from any distributed share that his heirs would be entitled to." If the will itself does not confer a power to sell realty, I do not think his codicil does. The petition does not state the amount of testator's personal estate, or the amount of Samuel's indebtedness to it. Had such statement been made, it would not have been material, for any practical difficulty (supposing it to exist) in making the proper deduction would not of itself alone raise up an inference of an implied power to convert land into money. Says Chancellor Zabriske in *Seeger v. Seeger*, 21 N. J. Eq. 91: "There is no authority or decision, so far as my researches have extended, which holds that, in a will which contains no power or directions to sell, such power is created by implication, because necessary or convenient to enable the executors to execute the directions of the will." The testator, by this codicil, does not attempt to modify the character or component parts of the "distributed share" given to Samuel's children, but only declares what shall be deducted from that share. This being so, I do not see how the codicil can produce an effect which the testator, if we are to judge by his language, never intended it should produce.

GREEN et al. v. BLACKWELL et al.

(Court of Chancery of New Jersey. Aug. 13, 1896.)

CHARITIES—TRUST BEQUEST—TERMINATION—VALIDITY—TRUSTEE—APPOINTMENT.

1. Where a testator bequeathed to an incorporated school and its successors a fund in trust, the income to be used for the education of poor children in its district, the abandonment of the school and diversion of the fund did not terminate the trust.

2. The bequest of a fund in trust for the education of the poor children of a certain district in a state is valid, though the free education of all poor children in the state is provided for by law.

3. A citizen not specially interested as trustee, executor, or beneficiary in a public charitable trust cannot secure the appointment of a trustee thereof by bill, but must do so as relator, on information filed by the attorney general.

Bill by William A. Green and others against Charles B. Blackwell and others to recover as next of kin, on an alleged failure of the trust, the principal of the trust fund. Dismissed.

Edwin Robert Walker and G. D. W. Vroom, for complainants. William M. Lanning, for demurrants.

STEVENS, V. C. The bill, to which a demurrer has been interposed by the board of education of Hopewell township, alleges that Abigail Moore died in March, 1833, and that by her last will, in which she describes herself as "Abigail Moore, of Pennington, in the township of Hopewell, county of Hunterdon," she made (inter alia) the following bequest: "To that incorporated body 'The Pennington Academy,' and their successors, I give and bequeath five thousand dollars, to make a fund and establishment for the education of all the poor children in that district forever. I will and direct that institution and their successors to put the said sum out on interest, secured by mortgage on landed estate worth double the sum loaned, without buildings, and the interest arising to be appropriated with economy toward the instruction of the poor children of the district, in reading, writing, arithmetic, grammar, and geography; and, if there are any savings, the same is to be put out in like manner, and for the above purpose, forever." The bill then goes on to state that Mrs. Moore's executor paid to the trustees of Pennington Academy the sum of \$5,000; and that subsequent to this payment there was opened in that certain district of the township of Hopewell wherein the village of Pennington was situated a certain school, under and by virtue of the laws of the state of New Jersey, which school was always thereafter supported by the public moneys raised for that purpose; and that, upon its organization, the Pennington Academy was, in the words of the bill, "abandoned, neglected, and ceased to have any existence in fact." The bill then alleges that the fund so left by Mrs. Moore was diverted from the objects and purposes mentioned in her will, a part of it having been loaned to the trustees of the public school of Pennington, and a part to one Fitzpatrick; and that, upon the "abandonment" of the Pennington Academy and "the diversion of the fund," the complainants became entitled thereto as next of kin.

It appears to me plain that, assuming that the academy was abandoned and the fund diverted in the manner mentioned, it does not follow that it became the property of the complainants. That the bequest constituted a good charitable trust at the time of the death of testatrix is not denied. Indeed, it would be hard to frame a gift to charity less open to question. The purpose of the trust was charitable, and there was a trustee competent to execute it. Analogous trusts have

been upheld by this court. *Mason's Ex'rs v. Trustees*, 27 N. J. Eq. 47; *Stevens v. Shippen*, 28 N. J. Eq. 532; *Goodell v. Association*, 29 N. J. Eq. 33. Did, then, the so-called "abandonment" of the Pennington Academy, and the loan of the money in the manner above stated, put an end to the trust? I know of no principle of law on which it could be so declared. On the contrary, it is well settled that a trust valid in its inception will not fail for want of a trustee. The court itself will appoint one. The case was argued as if the doctrine of cy-pres had some application to the facts. It was urged that because the public authorities had provided, at the public expense, for the education of all children, rich and poor, the court would be under an obligation to apply the fund, if it was to be used at all, to some other charitable use than that of educating poor children; and this, it was said, could not be done, for the reason that the doctrine of cy-pres is not known to the law of this state. Whether this be true in fact is, at least, questionable. *Newark v. Stockton*, 44 N. J. Eq. 191, 14 Atl. 630. But any consideration of the subject is unnecessary, because I do not think it follows that, because the legislature has devised a method by which all the children of the state may receive an education free of charge, testators may no longer devote a part of their estates to the education of the poor. Such a bequest came under consideration in *Mason's Ex'rs v. Trustees*, supra, and was held good. It is undeniable that the class designated to be benefited by the testatrix is still in existence, and as capable of being the recipients of her bounty now as it ever was. No change is needed in the destination of the fund, though probably a trustee should be appointed to carry out her direction. But, if the bequest under consideration be good, complainants have no interest in the fund in question, and the bill should be dismissed. It is therefore unnecessary to consider whether the residuary clause would not give this fund, if it had reverted, to the residuary legatees, rather than to the next of kin.

But the counsel of complainants suggest that, even if it be determined that the charitable bequest is still subsisting, the court ought not to dismiss the bill, but proceed to the appointment of a proper trustee. There are two ordinary modes of proceeding in equity,—by bill and by information. Where the proceeding is by bill, the rule, so far as I know, is universal, that every bill must show clearly that the plaintiff has a right to the thing demanded, or such an interest in the subject-matter (other than that merely which he has as one of the community) as gives him a right to institute a suit concerning it. *Daniell, Ch. Prac.* 360. Of the plaintiffs in this case, two live in Trenton, three out of the state, but in the United States, one in Australia, and only one, Mrs. Hunt, in Hopewell township. Whether Mrs.

Hunt lives in Pennington, or whether she is a taxpayer in Hopewell, does not appear. If it should be thought that Mrs. Hunt's interest, as a citizen of Hopewell, or the interest of those who reside in Trenton, as citizens of the state of New Jersey, was sufficient to give them a standing before the court, the bill would still be demurrable, on the ground of misjoinder of parties complainant, for certainly no one would assert that a resident of Australia or Nevada or Missouri had any interest in a question relating to one of the public charities of New Jersey. But I do not understand that a citizen of the state of New Jersey, not being a trustee or executor or otherwise especially interested, can file a bill in a case in which he seeks to do nothing more than vindicate a public right. In cases relating to charities, he may, indeed, be a relator in an information filed by the attorney general, but the presence of the attorney general is indispensable. The rule is well exemplified by *Attorney General v. Vivian*, 1 Russ. 226, where an information and bill were filed, and the master of the rolls dismissed the bill, because the complainant failed to show an interest, but retained the information. The case of *Attorney General v. Moore's Ex'rs*, 19 N. J. Eq. 506, is an illustration of the proper method of procedure. In the case in hand, neither the attorney general nor any beneficiary of the trust is before the courts. It seems to me that it would, under these circumstances, be a singular mode of procedure to turn a bill designed only to destroy the trust into what would be virtually an information to establish and preserve it, without the presence or consent of the attorney general or a single beneficiary of the charity. The bill should be dismissed, with costs.

(68 Vt. 471)

DARLING v. RICKER et al.

(Supreme Court of Vermont. Caledonia. July 28, 1896.)

FRAUDULENT CONVEYANCE—EXEMPT PROPERTY—BURDEN OF PROOF—SUFFICIENT CONSIDERATION.

1. There can be no fraud, as against creditors, in the conveyance of property exempt from attachment.

2. One seeking to have a conveyance set aside because in fraud of creditors must establish that the property was attachable, and hence a subject for conveyance which might be fraudulent as to creditors.

3. A conveyance made in consideration of services rendered by the grantees will not be set aside as in fraud of creditors, though at the time of the conveyance the value of the property was in excess of the sum then due the grantees, where, before the conveyance was attacked by creditors, the value of the services of the grantees amounted to a sum equal to the value of all the property conveyed.

Appeal in chancery, Caledonia county; Jonathan Ross, Chancellor.

Bill by J. R. Darling, administrator, against Joseph and Helen Ricker to test the validity

of a conveyance made by the orator's intestate to defendants. Heard upon the pleadings and a master's report at the December term, 1895. From a decree in favor of the orator, defendants appeal. Reversed.

Geo. W. Wing and J. P. Lamson, for orator, R. M. Harvey and Dunnett & Slack, for defendants.

THOMPSON, J. This is a bill in equity, brought by the administrator of Meribah Rick-er, deceased, for the benefit of a creditor whose claims against her estate have been allowed by the commissioners thereon, and are unpaid, to test the validity of the conveyance of certain personal property and real estate to the defendants by the orator's intestate in her life. She was the mother of the defendants. She was the owner of the farm and personal property in question, and, at the time of the conveyance thereof to the defendants, was owing the creditor the claims proven against her estate. From the time of her husband's death, in 1870, to her decease, in 1886, she and the defendants had resided together on the farm in question. During the earlier part of these 16 years, they mutually cared for each other; but during the latter part of this time, both before and after her conveyance to the defendants, in 1885, their care and work for her exceeded hers for them. For many years it was mutually understood between the defendants and their mother that she should convey the farm and transfer the personal property to them in payment for their services to her. To carry out this understanding, she conveyed the farm to them in the fall of 1885, and transferred the personal property to them in the winter of 1885-86. Such conveyance of the property was honestly made, in payment of the services rendered by the defendants, and without intent to defraud any one. At the time the farm was deeded, it was worth \$600, and was the home farm of the orator's intestate, and she had a homestead therein. At that time the services of the defendants for which they had not been paid amounted to \$650. The personal property transferred was of the value of \$200. At the date of their mother's death, September 29, 1886, the value of the defendants' services to her was \$800.

The orator contends that this disposition of the property by his intestate was fraudulent as to the creditor. There can be no fraud as against creditors in the conveyance of property exempt from attachment. *Prout v. Vaughn*, 52 Vt. 459. But waiving the question of the homestead, which was exempt from attachment at the time of the conveyance, there was then due the defendants \$650, a sum in excess of the entire value of the farm. Hence there was no constructive fraud arising from this transaction, for the mother had a right to pay them in preference to some other creditor.

There is no finding that the personal prop-

erty transferred was subject to attachment at the suit of creditors. If it was not attachable, then, in any view of the case, its transfer was not, in law, a fraud upon the creditor. The orator alleges fraud, and on that ground seeks relief. In general, the obligation of proving a fact rests upon the party who substantially asserts the affirmative of the issue (1 Greenl. Ev. § 74), with the possible exception of a conveyance to the wife by the husband. A party who attacks a conveyance as fraudulent as to creditors must establish all the facts requisite to make it thus fraudulent either in fact or in law. "The law in no case presumes fraud. The presumption is always in favor of innocence, and not of guilt. In no doubtful matter does the court lean to the conclusion of fraud. * * * The facts constituting the fraud must be clearly and conclusively established. Circumstances of mere suspicion will not warrant the conclusion of fraud. If the case made out is consistent with fair dealing and honesty, a charge of fraud fails." *Kerr, Fraud* (Ed. 1872) 382-385; *Waite, Fraud*. Conv. § 271; *Bradish v. Bliss*, 35 Vt. 326; *Wolcott v. Hamilton*, 61 Vt. 79, 17 Atl. 89. It was therefore incumbent upon the orator to establish that the personal property was attachable, and thus a subject for conveyance, which might be fraudulent as to creditors. Not having done this, he has failed to establish any ground for recovery arising from the transfer of the personal property.

Again, assuming that the personal property, at the time of the transfer, was attachable, this action cannot be maintained because of such transfer, although the value of the real and personal property at the time of the conveyance was in excess of the sum then due the defendants, because the case shows that at the date of the death of orator's intestate, and before the commencement of this suit, the value of the services of the defendants, in payment of which it had been understood for many years such conveyance should be made, amounted to a sum equal to the value of all the property conveyed. This phase of the case was so recently and fully discussed in *Kelsey v. Kelley*, 63 Vt. 41, 22 Atl. 597, that there is no occasion to renew the discussion here. Decree reversed, and case remanded, with mandate to dismiss the bill, with costs to defendants.

(68 Vt. 468)

SANDERS v. PIERCE.

(Supreme Court of Vermont. Windham.
July 28, 1896.)

TRESPASS—AD DAMNUM—JURISDICTIONAL AMOUNT
—DISMISSAL—MOTION—AMENDMENT.

1. Under V. S. § 1009, which provides that the county court shall have jurisdiction of all civil actions except those made cognizable by a justice, and section 1040, which provides that a justice shall have jurisdiction of an action of trespass *vi et armis*, where the matter in demand does not exceed \$200, where such action is originally brought in the county court, and

the declaration contains no statement of damages claimed, except the ad damnum, which is \$5, the lack of jurisdiction is patent on the face of writ and declaration; and defendant's motion to dismiss the suit for want of jurisdiction must be sustained, though it does not state the precise ground of his motion.

2. Though the statement of the ad damnum in such case be a clerical error, the county court cannot confer jurisdiction upon itself by amendment of the writ or declaration.

3. The court before which a cause is pending will dismiss it, at any stage of it, when it is discovered that such court has no jurisdiction.

Exceptions from Windham county court.

Action of trespass vi et armis by Leon E. Sanders, per aml, against Fred O. Pierce. Defendant pleaded the general issue. Trial by jury at the September term, 1895, and verdict for plaintiff. After verdict, and before judgment, defendant moved to dismiss for want of jurisdiction. Motion was overruled, and defendant excepts. Reversed.

Waterman, Martin & Hitt, for plaintiff. C. O. Fitts and Haskins & Stoddard, for defendant.

THOMPSON, J. This is an action of trespass vi et armis, brought originally in the county court. The ad damnum of the writ is \$5. The defendant appeared, pleaded the general issue, and a trial by jury was had, resulting in a verdict for the plaintiff for \$8.32 damages. After verdict, and before judgment, the defendant moved to dismiss the suit for want of jurisdiction. His motion did not specify the precise ground upon which he based his claim that the county court had no jurisdiction of the action; but it alleged that such ground appeared from the writ, to which reference was made. The court below overruled this motion, to which ruling the defendant excepted. It is provided by V. S. § 1040, that a justice shall have jurisdiction of an action of this kind, where the matter in demand does not exceed \$200. Id. § 1009, provides that the county court shall have original and exclusive jurisdiction of all original and civil actions, except those made cognizable by a justice. From the provisions of these two sections of the statutes, it is apparent that the county court had no jurisdiction of this case. Jurisdiction cannot be conferred by the consent of the parties. The court before which a cause is pending will dismiss it, at any stage of it, when it is discovered that such court has no jurisdiction. An objection to jurisdiction over the subject-matter is never out of time. *Chittenden v. Hurlburt*, 1 D. Chp. 384; *Glidden v. Elkins*, 2 Tyler, 218; *Southwick v. Merrill*, 3 Vt. 320; *Putney v. Bellows*, 8 Vt. 272; *Stoughton v. Mott*, 13 Vt. 175; *Shepherd v. Beede*, 24 Vt. 40; *Thayer v. Montgomery*, 26 Vt. 491; *French v. Holt*, 57 Vt. 187; *Niles v. Howe*, Id. 388; *Lamson v. Worcester*, 58 Vt. 381.

If the statement of the ad damnum at \$5 was a clerical error, as it probably was, yet the county court could not confer jurisdiction upon itself by amendment of the writ or dec-

laration. The declaration contains no statement of the amount of damages claimed, except the ad damnum. In this respect it differs from *Lamphere v. Cowen*, 42 Vt. 180, cited by the plaintiff. In that case the writ contained no ad damnum, but the declaration was in the usual form in general assumpsit for money paid, alleging an indebtedness of the defendant to the plaintiff to the amount of \$200. The question of jurisdiction was not raised. The precise question decided in that case was that "a writ and declaration wanting in nothing but an ad damnum is amendable in that particular."

The defendant's motion was sufficient to raise the question of jurisdiction. The lack of jurisdiction was patent on the face of the writ and declaration. The failure of the defendant to state the precise ground of his motion could not confer jurisdiction. Judgment reversed, motion to dismiss for want of jurisdiction sustained, and cause dismissed, with costs to defendant.

(68 Vt. 430)

VERMONT FARM-MACH. CO. v. BATCH-ELDER et al.

(Supreme Court of Vermont. Windham. July 28, 1896.)

EVIDENCE—CONSTRUCTION OF CONTRACT—SALE—WARRANTY—WITNESS.

1. A plaintiff who has introduced parol testimony to show that the language of a written contract should be given a particular construction cannot complain of the admission of similar testimony on behalf of defendant.

2. In an action to recover the price of a machine which the seller, by the contract of sale, guaranteed to do as good work as any other machine in the market, evidence to show that it was more expensive in operation than other similar machines was pertinent and admissible.

3. Where conditional sales of two machines of the same kind, and identical in construction and size, were made, with a guaranty that they would do as good work as any other machine in the market, and one of them was set up and operated by the side of a machine of a different make, by which it was tested by agents of both parties, the results of such test, and the declarations and admissions of the seller with reference thereto, are admissible in an action by the seller to recover on the contract for the other machine.

4. Under V. S. § 1410, empowering the supreme and county courts to require parties to produce books and writings containing evidence pertinent to the issues, where they might be compelled to produce them by the ordinary rules and proceedings in chancery, a court may properly require a plaintiff to produce letters in its possession which contain evidence tending to sustain the issues on the part of defendant.

5. The interest of a witness, and its extent, may always be shown on cross-examination, and the limit of such inquiry is within the discretion of the court.

Exceptions from Windham county court; Tyler, Judge.

Action in assumpsit by the Vermont Farm-Machine Company against Francis Batchelder & Co. Judgment for defendants, and plaintiff excepts. Exceptions overruled.

The plaintiff brought suit for the purchase price of one No. 1 U. S. cream separator, furnished under written contract with the defendants. The material part of this contract was as follows: "The Vermont Farm-Machine Company agrees to furnish Francis Batchelder & Co. one No. 1 U. S. cream separator, complete, with belt, one set of balls, one steel step, one set rubber rings, one 6 horse power Dutton vertical engine, or one 6 horse power Watertown horizontal engine, all to be placed and set up in the separator station at Plainfield, Vt., and guaranteed to do as good work as any other separator in the market, and to skim to one-tenth of one per cent. of fat, or less; the machine to be properly operated. By 'properly operated,' it shall be understood to mean that the machine shall be run at a speed of 7,200 revolutions per minute, and operated in every way in the same manner as usual in the ordinary method followed in the course of separating each day. In consideration of the separator being guaranteed as above, Francis Batchelder & Co. agree to pay the Vermont Farm-Machine Company the sum of \$450 for the outfit, complete, within thirty days from the time it is set up and tested: provided, that the said separator shall, for the thirty days, continue to do the work guaranteed, under the conditions described. It is further agreed by the Vermont Farm-Machine Company that if, at any time within one year from the acceptance of the said separator by Francis Batchelder & Co., said separator fails to regularly and uniformly produce the results guaranteed by the Vermont Farm-Machine Company under the described conditions, after the Vermont Farm-Machine Company have had an opportunity to correct any imperfections in the separator, they (the Vermont Farm-Machine Company) are to remove the separator from the station, upon the request of Francis Batchelder & Co. In case of the removal of separator, the Vermont Farm-Machine Company are to pay Francis Batchelder & Co., within thirty days from the date of removal of said separator, a sum equal to the amount originally charged to Francis Batchelder & Co. for separator and fittings peculiar to same." The evidence of the plaintiff tended to show that before the execution of the above contract the parties had some conversation in reference to a separator, and a contract was drawn up by the plaintiff and submitted to the defendants. That contract was not satisfactory to the defendants, and the one in suit was afterwards drawn up by a member of the defendant firm. The evidence of the plaintiff further tended to show that the ordinary and usual temperature at which milk was separated was from 80° to 90°; that, if the milk was separated at that temperature, the separator in question would fully satisfy the guaranty of the plaintiff; that the defendants had refused to make the test with the milk at that temperature, but

had insisted upon its being tested with the milk at a temperature of from 70° to 72°, and had declined to receive the separator and pay for the same upon the ground that when so tested it would not fulfill the guaranty, but was inferior to another separator, known as the "No. 1 Alpha." As bearing upon the point whether the test should be made at the higher temperature, as claimed by the plaintiff, or at the lower temperature, as claimed by the defendants, one of the agents of the plaintiff testified that before the contract was signed, and at the time of its execution, he informed the defendants that the ordinary temperature at which milk was separated was from 80° to 90°. In reply to this, one of the defendants was permitted to testify that the said agent of the plaintiff made no statement whatever as to the temperature at which this separator was operated, but that he (the defendant) then told said agent of the plaintiff that the defendants required a separator which would separate milk at a temperature of from 70° to 72°, and that the plaintiff so understood it when the separator was sold and the contract signed. To the admission of the above testimony the plaintiff excepted. The evidence of the defendants tended to show that butter made from cream separated at a temperature of from 70° to 72° was better, and would keep longer, than that made from cream separated at a higher temperature; that the defendants were familiar with this fact when the contract was made, and informed the agent of the plaintiff of their ideas in that respect. It appeared that the No. 1 Alpha separator, in comparison with which that of the plaintiff was mainly tested, would separate cream successfully at a temperature of from 70° to 72°; and the evidence of the defendants tended to show that at the time of making the contract they had an Alpha separator actually set up and in operation at Montpelier, with which they were then separating cream at a low temperature. As tending to show that the separator of the plaintiff did not fulfill the guaranty, the defendants were allowed to give evidence of the fact that the plaintiff's separator required more fuel for the same amount of work than the Alpha separator. To the admission of this testimony the plaintiff excepted. The separator in question was to be erected at Plainfield, Vt. It appeared that, at the same time that the separator in question was sold to the defendants, they purchased of the plaintiff another separator, identical in every respect with this, which was to be erected at Montpelier, Vt., and their testimony tended to show that it was then agreed that the test between the separator of the plaintiff and the Alpha should be made at Montpelier. It further appeared that the plaintiff sent several agents to Montpelier for the purpose of representing it in the making of these tests between the Alpha machine and this machine, one of whom was

a Mr. Remington, who at the time of the trial had become the agent of that company which was the proprietor of the Alpha machine. Mr. Remington was produced as a witness by the defendants, and testified that the tests in which he participated showed unfavorably to the machine of the plaintiff, that he so informed the plaintiff, and that the plaintiff endeavored to have him exchange the separator in question for another of their separators, of a later and more approved type; that he attempted to make the change, but was denied permission to do so by the defendants. The witness Remington produced, in the course of his testimony, certain letters and telegrams written to him by the plaintiff while he was at Montpelier, engaged in making the test, in reference to such test, and these letters were admitted in evidence against the exception of the plaintiff. The witness also testified that, in reply to these letters and telegrams, he had written the plaintiff as to how the two machines compared, and that these letters would be favorable to the defendants. Thereupon the defendants requested the plaintiff to produce these letters. This the plaintiff declined to do, unless so directed by the court. The court did thereupon order the plaintiff to produce this correspondence, and the same was produced and introduced in evidence. To the order of the court compelling it to produce these letters, the plaintiff excepted. The defendants were allowed to show the declarations made by Mr. Remington and the other agents of the plaintiff in the making of the tests at Montpelier, which were made at the time, and in reference to those tests. To the admission of these declarations the plaintiff excepted. One James, a witness produced by the plaintiff, was inquired of, upon cross-examination, whether he was the agent of the plaintiff, and whether he received a commission upon separators sold by him, to which he replied in the affirmative. The defendants were then permitted, against the exception of the plaintiff, to show by him that the amount of this commission was 10 per cent. In the course of the cross-examination of N. G. Williams, the manager of the plaintiff firm, and a witness produced by it, the following questions were asked and answered, and the following exception taken: "Q. You began to feel your machine was not good for anything there, and you wanted to lay it to somebody else, didn't you? A. No, sir. Q. That is pretty near it? A. No, sir; and you know it, too. Q. (by Mr. Martin). I know it is, if you are going to put in what I know about it; and I say the correspondence shows it. (Objection and exception by the plaintiff to statements made by Mr. Martin.) By Mr. Martin: I want to say, further, that this correspondence I have read to the witness shows I have a right to reply to what the witness says. (Exception by the plaintiff to the last foregoing statements by Mr. Martin.) Q. You stat-

ed what I know about this. Did you understand I had ever been up there to see these separators? A. No. Q. Or any other separators? A. Not as I know of."

L. M. Reed and Haskins & Stoddard, for plaintiff. Waterman, Martin & Hitt, for defendants.

ROSS, C. J. The action is to recover for a No. 1 U. S. cream separator, and other property to be used in setting up and propelling the separator at Plainfield, Vt., "and guaranteed to do as good work as any other separator in the market, and to skim to one-tenth of one per cent. of fat, or less, and to skim, of summer milk, 2,200 pounds per hour, and of winter milk, 1,800 pounds per hour; the machine to be properly operated. By 'properly operated,' it shall be understood to mean that the machine shall be run at a speed of 7,200 revolutions per minute, and operated in every way in the same manner as usual in the ordinary method followed in the course of separating each day." The separator was to be tested, and to continue for 30 days to do the work guaranteed, under the conditions described. The issue was whether the separator answered the guaranty.

1. The plaintiff gave testimony that at the time the contract was signed he explained that by the term, "in the usual and ordinary method," as regards the temperature of the milk, was meant 80° to 90° in winter and 70°, on an average, in summer. This testimony was admitted against the exception of the defendants. It opened the door for them to give evidence of what was said on the subject on that occasion. Nor was any of the testimony excepted to, given by them, outside the scope of the subject opened by the plaintiff. It only gave the reason they had for insisting, as they say they did, that the term must mean at 70° to 72°. The contract and evidence furnish another ground on which the defendants had the right to have the separator operated with the milk at 70° or 72° in the winter. It was guaranteed to do as good work as any other separator in the market. The Alpha separator was then in the market, and the main competitor of the separator in contention. The evidence tended to show that that separator did good work in the winter, when operated with the milk at this temperature, and that the cream thus produced made a better quality of butter. Hence the defendants had a right to have it tested with the milk at this degree, unless the term, "in the usual and ordinary method," was to restrict the guaranty as claimed by the plaintiff's testimony. The charge on this testimony cannot be complained of by the plaintiff. By this testimony the plaintiff asked to have its guaranty limited, by the construction which it said should be placed on these words, to a test with the milk at 80° to 90° in the winter, when compared

with the Alpha. If the admission of this testimony was an attempt to read into the contract something that was not there, as contended by the attorney for the plaintiff, it was allowed at the asking of the plaintiff. The exceptions do not raise the question whether this testimony of the plaintiff was properly admitted, and that question is not considered.

2. The plaintiff excepted to testimony admitted to show the power and fuel required to operate the separator, as compared with the same required to operate the Alpha. He contends that the guaranty "to do as good work as any other separator in the market, and to skim," etc., relates, not to the economy or expense of doing the work, but to its quality, or that it would skim as much milk, and as clearly of fat, as any other separator on the market. The subject-matter of the contract was the sale of the separator. The guaranty was with reference to its value when compared with other separators then in the market. It was not the intention of the defendants in requiring, nor of the plaintiff in giving, the guaranty, to bind the defendants to keep and pay for the separator if by the test it was found that it skimmed the milk as clearly of fat, and did the work as rapidly, as any other separator in the market, but at a much greater expense. It was intended that by the guaranty the defendants should secure a separator as good or valuable, everything being considered, as any other in the market, and one which fully met the requirements expressed in the guaranty. When the subject of the contract is the sale of a machine guaranteed to do as good work as any other like machine in the market, the value of the machine, when compared with other like machines, depends upon whether it can do the same amount and quality of work at the same expense. If it cannot, it does not do as good work, within the meaning intended by the parties, as the other.

3. On the day before the contract in contention was made, the parties thereto made another conditional sale and purchase of another No. 1 U. S. cream separator, to be set up and tested, by the side of the Alpha separator, in the defendants' factory at Montpelier. The two separators conditionally sold by the plaintiff to the defendants were in every respect alike, and were set up and operated very nearly concurrently, and were to be tested by the same agents of the plaintiff. The defendants' testimony tended to show that it was understood between the parties that the tests between these two separators, bargained for by the defendants, and the Alpha, should be made at Montpelier, as that was the only station where there was an Alpha with which to compare the workings of the machines when standing side by side. If this understanding was established, it made the comparisons between the U. S. separator at Montpelier and the Alpha pertinent

testimony on the question whether the separator in question would answer the guaranty of the plaintiff that it should do as good work as any other separator in the market. If this understanding should not be established, inasmuch as the U. S. separator in contention was identical in construction and size with the one at Montpelier, the working of the latter, when compared with the working of the Alpha under like conditions, was admissible upon the question whether the separator would answer the guaranty, or do as good work as the Alpha. The action of the plaintiff made the use of this class of testimony the more necessary. It refused to make the test called for by the contract, because the defendants insisted—as they had the right to, unless the guaranty was limited, as claimed by the plaintiff, by what was said at the time the guaranty was given, as shown in point 1—that the test should be made with the winter milk at about 72°. With this understanding established, the agents of the parties, who made the tests of the two separators at Montpelier, were their agents with reference to the test of the Plainfield separator, when compared with the Alpha; and their declarations and admissions, made within the scope of their agency, in regard to the tests of the separators at Montpelier, were the declarations and admissions of the parties, not only in regard to the separators at Montpelier, but also in regard to the separator at Plainfield, as compared with the Alpha at Montpelier. As no exceptions were taken to the charge of the court in regard to the use which the jury were to make of this testimony, it is to be assumed that the court gave the proper and necessary instructions on the subject. None of the declarations and admissions of the agents of the plaintiff who made the tests between the separators at Montpelier, admitted, so far as brought to our attention, were outside the scope of their agency.

4. George R. Remington was one of the plaintiff's agents who made the tests between the separators at Montpelier. While those tests were being made the plaintiff's manager wrote him a number of letters, and sent him telegrams, giving him directions and instructions in regard to making the tests, and in regard to substituting another U. S. cream separator, of a new and different construction, in some respects, from the one which the plaintiff had conditionally sold and placed on trial there. These were produced and given in evidence by the defendants. The exception to their admission taken by the plaintiff on the trial is not now insisted upon. To these telegrams and letters, Mr. Remington replied. These replies were in the hands of the plaintiff. They tended to support the contentions of the defendants in regard to the issues raised in the trial before the jury. Against its exception, the court ordered the plaintiff to produce

them for the inspection and use of the defendants. The plaintiff contends that the court had no power to make this order. By V. S. § 1410, it is enacted: "The supreme and county courts may, in the trial of actions at law, on motion and due notice thereof given, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue or relative to the action, where they might be compelled to produce the same by the ordinary rules and proceedings in chancery." The remainder of the section does not relate to the power conferred. On the authorities cited by the plaintiff,—*Daniell, Ch. Prac. (5th Ed.) 579; Haskell v. Haskell, 3 Cush. 542; Willson v. Webber, 2 Gray, 553*,—the court of chancery has power to compel a party to discover and produce any book or writing which is in his possession or power, and which is material for the establishment of the issues to be established by the orator. The orator, by a bill of discovery, cannot compel the production of books or writings which are only evidence to establish the defendant's contentions. The defendant in a bill of discovery is called upon to make answer to the claims of the orator set forth in his bill, but cannot be called upon to produce the written evidence which he relies upon to support his answer. His conscience cannot be probed for that purpose. But, if he has in his possession or power any books or writings relevant to the rights of the orator set forth in the bill, it is against good conscience and equity that he should withhold the same from the orator, and he can be compelled to discover and produce them. If the jury should find, as the defendants' testimony tended to show, that the tests between the U. S. cream separator and the Alpha, at Montpelier, by the agreement of the parties, were to be tests between the separator in contention and the Alpha, then the telegrams and letters ordered to be produced, and admitted, were relevant and material to the issues made by the testimony. They were sent and written in reply to the telegrams and letters of the plaintiff, through its officers and agents, Northrup and Williams, which it is now conceded by the plaintiff were properly received in evidence, and were necessary for a proper understanding of the latter, and also tended to contradict Williams' testimony that he did not attempt, secretly, to have U. S. cream separator B substituted for U. S. cream separator A at Montpelier, and also in that he was not endeavoring to charge the failure of the latter to stand the test with the Alpha upon the witness Remington.

5. There was no error in the extent of the cross-examination of J. H. James. The interest of a witness, and its extent, may always be shown, to be considered by the jury in weighing his testimony. The limits of such cross-examination are somewhat within the discretion of the court. It is never error

to allow, by cross-examination, a full and fair development of the witness' interest. We do not say it would have been error to have excluded the inquiry in regard to the amount of commission which the witness received while in the plaintiff's service. But it was not error to allow the inquiry and admit the answer.

6. The remark of the defendants' attorney, when cross-examining the plaintiff's manager, to which exception was taken, was provoked and called out by the uncalled-for personal declarations of the witness. At most, it was only the statement of the attorney's views of the construction to be placed on the correspondence referred to. It were better if it had not been made, as the attorney now concedes. Under the circumstances, of which the jury were cognizant, it was not erroneously prejudicial to the plaintiff. This disposes of the exceptions now relied upon. Judgment affirmed.

TAFT, J., being absent in county court, did not sit.

(88 Vt. 440)

CUSHMAN v. HALE, State Auditor.

(Supreme Court of Vermont. Chittenden. July 23, 1896.)

CONSTITUTIONAL LAW — PROSECUTING OFFICER — FINES — STATUTORY PARTICIPATION — REPEAL — VESTED RIGHTS.

1. Acts 1886, No. 41, as amended by Acts 1888, provided that one-fourth of the fines mentioned in certain sections of the Revised Laws should go to the complainant, when complaint was made, otherwise to the prosecuting officer, and for each conviction of a subsequent offense the prosecuting officer should receive \$50, to be paid "after the final determination of such prosecution and sentence of such offender." The act was repealed in 1894, the repeal to take effect December 1st. Within the provisions of Act 41, several prosecutions had been commenced, and convictions obtained, before December 1, 1894. The respondents had been duly sentenced, but each had appealed. The appeals suspended the execution of the sentences till after the termination of the term of the county court to which they were taken, and pending such suspension the law repealing Act 41 took effect. The court in which the prosecutions had been commenced subsequently enforced the sentences, and the fines imposed came into the state treasury. *Held*, that the prosecuting officer had no vested right in the fines when the repealing law took effect.

2. The offer of a fourth of the fines collected to the prosecuting officer, unless the fines had been paid into the treasury before the repeal of the law, was not a contract, or quasi contract, which precluded the legislative power which made the offer from withdrawing it at its pleasure.

3. The prosecuting officer's right to one-fourth of the fines could not attach until the prosecutions resulted in moneys collected as fines, and ready to be distributed; and hence his right to them at the time of the repeal of the act was not a "right accruing," within the meaning of V. S. § 29, which provides that the repeal of an act shall not affect a right accruing before the time when the repeal takes effect.

Exceptions from Chittenden county court.

Petition by J. D. Cushman for a writ of mandamus to compel Franklin D. Hale, state

auditor, to draw an order in favor of the petitioner for one-fourth of certain fines. Heard at the October term, 1895. Dismissed.

J. E. Cushman and R. E. Brown, for petitioner. Bates & May, for petitionee.

ROSS, C. J. This is a petition to have the writ of mandamus issue, commanding the state auditor to draw an order in favor of the petitioner, on the state treasurer, for one-fourth of certain fines paid into the treasury of the state after December 1, 1894. The petitioner claims the right to a fourth part of these fines by virtue of Act 41 of the Acts of 1886, amended by Act 41 of the Acts of 1888. The amendment only made the provision of Act 41 of the Acts of 1886 applicable to one other section of the Revised Laws. Act 41 of the Laws of 1886 provides: "One-fourth of the fines and forfeitures mentioned in sections [naming the sections] shall go to the complainant, when complaint is made, otherwise to the prosecuting officer, and for each conviction of a subsequent offence in violation of sections [naming them] the officer prosecuting said cause to final judgment shall receive the sum of fifty dollars: and the state auditor is hereby directed to draw his order upon the state treasurer in favor of the prosecuting officer for said sum after the final determination of such prosecution and sentence of such offender." This act was repealed in 1894, the repeal to take effect December 1st of that year. Acts 1894, p. 132. In two of the prosecutions named in the petition, the petitioner was complainant, and in all prosecuting officer, being state's attorney at the time. The prosecutions were all commenced, and convictions were obtained in the lower court, before December 1, 1894, and the respondents were duly sentenced, but each appealed therefrom to the county court. The appeal did not vacate the conviction and sentence, unless it was entered in the county court; but such appeal, unless sooner waived, suspended the execution of the sentence until after the termination of the term of the county court to which the appeal was taken. If the appeal was entered, it vacated the conviction and sentence of the lower court. If not entered, the lower court could enforce the sentence after the appeal was waived, or after the termination of the county court to which the appeal had been taken. The terms of the county court to which the appeals were taken did not terminate until after December 1, 1894, when the repealing clause of the statute took effect, and when the petitioner ceased to be state's attorney, and ceased to be complaining and prosecuting officer. None of the appeals were entered in county court. One was waived, but not until after December 1, 1894. After the waiver, in the case in which the appeal was waived, and after the termination of the terms of the county court to which the appeals were taken, in the other cases, the court in which the prosecutions

were commenced, and the convictions had, enforced the convictions and sentences, and the fines imposed came into the state treasury. In case the fine and costs were not seasonably paid, the sentence was that the respondent should be confined at hard labor in the house of correction for three times as many days as there were dollars in such fine and costs. Hence, on December 1, 1894, when the repealing statute took effect, the convictions and sentences were not enforceable, were liable to be wholly vacated by entering the appeals, and were of such a nature that, if enforced, fines, as such, in money, might not come into the state treasury. For these reasons, and because the convictions and sentences became enforceable, and the fines were paid into the state treasury after the repealing statute took effect, the state auditor refused to draw his order on the state treasurer, in favor of the petitioner, for one-fourth of such fines. These fines were not recovered in the name of the petitioner, either as a public prosecutor, or a public suitor. They were recovered in the name of the state, and ordered to be paid to the state treasurer. Such were either the expressed or implied terms of the sentence. If first paid to some intermediate agent of the state, their legal destination was the state treasury, and not until they reached the state treasury did the state auditor have control over them. One-fourth of them was not a part of the salary or fees given to the petitioner as state's attorney. They came to him in that capacity, if at all, because, by virtue of his office, he was a complaining and prosecuting officer,—one of many such officers under the law. It was given, in the first instance, to the complainant, whether a private person or a public officer; and, wanting such complainant, to the prosecuting officer. By the terms of the statute, such complainant or prosecuting officer was to receive nothing for his services in that behalf unless the prosecution resulted in a conviction and sentence, and payment of a fine or forfeiture. While given to encourage prosecutions of this class of offenses, as held in *Wing v. Smille*, 63 Vt. 532, 22 Atl. 74, it was not intended to encourage the institution of unfounded prosecutions, and so wisely withheld an inducement for the commencement of such prosecutions, unless reasonably sure to result in conviction, and the payment of a fine or forfeiture into the treasury of the state. Public policy, rather than payment for services rendered, was the inducement which led to the passage of the law. State's attorneys, and all other public prosecuting officers, were under a duty to institute and pursue prosecutions for all known offenses of this kind, without this inducement. Having been enacted in the interest of the public, the law could be repealed whenever, in the judgment of the lawmaking power, public good required its repeal; and no right would be violated, except such as had become fixed under the law, while in existence. The con-

tion is whether the petitioner had any fixed right to one-fourth of these fines.

1. The petitioner contends that the repealing clause of the act of 1894 should not be given a retrospective or retroactive effect, because there is nothing in the repealing act which declares a legislative intention that it shall be given such effect. This is a well recognized and established rule, applicable to all repealing and other statute laws which would operate injuriously upon established or vested rights. As announced in *Briggs v. Hubbard*, 19 Vt. 86, "Every law that takes away or impairs rights vested agreeably to existing laws, is retrospective." Or, as is defined negatively in the elaborately considered case of *Rich v. Flanders*, 39 N. H. 321: "Acts of the legislature are not to be considered as retrospective unless they impair rights that are vested, because most civil rights are derived from public laws; and if, before rights become vested in particular individuals, the convenience of the state produces amendments or repeal of these laws, those individuals have no cause to complain." Or as defined in the same case in the dissenting opinion of Bell, C. J.: "Every statute which takes away or impairs a vested right acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective in its operation." But on December 1, 1894, the petitioner had no vested right to one-fourth of what afterwards became fines paid into the treasury of the state. He could not have maintained any action for this fourth at that time. They had not then become fines. Whether they ever would was subject to several contingencies. If the respondents entered their appeals in the county court, all which the petitioner had caused to be done in the lower court in procuring conviction and sentence would be vacated. They had indicated their purpose to enter the appeals by taking them. Then the sentences were not absolutely for the payment of fines. It was at the election of the respondents to pay their respective fines, or to neglect to make such payment, and to submit to the alternative sentence at hard labor in the house of correction. In the latter case the fine, as a money fine, would never exist or become enforceable. These contingencies prevented the petitioner's right to one-fourth of these fines from becoming vested. *U. S. v. Morris*, 10 Wheat. 246. In this case, in 1813, a vessel and goods to the value of \$22,361.75 had been seized in the harbor of Portland for violating the nonintercourse act, then in existence, by the collector and surveyor of the port, who, under the law, were entitled to a moiety realized from such seizures. The case had gone to a judgment of condemnation and forfeiture, and execution had been placed in the marshal's hands, commanding him to sell the property. At this juncture, a

remission of the forfeiture, under existing law, had been secured from the secretary of the treasury. The marshal refused to proceed under the execution. The suit was brought in the name of the United States, for the benefit of the collector and surveyor, for one-half of the value of the vessel and goods condemned and adjudged forfeited to the United States, against the marshal, for having delivered the property to the owner, and for refusing to sell enough of it to pay the moiety. The case was argued by Wheaton and Webster for the surveyor and collector, and by Emmet and Ogden for the owner of the vessel and goods, and evidently carefully considered. It was held that the collector and surveyor had no vested right to the forfeiture, and would have none until the money arising from the sale of the property condemned was paid to the collector of the port of Portland; that until then the right of the secretary of the treasury to remit the forfeiture attached, and that the collector and surveyor had only an inchoate, conditional expectancy; that the United States would not become a trustee for the collector and surveyor until it had received the money, by a duly-authorized officer, and held it for distribution. This case, in several respects, is analogous to the one at bar. It is authority for holding that the petitioner had no vested interest in these fines when the repealing law took effect; that then the state held no money in trust for the petitioner, subject to the order of the defendant, as state auditor. The most that then existed was an inchoate, conditional expectancy that these prosecutions might ultimately ripen, as they did, into fines received by the state. To the same effect is *Cooley*, Const. Lim. *p. 359. Under the head of "Interests in Expectancy," he says: "First, it would seem that a right cannot be considered a vested right unless it is something more than such a mere expectation as may be based upon anticipated continuance of the present general laws. It must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand, made by another. Acts of the legislature, as has been well said by Mr. Justice Woodbury, cannot be regarded as opposed to fundamental axioms of legislation 'unless they impair rights which are vested, because most civil rights are derived from public laws; and if, before the rights become vested in particular individuals, the convenience of the state procures amendments or repeals of those laws, those individuals have no cause of complaint. The power that authorizes or proposes to give may always revoke before an interest is perfected in the donee.'" He cites, in support of these propositions, *Weidenger v. Spruance*, 101 Ill. 278; *Wanser v. Atkinson*, 43 N. J. Law, 571; *Merrill v. Sherburne*, 1 N. H. 199; *Rich v. Flanders*, 39 N. H. 304; 1 Kent,

Comm. 455. Hence, giving the repealing statute effect December 1, 1894, when it became an operative law, and giving it no retrospective effect, in a legal sense, the petitioner had no vested right in these fines, to be affected by the repealing statute. Twenty-five Thousand Gallons of Distilled Spirits, 1 Ben. 387, Fed. Cas. No. 14,282; *Inhabitants of Town of Goshen v. Inhabitants of Town of Stonington*, 4 Conn. 208, 10 Am. Dec. 121, and note on "Retrospective Laws and Vested Rights."

2. The petitioner further contends that, inasmuch as he had done what eventually proved to be all that was necessary to procure the payment of these fines into the state treasury, his title to one-fourth of them rests upon a contract, or quasi contract, which the repeal of the law giving him this fourth could not abrogate, nor take away. This contention would be maintainable if the fines had become such, in the possession of the state, before the repealing statute took effect. The infirmity of the contention is that, when the repealing statute took effect, these fines were neither in the possession of the state, nor was their character, as fines, determinatively and unconditionally adjudged and fixed. As to rights and transactions past and closed, under existing laws, the repeal of such laws has not the effect to disturb or discharge such rights. Such are the decisions upon which he relies, and especially *Steamship Co. v. Joliffe*, 2 Wall. 450. But these decisions cited in his brief show conclusively that salary, fees, or bounties offered or given by statutes are not contracts, nor in the nature of contracts. In *Butler v. Com.*, 10 How. 402, in which the question was whether, where persons had been appointed to an office for specified term, at a per diem named, such per diem for the entire term was a contract which the law-making power could not change during the term, the court quote with approval from the opinion of Duncan, J., in *Com. v. Bacon*, 6 Serg. & R. 322, as a clear and compendious statement of the law: "These services rendered by public officers do not, in this particular, partake of the nature of contracts, nor have they the remotest affinity thereto. As to stipulated allowance, that allowance, whether annual, per diem, or particular fees for particular services, depends on the will of the lawmaker; and this, whether it be the legislature of the state, or a municipal body, empowered to make laws for the government of a corporation." It was accordingly held, both by the state and the United States court, that the legislature of the state of Pennsylvania could lawfully reduce the per diem of the officials, who had been appointed under existing laws for a special term of office, during such term, from four dollars to three, per diem. In *Salt Co. v. East Saginaw*, 13 Wall. 377,—another case relied upon by the petitioner,—under a statute a bounty had been offered

to any person or corporation who would bore and find salt water in the state of Michigan, and manufacture a certain number of bushels of salt from such water. The bounty consisted of the payment of 10 cents per bushel for the salt manufactured, and the exemption from taxation of all the property employed in such enterprise. This law was subsequently repealed, after the plaintiff had erected expensive works, and produced the required number of bushels of salt. It was strenuously contended by Mr. Matt H. Carpenter that the offer of exemption from taxation of the works erected by the plaintiff while the offer was in existence was a contract, which the repeal of the law under which the offer was made could not affect. In reply to this contention, affirming the decision of the supreme court of Michigan, the United States supreme court, speaking through Justice Bradley, says: "Such a law is not a contract, except to bestow a promised bounty upon those who earn it, so long as the law remains unrepealed. There is no pledge that it shall not be repealed at any time. As long as it remains a law, every inhabitant of the state, every corporation having the requisite power, is at liberty to avail himself or itself of its advantages, at will, by complying with its terms, and doing the things which it promised to reward, but is also at liberty at any time to abandon such a course. There is no obligation on any person to comply with the conditions of the law. It is a matter fully voluntary, and, as it is purely voluntary on the one part, so it is purely voluntary on the other part; that is, on the part of the legislature to continue or not to continue the law." To the same effect is *Cooley*, Const. Lim. *p. 383. He says: "So, as before stated, a penalty given by statute may be taken away by statute at any time before judgment is recovered. So, an offered bounty may be recalled, except as to so much as was earned while the offer was a continuing one, and the fact that a party has purchased property or incurred expenses in preparation for earning the bounty cannot preclude the recall;" citing the last-named case, from 13 Wall. 377, and as found in 19 Mich. 259. Hence, on the authorities relied upon by the petitioner, whether the offer of a fourth of these fines collected, was made, as held in *Wing v. Smilie*, 63 Vt. 532, 22 Atl. 74, to encourage complainants and prosecuting officers to put into execution statute laws against those who commit the class of offenses named, and considered as fees to pay for services rendered, or as a bounty, such offer, except so far as fully complied with, was not a contract, nor a quasi contract, which precluded the legislative power which made the offer from recalling it at its pleasure. The petitioner cannot legally complain of the repeal of the law and the recall of the offer, although he had taken steps to comply with it, unless those steps had resulted in the payment of fines into the treasury of the

state while the offer was in existence. He relies upon the statute making the offer. He must show a full acceptance of it while the statute making it existed. When the fines became such, in the treasury of the state, subject to the control of the state auditor, the law giving the petitioner one-fourth of them did not exist, and the petitioner cannot lawfully say that the offer created a contract, or quasi contract, or obligation, which the legislature could not withdraw by repealing the law making the offer before the offer was fully accepted by him.

3. He further contends that under V. S. § 29, the repeal of the law making this offer did not affect his right to one-fourth of these fines; that his right to them was a "right accruing," within the meaning of this section of the statute. This section reads, "The repeal of an act shall not revive one which has been repealed, nor affect an act done, a right accruing, accrued, acquired, or established, nor a suit or proceeding had or commenced in a civil cause before the time when the repeal takes effect; nor shall it affect a suit pending at the time of such repeal for the recovery of a penalty or forfeiture incurred under the act so repealed." This section took its present form in the revision of the statutes of 1880. From the marginal note it would appear to be intended, in other language, to express what was included in Gen. St. c. 4, §§ 18, 19; but, from the report of the revisers, it is a record and amendment of these sections so as to conform to chapter 130, §§ 3, 4, of the General Statutes, as containing the later and clearer expression of the legislature on the subject. Sections 18 and 19 are in substance, if not in the exact language, Act 15 of 1851. This act was passed, doubtless, to remedy the defect in the law shown by *Sumner v. Cummings*, 23 Vt. 427, and relates wholly to saving a suit predicated upon a statute repealed pending the suit. This decision was made in the spring of 1851. The plaintiff was cast in the action, after having once obtained a verdict by the repeal of the statute, without a saving clause, on which the suit was brought. Sections 3 and 4 of chapter 130 of the General Statutes relate to the effect of the repeal of statutes made by that revision, and are somewhat broader in scope and language than sections 18 and 19. Eliminating that portion of sections 3 and 4 which relates to the repeal of a statute not reviving a statute before repealed, and to penalties and forfeitures, and suits pending for their recovery, section 3 reads, "Neither shall it [the repeal] affect any act done or any right accruing, accrued or established, or any proceedings, doings or acts ratified or confirmed, or any suit or proceeding had or commenced in any civil cause before the repeal takes effect, but the proceedings therein shall when necessary conform to the provisions of the General Statutes." From this came that portion of V. S. § 29, reading, "nor affect an act done, a right

accruing, accrued, acquired, or established, nor a suit or proceeding had or commenced in a civil cause before the time when the repeal takes effect." It is the manifest purpose of sections 3 and 4 of chapter 130 of the General Statutes to save all rights then in being, which had arisen under existing laws, from being affected by the revision, so far as it should operate to repeal such laws. For this reason it declares that an act done under existing laws shall not be disturbed by a repeal of those laws, nor shall a right accrued or established under existing laws be affected by their repeal. A right might be acquired by a misformed judgment rendered under such laws, or by a duty imposed by such law, and the failure to discharge that duty, which failure operated to the damage of some one, without his fault, as was held in *Harris v. Town of Townshend*, 56 Vt. 716. It may be difficult to specify in advance all the ways in which rights might have been acquired or established, or have accrued, under existing laws. An acquired or an accrued right might not have been established, and need to be shown to exist by proper proof, as was allowed to be done in *Harris v. Town of Townshend*, supra. It would not be difficult to apply these general terms to the facts of cases as they arise. It is more difficult to determine what is intended by a "right accruing." Perhaps the only case decided under the law of 1851 before the enactment of sections 3 and 4 of chapter 130 of General Statutes may throw some light upon such intent. That case is *Pratt v. Jones*, 25 Vt. 303. It is an action of *scire facias* to obtain a new execution upon a justice judgment, which had apparently been satisfied by the set-off of real estate. The real estate was covered by an unnoticed mortgage for its full value, so that in fact the original execution was unsatisfied. At the time of the levy of the execution there was no statute law by which its apparent satisfaction could be shown to be no satisfaction. In 1850 such a statute was enacted, and the plaintiff commenced his suit. This statute conferred upon the plaintiff a right, in the form of a remedy, which did not before belong to him. By bringing his suit under it, this right began to accrue to him, but it would not become a right which had accrued to him until he obtained judgment under it. Then Act 15 of 1851 was passed. In 1853 the act of 1850 was repealed before the plaintiff had obtained judgment, or before the right conferred by the act of 1850 had become an accrued or acquired right. It was held that the act of 1851 saved to the plaintiff the right conferred by the act of 1850, of which he was availing himself, but had not fully availed himself. It was therefore a right given by the statute, which was accruing to the plaintiff when the statute conferring the right was repealed. The same principle is involved, and decided the same way, in *Hine v. Pomeroy*, 39 Vt. 211. The right, in each case, which, under the act

of 1851, was held not to be taken away by the repeal of the statute conferring it, was a remedial right. It was a perfect right given to the plaintiffs by the statute when they brought their suits. But before the plaintiffs had come into the enjoyment of the benefits to be derived from its use the right was taken away, unless saved by the act of 1851. The right, but not the benefits to be derived, was as perfect when they commenced their suits as when the suits should result in judgment. When the statutes conferring the right were repealed, the plaintiffs were in the exercise of a statutory right "accruing." The common-law right of dower is also an example of a right accruing. The wife's right to her husband's lands attaches as soon as he acquires title and enters into possession. Although not an estate in the land while he is living, he cannot divest her of it by conveyance under covenants of warranty. It is a right which she can convey, and must convey, even while the husband is living, to be divested of it, although such conveyance operates only as an estoppel. But she does not come into personal enjoyment of it unless she survives her husband, nor until then. If it existed under our law, it would be a right accruing to her during the life of the husband. Yet, unless saved by the statute under consideration, it can be taken away by statute, during the marital relations, after it has attached to the husband's real estate, because it will not become an interest in such real estate unless she survives him. *Porter v. Noyse*, 2 Greenl. 22, 11 Am. Dec. 30, and note; *Combs v. Young's Widow*, 4 Yerg. 218, 26 Am. Dec. 225, and note; *Strong v. Clem*, 12 Ind. 37, 74 Am. Dec. 200, and note; *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355, and note; *Moore v. Mayor, etc.*, 8 N. Y. 110, 59 Am. Dec. 473, and note. These are instances of a right accruing under law which would be saved by this section of the statute. There may be many others conferred both by remedial and nonremedial statutes. But the repealed statute must have conferred a right, for it is only a right, whether accruing, accrued, acquired, or established, that is saved. Expectations and anticipations are not saved. The petitioner was given no right, under this statute, except to fines and forfeitures when they became such. When the proceedings instituted or prosecuted by him ripened into fines, he took a right to one-fourth of them, and when they were paid into the state treasury the defendant had authority to draw an order in his favor for such fourth. His relation to these fines was not unlike that of a plaintiff to costs, wholly conferred by statute, and which do not attach until final judgment. Hence a variation or removal of them by statute pending a suit disturbs no right of the recovering party. *Taylor v. Keeler*, 30 Conn. 324. As said in this case, such change in the statute may disturb "well-grounded anticipations," but no right, because such

right does not attach until final judgment. *Supervisors v. Briggs*, 3 Denio, 173. The statute gave the petitioner a right to one-fourth of fines. His right did not attach until the prosecutions resulted in fines. Like the right of the collector and surveyor of the port of Portland in *U. S. v. Morris*, supra, it attached only to the money collected as fines, and ready to be distributed. When the prosecutions resulted in fines, no law existed conferring one-fourth of them on the petitioner. Petition dismissed, without costs.

IN RE ATLANTIC HIGHLANDS, R. B. & L. B. ELECTRIC RY. CO.

(Court of Chancery of New Jersey. Aug. 25, 1896.)

RAILROADS—CROSSINGS—MODE OF CONSTRUCTION.

1. Under P. L. 1895, p. 462, providing that, where the route of a railway crosses an established steam railway, applications shall be made to the chancellor to define the mode, who shall proceed to define it, and shall avoid a grade crossing if, in his judgment, it be reasonably practicable to do so, and the public safety so requires, he cannot change the location of the crossing to a point which he considers better for the public.

2. It is not "reasonably practicable," within such act, to avoid a grade crossing of an electric railway or a steam railroad where an overhead or undergrade crossing will cost \$100,000, and will materially interfere with the approach on the highway to an important railroad depot, and it appears a grade crossing can be rendered safe by a signal tower and apparatus for stopping an electric car if the motorman disobey signals to stop.

In re application of the Atlantic Highlands, Red Bank & Long Branch Electric Railway Company to define the mode of crossing the line of the New York & Long Branch Railway Company. Granted.

James E. Degnan, for applicant. Edmund Willson, for town of Red Bank. John S. Applegate, for New York & L. B. R. Co. R. W. De Forrest, for New Jersey Cent. R. Co. Alan H. Strong, for Pennsylvania R. Co.

MCGILL, Ch. The statute (P. L. 1895, p. 462) contemplates that where the route of a steam or electric railway shall cross an established steam railway, outside of a city, the intended crossing shall be constructed so as to inflict as little injury as possible to the rights of the existing railway, and so as to afford proper protection to the public; also, that, before the crossing shall be constructed, the new railway company shall apply to the chancellor to define the mode of crossing, whereupon the chancellor shall cause notice of the application to be given to the municipality in which the crossing is to be located, and to the company whose railway is to be crossed, and then proceed, by his decree, to define the mode in which the crossing is to be made. He is expressly enjoined to avoid a grade crossing if, in his judgment, it be reasonably practicable to do so, and the pub-

lic safety so requires. Under this statute, application has been made to me in behalf of the Atlantic Highlands, Red Bank & Long Branch Electric Railroad Company to define the mode of its crossing the railway of the New York & Long Branch Railroad Company, where, on grade, the latter railway intersects the junction of Bridge avenue and Monmouth street, in the town of Red Bank. It is proved that more than 90 trains daily pass over the New York & Long Branch Railroad at that point, several of them at high rates of speed, and without stopping, and also that immediately southeast of this crossing the railroad depot of Red Bank used by the New York & Long Branch and New Jersey Southern Railroads, to which, every day through the summer months, a large number of carriages and wagons are driven, is situated. The depot is the third in importance on the New York & Long Branch Railroad. The center is undoubtedly a busy one, and the proposed crossing, at grade, if insufficiently safeguarded and managed, will unquestionably, when subjected to additional use by an electric railway, be one of considerable danger. Regarding these conditions, I am satisfied that public safety will be best subserved by a crossing constructed either over or under the New York & Long Branch Railroad, because either of those methods of crossing will afford practically absolute security, principally for the reason that their safe use will depend only in the slight measure which timely repairs may require upon human agency.

The question which has occasioned me some perplexity, and the answer to which controls my conclusion, is whether an overhead or an undergrade crossing is "reasonably practicable," in view of the expense it will occasion, and the injurious incumbrance the first named of them, if adopted, will be to the town. The plans of engineers show that the overhead crossing will be an unsightly affair, and, unless built at a very considerable expense, will dangerously obstruct the street on which it will be erected, and, whether expensively or otherwise constructed, will almost impassably incumber that street at the terminus of the required structure. An undergrade crossing will require change in grades of two streets, and involve not only an expenditure of between sixty and seventy thousand dollars in the work, but also the payment of damage to the owners of the property which borders upon these streets. Besides, a depression of the streets at this point will materially interfere with facility of approach from the street to the steam railroad depot, and will thereby work considerable inconvenience to the public. The representatives of the steam railroad call my attention to the fact that, a short distance from the Monmouth street crossing, the steam railroad now crosses Front street, a highway which is parallel to Monmouth street, and a short distance north of it, by an

overhead bridge, and that by changes of grade and the acquirement of a little property for additional right of way, at inconsiderable expense, a perfectly safe undergrade crossing for the electric railway can be had there. The steam railroad offers to make substantial contribution towards the expense of grading if crossing be had at this point, and to build a new bridge for its road, which will amply accommodate the proposed electric railway crossing. I have studied the plan proposed for this crossing, and am satisfied that it is not only entirely feasible, but also is most desirable for public safety. The objection to my adopting it is that it is not within the chosen route of the electric railway,—the route which the municipal authorities of Red Bank have deliberately sanctioned by ordinance, after having their attention called to Front street as the safest crossing. Now, I am confronted not only with the establishment of this route by the concurrent action of the town and the electric railway company, but also by the opinion and judgment of the authorities of the town, evinced by their ordinance, that the electric railway crossing over the steam railroad should be made at grade. Of course, such expression of opinion does not bind me, but its influence, as the mature judgment of the municipal authorities, who must be assumed to be familiar with the location, and to have acted in sincerity for the welfare and safety of the public, cannot be without weight in my consideration. Yet I am so strongly convinced that the crossing should have been located at Front street that I am satisfied that I would fix it there if I had the power to do so. But I have not that power. It is true, I, perhaps, might indirectly accomplish the change by deciding upon the most expensive method of crossing, as was suggested by one of the counsel of the steam road; but it is remembered that the determination which is required of me is—First, whether an undergrade or an overhead crossing, within the route selected, is "reasonably practicable," and required for public safety; and, second, what method and safeguards in crossing shall be observed. The statute does not contemplate that I shall prescribe any change in the route of an electric road. The answer to the proposition of counsel is that it would be a sacrifice of the integrity of my judgment upon the questions submitted to use it in any manner to secure, by indirection, a preferable crossing outside of the established route of the electric railway. If I were called upon to assent to the route, as were the municipal authorities, I could enforce the Front street crossing.

The question of expense, as an element in the definition of the reasonable practicability of the undergrade or overhead crossing, is dependent in some measure upon public safety; for, if no other crossing will subserve that safety, expense becomes an insignificant element in the definition. And so,

on the other hand, if public safety may be secured in a crossing at grade, the reasonable practicability of the other crossings is in a considerable measure determined by a comparison of their expense with the expense of a safe-grade crossing. It is in testimony that there is an invention by which an operator in a tower, by mechanical signals, can warn the electric car of the approach of a steam train, and, at the same time, raise up on the electric railway track an impediment, called a "scotch block," which will stop the electric car, or turn a switch which will derail it, if its motorman disobeys the signals, and, at the same time also, will deprive the motor of the electric current which furnishes its motive power. The mechanism is so arranged that, when the way for the electric car is open, danger signals, at proper distances, are exhibited on the steam railway. In the hands of a careful operator, this contrivance appears to afford abundant security. The main objection to it is the watchful care it requires of human agency. It is insisted that risk of accident may be reduced still further by the additional requirement that no electric car shall cross the steam road before it shall have first stopped some seconds, and until its conductor shall have gone upon the steam tracks, and have ascertained that the car may safely proceed. It may be doubted whether this additional precaution is not objectionable, in that it may lead to carelessness between the conductor and signal man in the tower, by encouraging the one to be dependent upon the other, or by opening the door to accident, by taking the conductor from the care of the trolley which runs upon the power wire, which, by jolting on the rails of the steam road, may be thrown from the power wire, as was lately the case in this state, and leave the electric car upon the steam railway tracks without motive power. The electric railway company offers this double precaution, and I, however, incline to adopt it provided the tower man be the employé of the steam road, subject to its control and discipline. I think that it presents a fairly safe scheme for crossing at grade, and, in view of it, I am constrained to adjudge that, if it be adopted, the overhead and under-grade crossings which are available at the point in question, costing \$100,000 or thereabouts, should be deemed, reasonably speaking, as impracticable.

I will order that if, before it constructs a crossing, the electric railway company shall give bond to the steam railway company, with sufficient surety or sureties, in the penal sum of \$5,000, conditioned to pay at stated periods the reasonable salaries of such competent tower men, employed by the steam road, and such other expenses, as shall be necessary to the efficient maintenance and management of the signals and cut-offs mentioned, during the continuance of said crossing, and shall completely erect the "Gibb's signal system," including the power cut-off

and the scotch block or derailing switch, and place it in control of the steam railway, it shall be permitted, when it shall have complied with all other legal and lawfully required conditions precedent to give it the right to cross, to cross at grade, by proper crossings put in place at such time of the day or night, and in such manner, as the steam road may designate as least injurious to it, and thereafter to use said crossing, in the exercise of the double precautions referred to. The steam railroad now maintains gates at this crossing. Those gates will, of course, remain, and will be a third safeguard. The electric company must bear whatever expense shall be necessary to adapt those gates for continued use after their wires shall be erected.

KNACK v. USHER.

(Court of Chancery of New Jersey. Aug. 7, 1896.)

CANCELLATION OF DEEDS — FALSE REPRESENTATIONS.

Deeds by a widow without children to one who for many years had lived in her family as her daughter will not be set aside on the ground that those who took her acknowledgments thereto, as well as the one who drew her second will (a different person in each case), represented to her that such papers were merely "relative to the will" which she had first made, by which she gave two lots to such daughter, her statement being denied by several witnesses, and contradicted by statements made by her to various persons; and all the property covered by the deeds, as well as other property, being given to such daughter by the second will, which was executed after the deeds, and also gave certain property to sisters of the widow.

Bill by Maria Knack against Annie Usher.

Chas. E. Thompson, for complainant.

Chas. C. Black, for defendant.

STEVENS, V. C. The complainant files her bill to set aside three deeds of conveyance purporting to have been made by her to the defendant, Annie Usher, dated, one on December 18, 1885, and the other two on April 28, 1886. The land conveyed consists of certain lots situate at or near the southwest and southeast corners of Humbolt street and Bergenline avenue in Union Hill, Hudson county, worth at present from \$15,000 to \$20,000. Their value now is, perhaps, somewhat greater than it was at the time of the execution of the papers. The deeds are attacked—First, on the ground that they were procured by fraud; second, on the ground that, though recorded, they were never delivered.

The following facts are disclosed by the evidence: Maria D. Knack, the complainant, aged 76 years, is the widow of Charles Knack, who died in September, 1885. He left a will, devising all his property, including the above lots, to his wife. The defendant, Annie Usher, who is 36 years old, was an orphan. When about 5 or 6 years old,—

that is, in the year 1866 or 1867,—she was taken into the family of Mr. and Mrs. Knack, who had no children of their own; and up to the time of her marriage, in November, 1886, she was treated by them as their daughter. When confirmed, at the age of 14, she was described in her confirmation certificate as Annie Arberg Knack. From the time she was 14 years old she contributed to the support of the family by working with her needle on piecework done for a New York clothing house. Charles Knack, the deceased husband of complainant, was a carpenter, who had by his thrift saved money enough to buy the lots in controversy and two or three others. He built the houses upon them with his own hands, as he found opportunity. The deeds by which Mrs. Knack, after her husband's death, conveyed the lots in controversy to Annie, were deeds of bargain and sale, and purport to convey to Annie a present estate in fee simple. Shortly stated, the complainant's insistent about these deeds is that, she being ignorant of the English language, they were obtained from her by Annie or her confederates under the representation that "they were relative to" a will admitted to have been made in Annie's favor; while Annie's insistent is that both Mr. and Mrs. Knack, being strongly attached to her, and having no children of their own, desired the greater part of their property to go to her after their death; that Mrs. Knack, in order to give effect to the wishes of both of them, executed and delivered the deeds in question, and that Annie on her part executed a deed or paper to the complainant for the purpose of securing to her, while she lived, the possession and income of the property so conveyed. No less than five papers were in fact executed by complainant in Annie's favor. First, a will bearing date October 19, 1885, just a month after Charles Knack's death, devising to Annie two lots on the corner of Bergenline avenue and Humbolt street; second, a deed bearing date on December 18, 1885, for two lots on the same corner, with this difference, however: that whereas the lots were by the will to extend along Bergenline avenue, the principal street, 100 feet, and along Humbolt street 50 feet, they were, by the deed, to extend along Bergenline avenue only 50 feet and along Humbolt street 100 feet; third, two deeds, bearing date April 28, 1886, one of them conveying two lots on Bergenline avenue adjoining the lots conveyed by the deed of the 18th day of December, and the other conveying a lot on the opposite side of the street; fourth, a will bearing date May 7, 1886, giving two lots (not conveyed by any of the before-mentioned deeds) to her sisters in Germany, and the residue of her property to Annie. Every one of these papers is called in question by the complainant. The first will gives two lots to Annie, and complainant says her instructions were to give only one. As to all the other papers, her sole and stereo-

type explanation of how she came to sign them was, "I thought it was something relative to the will that I made with Dr. Helfer" (alluding to the first will that she executed). And these papers were executed before Annie's marriage to James Usher; the first will and the first deed about a year before, and the other deeds and the second will about six months before. Annie was, at the time of their execution, "keeping company" with James Usher; and James, who was a real-estate agent, appears to have taken some part in the making or recording of all the papers, except the first will. It is singular and significant, however, that while complainant, in her bill, charges that the deeds were obtained by Annie "by false pretenses," in her evidence she does not allege, or even intimate, that she was induced to execute any of them through the persuasion of either Annie or her future husband. Her theory seems to be, if she can be said to have any theory on the subject, that those who actually drew the wills or took the acknowledgments of the deeds made such representations to her at the time she executed them as to lead her to believe that they were "relative to the will that she made with Dr. Helfer." Now, it so happens that the wills were drawn by different counsel, and the acknowledgments were taken before different officers. If her testimony is to be credited, we must assume that, without apparent motive or without concert, these different gentlemen at different times were guilty of making the same misrepresentation. Senator Stuhr, of Hoboken, drew the first will, and Michael T. Newbold, a lawyer of high standing, then practicing in Jersey City, but now dead, drew the second. The acknowledgment of the first deed was taken by Gustav Stahl, a commissioner, who testifies that he made known to her the contents of the deed before she executed it; and the acknowledgments of the two other deeds were taken before Frederick Franback, a practicing lawyer, and master in chancery, who testifies that he did likewise. Three of these gentlemen were of German parentage, and conversed with her in German; while the fourth, Mr. Newbold, appears to have had some knowledge of that language. There is, therefore, no room for supposing that Mrs. Knack misunderstood what they said because of her inability to understand them, even if she herself, though she had lived 41 years in this country, did not, as she testified, understand English. I am inclined to think, however, in view of the testimony of Mr. Harper, an insurance agent with whom she had many business transactions, and of Dr. De Graw, who at one time was her physician, who neither of them spoke German, that she understood and could express herself in English better than she was willing to admit. Nor could failing powers be urged in support of her present contention. While Mrs. Knack was 76 years old at the

time she testified, she gave but little evidence of either mental or physical decay. She is by no means devoid of intelligence, and still assumes the sole management of her property. In answer to the question, "How is your memory?" she replied: "You will find it out the way I talk. I have my five senses pretty well together." If her account of what transpired when she executed the papers is vague and unsatisfactory, it seems to me that the explanation is that she cannot make the facts fit her theory. I have no doubt that she fully understood what she was doing when she executed the papers, and that their purport and effect were fairly stated to her. The evidence fails to show that any undue influence was exerted upon her, or that any fraudulent representations or misleading statements were made to her, either before or when she signed. And what she did, if it be conceded that Annie gave to her a life interest in the property, was both reasonable and natural. I think the evidence demonstrates that Annie was regarded by both Mr. and Mrs. Knack as a daughter. She called them father and mother, and she was thought by many persons to be their own child. In her second will, drawn by Mr. Newbold, Mrs. Knack uses this language: "I give, devise, and bequeath to my dear companion Annie Arberg (sometimes called Annie Arberg Knack), who has for many years past been as near and dear to me as a daughter could be, * * *." It is not likely that Mr. Newbold put this in her will without any instruction on her part. But Annie was not a blood relation. If Mrs. Knack failed to make a positive provision for her, she would get nothing. There is evidence—controverted, however—to the effect that some of Charles Knack's heirs had threatened to dispute her husband's will, the fact being that he had committed suicide, and this may have made Mrs. Knack unusually careful in securing to Annie the enjoyment of what she then intended she should have. There is also evidence that the estrangement between herself and Annie occurred about the time when, according to evidence apparently uncontradicted, Mrs. Knack desired to contract marriage with a Mr. Goertler. I do not attach much weight to this evidence, and only allude to it because it may be thought to shed some light upon the conduct of the parties then and subsequently.

There is another aspect of this case which merits consideration. There cannot be any doubt whatever but that in the year 1886 Mrs. Knack did intend that Annie should have all her property at her death, except that which she contemplated leaving to her two sisters. The will drawn by Mr. Newbold proves this intention conclusively, and her reason for it, viz. that Annie was "her dear companion, * * * as near and dear to me as a daughter could be." Her deeds, made before this will was drawn, had given partial effect to her in-

tention. To give complete effect to it, she supplemented the conveyances by the will, giving two lots to her two sisters in Germany, and providing that Annie should, in addition to what she had already given her, have whatever other real or personal estate (and there is evidence that she had some railroad stock and some furniture) she might die possessed of. In addition to the evidence I have mentioned, there is also evidence of declarations made by Mrs. Knack, tending to show that she knew that she had conveyed the property to Annie, and that she herself alone was no longer able to dispose of it. The only evidence that I will refer to in this connection is that of Mr. Harper, an insurance agent. Charles Knack had built several small houses on the property, and these Mr. Harper had insured. He was accustomed to go to Mrs. Knack's house when the policies needed renewal, and he testifies that, having gone there in March, 1886, he, by direction of Mrs. Knack, changed a policy of \$2,000 on the corner house to the name of Annie Arberg Knack. Subsequently, by the same direction, he changed other policies on the other houses on the west side of Bergenline avenue to the same name. In 1892 and 1893, Mrs. Knack instructed him to change them again, and to have them made out in her own name. Mr. Harper's evidence was supported by references to his books, and strongly corroborates defendant's insistence that Mrs. Knack understood what she was doing when she signed the deeds. The deed of December 18, 1885, was, as I have said, an absolute conveyance of the corner lot and of a lot adjoining. By its terms Annie would have had the right at once to take exclusive possession. This probably was found not to accord with the views or expectations of either of the parties, as they were still living together, and as Mrs. Knack was herself occupying the upper floors of one of the houses so conveyed. Annie's evidence is—and I see no reason to doubt it—that subsequently to the conveyance the complainant agreed with her that if she (Annie) would permit complainant to rent and manage all the property during her life, the complainant would convey to her (Annie) the property described in the deeds of April 28th. Annie further testifies that this agreement was carried into effect, Mrs. Knack conveying the property described in those deeds, and she executing a paper giving complainant a life right in all the property which her mother had deeded to her. This last paper was neither recorded nor produced. I do not attach much weight to Mrs. Knack's denial of its existence. Not only is her testimony on other points unsatisfactory, but she likewise denied the existence of another paper; one in which Mr. Knack expressed to his wife his wish that Annie should have a part of his property after his death. That there was such a paper was proved by several witnesses, and admitted by Mrs. Knack herself when first cross-examined about it, although

she afterwards denied its existence when pressed to produce it. Aside, however, from Mrs. Knack's denial, it is surprising that so careful a lawyer as Mr. Newbold, who is said to have drawn the paper giving Mrs. Knack a life right in the property, should not have taken care to have had it recorded. Nor is Annie's testimony in regard to it very explicit. As she swears, however, that she executed such a paper, and as Annie's husband swears that Mrs. Knack told him that Annie had given her such a paper, and as it is undisputed that for 10 years Mrs. Knack has been in the undisturbed possession of all the property, dealing with it in precisely the same way that any tenant for life would have dealt with it, I think I am justified in finding that the paper existed.

I do not think the contention (not made in the bill) that the deeds were never delivered, and consequently never took effect, well founded. Annie, in the course of her cross-examination, when asked what became of the deeds of April 28, 1886, replied, "Mrs. Knack gave them to me for safe-keeping." On this statement is built up the argument that there was no delivery vesting title. Apart from the legal doctrine that there can be no delivery in escrow to the grantee himself (*Ordinary v. Thatcher*, 41 N. J. Law, 404), and apart from the maxim, "*In traditionibus chartarum non quod dictum sed quod factum est inspicitur*" (*Shep. Touch.* 59), I think the evidence shows that it was intended by the parties that the deeds should take effect, and that they did in fact take effect by an unconditional delivery.

GEORGE et ux. v. GEORGE.

(Court of Chancery of New Jersey. Aug. 20, 1896.)

MORTGAGES—ASSIGNMENT—FORECLOSURE—CANCELLATION OF ASSIGNMENT—EVIDENCE.

1. An executor foreclosed a mortgage transferred to his testator by assignment absolute in form, without making the mortgagees parties to the suit, and himself became the purchaser. The mortgagors, claiming that the assignment to testator was only intended as collateral security, subsequently sued the executor to secure its cancellation on the ground that the obligation secured was discharged. A witness for plaintiffs testified that the assignment was made to secure the testator as surety on the bail bond of one jointly indicted with plaintiffs' son, and to enable him to raise money to back bail a co-surety. The principal died before trial, and the bail bond was discharged. There was no proof that the back bail was ever deposited with the co-surety. Three witnesses for defendant testified that the assignment was made to secure the payment of \$1,000, advanced for the use of plaintiffs' son, and advances to be made to replace moneys embezzled by him, to prevent further prosecution; that \$5,000 was subsequently advanced for this purpose. *Held*, that the assignment was for advances to the son.

2. The bill should be dismissed, subject to the rights of plaintiffs to file a bill to redeem, since they were not made parties to the foreclosure suit.

Bill by Richard George and wife against Samuel M. George, executor, to cancel an assignment of a mortgage to defendant's testator, and to have defendant, who had, on foreclosure sale thereof, become the purchaser, declared to hold the same as trustee for plaintiffs' use. Decree rendered declaring that defendant held the premises subject to plaintiffs' right to file a bill to redeem.

Leon Abbett, for complainants. Geo. T. Wert, for defendant.

EMERY, V. C. This case presents a single disputed question of fact relating to the purpose for which a mortgage was assigned by the complainants, Richard George and Sarah A., his wife, to Philip R. George, the defendant's testator. On March 15, 1887, the complainants conveyed to one Joseph Braeznell a farm in Morris county, of which the bill alleges Richard George to have been the owner, and as part of the purchase price received from Braeznell a bond for \$6,500, secured by mortgage on the premises, the bond and mortgage being given to the complainant Richard George. On or about April 28, 1887, as the bill alleges, the complainants executed and delivered an assignment of this mortgage to Philip R. George, now deceased, to secure him from any loss or damage by reason of his executing a recognizance for \$5,000 on behalf of one John Rosewarne, who had been indicted in the Morris county quarter sessions. Rosewarne died before the time fixed for his appearance. The bail bond was discharged on October 11, 1887, by order of the sessions, and the complainants' case is based upon the claim that, the purpose of the assignment having failed, they were entitled to a return of the mortgage. The bill then claims that Philip R. George retained the mortgage; that after his death, his executor, the defendant, Samuel M. George, foreclosed it as an absolute owner in a suit to which complainants were not parties, bought in the property, and now holds it. The relief asked is that defendant be declared trustee of the lands for complainants, and account for the rents and profits. The defendant admits the assignment to his testator, the foreclosure of the mortgage, and his purchase of the property; but denies that it was assigned as collateral or security for the purpose mentioned, and sets up that Philip R. George purchased the mortgage for full value. The assignment was, on its face, an absolute assignment of the mortgage; and no written evidence, directly relating to the purpose of the assignment, has been produced on either side, both parties relying upon oral evidence as to the object of the assignment. The witnesses upon both sides show that the assignment was intended as collateral security, and the dispute arising upon the evidence is whether the mortgage was assigned solely for the purpose alleged in complainants' bill, or whether it was assigned to secure Philip R. George for ad-

vances made by him at the request of the complainant Mrs. George, in the payment of advances to her son William George, or debts or claims against him. In view of the contradictory character of the proofs, the case is one which must be decided by the weight of the evidence, in connection with the probabilities of the case. The complainants' case is sustained by one witness, Mr. Albridge C. Smith, the attorney of Mrs. George, a member of the New York and New Jersey bar, whose credibility is not attacked or impugned. He says that, acting on behalf of Richard George and William R. George, his son, who had been indicted with John Rosewarne, he had been endeavoring to secure bail in Morris county for Rosewarne, who was in custody, and that William George, of Dover, a brother of Richard and Philip R. George, was willing to become bail for Rosewarne if he could be indemnified; that William George required a deposit of either \$2,000 or \$3,000 to be placed in his hands as part of the condition for going on his bond, and Mr. Smith says that the mortgage and assignment were delivered to Mr. Cunningham, the son-in-law of Philip R. George, who was acting for him, with the understanding that Cunningham was to take the mortgage, and raise sufficient money on it to indemnify William George, so that he would go on the ball bond. The assignment was delivered to Mr. Cunningham on May 20, 1887, and on May 21, 1887, William George and Philip R. George did become bail for Rosewarne, and he was released. There is no proof, however, that any money was ever deposited with William George to secure him, or any independent evidence that he ever asked or required security. Richard George was in Mexico at this time, and Mr. Smith says that the complainant Sarah George was present, and authorized the delivery of the mortgage to Mr. Cunningham for this purpose; but Mrs. George herself says that she knows only what she has been told by Mr. Smith about what became of the mortgage. The case in complainants' bill rests substantially, therefore, on the evidence of Mr. Smith alone. The account of the transaction given by the defendant's witnesses is substantially as follows: William R. George, the complainants' son, had been arrested in New York on Saturday, May 14, 1887, upon the New Jersey indictments, and was in custody until Monday, May 16th, when he was released on habeas corpus proceedings. It was deemed desirable that he should leave this city at once, to avoid re-arrest, and, his father being then absent in Mexico, an appeal was made to his uncle, Philip R. George, the superintendent of the Cooper & Hewitt works at Ringwood, to advance money for him. Philip R. George came to New York on Monday, May 16th, in response to this appeal, and advanced \$1,000 for William R.'s benefit, without any security, and upon Mrs. George's promise that her husband would reimburse him on his return from Mexico. This \$1,000 was given to William R.,

or applied for his benefit, and he was kept in concealment in New York for some days. During this time, and before May 20th, additional charges were made against William R. George of overdraft or embezzlement, amounting to at least \$5,000, from a company of which he was an officer; and when this charge was made it was deemed important that this claim should be settled at once. Between May 16th and May 20th efforts had been made by Sampson George (a son of Philip) and Cunningham to dispose of the mortgage for the purpose of raising funds, but without success, and on May 20th Sampson George says he returned the mortgage to Mr. Smith. In order to raise the money necessary for the purpose of meeting the claim of the company, Philip R. George was again appealed to on May 20th, but he declined to advance any more without security, and it was then agreed that for whatever money he advanced he should have the mortgage as security.

In the assignment of the mortgage the name of the assignee had not been filled in when the assignment was executed and acknowledged on April 26th, the intention of Mr. and Mrs. George being to sell the mortgage, and it was executed in blank on account of Mr. George's departure for Mexico. Pending the efforts of Sampson George and Cunningham to sell the mortgage, the blank in the assignment was not filled, but when these efforts were abandoned, and the mortgage was returned to Mr. Smith on May 20th, as Sampson George states, the mortgage was assigned to his father as security for any advances he should make, and his name was then filled in the assignment, and it was delivered. After this assignment, and between May 20 and June 9, 1887, Philip R. George advanced the \$5,000. This was in addition to the \$1,000 advanced on May 14th. This statement of the purpose for which the mortgage was assigned to Philip R. George is given substantially by three witnesses,—Sampson George, Joseph Cunningham, and John George,—and both Sampson and John George say that nothing was said about Rosewarne. Cunningham, however, says that there was some talk about Philip George's securing Rosewarne's bond for \$1,000, but he is not sure what was done about it. The statement of defendant's witnesses is to some extent corroborated by the probabilities of the case. It is more probable that Philip R. George insisted on and received the security for the moneys he proposed to advance at once for William's benefit, which were likely to be about \$5,000, than that he should be willing to advance these sums without any security, but should, on the other hand, demand security only for money he was to raise to "back-bail" his brother William George on Rosewarne's bond. It does not appear that he ever deposited any money at all with William. If Philip was disposed to insist on security, it is difficult to understand why he

should only desire security for the Rosewarne bond, and not for his immediate advances. The possible reconciliation of the testimony on both sides is that the mortgage was assigned as collateral to secure him for all advances he made on account of William, or of his brother Richard, and that the liability of his brother William on the Rosewarne bond to the extent of \$1,000 or \$2,000 was also to be secured. But in this situation it is evident that the burden is on the complainant to establish by the clear weight of evidence that the advances made at the request of Mrs. George were not to be secured. The preponderance of evidence is on the side of the defendant, and his witnesses' statement of the transaction is further corroborated by the subsequent correspondence between Richard George and his brother Philip R., in reference to the amounts advanced by the latter for William. By this correspondence, which was after Rosewarne's death, it appears that it was known as early as April, 1888, by Richard George, that Philip R. George claimed to hold the mortgage to secure his advances for William; and, although Philip's right to retain the mortgage was disputed on other grounds, and by other persons than complainants, the claim that the mortgage was assigned only in connection with the Rosewarne bond does not seem to have been made until some years after Philip R. George's death.

Considering the whole evidence, I find that the complainants have failed to make out the case alleged by their bill. The bill admits an assignment of the mortgage by both of the complainants to Philip R. George, and does not contest the validity of the assignment upon any grounds. The simple question raised on this bill is whether the assignment was made for the purpose alleged in the bill, but, inasmuch as upon the evidence taken by defendant it would seem that the complainants have a right to redeem the mortgaged property upon paying the amount due to Philip R. George, I will hear counsel for complainants, if he desires, upon the question whether, on this bill, a decree for such redemption and account can be made; otherwise the dismissal will be with costs, but without prejudice to filing a bill to redeem. The complainants, not being parties to the foreclosure suit, are not cut off by those proceedings.

(54 N. J. B. 623)

KOEGEL et al. v. EGNER et al.

(Prerogative Court of New Jersey. Aug. 17, 1896.)

WILLS—CAPACITY TO MAKE—INEBRIETY—ATTEMPTS AT SUICIDE.

1. Inebriety, though long continued, and resulting occasionally in temporary insanity, does not require proof of lucid intervals, to give validity to the acts of the drunkard, as is required where general insanity is proved. Consequently, where habitual intoxication is shown,

there will be no presumption that incapacitating drunkenness existed at the time of making the will.

2. If it be conceded that bona fide attempts to commit suicide, and accomplishment of suicide, manifest a deranged mind, it will not follow that such derangement is inconsistent with ability to make a will. It may exist with testamentary capacity.

3. Proof of mere attempts to commit suicide, and suicide, without more, exhibit, at best, but a temporary mental affliction, having no reference to antecedent or subsequent periods of time.

4. Where a will in English was drawn for a German, who possessed little familiarity with the English language and was habitually intoxicated, by his partner in business, who supervised the execution of the will and took substantial benefit under it, the courts, upon allegation of fraud or undue influence in the production of the instrument, will look upon such circumstances as indicia of fraud or undue influence, and will suspiciously weigh those circumstances in reaching its conclusion upon the issue whether the instrument was the product of fraud or undue influence. If they be not enough to raise a presumption against the instrument, they will at least induce a suspicious scrutiny.

(Syllabus by the Court.)

Appeal from orphans' court, Essex county; Ludlow, Schalk, and Ledwith, Judges.

Eliza Koegel and Julia Heinz appealed from a decree admitting to probate a paper purporting to be the last will of August Mels, deceased, of which will Henry W. Egner and John F. Zimmerman were appointed executors. Affirmed.

Charles Borchertling and Schuyler B. Jackson, for appellants. William B. Guild, for respondents.

McGILL, Ordinary. August Mels was by birth a German, and by occupation a tanner. For many years before his death he lived in the city of Newark, and carried on business there. He committed suicide, by shooting himself, in the yard of his factory, on the 23d of August, 1894; leaving him surviving, as the natural objects of his bounty, his widow and three children by a former wife, a son and two daughters. The daughters were the contestants below, and are the appellants here. The documents in dispute are a will dated on the 21st of December, 1892, and a codicil thereto dated on the 26th of September, 1893. They are impeached by the appellants upon the grounds—First, that the testator was mentally incapable of making them when they were respectively executed; and, second, that he was unduly influenced to make them, or they were fraudulently imposed upon him, by Henry W. Egner, his business partner. With the exception of the signatures of Mels and the subscribing witnesses, the documents are in the handwriting of Egner, who by them is appointed one of their executors, and indirectly is made the recipient of other benefits and advantages, to which I will presently refer. The proofs show that although Mels could speak English, and, with some difficulty, read and write it, he was familiar with, and ha-

bitually used, the German language. About eight years before his death he entered into partnership with Egner in the business of conducting a tannery in Newark, which furnished employment for some 30 or 40 men, and was a prosperous and paying concern. His principal occupation in that business was the superintendency of the manufacturing, and the sale of the products of the factory, while Egner, who was more proficient in the English language, did the office work; that is, kept the books, carried on the necessary correspondence, and attended principally to the financial part of the business. The proofs, however, show that at times Meis was obliged to perform Egner's duties, and that he possessed a sufficient knowledge of English to do so. For 15 or 20 years prior to his death, Meis was addicted to the excessive use of intoxicating liquors, so that he was frequently drunk, and occasionally remained so for days at a time. In that condition, at home, he was irritable, violent, and destructive, acting sometimes as though bereft of his reason. His daughters say that at times he would be so violent that his family, in fear, would fly from the house, and he would break the dishes and furniture, and that once, while in that condition, he was so far demented as to remove his clothing and put it in the stove to burn. One of his daughters thinks that his drunken sprees would average three a week. The other says, generally, that he was constantly drinking, and for years had been a brute. It is testified also by the daughters, in the vague and general terms which characterize the greater part of their testimony, that upon several occasions he attempted to take his own life. This testimony fails to give the particulars of those several attempts, or any account of the causes which led to them. The approximate dates of two only of the attempts, both by hanging himself, are stated, one immediately after the death of his first wife, and the other about two years before his own death. It does not appear whether or not the attempts at suicide and the accomplished suicide were referable to present intoxication or to nervous despondency attendant upon recovery from some continued debauch, or to other causes. That they were attributable to his habits is probable, for Mrs. Heinz says that his condition was caused by "only drinking. It was nothing but drinking." It is admitted by the appellants that their father, when sober, was an industrious and competent business man. It is not shown what his relations with his son were. His daughters complain of him as having been brutal at home; and Mrs. Heinz says—vindictively, perhaps—that after the death of his wife, several years before the will was made, he became so debased as to propose to her that she lead an incestuous life with him. She adds that she recounted this proposition of her father to a neighbor, and to his second wife; and thus, possibly, she discloses a rea-

son why the father may have limited his bounty to her and her sister. The daughters both married, and, when the will was made, were living with their respective husbands. By the disputed will, Meis bequeaths \$2,000 to each of his daughters, and \$1,000, with his household effects, to his widow, and devises to his son, August Meis, Jr., all his real estate, and bequeaths to him his half interest in the tannery business of Meis & Egner; requiring the son, however, to share the homestead equally with the testator's widow, and pay her \$4 each week, during her life, and to pay all taxes, insurance, water rents, assessments, etc., imposed upon the homestead. He also prohibits the son from mortgaging and selling the homestead, and provides that at the death of the son the homestead shall go to his children, and, if he should not leave a child or children, to the children of the testator's daughters. Doubt is expressed whether the latter proviso is not applicable also to the business real estate. The testator was the owner, not only of one-half of the business of Meis & Egner, but also of one undivided half of the real estate constituting the tannery plant. Another important feature of the will is that it enjoins the son to become the partner of Egner in the father's place, and to continue the tannery business, and forbids him to sell his interest in the tannery real estate without the consent of Egner. Egner and John F. Zimmerman are appointed the executors of the will. The codicil states that on the 4th of April, 1893, the testator paid his wife \$1,000, and that, therefore, the bequest of that sum to her in the will is revoked. The proofs do not disclose the value of the properties left to the son, but, from their description, enough appears to satisfy me that his share in the estates was much greater in value than the legacies to his sisters, even though the charge upon it in behalf of the widow, and his limited and incomplete estate, be taken into consideration.

It does not appear that fixed mental disease resulted to Meis from his habitual and excessive use of intoxicants; nor does a presumption to that effect arise either from the proof of his habits, or from such proof coupled with the testimony that at times he attempted to commit suicide, and eventually did take his own life. It is established by abundant authority that inebriety, though long continued, and resulting occasionally in temporary insanity, does not require proof of lucid intervals, to give validity to the acts of the drunkard, as is required where general insanity is proved. Consequently, where habitual intoxication is shown, there will be no presumption that incapacitating drunkenness existed at the time of making the will. Such a condition at that time must affirmatively appear, or the presumption of capacity will prevail. *Lee's Case*, 46 N. J. Eq. 183, 200, 18 Atl. 525. "It is not the law," said Chief Justice Denio in *Peck v. Cary*, 27 N. Y. 9, 23, "that a dissipated

man cannot make a contract or execute a will, nor that one who is in the habit of excessive indulgence in strong drink must be wholly free from its influence when performing such acts. If fixed mental disease has supervened upon intemperate habits, the man is incompetent, and irresponsible for his acts. If he is so excited by present intoxication as not to be master of himself, his legal acts are void, though he may be responsible for his crimes." This judicial utterance, I think, is an excellent epitome of the conclusion of the courts upon this subject. I have had occasion to apply to it in cases which I have heretofore been called upon to decide. *Bannister v. Jackson*, 45 N. J. Eq. 702, 17 Atl. 692, on appeal 46 N. J. Eq. 593, 21 Atl. 753; *Fluck v. Rea*, 51 N. J. Eq. 233, 27 Atl. 636, on appeal 51 N. J. Eq. 639, 30 Atl. 430. We generally attribute the act of self-destruction to a morbid condition of the mind, which may be either fixed insanity, or a temporary surrender of reason. It is regarded as being in the latter condition where the object of the intended suicide is to secure relief from present pains, either in realization of affliction (mental or physical), disgrace or disaster, or the impelling cause is the apprehension of such evils; for we cannot believe that a mind can be in normal health, even though it be cowardly and skeptical as to the future, if it accepts the uncertainty of the state after death as a relief from present mental or physical suffering. But this latter species of mental derangement, if it can be said to exist, "may be, and frequently is, consistent," as was said by Chief Justice Parker in *Brooks v. Barrett*, 7 Pick. 94, "with the exercise of usual discretion in the management and disposition of property. Indeed, the power of reasoning upon other subjects may be wholly unimpaired. The law does not consider the act of suicide as conclusive evidence of insanity. On the contrary, it is held as a crime, unless insanity be proved." And, more than this, it is, in its very nature, transitory; and the proof of its existence, by mere proof of an attempt at suicide, or of the act of suicide itself, by no means establishes its existence at an antecedent or subsequent period of time. No presumption or fixed or lasting mental aberration arises upon such proof. This case presents a man who, during and after protracted excessive indulgence in the use of intoxicating liquors, in all probability suffered from great nervous prostration, and corresponding mental despondency. It may be (the proofs, as I have said, do not give any information upon the subject) that he was in this condition when his attempts at suicide and self-destruction occurred. It is well known that speedy and complete recovery may follow such condition. It follows that the burden in this case was upon the contestants to establish incapacitating temporary insanity or drunkenness in Mels at the very time when the will and codicil were made. *Elkinton v. Brick*, 44 N. J. Eq. 154, 158, 15 Atl. 391; *Lee's Case*, 46 N. J.

Eq. 194, 201, 18 Atl. 525; *Fluck v. Rea*, 51 N. J. Eq. 233, 234, 27 Atl. 636; *Sanderson v. Sanderson*, 52 N. J. Eq. 242, 251, 30 Atl. 823. That they have failed to bear that burden is too clear to admit of discussion. They did not attempt it. But, on the other side, the subscribing witnesses produced, and Mr. Egner, relate particularly that which occurred at the execution of the will and codicil, and, if the witnesses speak truly, exhibit the testator to have been at such times in full possession of his faculties.

Passing to the insistence that the will and codicil were the products of undue influence or fraud, we find the contention to be based upon the participation of Egner in the preparation of the papers, and the advantages he derives from them. Both the papers were drawn by him. They were both executed under his personal supervision, immediately after their preparation. He was the only partner of the testator, and as such, and because of his superior knowledge of the English language, had a strong hold upon the testator's confidence. The will thus prepared by him not only appointed him an executor, but required the testator's son to immediately, upon his father's death, enter into partnership with him, so that the existing business of the firm, "shall" (adopting the language of the will) "be carried on without delay, hindrance, or interruption of any person or persons whomsoever," and forbade the son selling any part of the business property except by Egner's consent. These circumstances are usually reckoned among the indicia of undue influence and fraud, and excite suspicions, especially in case of a testator who suffers from some mental or physical infirmity which renders him an apt subject for imposition. Here the appellants point to the habits of Mels, and to his lack of familiarity with the English language, and to proof that he had some difficulty in hearing. The circumstances certainly arouse suspicion, and demand their critical consideration by the court, though, in view of other circumstances in the case, they do not appear to be strong enough to raise a presumption against the instrument. Mr. Egner was sworn as a witness in this court. He has been registrar of deeds for Essex county, and appears to be a man of fair intelligence. He says that he was accustomed to occasionally draw wills; that Mels first requested him to draw the will in question, and later the codicil; that, some time before the will was prepared, Mels instructed him as to its contents, and that after it was drawn, on the morning of its execution, he and Mels went over it,—Egner reading it, paragraph by paragraph, in both English and German, so that Mels as perfectly understood it as Egner did; that Mels wished his son to become Egner's partner, and that Egner stipulated that, if the son should become his partner, neither partner should sell without the consent of the other; and that, thereupon, Mels said that it was his desire that his son should not have

power to sell without the consent of Egner, because there was a rumor that a railroad company, named, desired to buy the tannery property, and, as the son was young and inexperienced, he might be induced to sacrifice his interest if he had full power to sell, and upon such discussion the restriction upon the son's power to sell was adopted. If Mr. Egner is to be believed, the will was the deliberate and free act of Meis, upon a full understanding of the instrument, and when it was executed Meis was in full possession of his faculties. I think that I should believe this witness, not only because his narration is apparently candid, but because the contestants themselves satisfy me that their father, at least in a general way, understood the will. Mrs. Koegel says that, 8 or 10 weeks before his death (that is, a year and a half after the will was made), her father was at her house, and there complained that his son did not take any interest in his (the father's) business, and did not do right by him, and therefore he would not do all for one child, but would treat them equally; and Mrs. Heinz says that, 2 or 3 months before his death, her father came to her house, in a state of intoxication, and said, as I interpret her meaning, that he had made his will, but was going to make it over again, and give equal shares of his property to his children. Her language is: "He was intoxicated,—very full,—and said he was going to make equal shares; that he had made his will, but was going to make us all an equal share." She adds that he said his son was not fit to conduct a tannery. It is inferable from these declarations that he had become, at least temporarily, dissatisfied with and disappointed in his son, and that he contemplated the abandonment of previous testamentary intentions which gave the son his tannery interest, and made the division of his estate among his children unequal. More than this, the execution of the codicil nine months after the execution of the will manifests a knowledge of the provisions of the former instrument in favor of his wife. The evidence of the witnesses as to the verity of the codicil as his act is corroborated by the production of the check with which the \$1,000 was paid to his wife. Undoubtedly, the provisions of the will that the son should take his place in the firm of Meis & Egner, and that the business should continue without interruption, was advantageous to Egner, but it possessed also the same advantage for the son. Moreover, there is nothing which shows that Egner ever abused the confidence of his partner. On the contrary, the proof is that he tolerated the drunkenness of Meis, and, instead of taking advantage of it for his own gain, in all probability, by his fidelity to his partner's interests, saved his estate for him. Hence it is not surprising that that partner made him an executor of the will. These considerations, I think, overcome the suspicions engendered by the terms of the will, and the participation of Egner in its execution. I

am satisfied that the disputed documents were properly admitted to probate, and will affirm the decree of the orphans' court.

(58 N. J., L. 646)

NEW JERSEY SCHOOL & CHURCH
FURNITURE CO. v. BOARD OF
EDUCATION OF SOMERVILLE.

(Court of Errors and Appeals of New Jersey.
Aug. 24, 1896.)

BREACH OF CONTRACT—DAMAGES—NONSUIT—PER-
FORMANCE—REASONABLE TIME.

1. For the bare breach of a contract, unaccompanied by proof by which actual damage may be inferred or measured, a recovery for nominal damages may be had. *Held*, in such case, it is error to nonsuit the plaintiff.

2. To warrant a nonsuit, it is not enough that the facts are without dispute. The inference that is drawn from such facts must likewise be, in a legal sense, indubious, i. e. one about which reasonable men may not honestly differ.

3. The question of reasonable time is generally for the jury, and always so when it rests upon conflicting inferences as to the mutual effect of the conduct of the parties to the transaction.

Beasley, C. J., and Depue, Ludlow, and Van Syckle, JJ., dissenting.

(Syllabus by the Court.)

Error to supreme court.

Action brought by the New Jersey School & Church Furniture Company against the board of education of Somerville. From an order directing a nonsuit, plaintiff brings error. Reversed.

Linton Satterthwait, for plaintiff in error.
James J. Bergen, for defendant in error.

GARRISON, J. The controversy in this case is over certain school desks manufactured for the defendant by the plaintiff. When the desks were ready for delivery, the defendant refused to accept them, because of delay in filling the order. This action for the contract price was thereupon brought.

At the close of the plaintiff's testimony a nonsuit was directed by the trial court. The two grounds upon which this judgment was directed were that no proof for the measurement of the damages had been offered, and that the delay of the plaintiff had released the defendant from its agreement to take the desks.

Upon the first point the view of the learned justice who tried the cause was thus expressed: "Where the contract is executory,—where the articles are not in a deliverable state at the time of making the contract,—then the property does not pass; and, as there has never been a passing of the property, the only remedy is an action on the case for breach of the contract, or failure to accept. And the measure of damages in the latter case is the difference between what the plaintiff would have received if he had been paid the contract price, and the market value of the goods sold; and, as there has been nothing in this case to show the value of these goods, there is nothing for the jury

to base their verdict upon, for the contract price and the market price may in this case be one and the same thing, and consequently no injury done to the plaintiff."

It is not necessary to pass upon the correctness of this exposition of the law, for the reason that, even if the rule be as stated, it would not sustain the judgment pronounced. The effect of a nonsuit in such case is to concede that the defendant has broken its contract, and yet to deny that the plaintiff may have judgment,—a paradoxical result, for which authority is wanting. At common law a breach of contract was, per se, a legal injury, from which some damage to the plaintiff would be inferred. If actual injury be not proved, nominal damages alone can be recovered. A plaintiff who fails to offer proof by which his injury may be measured is in no worse state than he who proves no injury at all. The accepted rule upon this subject is thus stated by Beasley, C. J.: "Where actionable misconduct is shown on the part of the defendant on the breach of a covenant, the law implies nominal damages at least." *Golden v. Knapp*, 41 N. J. Law, 215.

And in the case of *Quin v. Moore*, 15 N. Y. 432, where a nonsuit was asked upon this ground, Comstock, J., speaking for the court of appeals, said: "As the statute expressly gives the right of action, nominal damages, at least, could be recovered. The motion for a nonsuit, made in part upon this ground, was properly denied."

When we consider that the doctrine of *res judicata*, or even the title to property, may rest upon a judgment for nominal damages as well as upon a more substantial redress, it is evident that the right to a verdict is not controlled by the incidental question of the amount of damages to be recovered.

The cases upon this subject will be found collected in *Sedg. Dam.* § 98, where the proposition formulated by that accurate writer is "that nominal damages may be recovered for the bare breach of a contract, unaccompanied by proof of actual damage."

Before leaving this branch of the case, it may be well to say that the testimony with respect to the articles in suit does not make it entirely clear that they were not within the rule that obtains in cases of specific manufacture. *Sedg. Dam.* p. 137.

The other ground upon which the plaintiff was nonsuited was that, at the time of the offer to deliver the desks, there was no contract between the parties, or, in the language of the trial court, "There can be no recovery by the plaintiffs, for the breach of the contract was by them, and not by the defendants." The facts of the case are not in dispute, being for the most part the written communications between the parties, or the entries in the minutes of the defendant. This circumstance does not, however, of itself, create a question of law for the court, since, if indisputable facts admit of two inferences,

one favorable and the other unfavorable to the plaintiff, a question is presented that calls for the opinion of the jury.

In other words, to warrant a nonsuit it is not enough that the facts are without dispute. The inference that is drawn from such facts must likewise be, in a legal sense, indubious, i. e. one about which reasonable men may not honestly differ.

The proposition, therefore, upon which this nonsuit rests, must be that upon no reasonable inference deducible from the facts before the trial court was the defendant bound to accept the desks at the time they were tendered.

This inquiry necessitates a statement of the main facts of the transaction in question. The negotiation between these parties began at an interview between the defendants, who are public-school directors, and an agent of the plaintiff, a corporation engaged in the manufacture of school furniture. This was prior to July 23, 1894, upon which date the parties executed the following written agreement:

"Memorandum of agreement made this 23d day of July, A. D. eighteen hundred and ninety-four, between the board of education of Somerville, New Jersey, and New Jersey School and Church Furniture Co., of Trenton, New Jersey:

"Witnesseth, that the said the board of education agrees to purchase of said New Jersey School and Church Furniture Co. one hundred and forty-six (146) adjustable, single Novelty desks, grammar size; two (2) teachers' desks, No. 71; one (1) teacher's desk, No. 74.

"The said articles are to be made in good, workmanlike manner, of good material, and to be delivered by said New Jersey School and Church Furniture Co., in the public schoolhouse at Somerville, put up ready for use, not later than September 25th, 1894, and as much earlier as possible.

"And the said board of education agrees to pay to the order of said New Jersey School and Church Furniture Co. therefor the sum of \$510.00.

"[Signed] A. G. Anderson,

"President of the Board of Education,
Somerville, N. J.

"Signed for New Jersey School and Church Furniture Co.: L. H. McKee, Manager."

No desks were delivered under this contract by September 25th, the latest date fixed for the performance; but, on the contrary, the inability of plaintiff to comply with its undertaking was communicated to the defendants, as appears by the following extract from their book of minutes: "October 4, 1894: The agent for the Trenton Furniture Company was present, and stating that, owing to their inability to procure the necessary castings for the adjustable desks, there was no telling how soon they would be able to fill our order for furniture for the new schoolhouse; they had only forty-five or fif-

ty of these desks completed. He promised to put in the New Era desk, either permanently or temporarily. It was the sense of the board that we wanted that desk previously ordered. On motion, the furniture company was requested to ship at once as many of the adjustable desks as they had, and fill in the balance of the order with the New Era desks, the same to be replaced with the adjustable desk as soon as possible."

The outcome of this communication was that upon October 13th the plaintiff shipped to the defendant 160 New Era desks,—an increase of 14 over the original contract. These desks were put in use by the defendant, and nothing further was heard concerning them until March 7, 1895, when it appears by an extract from the defendant's minutes that the New Era desks were deemed not acceptable, and that a member was requested to meet with a representative of the plaintiff to see if some satisfactory arrangement could not be made. At a meeting held on March 14th an agent of the company was present, and agreed that, if the desks of the kind originally ordered were wanted, they would be put in upon April 12th and 13th. Two sample desks were forthwith shipped to the defendant, who, however, makes no mention of the fact in a letter written on April 19, 1895, in which they recite the two failures of the plaintiff to deliver the kind of desks ordered, and say in conclusion: "Your people seem to be determined that we shall accept some other desk than that we purchased, for the reason that you think the adjustable desk will not be satisfactory. The board desires to say very emphatically that we will take the responsibility of any dissatisfaction, provided you furnish what you agreed to, which we expect you to do at once. Please advise. Yours, truly,

"H. P. Mason,
"Secretary Board of Education."

The two letters that follow were received by the defendants, who do not appear to have made any reply to the inquiries they contained:

"Trenton, N. J., April 22, 1895.

"Mr Henry P. Mason, Sec'y B. E., Somerville, N. J.—Dear Sir: In reply to your favor of the 19th inst., concerning our furnishing the original adjustable desk, permit us to say that we will proceed at once to supply the same. We will require a few days to get them in readiness; and, as we learn that you desire the desks darker in color than the last ones, we will have to go over the stock we have again. The original order calls for 146 desks, while we have supplied you altogether with 160. Would you please inform us your desire as to what style and size the 14 extra desks should be?

"Most respectfully,

"New Jersey School and Church
Furniture Co.,

"L. H. McKee, Secretary."

"Trenton, N. J., May 13th, 1895.

"Mr. H. P. Mason, Sec. B. E., Somerville, N. J.—Dear Sir: We are now on the point of shipping the desks, and ask that you kindly let us know about the 14 desks referred to in our last letter. The desks we are shipping according to contract, and are like the two we sent to you some time ago.

"Kindly let us hear from you as soon as possible, and oblige,

"Most respectfully,

"New Jersey School and Church
Furniture Co.

"Dictated.

"L. H. M."

On May 15th, two days after the last of these letters, the defendant wrote to the plaintiff, canceling the order, in these words: "You have failed to keep your part of the agreement, and we are therefore under the necessity of canceling the order with you, and placing it with other parties."

From this brief history of this transaction, it is entirely clear that the agreement as to time was entirely abandoned, and that even the description of the article wanted was for a long period held in abeyance. At least, such would be a not unreasonable inference from the conduct of the parties. It was not, indeed, until the interview sought by defendants, upon March 14th, that the agent of the plaintiff was informed that the New Era desks that had been in use without complaint for over five months were not finally acceptable to the defendants.

The conduct of the defendants in renewing their order for the desks originally ordered, and continuing to urge their delivery, so far from being notice of a purpose to abandon the contract, was consistent alone with the notion that the agreement was still in force. Under such circumstances, the delivery of the desks within a reasonable time after receipt of an answer to the pertinent inquiries of the plaintiff would have been a legal fulfillment of the contract. The question of reasonable time is generally one of fact, for the jury, and is always so when it rests upon conflicting inferences as to the mutual effect of the conduct of the parties to the transaction.

In the present case there was undoubtedly delay, but the question whether a reasonable time had elapsed, or even begun to run, in view of all the circumstances, would seem to be susceptible of two answers, one of which would not be unfavorable to plaintiff's contention.

The further fact that the defendants had in use, free of charge, 160 of the plaintiff's desks, and that the school year had nearly terminated, might also be considered upon the reasonableness of the defendants' conduct, where no specific date was set for filling the order.

There are other circumstances of more or less significance, but enough has been said

to indicate the test according to which, as we think, the whole case should have gone to the jury, viz. that the conclusion of fact to which the learned justice came was not one about which reasonable men might not honestly differ. There must be a *venire de novo*.

BEASLEY, C. J., and LUDLOW, DEPUK, and VAN SYCKLE, JJ., dissent.

HOPPER et al. v. HOPPER et al. (two cases).
(Court of Chancery of New Jersey. Aug. 25, 1896.)

DEEDS—SUIT TO SET ASIDE—WANT OF CAPACITY
—FRAUD.

Deeds from a father, joined in by his wife, to two of his eleven children, of vacant lots, amounting to 4 per cent. of his estate, will not be set aside on the ground that he was incapacitated from paresis (though he was not declared to be insane till five years thereafter), and that he was induced by fraud to execute the deed; the transaction having been open and known by the others at the time, and the evidence pro and con as to his capacity not being such that complainants can be said to have sustained the burden of proof.

Two suits by John G. Hopper and others, one against James G. Hopper and others, the other against Abram G. Hopper and others. Heard on bills, answers, replications, and proofs.

Peter W. Stagg, for complainants. Cornelius Doremus, for defendants.

MCGILL, Ch. The object of these suits is to set aside two deeds made by Garret L. Hopper and his wife, on the 1st of December, A. D. 1887, respectively, to two of the sons of Garret L. Hopper, James and Abram; the deed to James being for two parcels of land, represented as lots 11 and 12 on a map of the property of Garret L. Hopper, at Ridgewood, in Bergen county, and the deed to Abram being for a single parcel, lot 13, on the same map, the lots each being 50 feet wide and 225 feet deep, and worth about \$200. The contention of the complainants is that, when the deeds were executed, Garret L. Hopper was so afflicted with paresis that he did not comprehend the import of his act, and was fraudulently prevailed upon to sign and acknowledge them. Mr. Hopper was a farmer at Ridgewood. He died, intestate, on the 16th of November, 1893, aged about 80 years, leaving, him surviving, his second wife and eleven children, four sons and seven daughters, four of whom, three sons and one daughter, were the children of his first wife. The disease from which he suffered appeared several years before his death, and because of it, in November, 1892, a year prior to his death, under a commission out of the court of chancery, he was found to be so far insane as to be incapable of governing himself and his affairs. The inception of the disease was al-

most imperceptible. It first manifested itself by its subject's forgetfulness and needless repetition of his remarks and questions, and later by his inability to remember friends and kindred, progressing therefrom, by stages, until ability to comprehend and reason was entirely lost. The disease undoubtedly afflicted him in December, 1887, when the deeds in question were executed, but to what extent it then affected his mental faculties is a mooted question in the case. His wife participated in the execution of the deeds, and was present when he signed them. She appears to have been in good health, and it is not intimated that she was not fully cognizant of their purport and effect; and hence it is difficult to understand how, if a fraud was practiced upon her husband, she could be other than, at least, an acquiescent party to it. One of the grantees, James Hopper, to whom two lots were conveyed, was her son, and the other, Abram, to whom one lot was conveyed, was her stepson. She had other children of her own and other stepchildren, and no satisfactory reason is assigned why she should so far prefer James and Abram to those other children as to induce her to participate in an imposition upon her husband, that they might reap an advantage which would be detrimental to their brothers and sisters. It appears to be improbable that she would acquiesce in any such transaction. It is admitted that Mr. Hopper's estate amounted in value to about \$15,000 when the deeds were executed; hence he then parted with about 4 per cent. of his estate. He did not part with that which yielded him a present substantial income. He gave vacant building sites, upon which the two sons might erect houses near him. A gift of this character would not be so unnatural and inequitable to the remaining children as to shock our sense of justice. It is not shown that Abram had special claim upon his father's bounty, but it appears that James resided with his father, and assisted him to work his farm, until he was 27 or 28 years of age, and to within a year of the time when the deed to him was executed, receiving such compensation only as the father was pleased to give him, and that, after he went away, he continually returned to see to the welfare of his parents.

If James is to be believed, the father first suggested a gift to him alone, and afterwards determined to give to Abram also. Neither the character nor the value of the gifts, nor the persons upon whom they were bestowed, are such as to present a glaring impropriety, which shocks the mind, as it approaches the inquiry which the complainants present. The intentment is in favor of the validity of the act, and the complainants are required to clearly bear the burden of proof. The proof they offer comes mainly from two sons, a daughter and a sister of Mr. Hopper, and a neighbor, named Ackermann. One of the sons, John G. Hopper, says that his father

began to be forgetful in 1875; that between 1880 and 1882 he became unfit to transact business; that, for instance, in 1882 he failed to understand an insurance note similar to notes of that character which he had been accustomed to give, and in 1887, when the witness, as assessor of taxes for the township, called to assess him for taxes, forgot that he had sold a \$500 bond, and appealed to his wife to know if he had done so, and in November of the same year, at a silver wedding, away from his home, failed to recognize one of his married daughters. His sister Mary Naugle says that in 1887 he failed to recognize her when she called upon him. His daughter Mary L. Christopher instances his failure to recognize her in 1886, at his own house, and also in 1887, at the silver wedding referred to. His son Albert G. Hopper says that in December, 1887, or January, 1888, he mentioned to his father that he had heard that the father had given James and Abram each a lot, and that the father replied that he had not, but that James and Mrs. Hopper had been doing something which he did not understand. Garret G. Ackermann, the neighbor, says that in 1885, 1886, or 1887, while, as constable, he was conducting a sale about a quarter of a mile from Mr. Hopper's residence, Mr. Hopper came along, unable to find where he lived, and disputed with the witness when he was told which way to go. All these witnesses speak in a general way of Mr. Hopper's forgetfulness, but the instances they give of it date after the year 1887, except as stated. With the exception of Ackermann, they all appear to be interested in the event of this suit, in one way or another. The two brothers John and Albert and the sister Mary are complainants, contesting the deeds, and Mrs. Naugle admits that the complainants have secured her favor by expressing to her a willingness to pay her some money she claims from their father's estate. The testimony as to the condition of Mr. Hopper at the silver wedding, and the general assertions of the complainants' witnesses concerning the degree of Mr. Hopper's forgetfulness in 1887, are disputed by the witnesses upon the part of the defendants; and those witnesses outnumber the complainants' witnesses. Dr. Vroom, a young physician, who saw Mr. Hopper for 20 minutes in 1891, ventures the opinion, based upon Mr. Hopper's condition then, as he was able to note it in his short visit, that Mr. Hopper must have lacked capacity in 1887; but evidently the doctor has failed to take into account the well-known characteristic of paresis, which was stated by Dr. S. Preston Jones, a well-known expert in diseases of that character, in *Wilkinson v. Sherman*, 45 N. J. Eq. 420, 18 Atl. 231, in this language: "These patients will have a bad spell, and take a slip downward, and then they will live for months without a change; then they will have another spell and another slip downward. After these spells, they never rise

up to where they were before." It may be that in 1887 the stage or plane of the disease from which Mr. Hopper suffered admitted of his capacity to execute the deed, and that thereafter, when Dr. Vroom saw him, he had suffered slips downward. Dr. De Mund, a physician of 31 years' experience, testifies that he made three professional calls upon Mr. Hopper in January, 1889, and one call upon him in June of the same year, without at these times noticing any marked peculiarity in his conduct. I need not recite the evidence further. It is enough to say that it satisfies me that, when the deeds were executed, Mr. Hopper's intellect, although to some extent impaired and weakened, was not so far impaired as to deprive him of capacity to understand the deeds and the import of his act when he executed them.

It is admitted that James Hopper got the map of his father's property from him, and took it to a scrivener, whom he instructed as to the preparation of the deeds, and, when they were drawn, accompanied him to his father's house, where they were signed and acknowledged, and was present at the execution of them by his father, and immediately thereafter took possession of them, and paid the scrivener for his services. Standing unexplained, such conduct, coupled with proof of the mental weakness of Mr. Hopper, undoubtedly awakens strong suspicion against the instruments, and leads the mind to a close scrutiny of the circumstances which surround the execution of them; but, when that execution is regarded in the light of those surrounding circumstances, manifesting, as they do, an absence of all clandestinity, I think that the conduct is not sufficient to raise a presumption against the fairness of the transaction. James Hopper testifies that for a long time his father had promised him some ground, and that one morning, in October, 1887, while he was paying his father a visit, the father announced that he had made up his mind to give James a lot, and then directed James to get some one to prepare the deed for him; that thereupon James saw Mr. A. Z. Demarest, a lawyer, and asked him to draw the deed, and Mr. Demarest agreed to do so, but said that he would need the father's map for that purpose; and that thereupon James again saw his father, and together they looked over the map, and the father pointed out two lots that he would give James, and one lot that he would give Abram; and thereupon James took the map to Mr. Demarest, and had the deeds drawn for the lots indicated by his father, and on the 1st of December, 1887, with Mr. Demarest, went to his father's house, where the deeds were handed to his father, who commenced to examine them, and finding that they were in Mr. Demarest's handwriting, handed them to Demarest, and said that, as they were in Demarest's handwriting, he had better read them; and that thereupon Mr. Demarest read

them, and then they were signed and acknowledged by Mr. Hopper and his wife. Mr. Demarest corroborates this testimony, and says that he read one of the deeds to Mr. Hopper, and the description of the land in the other of them, saying that in other respects the deeds were alike. He says that, when he entered the room where the papers were executed, Mr. Hopper sat at a table, and his wife and two younger ladies were in the room. He failed to notice anything peculiar in Mr. Hopper's conversation and conduct. James Hopper says that his sister Kate was in the room, but, although this sister was produced as a witness to show that her father had capacity to execute the deeds, she was not interrogated as to the execution of those papers. Probably she left the room before they were executed, for, in answer to a question upon cross-examination, she says that the first she knew of the execution of the deeds was the morning after they were signed. She does not say that she had not previously heard of the deeds. Who the other woman who was in the room when Mr. Demarest came was does not appear. Neither she nor Mrs. Hopper was produced as a witness. It is explained that the failure to examine Mrs. Hopper was on account of her feeble physical condition. It is regretted that she was not examined as a witness, for, if there be fraud here, as I have said, she must have been a party to it, either active or acquiescent. The transaction thus appears to have been an open and fair one, unmarked by clandestinity. The testimony of Albert Hopper regarding the interview with his father when he questioned him whether he had made deeds to Abram and James fixes the time of his interview almost immediately after the execution of the deeds, and evinces that the giving of the deeds was immediately known in the family. Mr. Hopper lived six years after the deeds were given, and it was not until five of those years had expired that his family took steps to have him adjudged to be a lunatic, and to have a guardian appointed for him. In the meanwhile, James and Abram had asserted their title to the lots conveyed to them, by planting upon them, and paying the taxes assessed against them, and improving the street in front of them. I think that the complainants have failed to make out their case, and I will therefore dismiss their bills, with costs.

(54 N. J. M. 581)

BOICE et al. v. CONOVER et al.

(Court of Chancery of New Jersey. Aug. 14, 1896.)

CHATTEL MORTGAGES — VALIDITY — FRAUDULENT CONVEYANCES — PRIORITIES OF LIENS — RECEIVERS — PAYMENTS ON LIENS.

1. Where the affidavit to a partnership chattel mortgage, given to secure a loan of \$2,000 to one of the partners individually, and indorsements of unmatured firm notes for \$2,800, recited that the true consideration thereof was a

loan of \$4,800 to the firm then due and owing, the mortgage was, as to a prior judgment creditor of the firm, void, under Supp. Revision, p. 491, § 11, declaring a chattel mortgage void as to creditors unless an affidavit is attached thereto stating the consideration, though the misstatement was the result of an honest mistake of the mortgagee.

2. A father, knowing that a partnership which his son was to enter with another would require several thousand dollars capital, promised to lend them \$2,000, and, after the partnership was formed, advanced that amount, and took his son's individual notes therefor, payable in long time, and, on maturity, took renewal notes of his son individually. The son, who kept the firm books, credited the advances as payments on his share of the capital. *Held*, that the advances were to the son individually, and not to the firm.

3. A creditor who accepts a chattel mortgage as security for his debt becomes a purchaser, and cannot therefore, while relying on his mortgage, have a prior voluntary conveyance by the mortgagor declared fraudulent as to him, in his right as creditor.

4. Where two chattel mortgages are in point of time a first and second lien on firm property, and an execution levied on the firm property and individual property of one of the partners a third lien on it, and the first mortgage, which is larger than the execution lien, is as to the execution creditor, by statute, void, as in fraud of creditors, in marshaling the securities the execution lien should be first paid, then the excess of the first mortgage over the execution lien, then the second mortgage in full, and then the unpaid balance of the first mortgage.

5. In such a case the first mortgagee cannot compel the execution creditor to resort first to the individual property levied on to satisfy his lien.

6. Two chattel mortgages on the stock and accounts of a firm, and an execution on the stock, were in time, respectively, a first, second, and third lien; and a receiver, being appointed, paid to the first, with the consent of the second, mortgagee, but without notice to the execution creditor, part of the sum due on his mortgage. The first mortgage was subsequently held void as to the execution. *Held*, that the payment was made subject to the right of the execution creditor, if the payment included part of the proceeds of the stock, to have the same repaid into court, for the satisfaction of his lien.

Bill by Gertrude D. Bolce and others against Cornelius N. Conover and others to foreclose a chattel mortgage, and for the appointment of a receiver. Receiver appointed, and decree rendered, foreclosing complainants' mortgage, and that of defendant Edwin Allen, set up by cross bill, and determining priorities of mortgages and the claim of the defendant Mapes Formula & Guano Company, as a judgment creditor of the mortgagor.

John S. Voorhees for complainants. Alan H. Strong, for defendant Edwin Allen. Chas. H. Runyon, for defendant Mapes Formula & Guano Co.

EMERY, V. C. The dispute in this case relates to the respective priorities of two chattel mortgages, and of a judgment and execution creditor; one chattel mortgage being held by complainants, one by the defendant Edwin Allen, and the execution creditor being the defendant the Mapes Formula & Guano Company. Both chattel mortgages were given by the defendants Cornelius N. Cono-

ver and William Allen, partners as Conover & Allen; the complainants' mortgage being dated on October 21, 1893, and recorded October 25, 1893, subsequent to the defendant Allen's mortgage, which was dated September 8, 1893, and recorded September 9, 1893. The two mortgages cover the same property, and include the partnership stock, horses, wagons, etc., goods and fixtures, and also the books of account, debts, etc., due or to become due to the firm. The judgment of the Mapes, etc., Company, was obtained on December 12, 1893, in the Middlesex circuit court, for \$1,096.61 damages, and \$33.50 costs, upon an account due from the firm of Conover & Allen, which, as appears from the record of the judgment, was incurred between February 2 and April 10, 1893, and previous to the execution of either of the chattel mortgages. Upon execution issued under this judgment, levy was made upon the goods and chattels covered by the chattel mortgages (but not upon the book accounts and choses in action mortgaged), and also upon the separate interest of Conover, one of the members of the firm, in certain real estate in Middlesex county. Levy was made on the execution before the filing of complainants' bill. On December 28, 1893, complainants filed a bill to foreclose their chattel mortgage, disputing the priority of defendant Allen's mortgage as to \$2,000, part of the debt secured by it, on the ground that this portion of the debt secured by Allen's mortgage was the individual debt of William Allen, one of the partners, and was not a firm debt, and the mortgage was therefore charged to be fraudulent and voluntary as to complainants' mortgage, which was given to secure a firm debt or liability. Upon this bill, a receiver of the mortgaged property was appointed, the receiver being Mr. C. H. Runyon, the attorney of the Mapes Company, and the mortgaged property (including the book accounts and debts due) has been sold and collected. Out of the proceeds, the receiver has paid to Edwin Allen the sum of \$2,017.78, under orders of the court (consented to by complainants), to be applied on that part of the debt secured by Edwin Allen's mortgage which was not disputed by complainants' original bill. Subsequent to this sale and collection by the receiver and to these payments, and in order to reach the funds in court for application on his mortgage, the defendant Edwin Allen (at the suggestion of the court, made when the case was brought to hearing) filed a cross bill upon his mortgage against the complainants and the Mapes, etc., Company, who had not put in any answer to the original bill. In its answer to the cross bill, the Mapes Company attacks the Allen mortgage as void for want of a proper affidavit under the statute relating to chattel mortgages, and also as a voluntary mortgage to the extent of \$2,000, in that it was given to this extent by the members of the firm, upon the firm property, to secure an individual debt of one of the

partners, and is therefore void as against the judgment creditors of the firm, whose debts existed at the time of the mortgage.

The defendant Edwin Allen alleges that the entire indebtedness secured, or intended to be secured, by his mortgage, was a partnership debt or liability; and, as against the execution creditor, defendant also alleges that the real estate of Conover, one of the defendants in execution, is sufficient to satisfy the execution, and claims that this must be first sold before resorting to the goods and chattels of the firm. The Allen mortgage was given to secure the payment of \$4,800 on demand, with interest from the date of the mortgage (September 8, 1893); and, in his affidavit annexed to the mortgage, Edwin Allen, the mortgagee, swears that "the true consideration of the said mortgage is as follows, viz. the sum of four thousand eight hundred dollars, cash money loaned by this deponent to said Cornelius N. Conover and William Allen, partners, trading as Conover & Allen, at their request, and before the execution hereof, and now due and owing from them to this deponent; and the deponent further says that there is due on said mortgage the sum of forty-eight hundred dollars, besides lawful interest thereon from the 8th day of September, 1893." It is admitted by the answer and the cross bill of Edwin Allen, and is undisputed on the evidence, that, at the time of giving the mortgage, neither the firm nor William Allen owed Edwin Allen more than \$2,000, and that the \$2,800 additional included in the mortgage represented notes to that amount which Edwin Allen had indorsed for the accommodation of the firm, and on which he was liable as indorser, but which were not then due; so that to this extent the true state of the indebtedness and the true consideration of the mortgage were not disclosed by the mortgage or affidavit. The execution creditor insists that this failure to disclose the true consideration of the mortgage avoids the mortgage as to it under the statute, and also that the affidavit that any of the \$2,000 indebtedness was due or to become due from the firm was false in fact; this being a debt due solely from William Allen for the capital advanced by William Allen to the firm. The disputed question of fact in the case is whether the \$2,000 was an indebtedness due from the firm, or only from William Allen; and, upon the whole evidence, I reach the conclusion that the debt was not a firm debt, but was due to Edwin Allen from his son William alone, and not from the firm. Edwin Allen had no dealings whatever with Conover, the other partner, in relation to the advance of the \$2,000; and this money was at different times between June 20, 1892, and August 3, 1892, paid or advanced by Edwin Allen to his son William, the evidence of indebtedness in each case being notes signed by William Allen alone, which were delivered by him to his father, and were renewed when due by the son's obligations alone. By the agreement between the partners, each was to

contribute \$2,500 capital; and, in the books of the firm, which were kept by William Allen, he entered the moneys received by him from his father as part of the credit to his account as a partner. So far as William is concerned, this and the other evidence in the case (showing that, up to the time of giving the mortgage, these advances from his father had not been treated as a partnership liability) is conclusive, and entirely overcomes his present statement that the money was originally advanced as a loan to the firm. William Allen's statement that the advances from his father were put in his account, "so that it could be either way, that I owed it to him or the firm owed it to him," is of itself sufficient to discredit his present evidence. As to Edwin Allen's evidence on this point, it appears that he knew that it would require about \$5,000 or \$6,000 to buy the stock or business which the firm proposed to take, and that, before the partnership was formed, he promised his son to let them have \$2,000. \$1,000 of the amount was advanced June 20, 1892, on a note for one year, signed only by his son; \$300, on July 15, 1892, on a similar note. These two notes were renewed on falling due, June 20, 1893, and July 15, 1893, by other notes of the son alone, for one year. On July 23, 1892, there was another advance by Edwin Allen to his son of \$500, for which he took his son's note, probably at one year; and on August 3, 1892, the fourth and last advance, of \$150, on William's note for one year. The former was renewed on July 23, 1893, by a note of six months, and the latter on August 3, 1893, by a note at one year. These notes make up \$1,950, and are all the evidences of indebtedness produced in relation to the advances, and Edwin Allen still retained all these renewed notes up to the time of hearing. His explanation of the notes being signed by his son, and not by the firm, is that "he wasn't near the firm's place of business, and, when he gave me these, I didn't have any idea of trouble ahead. I was careless in taking them in that way." This explanation, given when "trouble" had arisen, and his advance to his son is put in jeopardy, is not sufficient to overcome the effect of the written evidence agreed on by the parties at the time of the advances, by taking the securities of his son alone. The time for repayment fixed by the notes is an additional indication that the advances were not temporary loans to the firm, which were to be repaid by them, but that they were advances to the son alone. The money advanced undoubtedly went to the use of the firm, but this is not sufficient to constitute the lender a creditor of the firm (*Bannister v. Miller* [N. J. Ch.; Oct., 1895] 32 Atl. 1066, *Reed, V. C.*); and the question is whether Edwin Allen advanced the money to his son, or whether he advanced it to the firm. Considering the situation and the relationship of the parties, the security given (being notes of the son alone), and the time for repayment, and the whole aspect of the case, it seems to me that there is no

evidence which will justify me in holding that the real transaction was not the one which was evidenced by the writings agreed on by the parties at the time.

Complainants claim that under the decision in *Uhler v. Browning* (1859) 28 N. J. Law, 79, 82, parol evidence is not admissible to contradict the written evidence furnished by the notes themselves, or to show that the notes were debts of the firm. But, without resting the decision upon this point, I find that, as matter of fact, upon all the evidence, it appears that \$2,000 of the indebtedness included in the Allen mortgage was not for cash money loaned by Edwin Allen to the partners at their request, and before the execution of the mortgage, as stated in the affidavit, but was in fact for money advanced to William Allen alone, and the payment of which was assumed by the firm for the first time by the chattel mortgage itself; this assumption by the firm being subsequent to the creation of the debts of the complainants and of the Mapes Company.

It is claimed on behalf of defendant Allen that the indebtedness to complainants was purely voluntary, and arose subsequent to the execution of the Allen mortgage; this claim being based on the facts that the complainants' mortgage was given only to secure them against liability as indorsers for accommodation on a note of Conover & Allen for \$1,500; that the complainant Gertrude Boice was a married woman, and therefore not bound by the indorsement; and that her subsequent payment of the note to the bank which had discounted it was purely voluntary on her part, and not sufficient to constitute her an existing creditor of the firm. The fault in this contention is that it overlooks the fact that the real creditor of the firm upon these notes was the bank, and that the complainant Mrs. Boice, on paying the notes, as she had a right to do, and perhaps was morally bound to do, was substituted for the bank as the creditor of the firm, and therefore, so far as relates to the time when the complainants' debt was created, occupies the position of the bank, as a creditor of the firm existing at the time of the Allen mortgage. *Cramer v. Reford*, 17 N. J. Eq. 367, 380, 384. The real question of difficulty in relation to complainants' case against the Allen mortgage is not whether the complainants were existing creditors at the time of the Allen mortgage, but whether, having taken a mortgage to secure their debt, they are now simply subsequent mortgagees or purchasers from the firm, and not creditors standing in their rights as creditors for an existing debt or liability which was the consideration of the mortgage.

The attack upon the validity of the Allen mortgage is made from two different standpoints: First, under the chattel mortgage act; and, secondly, as a voluntary conveyance made by a firm to secure the individual indebtedness of one of the partners, and there-

fore fraudulent and void against creditors of the firm. The Mapes Company, insists upon both of these objections. The complainants have, on the record, only relied upon the latter objection.

As to the first objection: The fourth section of the chattel mortgage act of May 2, 1895 (Supp. Revision, p. 491), provides "that every mortgage of goods and chattels * * * shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage have annexed thereto an affidavit stating the consideration of said mortgage, and as nearly as possible the amount due and to grow due thereon." The affidavit annexed to the Allen mortgage failed altogether to disclose its true consideration. For \$2,800 of it, the mortgagee was only liable as indorser. For the other \$2,000, the money had been advanced, as I have found, to William Allen, and not to the firm. The status of the indebtedness disclosed in the affidavit diverges so widely from the true state of facts that it seems impossible to deny that this affidavit did not, either in respect to the \$2,800 or the \$2,000, comply with the letter or the spirit of the statute, and the suppression of the true consideration was manifestly material. Mr. Allen's counsel claims that this misstatement was the result of an honest mistake, but the question is one of the construction of a statute, which defines what the affidavit must contain, and makes no exception or allowance for mistakes. As was said in *Kennard v. Gray*, 58 N. H. 51 (a case arising on an affidavit under a somewhat similar law), the statute condemns such securities, because their natural tendency is to deceive and defraud creditors, however honest the intention of the parties. And as was held by Mr. Justice Dixon in *Fletcher v. Bonnet* (Err. & App.; 1893) 51 N. J. Eq. 615, 618, 28 Atl. 601, the validity of the chattel mortgage depends on the correctness of the information in the affidavit, and not on the knowledge of the affiant of its truth. Neither, as it seems to me, can the validity of the mortgage depend on the honesty of an affiant in making an affidavit which is substantially untrue. I hold, therefore, that as against the Mapes, etc., Company, judgment creditors of the firm, the Allen mortgage is void under the chattel mortgage statute.

As to complainants' mortgage the situation is different. It is proved by one of the complainants' witnesses that the complainant Mrs. Boice and her attorney, who drew their mortgage, had actual knowledge of the Allen mortgage at the time of taking their mortgage; and, if the complainants' rights rest solely on their mortgage, she is not protected by the statute, which only covers mortgagees in good faith,—that is, without notice. But complainants claim that they are creditors of the firm and that, inasmuch as the mortgage given to Edwin Allen was to secure a

debt of the individual partner, she is entitled to set it aside as fraudulent against her, under the statute relating to fraudulent conveyances. As to judgment creditors of the firm, the mortgage would be set aside (*Bannister v. Miller* [N. J. Ch.; 1895] 32 Atl. 1066, *Reed, V. C.*); but the question is whether, as mortgagees, the complainants are not to be considered as purchasers, under the statute of frauds, rather than creditors. The complainants are not standing here upon their original debt and upon the rights which the common law and statute both gave them as creditors, to set aside any conveyance made by their debtor to others in fraud of their rights as creditors; but, so far as relates to their lien on the mortgaged property, they stand solely upon a mortgage voluntarily made to them by their debtors of the debtors' rights in personal property, which property had previously been subjected by their grantors to the payment of a voluntary charge in favor of Edwin Allen. Under the statutes relating to fraudulent conveyances, mortgagees of real estate have always been held to be purchasers, and entitled to the protection of 27 Eliz., relating to subsequent purchasers, re-enacted substantially in our statute of frauds and perjuries (Revision, p. 446, § 13). *Lavalette v. Thompson* (1861; *Green, C.*) 13 N. J. Eq. 274, 1 *Smith, Lead. Cas.* (8th Ed.) p. 28. And judgment creditors are not purchasers, within 27 Eliz., so as to avoid voluntary conveyances. *Beavan v. Lord Oxford*, 2 *Jur. (N. S.)* 121. This section 13 of our statute extends in terms only to the purchasers of real estate, and 27 Eliz. has been construed not to embrace chattels. 2 *Bigelow, Frauds*, p. 526, § 2. And it has been held in a late English case (*Barton v. Vanheythuysen* [45 *Eng. Ch.*] 11 *Hare*, *126) that it did not extend to chattels, and that a mortgagee of chattels could not, under his mortgage, attack a previous voluntary conveyance by his mortgagor, although he might have set it aside had he stood simply upon the rights which the law gave him as creditor. See, also, *Bill v. Cureton*, 2 *Myrne & K.* (7 *Eng. Ch.*) 503, 512. *Perrine v. Bank*, 55 N. J. Law, 402, 27 Atl. 640, decides that, where a mortgage is declared to be subject to a prior mortgage, this will prevent the mortgagee, as mortgagee, from contesting the validity of the former mortgage as a fraud on creditors. And, although there was no such provision in complainants' mortgage, it seems to me that, so long as the complainants stand on their rights as mortgagees of goods and chattels under a mortgage given to secure a pre-existing debt or liability, they must accept the mortgage as a mortgage only to the extent of the mortgagors' then interest in the property mortgaged, and cannot, as mortgagees, claim to set aside the previous voluntary mortgage, as a fraud upon them, considered in the light of creditors under the statute. In other words, a mortgagee of a fraudulent grantor cannot attack a fraudulent convey-

ance, on the basis of being a creditor, for the debt which was the consideration of the mortgage; and the reason is that the rights to attack a fraudulent conveyance, given by the common law and statute to creditors, are rights which proceed from the law only, and are given by the law alone to creditors purely as creditors, and having a lien, as such creditors, on the property conveyed. If the debtor, by his voluntary act, intervenes to secure such creditor by mortgage or deed, subsequent to the fraudulent conveyance, the creditor then becomes a purchaser succeeding to his grantor's rights, as they were at the time of the conveyance, and protected only as such purchaser is protected from previous fraudulent conveyances. He is certainly a purchaser, and cannot be at once both creditor and purchaser. This view of the effect of taking a mortgage or conveyance by a creditor is confirmed by the following cases: 1 *Hil. Mortg.* p. 625, §§ 9, 10, citing *Sprague v. Graham*, 29 Me. 160; *Fox v. Clark*, Walk. (Mich.) 535, a leading case. Upon this branch of the case, therefore, I conclude that the Allen mortgage is not invalid against the complainants, either under the chattel mortgage act or as a conveyance in fraud of the creditors of the firm.

The Allen mortgage, which is the first in point of time, being thus valid against the complainants' mortgage, the second security in time, and invalid as against the execution creditor, the third security, and the complainants' mortgage being admittedly valid as against the execution creditor, these three incumbrances, so far as relates to the proceeds of sale of the goods and chattels which they all cover, would regularly be marshaled under the rule settled in *Hoag v. Sayre* (Err. & App.; 1881) 33 N. J. Eq. 552. This rule is that the execution creditor shall first be paid out of the proceeds, so far as the amount due on the first mortgage extends; then the first mortgagee shall receive from the proceeds the balance of the amount for which his mortgage is prior to the second mortgage; then the second mortgagee is to be paid in full; and then the residue to the first mortgagee. The defendant Allen insists, however, that there must be a further marshaling of securities in his favor, and that the execution creditor must first exhaust the separate real estate of *Cornelius N. Conover*, which has been levied on, and not yet sold. If the execution creditor were now here simply as a creditor, seeking, as a complainant, to set aside a fraudulent conveyance, made by the judgment debtors, then, under the rule settled in *Wales v. Lawrence* (1882; *Van Fleet*, V. C.) 38 N. J. Law, 207, it might be necessary to sell the separate real estate of any of the debtors before the property fraudulently conveyed could be reached. But the execution creditor in this case is a defendant, and rests on his levy made on the goods and chattels of his debtors, and upon his statutory rights under the chattel mortgage act to have the mort-

gage of complainants on these chattels declared void as to him. His status as defendant, claiming the benefit of the chattel mortgage act, is different from that of a creditor, as complainant, attacking a fraudulent conveyance under the act relating to fraudulent conveyances; and the fact that the execution creditor has not exhausted his rights against the separate real estate under the execution is no reason for denying him the right, given by the statute, to have the goods and chattels levied on first applied to the payment of his debt, if he so chooses. And, indeed, the sale of the goods and chattels, which was prevented by the appointment of a receiver under a prior mortgage, would otherwise regularly have taken place under the statute, prior to a sale of any of the lands.

The defendant Allen further insists that, upon the principle of marshaling securities, the execution creditor, having two funds, must first resort to the one not covered by Allen's mortgage. But these rules are not applicable. In the first place, there clearly can be no enforced marshaling of securities, unless the securities to be marshaled are all valid as against the creditor whose security is marshaled. To require the creditor in this case first to exhaust the separate real estate would be to compel him to relieve, by his good security, the mortgage which is void against him, and, in effect, would be indirectly holding it valid against him. But, secondly and most important, the doctrine of marshaling does not apply as between creditors of different persons. 14 *Am. & Eng. Enc. Law*, p. 690, and cases cited; 1 *Story*, Eq. Jur. §§ 642-645. Mr. Justice Story says: "Where a creditor has a right to resort to two persons, who are his joint and several debtors, he is not compellable to yield up his remedy against either, since he has the right to stand upon the letter and spirit of his contract, unless some supervening equity changes or modifies his rights. If each debtor is equally bound in equity and justice for the debt, as in the case of joint debtors or partners, where both have had the full benefit of the debt, the interference of a court of equity to change the responsibility from both partners or debtors to one would seem to be utterly without any principle to support it, unless there was a duty in one of the debtors or partners to pay the debt in discharge of the other." See, also, *Dorr v. Shaw*, 4 Johns. Ch. 17, 20, and *Ex parte Kendall*, 17 Ves. 520. In the latter case, Lord Eldon says that there might be an opposite equity,—that of compelling the creditor to go first against the property of surviving partners, primarily liable, before resorting to the separate estate of a deceased partner. In our courts the rule is recognized that the firm assets must be exhausted before the separate estate of a deceased partner can be charged with the firm debts. *Buckingham v. Ludlom* (1883; *Van Fleet*, V. C.) 37 N. J. Eq. 137, 148, affirmed 41 N. J. Eq. 348, 7 Atl. 851. There has been

no issue on the record or suggestion on the evidence in this case that, as between the partners, Conover & Allen, Conover is equitably liable to pay complainants' debt in discharge of the firm assets; and evidently such an issue could not be determined without taking an account between the partners, nor without bringing in all who are interested in Conover's separate real estate levied on. No equitable duty is charged or appears imposing on the partner Conover the duty of discharging the execution for the firm debt from his individual property before exhausting the firm assets, and the judgment will therefore be first paid from the proceeds of the sale of the firm property levied on.

A single question remains for consideration. It relates to the effect of the orders made in the cause directing the receiver, out of the moneys in his hands, to pay the sum amounting to \$2,000 towards payment of the note of that amount indorsed by Edwin Allen, for the accommodation of the firm of Conover & Allen. On March 6, 1894, and before the time of the Mapes Company to answer had expired, an order was made directing that the receiver apply \$750 of the moneys in his hands for that purpose towards the payment of the note then due and held by the National Bank of New Jersey, the said note forming part of the consideration of Allen's mortgage. This order was made upon a written whilver of notice signed by complainants' solicitor, and their written statement, annexed to the order, that no objection was made to granting the same. No notice was given to the Mapes Company. On May 18, 1894, another like order was made, directing the receiver to pay the balance due on the note out of the moneys in his hands so far as they extended. This order was made upon the written consent of the complainants' solicitors, annexed to the order, and also without any notice to the Mapes Company. The receiver made the payments directed by these orders, on March 10, 1894, \$750, and on May 26, 1894, \$1,267.78,—in all, \$2,017.78. The funds in the hands of the receiver consisted of proceeds of sale of the mortgaged goods and chattels embraced in the levy, and also of accounts collected which were included in both mortgages, but were not covered by the levy. The payments were made without the consent of the execution creditor, for, although the receiver was the attorney for the execution creditors, the payments made by him as receiver under orders of the court, and without notice to the execution creditor, cannot be considered as consented to by them. These payments, therefore, must be considered as made out of the proceeds of the accounts collected, as to which the chattel mortgage act does not apply, and as to which the consenting parties also had the authority to consent. They cannot be considered as effective against the execution creditor in relation to the proceeds of sale of the goods and chattels covered by his execution. The execution creditor will therefore

be paid out of the proceeds of sale of the goods levied on, and, if the amounts paid as above exceed the proceeds of accounts collected, the defendant Edwin Allen must return the excess to the receiver, so far as it represents goods levied on for the purpose of satisfying the execution.

The receiver is the officer of the court, appointed by it, to convert the property for the benefit of the persons ultimately entitled; and, for the purposes of paying out in the suit, the money in the receiver's hands must be treated as money in the court. Regularly, money in court can only be paid out on notice to all parties to the suit, or, at least, to all the parties appearing on the record to be interested in the proceeds. Where a fund is improperly paid out of court, without providing for a payment due on it, the court will order the person who has received it to pay the amount. 2 Daniell, Ch. Prac. *1905. The same course is pursued where the fund has been paid out in consequence of fraudulent misrepresentations. Id. *1814. The payment to Edwin Allen in this case must be considered as having been made subject to the rights of the parties who had no notice of the order, and did not consent to it, and subject to any direction on final decree for reimbursement in their favor. The accounts of the receiver will be settled before final decree, if necessary to carry out these directions, and the form of decree settled, on notice to all parties.

(58 N. J. L. 655)

VILLAGE OF SOUTH ORANGE v. WHITTINGHAM.

(Court of Errors and Appeals of New Jersey.
Aug. 24, 1896.)

MUNICIPAL IMPROVEMENTS—EXTENSION OF SEWER.

Authority to a village to extend its sewer into and across the territory of an adjoining township (P. L. 1891, p. 124) does not authorize the construction of a sewer across the lands of a prosecutor lying in a township that at no point touches the boundaries of the village. Dixon, Brown, and Krueger, JJ., dissenting.

(Syllabus by the Court.)

Error to supreme court.

Action by W. R. Whittingham against the village of South Orange. Judgment for plaintiff. Defendant brings error. Affirmed.

James McC. Morrow and Henry Young, for plaintiff in error. R. Wayne Parker, E. L. Price, and Allan McDermott, for defendant in error.

GARRISON, J. This writ of certiorari brings up an ordinance passed by the board of trustees of the village of South Orange. The purpose of the ordinance is to make a connecting sewer between the village of South Orange and a tract of land that it owns in the township of Millburn.

The proposed pipe line or sewer, after leaving the village of South Orange, crosses the

township of South Orange, until it reaches the township of Millburn, where it goes through the lands of the prosecutor. The authority of the village to extend a sewer beyond its own boundaries is derived solely from the provisions of "An act to provide for drainages and sewage in densely populated villages in which there is a public water supply." P. L. 1891, p. 124.

By force of section 4 of this statute, a village of the sort described may, under certain circumstances, construct an extension of its main sewer, "through and across the territory of an adjoining township or municipality in, through, under and across the roads, streets and highways of such adjoining township or municipality, in such manner and to such point or place of discharge and upon such terms or conditions as shall or may be mutually agreed upon by the governing body of such village and the proper municipal board of such adjoining township or municipality."

Beyond this grant of power, which is limited to the territory of "an adjoining township or municipality," there is no authority given to the village to extend its sewers beyond its own limits.

If, therefore, Millburn township does not adjoin the village that seeks to extend its sewer, there is no authority whatsoever for its construction at the point where it affects the prosecutor of this writ. It is an admitted fact in the case that the proposed sewer will run through the township of Orange before it reaches Millburn. It is likewise admitted that Millburn township at no point touches the boundaries of the village, being separated from it by the township of South Orange if a direct line be drawn; otherwise, by other municipalities.

Two localities that are at every point separated from each other by the interposition of a third would not commonly or aptly be described as "adjoining." If a meaning so contrary to the ordinary one is to be ascribed to this word in the present instance, it must be compelled by the context. So far, however, from this being so, an interpretation that would make the more remote township the adjoining one would make the intermediate and actually contiguous township one that was not adjoining,—a result sufficiently preposterous without adding that this construction of the act would empower the village to cross a township upon which it did not border, but would give it no power to cross the territory of the township that intervened. If this difficulty be surmounted, a further anomaly would be that the legislature in that case would have provided that the public highways of the noncontiguous municipality should be protected by a contract with its governing body, but would not have imposed any such duty with respect to the government of the township that would be first affected. If, however, this provision be deemed applicable to the contiguous town-

ship, it must be because it is "the adjoining" one to the village, in which case it would scarcely be necessary to argue that the township to its further side does not adjoin the village. In fine, I cannot see how it is possible to hold in the present case that the township of Millburn adjoins the village of South Orange, without saying that the township of South Orange does not adjoin the village, unless it is by deciding that both townships adjoin the village, which is to deny to words any fixed or known meaning, or to strip an important part of the enactment of all rational purpose.

Under the statute, the prosecutor's land may be taken in invitum. In such case the right to exercise the sovereign power should clearly appear, if not upon a strict, at least upon a fair, construction of the language of the grant.

My conclusion is that no such authority is shown for crossing the land of the prosecutor in the township of Millburn. This is the only point decided, and leads to the affirmation of the judgment rendered in the supreme court, although upon a ground there argued, but not passed upon by the opinion delivered in that court.

There were other points argued before this court that went beyond the case of the prosecutor, and affected interests that were not represented; but, as they were not necessary to the decision of the case in hand, they have not been considered.

DIXON, BROWN, and KRUEGER, JJ.,
dissent.

(56 N. J. E. 610)

CORNISH v. WIESSMAN.

(Court of Chancery of New Jersey. Aug. 27, 1896.)

DEED—BUILDING RESTRICTION—ENFORCEMENT.

1. The use of a portion only of a building for a meat and vegetable store is a violation of the provision of the deed of the lot that the premises are to be used for "dwelling purposes only."

2. The provision in a deed of part of a tract in a residence portion of a city that the premises are to be used for dwelling purposes only will be enforced against one purchasing from the grantee with notice thereof, unless it is made clear beyond the possibility of a doubt that the remainder of the tract will not be damaged by its violation.

Suit by Mary A. Cornish against Peter Wiessman. Heard on bill, answer, replication, and proofs taken orally.

Edward Oakes, for complainant. John R. Hardin, for defendant.

EMERY, V. C. The object of this bill is to enforce certain restrictions in relation to the use of land which was conveyed by complainant, Mrs. Cornish, to defendant's grantor, one James R. Schmidt. The deed from complainant to Schmidt conveyed a lot of

land in Bloomfield, Essex county, 50 feet front, on Broad street, by 150 feet deep, the conveyance containing the following clause at the end of the description: "The above premises to be used for dwelling house purposes only, with the necessary barn and out-buildings." This deed was dated September 20, 1895, and recorded September 25, 1895. On October 3, 1895, James R. Schmidt and wife, for an expressed consideration of one dollar, and, by deed of bargain and sale, conveyed the premises in question to the defendant Wiessman. In this deed the restrictive clause was omitted. Wiessman has put up a building on the premises, and the front part of the first floor of the building (being all of the front except a hallway) he uses for the purpose of a meat and vegetable market. The upper part of the building and the rear of the first story are used for the purposes of a dwelling by the defendant. A porch, with a wooden awning or roof, and supported by small pillars near the curb line, extends across the whole width of the building over the first story, and across the sidewalk. This porch is sometimes used for displaying or storing the meats. On receiving information of defendant's intention to use part of the building for this purpose, and before its erection, complainant filed her bill to restrain the use of the premises in violation of the restriction, and, upon filing the bill, applied for a preliminary injunction, but this was denied, and the rights of the parties reserved to be determined on final hearing. Pending the hearing, defendant, at his risk, proceeded with the erection of the building according to his plans, and is now carrying on a meat and vegetable market on the first floor of the building, and claims the right to do so notwithstanding the restriction in the deed to Schmidt, his grantor. It is not claimed that he is not chargeable with notice of the restriction in Schmidt's deed, for it is conceded that under the doctrine settled in *Brewer v. Marshall*, 19 N. J. Eq. 537, and *Hayes v. Railroad Co.* (1893; McGill, Ch.) 51 N. J. Eq. 345, 349, 27 Atl. 648, the defendant is chargeable with constructive notice of the restriction in the Schmidt deed, which was one of his muniments of title. Upon the question of notice, moreover, I am satisfied from the evidence in this case that the defendant, before taking his deed from Schmidt, had actual notice of this restriction in Schmidt's own deed.

The general rule in this state in relation to the enforcement of restrictions of this character is thus stated by Chancellor McGill in *Hayes v. Railroad Co.*, 51 N. J. Eq. 348, 27 Atl. 649: "It is settled by adjudication in this state, as a general rule, that where a grantor, retaining a portion of the land out of which the grant is made, enters into an express written understanding with his grantee, whatever may be its form, whether covenant, condition, reservation, or exception, which restricts the enjoyment of the portion

of the land which is conveyed, in order to benefit the portion retained, and the restriction is reasonable and consonant with public policy, whether it runs with the land, and is binding at law, or not, it will be enforced in equity against the grantee and any one subsequently acquiring title to the land with notice of it, at the instance of the grantor or subsequent owner or owners of parts of the remaining land, when its violation results in material detriment to the portion of the remaining land, which the complainant in the suit holds." The lot sold to Schmidt was part of a tract containing over three acres, owned by the complainant. Complainant's residence was near the center of the tract, and the whole tract is situated in the residential part of the town of Bloomfield, and is well adapted for residence purposes. There were but few places of business of any kind in the neighborhood, and the restriction was one which, in view of the situation of the remaining tract, it was within the right of the complainant to impose as a reasonable restriction, so that the sole question now is whether she is entitled to have it specifically enforced against the defendant, who purchased with notice.

The defendant's counsel oppose the relief prayed for on two grounds: First, and mainly, because, as he asserts, the building is in fact defendant's dwelling house, and the use of a portion of it as a meat and vegetable store does not violate the covenant. Counsel insist that the house still continues to be a dwelling house, although a portion may be used for a store or market, and treats the case as if the question under the covenant was whether this building may still be considered as legally a dwelling house, although some portion of it is used for a store or market. Even if the question arose in this shape, I should be inclined to say that, considering the object of the restriction, the building, part of which is occupied as a store, could not be called a dwelling house only. One plain object of such a covenant is to distinguish between the use for the purpose of a dwelling house or residence and the use for purposes of trade. But the covenant in this case reaches directly to the use of the building or any part of it. It is that the premises are to be used for "dwelling house purposes only." As it seems to me, it is impossible to say that a "store" or "market" use or purpose is a dwelling house purpose. The whole of the premises (which will include the whole of any building on the premises) must, under the form of this covenant, be used only for dwelling house purposes or barn and out-buildings; and, I think, the use of any portion of the building, for the purposes of the trade defendant carries on, is a clear violation of the covenant.

In the next place, it is urged that complainant has not shown any damage, or, at least, any material damage, from the violation of the covenant, and the court of equity, there-

fore, will not interfere; and I am asked to determine the question of her injury, as matter of fact, upon all the evidence, and especially to decide whether the complainant, with the defendant's meat store where it is, is not better off than before he opened it, and when he carried on his business on the opposite side of the street. The complainant proves by some witnesses that, in their opinion, her remaining property will be damaged for residential purposes by the continuance of defendant's market, and I think their judgment is well founded. The case is certainly one in which the fact that there is no damage is not so clear that it can be said to be free from all possibility of doubt. The rule to be applied, therefore, is the one stated in *Kerr, Inj.* 532, and applied by Chancellor Zabriskie in *Kirkpatrick v. Peshine* (1873) 24 N. J. Eq. 206, where a bay window projected over the building line, and it was urged that no damage was done: "There may be cases in which the damage to arise from the breach of the covenant would be inappreciable, and in which the court would refuse to interfere. But the case must be free from all possibility of doubt. It must be clear that there is no appreciable, or, at all events, no substantial, damage, before the court will, upon the ground of smallness of damage, withhold its hand from enforcing the execution. The mere fact that a breach of the covenant is intended is a sufficient ground for the interference of the court by injunction. A covenantee has the right to have the actual enjoyment of the property, modo et forma, as stipulated for by him. It is no answer to say that the act complained of will inflict no injury on him, or will be even beneficial to him. It is for the plaintiff to judge whether the agreement shall be kept, as far as he is concerned, or whether he shall permit it to be violated. It is not necessary that he should show that any damage has been done. It being established that the acts of the defendant are a violation of the contract, the court will protect the complainant in the enjoyment of the right he has purchased." The right to enforce building restrictions and restrictions upon the use of property is now so clearly settled and so generally recognized, especially as to urban and suburban property, that the whole system of such restrictions would be put in jeopardy if the right to enforce them depended upon the decision of the court in each case as to the amount of damage or injury. A purchaser deliberately and intentionally disregarding the restriction should make it clear "beyond possibility of doubt" that the complainant cannot be damaged. This has not been done here, and the defendant, having proceeded at his peril with the erection, after notice of complainant's rights and her intention to enforce them, must bear the penalty. An injunction will be advised restraining the use of the premises or any part of the building thereon for the purpose of his market,

and from the use of the building except for dwelling house purposes only. Complainant is entitled to costs.

(55 N. J. E. 127)

DANFORTH et al. v. MOORE et al.

(Court of Chancery of New Jersey. Aug. 7, 1896.)

TENANTS IN COMMON—EXPENDITURES—CONTRACTS
—TRUSTEE—LIABILITY.

1. Evidence of a declaration by a tenant in common of property, to a disinterested person, that he was operating it entirely at his own expense, is not sufficient to establish a contract on his part not to make any demand on account of his expenses.

2. In the absence of a contract, the only remedy for a tenant in common who makes expenditures on the common property is to have the part improved set aside to him on a partition, or, this being impracticable, to obtain an equitable allowance, on sale in lieu of partition.

3. Where property held in common is sold pursuant to an agreement of the tenants in common, among themselves, that, from the proceeds, there shall first be paid to them the respective amounts found to be due to them, as debts, and this has reference to expenditures made by them on the property, the agreement will be enforced, but such expenditures will not be considered debts, so as to bear interest from the time they were made up to the time of such agreement.

4. Where an agreement is made by the owners of railroad bonds, the purchasers thereof, and the agent negotiating the sale, that one of the owners shall be custodian of them, and make pro rata delivery thereof to the purchasers, as partial payments in money are made, and pay the agent his commission when a certain amount of the purchase money is paid, he will be liable to the other owners for making delivery of part of the bonds for a worthless note, and for delivering others to the purchasers on their agreement, to pay the agent; the purchasers not having then or afterwards paid the amount which entitled the agent to his commissions.

5. The loss by reason of such delivery will, in the absence of evidence as to the value of the bonds, or any regular market value, be the price put on them in the contract of sale made shortly before; allowance, however, being made for the fact that the remaining bonds, which the purchasers failed to take, were benefited by a necessary expenditure in improving the road, which the purchasers made pursuant to their agreement that they would do so if the bonds should be delivered in consideration of the note.

6. On a sale of railroad bonds, one of the owners was made custodian thereof, to make delivery of pro rata amounts as partial payments were made. Without authority, he delivered some of them for a worthless note. Thereafter, the purchasers having failed to take the remaining bonds, and the road having become insolvent, and there being litigation pending in which the organization of the railroad and validity of the bonds were attacked, the other owners proposed a sale of them for a certain amount, and he agreed to a sale at any price, "provided, however, I am forever thereafter relieved from any further responsibility or liability in any way relative to said railroad, or the securities thereof." Held, that this did not have reference to or include his liability to the other owners for this unauthorized delivery of bonds.

Bill by Waldo Danforth and another, executors of Edward G. Brown, deceased, against James Moore and others, for an accounting.

Heard on bill, answers, replications, and proofs.

J. R. English and A. S. Brown, for complainants. Frank Bergen, for defendants.

EMERY, V. C. The bill in this case was filed by the complainants, as executors of Edward G. Brown, one of three tenants in common, against James Moore and John Kean, the other two tenants in common; and, John Kean having died after answer filed, the suit has been continued against his executors by an order of revivor. The common property was sold previous to the filing of the bill, under an agreement in writing made between the complainants and Moore and Kean, and the proceeds of the sale have, by virtue of the agreement, been paid over to John Kean, Jr., as trustee, who is also made party defendant in that capacity. The object of the bill is twofold: First, to recover for the complainants the disbursements which were made by Edward G. Brown in his lifetime, for the repairs and improvements made upon the common property, and in managing the property, with interest thereon, payment of these sums being claimed before any division of the proceeds of sale among the tenants in common or their representatives; and, second, to charge the defendant James Moore, one of the tenants in common, with the amount of two notes, aggregating \$12,000, which were taken by him as part of the proceeds of sale, and which turned out to be worthless, and also to charge him with a certain other payment or allowance of \$1,500, made by him. For these amounts the complainants claim that Moore is accountable, under the agreement of sale.

So far as relates to the claim for contribution or reimbursement of the expenditures made by the deceased tenant in common, the facts established by the pleadings and proofs are as follows: The property in question was a horse railroad on Staten Island, in the state of New York, with its appurtenances and franchises, which was purchased on or about August 22, 1871, by deed of that date, at a sale by public auction, made by a trustee under a mortgage given by the Staten Island Shore Railroad Company, and the property purchased consisted of both real and personal property. The purchase price was \$31,000, and the deed conveyed the railroad franchises and all the property of the company owned by it at the date of the sale. The defendant James Moore was the sole grantee named in the deed, but the purchase was made on the joint account of Edward G. Brown, the complainants' testator, and the defendants James Moore and John Kean. About the 1st of September, 1871, and while the title still stood in Moore's name alone, Brown took charge of the railroad. No direct evidence has been given by the defendants of any express agreement made with Brown by the other co-owners when he took posses-

sion, or of the terms of any such agreement; but a recital or statement contained in the agreement for sale made between the parties to this suit throws some light upon the character of the entry, if it can be used for that purpose. This agreement, dated September 1, 1887 (Exhibit C 5), recites the purchase by Brown and Kean, respectively, from Moore, of a three-eighths interest in the property and franchises, on the 22d day of August, 1871 (the day of Moore's purchase), and then proceeds: "And whereas, afterwards, by the consent of said Kean and Moore, the said Brown (whose business fitted him therefor) assumed the control of said property, and managed the running of the horse railroad so purchased as a part of the property of said corporation, and for many years had the entire control of the receipts and disbursements of money incident thereto." This agreement also refers to a suit then pending in this court, by the complainants, as executors of Brown, against the defendants Moore and Kean, which was about to be argued, in which the complainants alleged a co-partnership between the tenants in common, in the operation of the road, and seek to recover these advances, and the last provision of the agreement is "that nothing contained in it, either in recital or agreement, should in any way abridge or estop or by any implication affect the defenses made or to be made in that suit, or on its hearing and final determination."

At the time Brown took charge, the road was not in operation, and was in such condition that it could not be operated without large expenses for repairs and improvements. The track was settled, and required raising and relaying for the whole or a large part of its entire length,—seven miles. The ties were rotten, and required replacing. It had no horses, or, at least, not more than two, and the cars were in bad repair; and, besides these and a few sets of old harness, there was no equipment or rolling stock. Brown, after assuming control, proceeded with the repair and improvement of the road, and the purchase of horses and rolling stock, and general equipment for operation, and began the operation of the road; and advanced the money necessary for this purpose, after applying the receipts of the road. He purchased, in August or September, 1871, about 20 horses, for about \$2,700, and more in the following spring, all being used on the railroad. The total expenditures made by Brown previous to July 1, 1872, on the construction of the road, was \$6,273.34,—for horses, \$4,699.82; rolling stock, office furniture, harness, and tools, \$1,139.90. The details appear in Exhibit C 1, a cash balance, dated July 1, 1872, which also shows that the receipts up to that time had not been sufficient to pay the operating expenses. Up to that time, Brown had advanced \$15,849.42, for the purposes of the road, and John Kean \$1,500. As to this payment by Kean,

he says in his answer "that, soon after the purchase of the property, Brown suggested to him that it would be of advantage to the property to make certain repairs and improvements, which would cost a few thousand dollars, and asked him to co-operate in having the same made; that he consented to said repairs and improvements being made, and contributed his proportionate expense thereof, viz. \$1,500." There is no other evidence than this admission of his answer relating to the circumstances of this advance by Kean; and, if the statement is to be taken as an admission of consent to the repairs and improvements, it must, of course, be taken as a whole, and subject to its qualifications. Moore made no advances whatever, nor does it appear that he was ever requested to contribute to this purpose. About October 16, 1872, more than a year after the original purchase, and after Brown and Kean had made their advances, Moore, in whose sole name the title to the property purchased in August, 1871, had stood up to this time, executed a deed conveying to Brown and Kean each a three-eighths interest in the railroad property, rights, and franchises, as tenants in common, in the proportions of two-eighths to Moore, three-eighths to Brown, and three-eighths to Kean. This deed has not been put in evidence by the complainants, and the only evidence as to the property conveyed or intended to be conveyed by it must be derived from the admissions of the bill and answers, which leave it somewhat doubtful whether the deed to Brown and Kean purported to convey the personal property which had been brought by Brown, and used on the railroad, after August, 1871, or whether it conveyed simply the property, which at the sale in August, 1871, belonged to the Staten Island Horse-Railroad Company. The complainants, in their bill, make the conveyance of October 16, 1872, the origin of their title and rights, and allege that Brown took possession of the railroad and made his expenditures subsequent to that date; but the evidence shows that this is a mistake, and that Brown really took possession and expended the money for which he now seeks reimbursement while the title to the property (except the personal property bought by Brown) stood in the name of Moore. No conveyance of the personal property purchased by Brown, or of any interest therein, appears to have been made by him to either of the other tenants in common. After the conveyance to him as tenant in common, Brown continued to operate the road up to the time of his death, in March, 1886; making personally whatever advances were necessary in running the road over and above the receipts, and receiving and crediting in his account whatever surplus resulted from the operation of the road. Up to about 1880 there was no surplus, and up to this time, as appears by the accounts, Brown had ad-

vanced nearly \$20,000. From 1880 to 1886 there was a surplus over expenses, which surplus Brown received and credited to his account, but making no credit of any portion of the surplus to Kean's account for advances. At the time of Brown's death, the balance due him for advances, after applying the surplus receipts, amounted to \$13,130.85, being less than the sum advanced by Brown during the year 1871, and prior to July, 1872. Up to the time of Brown's death, the only payments or advances made by Kean in connection with the road or its operation were the above payments by Kean of \$1,500, admitted in his answer, and also the sum of \$187.50, paid by Kean in December, 1880, as his proportionate share of a loss of \$500 on the operation of the road, occasioned by an accident. At this time (December, 1880), as appears by the books, defendant Moore is also credited with \$125, as contribution on the same account. Kean, in his answer, admits these advances for these purposes; but Moore alleges that he advanced the \$125 to Brown as a loan, and on his promise to repay. Mr. Cunningham, the superintendent, says that he personally received \$500 of the \$1,500 from Mr. Kean; but beyond this no evidence has been given on either side relating to these advances, except the entries in the books kept by Brown, and these do not appear to have been seen by Moore or Kean until after Brown's death.

On September 30th of each year, trial balances and balance sheets were made out, which showed the advances made by Brown and Kean, and copies of these were given to Mr. Brown; but there is no evidence that any of these statements were ever received by either Kean or Moore, or that any statements or accounts of the expenditures were ever submitted to either of them by Brown during his management, except in one instance. The bookkeeper, Rogers, on September 30, 1879, in addition to the balance sheet for the year, made out a statement in connection with it, called "Statement of Cost of the Staten Island Shore Railroad" (Exhibit C 32), as follows:

September 30, 1879.	
Original cost at auction, year 1871..	\$31,000 00
Expended on road since.....	22,032 96
	<hr/> \$53,032 96
Interest a/c.	
Interest on the original cost, 8 years.....	\$17,600 00
Interest on the expenditures since, 7 ¹ / ₁₀ years	12,040 25
	<hr/> 29,640 25
	<hr/> \$82,673 21

Length of road, 7¹/₄ miles.
18 passenger cars; 89 horses.

This statement came to Mr. Moore's hands, as appears by an indorsement in ink in his handwriting, "Staten Island Shore Railroad, Sept. 30, 1879," and by a lead pencil note in his handwriting at the bottom of the statement, referring to an introduction of a

Mr. Haynes. Moore, although called as a witness, was not examined as to his receipt of the statement, and no proof was given of the time of its receipt. The statement was produced by the complainants, and would therefore seem to have been returned by Moore to Brown, or some one for him, after his indorsements. In reference to Brown's disbursements in managing the road, it should also be stated that no evidence has been produced by the complainants of any express contract by the other co-tenants with Brown agreeing to contribute to the expenses for repairs and improvements; nor is there any evidence that previous to 1885 either Kean or Moore had been informed by Brown that his expenditures had not been reimbursed from the receipts of the road. The answers admit that about that time the other co-tenants received this information, but, in connection with this admission, allege that, on being informed, they denied Brown's right to reimbursement or contribution as a first charge or debt of the road.

After Brown's death, in 1886, the defendant Moore took charge of the road and its property, including all the personal property used in operating it, and operated the road; and both Moore and Kean made advances for its operation, over and above the receipts of the road. Shortly after Brown's death, his administrator pendente lite (as appears by the recitals in the agreement of September 1, 1887), before any division or sale of the common property, either real or personal, commenced a suit against Brown and Kean, seeking to charge them as co-partners, for the amount of the advances made by Brown in his lifetime. To this suit, the present complainants, after the probate of the will, succeeded as complainants; and, pending the suit, an agreement for the sale of the common property and the disposition of the proceeds of sale was executed under the seals of the executors of Brown and the defendants Moore and Kean. This agreement, dated September 1, 1887, recites the purchase by Moore, on August 22, 1871, of the rights, properties, and franchises of the Staten Island Shore Railroad Company; the purchase thereupon by Kean and Brown of a three-eighths interest each in the said interests, franchises, and properties; that, by the consent of Kean and Moore, Brown assumed control of the property, and managed the running of the horse railroad so purchased as a part of the property of the corporation, and for many years had entire control of the receipts and disbursements of money incident thereto; that, before a settlement between the parties interested in such purchase, Brown died; that suit had been brought, and was pending, by Brown's representatives, alleging a co-partnership in the management of the road, and claiming recovery for his advances, in which suit Kean and Moore denied the co-partner-

ship, and also denied the allegation of advances; that Moore had managed the railroad since Brown's death, and he (Moore) and Kean had advanced and paid moneys for this purpose; that Moore and Kean had interested themselves to procure a purchaser for the said rights, franchises, and properties, with a view of discharging all obligations incident thereto, and procuring the moneys advanced by them, with such profit as the sale might afford, and considered that they had found a purchaser for the sum of \$50,000, being the Staten Island Belt Line Railroad Company, to be paid as specified; that this purchaser, in concluding such arrangement, insisted that the complainants, as executors as aforesaid, should join in the execution of the conveyance to them of the rights, franchises, and properties aforesaid; that the executors, at the request of Kean and Moore, were willing to do so if the execution would forward a settlement of the conflicting claims in the matter, and especially would not defeat their claims in the pending suit; and finally reciting as follows: "And whereas, it is deemed advisable by said Kean, Moore, and said executors that the question of amount claimed by said administrator in and by his said bill of complaint, and now claimed by said executors, shall be paid out of such purchase money when the same shall be procured, if the claim shall be correct, and, if not, that such proportion of the same, if any, as shall so prove to be correct, shall be so paid, and that abundant latitude should be extended for an investigation of the same, either judicial or friendly; and it being conceded by said Kean and Moore that, when such investigation shall have resulted in a determination satisfactory to them, the amount found to be due to said executors shall at once be paid to them, and be beyond the contingencies of further judicial proceedings." The agreement, after these recitals, then provided (1) for a conveyance to the Staten Island Belt Line Railroad Company, to be executed by Kean, Moore, and the complainants, as executors of Brown, "of all the rights, franchises, and properties aforesaid"; (2 and 3) for the delivery of the conveyance on the payment of \$50,000 to the grantors or a trustee nominated by them, with provisions for delivery without payment in cash; (4) that, on the completion of its sale, the payments should be made to John Kean, Jr., who should become the trustee of the fund, and should dispose thereof as follows: "(a) He shall deduct his reasonable charges therefrom. (b) He shall pay to said John Kean, James Moore, and executors of Edward G. Brown, dec'd, the respective amounts found to be due to them, as debts, which shall be adjudicated by such court of New Jersey as the said trustee shall choose finally to appeal to, or which shall be agreed to by such parties, to be evidenced by the personal signatures of all of them, as said

parties all have claims since the death of said Brown, made to assist the running of said railroad. (c) After such payments, such trustee shall divide the balance of such moneys, if any there shall be, among such parties, in the proportion of three-eighths to said Kean and to said two executors each, and to said Moore two-eighths." It was further agreed that in case the rights, franchises, and properties failed to be sold for a sufficient sum in hand to pay all the debts, in law or equity, due by Brown at his death, contracted in behalf of said railroad, the agreement should stand for nothing, and the complainants should have the right to proceed with the suit referred to, subject to the defenses Kean and Moore would have had if the executors had not become parties to the agreement or such defenses as had been set up in their answer. The defendant John Kean, Jr., was constituted the trustee under the agreement, and he accepted the trusts by a writing annexed to the agreement. The agreement recited that the suit referred to was about to be argued, and the concluding clause was a provision "that nothing in these presents contained, either in recitals or agreement, shall in any way abridge or estop, or by any implication affect, the defenses made or to be made by said Moore and Kean in the suit aforesaid, or on the hearing and final determination of the same." Pursuant to this agreement, and to carry out the sale, Moore, Kean, and the complainants, as executors of Brown, by deed dated September 1, 1887, conveyed to the Staten Island Belt Line Railroad Company "all the property, rights, and franchises of the Staten Island Shore Railroad Company of which the said James Moore became possessed by virtue of the conveyance to him by the said Caleb C. Norvell, as trustee, by the aforesaid deed, bearing date the 22d day of August, 1871, or which are now possessed by the parties of the first part hereto, the same to be free and clear of all incumbrances, debts, liens, and liabilities; that is to say, its railroad, from Holland's Hook to the southern terminus of New York avenue, in the county of Richmond, including the right of way thereof, with the superstructure and all rails or other materials used therein or procured therefor, and all horses, cars, harness, machinery, bridges, viaducts, culverts, fences, stables, depot grounds, and buildings erected thereon, and shown in the inventory hereto annexed, and all rights therein, tolls and revenue to be had or levied therefrom, and all the franchises, rights, and privileges of the Staten Island Shore Railroad Company of, in, or to, or concerning the same, together with all and singular the rights, titles, privileges, members, hereditaments, and appurtenances to the same belonging or in any wise appertaining; also, all rights of action against corporations or individuals, officers, or employees at any time acquired by the parties

of the first part hereto during the ownership of said James Moore, John Kean, and Edward G. Brown, or his executors, or either of said parties; also, all books of accounts and papers of said Staten Island Shore Railroad Company, covering from the date of said first-mentioned purchase of James Moore to the present time." The inventory annexed to the deed, and referred to in it, was called an "inventory of the property of the Staten Island Shore Railroad Company," in possession of the parties of the first part hereto, including the franchise, and specified 45 horses, 11 cars, and a long list of other personal property. The deed was one of bargain and sale, without covenants, and the will of Brown was not proved, so that it could be known whether his executors, as such, were authorized to convey his interest in the real estate, as a tenant in common. Neither Brown's heirs at law nor devisees were parties to the conveyance. The consideration of the conveyance was first mortgage bonds of the Belt Line, etc., Company, to the extent of \$100,000, and \$200,000 in stock, and \$2,810 in cash. The bonds and stock were afterwards, by agreement made September 19, 1887, between the complainants, as executors, Moore, and Kean, of the one part, and A. W. Beasley & Co., of the other, agreed to be sold to the latter for \$50,000, payable in cash installments. Beasley & Co. paid \$10,500, gave notes for \$12,000 more, and, in the spring of 1888, defaulted in the payments, after having received \$80,000 in bonds and \$9,000 in stock. The entire balance of the stock and bonds was in April, 1872, by consent of the parties, sold to one Graves, for \$10,000, part of this (\$4,000) being in note not yet collected, but secured by collateral, and claimed to be good and collectible. The trustee, John Kean, Jr., under the agreement, and by consent of all the parties thereto, has paid out to the defendant James Moore \$2,400, on account of his advances in the maintenance and operation of the road since the death of Brown, and \$1,200 to the defendant John Kean, for his advances for the same purpose during that time, and now has in hand cash and securities (considered good) amounting to \$14,698.30, held by him under the agreement.

The complainants, for reasons hereafter stated, claim that the defendant Moore should also make good to the trust fund the sum of \$12,000 and interest, represented by the worthless A. W. Beasley & Co. notes, and \$1,500, allowed by him to Beasley & Co. at the time of the second payment for the purpose of paying the commission of the agent or agents who had effected the sale. In reference to the claim for advances, the complainants base the right to charge the balance due to Brown for his advances as a first lien upon the proceeds of sale upon two grounds: First, upon the rights of one tenant in common to recover, in equity,

such expenditures out of the proceeds of sale of the common property; and, secondly, upon the effect of the agreement of September 1, 1887, relating to the disposition of the proceeds of sale. It is not claimed that there is evidence of any express contract for repayment or contribution of these advances by Brown, nor do I think circumstances sufficient to raise an implied contract have been shown. The recital in the agreement of September 1, 1887, that Brown, by consent of Kean and Moore, assumed control of the property, and managed the running of the road, is not sufficient to authorize an inference that expenses for construction and improvements, amounting to half the purchase price of the road, were intended to be included within its terms, or that improvements could be made at Brown's own pleasure, and charged as a debt on the property, without the consent of his co-tenants. The defendants, in their answers, allege that Brown, on taking possession, expressly agreed to operate the road at his own expense, and without charge to his co-tenants. The only evidence offered by the defendants to establish this allegation is that of Charles K. Moore, a son of the defendant James Moore, who had a conversation with Brown in 1873, in which Brown said substantially that neither Col. Kean nor Col. Moore would lease a dollar in that property, as it was a good speculation, and he could sell it at a profit, and that he anticipated selling it at a profit at not a very remote date. He further stated (in reply to a direct question) that Brown then told him he was operating the road entirely at his own expense. This evidence is clearly insufficient to establish a contract on the part of Brown not to demand repayment or allowance for his expenses, or to prove the allegations of the answer. The case must therefore be treated as one in which the disbursements were made, without any contract in relation to them on either side, and the rights of the parties are to be determined upon the rules applicable to tenants in common, except so far as these rights are modified by the agreement for sale and division of the proceeds.

The right of the complainants to recover their proportion of these expenditures, made by Brown, from the other tenants in common, cannot, it seems to me, be based on the first ground alone, for the rule is clear, both at law and in equity, that in the absence of a contract to pay, either express or implied, on the part of the co-tenants, no remedy exists for money expended in repairs or improvements by one tenant in common so long as the property is enjoyed in common. *Leigh v. Dickeson*, 15 Q. B. Div. 60, 67; *Farrington v. Forrester* [1893] 2 Ch. 461, 478; *Freem. Co-Ten.* pars. 261, 262. In such cases, where necessary repairs and improvements have been made in good faith by one tenant in common, but without any contract or agreement for repayment or con-

tribution, the only remedy of the tenant who has made the disbursements is in the court of equity, where, on a partition or sale of the common property, an equitable adjustment is made to the tenant, either by assigning to him the part of the property which he has improved in good faith, or where such partition is impracticable, and the property is sold at an increased value, by reason of the repairs or improvements, by making an equitable allowance for what has been expended in order to obtain this increased value. The former course was followed in *Hall v. Piddock* (1871; *Zabriskie, Ch.*) 21 N. J. Eq. 311; *Doughaday v. Crowell* (1856; *Williamson, Ch.*) 11 N. J. Eq. 201; *Brookfield v. Williams*, 2 N. J. Eq. 341; and *Obert v. Obert*, 5 N. J. Eq. 397. Lord Justice Cotton, in *Leigh v. Dickeson*, 15 Q. B. Div. 67, says: "No remedy exists for money expended in repairs by one tenant in common so long as the property is enjoyed in common; but in a suit for partition it is usual to have an inquiry as to those expenses, of which nothing could be recovered so long as the parties enjoyed their property in common. When it is desired to put an end to that state of things [the ownership in common], it is then necessary to consider what has been expended on improvements and repairs; and, whether the property is divided or sold by the decree of the court, one party cannot take the increase in value without making an allowance for what has been expended in order to obtain that increased value. In fact, the execution of the repairs and improvements is adopted and sanctioned by accepting the increased value. There is therefore a mode by which money expended by one tenant in common for repairs can be recovered, but the procedure is confined to suits for partition." Brett, M. R. (page 65), also says: "The only remedy which exists either at law or in equity is when the rights of the tenants in common go into chancery on suits for partition or sale. If the law were otherwise, a part owner might be compelled to incur expense against his will. The refusal of one co-tenant to bear any part of the cost may be unreasonable. Nevertheless, the law allows him to refuse, and no action will lie against him." See, also, cases cited in *Ward v. Ward* (W. Va.) 29 Lawy. Rep. Ann. 452, notes; s. c., 21 S. E. 746.

The cases in our own courts above referred to, which are relied on by complainants, are not authority for the recovery of a proportionate share of the advances made by Brown, as of a debt due to him, for so much money, but only for an equitable partition of premises which have been improved by one tenant in common. And, if the complainants' right of recovery is to be put upon the basis of a debt or claim for which Brown had the right of recovery at once, either at law or in equity, it is difficult to see why the claim is not barred by laches. The

claim, on this basis, was due not later than July, 1872, while the bill in this case was not filed until September, 1893; and the debt, not being due by contract under seal, was, by analogy with the statute of limitations and upon the ground of laches, barred before Brown's death. After this delay, and in the absence of any express contract or of circumstances from which a contract for reimbursement can be implied, the complainants' right to recover must be based on their equities as representing the deceased tenant in common, and succeeding to such rights, modified, as they were, by the agreement for sale. Independent of this agreement for sale, the equity of the complainants was to have such equitable allowance made on a sale of the property as would, out of the increased value of the property, derived from Brown's expenditures for improvements, reimburse him to the extent of his advances (in connection with Kean's). But the common property having been sold by agreement of the parties, without application to any court for partition or sale either in New York (where the property was located) or in New Jersey (the domicile of the owners), it has been rendered impracticable to adjust the equities on this basis. And in making the sale, under this agreement, the parties have treated the advances made by Brown, if recoverable at all, as the personal property of Brown's estate; whereas, for all the expenditures which relate to the real estate, the heirs at law or the devisees of the tenant in common, and not his executors as such, are the successors to the rights of the deceased tenant in common, and entitled to the allowance for improvements on the real estate. So that in the present case the defendants and the complainants, by selling all the property as common property, owned as such by themselves, and themselves only, have pursued a course which has made the usual course of inquiry either impracticable or altogether unsatisfactory. It would be difficult, if not impossible, to ascertain now, by a reference, what increased value, at the time of the sale, in 1887, existed in the property, both real and personal, by reason of the repairs and improvements made by Brown in 1871 and the years following up to 1880, and to ascertain, further, what proportion of this increase was due to the complainants, as succeeding to the personal estate of Brown. And if the rights of the parties to this suit were to be settled purely on the basis of the rules of equitable allowance, for the increased value, the fairest rule to be applied, on the evidence in this case, would be, as it seems to me, to treat the advances made by Brown and Kean as additions to the cost of the road, and to treat them as adding their proportion, along with the original cost, to the value at the time of the sale. This seems to have been the basis on which the statement of September 30, 1879, was made up; the origi-

nal cost and the additional expenditures each being put on the same basis as to interest. This would increase the proportion of Brown and Kean in the proceeds of sale over their original three-eighths, until the balances due for advances were repaid. But in view of the express provisions as to the disposition of the purchase money, made by the agreement of sale, and of the radical changes which that agreement made in the equitable status of Brown's estate, and especially of his personal representatives, I do not consider that I have the right to remit the complainants to what would have been their strict equitable rights if a court of equity had ordered a sale. The complainants, as Brown's executors, succeeded certainly to his rights in all the personal assets conveyed, including choses in action, accounts, etc., and, by reason of Brown's original ownership of all the personal property purchased by him, and which does not seem ever to have been conveyed to the other cotenants, had, perhaps, exclusive ownership (at least in equity) of all the valuable personal property which replaced his original purchases. When, therefore, the defendants, desiring to convey the whole property, real, personal, and choses in action, as one common property, procured the complainants to join in the sale, and thus change altogether their existing equitable status, it was entirely competent for the parties to treat the property as a common property in its then-existing state, without reference to the proportionate value to it of Brown's repairs and improvements; and to provide, by their agreement, for another method of protecting Brown's right to reimbursement for his advances.

In my judgment, and as I construe this agreement, the parties have made this change in the status existing at the time of the sale, and have, by this agreement, and for the purposes of dividing the proceeds, agreed to treat the advances made by all of the cotenants as debts to be first paid out of the proceeds of sale. The advances made by Moore and Kean, after the death of Brown, and before the agreement, were, so far as appears, of precisely the same nature as those made by Brown, and have no higher equity. These advances by Moore and Kean, equally with those made by Brown (when the latter were judicially determined), are treated, for the purposes of the agreement and division, as debts, the language of the agreement being: The trustee "shall pay to John Kean, James Moore, and the executors of Edward G. Brown the respective amounts found due to them as debts," etc. For the purposes of this division, the parties treated advances made by either tenant in common as a debt, and not merely as a claim for equitable allowance, based on benefits actually conferred in the property. As the parties were competent to deal with the proceeds on any basis they chose, a court of equity should carry out the

settlement on the basis of the advances provided for them in the agreement, especially in view of the fact that the agreement and sale thereunder have made it impossible to adjust the rights of the parties on their original equitable basis. In reference to this claim for reimbursement, therefore, I conclude that the complainants and Kean are to be first repaid, out of the funds remaining in the hands of the trustee, the balances due them, respectively, for their advances prior to Brown's death. This allowance, however, will be made only on the principal of the claims, with interest thereon from the time of filing the bill. The agreement makes no express provision in regard to the interest, and the mere characterization of these advances as "debts" in the agreement for division of the proceeds of sale will not so change their nature as to make them debts payable when the advances were made, and with interest from that time. The advances, as I have above said, cannot be treated as debts of this character, for then both principal and interest would be barred by Brown's laches.

Complainants claim interest at least from 1883, the time when, as defendants' answers admit, Brown notified them of his advances, and that he would ask payment out of the proceeds of sale; but the defendants also state that, at the time of the notice, they denied his right to reimbursement, and that Brown agreed they should be paid only after the original cost had been repaid. These admissions are not sufficient to charge them with interest from that date, nor, in view of the agreement of sale and its effects on the equitable rights of the parties, do I see any basis of allowing interest on any debt for advances payable to complainants under this agreement, until demand made for it, under the agreement which in this case was by filing the bill in this cause.

The second question in the cause relates to the right of the complainants, under the agreement of sale, to charge the defendant with certain notes of A. W. Beasley & Co., one for \$4,000, and one for \$8,000, and an allowance to them of \$1,500 for commissions to the agent who effected the sale; the claim being that Moore received and allowed these in violation of the agreement, which provided that cash should be paid, and that the commissions were not payable until the whole purchase price was paid. Moore, in his answer, alleges that the notes were taken, and the allowance of the \$1,500 made, with the consent of the complainants; and it is claimed by his counsel that the proofs establish that the \$4,000 note and the \$1,500 allowance for commission was made by the verbal authority of the complainant Ryder, one of the executors, and that the \$8,000 note was taken by authority of Danforth, the other complainant executor. The agreement of September 1, 1887, above referred to, provided for a conveyance to the Staten Island Belt

Line Railroad Company, and that this conveyance should not be made until the sum of \$50,000 was paid into the hands of the vendors, or a trustee named by them, or until each and every of the vendors affixed their hands and seals to the conveyance; but it was then provided that in order to facilitate the sale, if the purchaser desired the conveyance, preparatory to an issue of bonds, for the purpose of raising the purchase money, then the vendors might deliver the conveyance at their option, without payment of the \$50,000, but only with the concurrence of all of the vendors, to be evidenced by their seals set to the conveyance. This conveyance to the Belt Line Railroad Company was executed, as above stated, by all the vendors; and first mortgage bonds to the amount of \$100,000, and full-paid capital stock for \$200,000, were issued to the vendors for the purchase money. This method of converting the common property into bonds and stock was adopted in order to carry out the sale of the property for \$50,000 to the firm of A. W. Beasley & Co. The owners, after the death of Brown, authorized Thomas Moore, son of the defendant James Moore, to sell the road for that price; and he procured an offer in writing from Beasley & Co., on June 1, 1887, which proposed this method of carrying out the purchase, and that \$50,000 in cash should be paid within 90 days after the transfer to the new company, the stock and bonds meanwhile to be held by a trustee in escrow, to be delivered up pro rata as fast as paid for, it being also understood that the road was to be transferred clear of all debts, liens, and incumbrances.

The formal agreement settling the manner of payment for the bonds and stock was made September 19, 1887, between Moore, Kean, and the complainants, of the first part, A. W. Beasley & Co., of the second, and Thomas Moore, the agent, of the third; the latter being a party only so far as related to his position as agent, and to his commissions for making the sale. This agreement recited Thomas Moore's authority from the vendors to sell the railroad property for \$50,000, and no less without obtaining permission; and that about June 3, 1887, Thomas Moore received from A. W. Beasley & Co. a proposition for purchase, which he submitted to the vendors; and that since that date, by general understanding and co-operation of all the parties, certain transactions had been carried out looking to the consummation of the sale, essentially as proposed by A. W. Beasley & Co., so that the Staten Island Belt Line Railroad Company had been incorporated, and the vendors had become the owner of capital stock of the company, amounting to about \$200,000 par value, and \$100,000 par value of first mortgage bonds of the company. It was thereupon agreed, in order to fully consummate the proposition essentially as made, that the vendors should sell and deliver the entire amount of stock and bonds for \$50,-

000; and Beasley & Co. agreed to purchase and pay this sum for the stock and bonds, in the following manner: "The bonds to be delivered to and held by James Moore as custodian, and the stock to remain as at present upon the books of the company; and whenever eight thousand dollars is paid in to John Kean, Jr., who has been designated and chosen by the parties of the first part to receive the purchase money above mentioned, there shall be ten bonds of \$1,000 each delivered in exchange therefor, together with a certificate for thirty shares of full-paid stock of the company; and payment may be made of not less than eight hundred dollars at one time, with corresponding delivery of one bond and three shares of stock therefor; and, after forty-eight thousand dollars in money and sixty bonds shall have been thus exchanged, then, upon payment of the remaining two thousand dollars to John Kean, Jr., said custodian shall deliver to the parties of the second part all the remaining forty bonds going to make up the one hundred bonds aforesaid, and all the balance of said stock going to make up the two hundred thousand dollars aforesaid; and as soon as eight thousand dollars shall have been paid under this agreement as aforesaid to the said John Kean, Jr., he, the said John Kean, Jr., shall pay to the party of the third part (Thomas Moore) the sum of two thousand dollars; and as soon as the whole purchase price of fifty thousand dollars shall have been paid to John Kean, Jr., he shall pay the further sum of three thousand dollars, making five thousand dollars in all, to the said Thomas Moore, in full of all commissions and expenses of himself and associates connected with this sale, including the cost of organization of the Staten Island Belt Line Railroad Company in full, the preparing of the mortgage and the bonds and stock certificates, and the trust company's charge for certifying to said mortgage and indorsing said bonds, one hundred in number, and all payments and expenses, of every kind soever, amounting to about one thousand dollars." Beasley & Co. agreed to complete the agreement, and pay the \$50,000, on or before January 15, 1888. By a supplement to the agreement, bearing the same date, and executed by all the parties, it was agreed that the first payment of \$2,000 to Thomas Moore should be by check made payable to him, and, further, that James Moore, the custodian of the bonds and stock, would deliver the same to A. W. Beasley & Co., according to the foregoing agreement, from time to time, as requested by said firm, receiving in payment therefor checks payable to the order of John Kean, Jr. Thomas Moore, the agent of the owners for making the sale, had previous to this agreement, and on June 14, 1887, made a contract with A. W. Beasley & Co. and one Arents, by which they were all to share the profits of this purchase of the road after paying the \$50,000 to the owners.

At the time of the execution of this contract of September 19, 1887, in which Thomas Moore, the agent, joined, none of the owners, except James Moore, appear to have known of Thomas Moore's interest in the purchase. James Moore denies that he knew it, but his evidence on this branch of the case is not satisfactory. A. W. Beasley, who was called as defendant's witness, says that he told James Moore of his son's interest in the purchase about the time the contracts were made with his son. I think there is no doubt that neither of the complainants knew of Thomas Moore's interest in the purchase, either at the time of agreeing to make the sale, or until after the Beasley & Co. contract had been abandoned. Under the agreement of September 19, 1887, James Moore delivered to A. W. Beasley & Co., about September 23, 1887, 10 of the bonds (\$10,000) and 30 shares of stock (\$3,000), receiving therefor a check of \$6,000 to John Kean, Jr., the trustee, and a check of \$2,000 for Thomas Moore's commissions. Beasley & Co. failed to make any more payments before the time limited by the contract January 15, 1888. On February 24, 1888, Mr. James Moore delivered 10 additional bonds and 30 shares of stock to A. W. Beasley & Co., upon receiving from them \$4,000 in their note at 90 days, \$2,500 in cash, and allowing them a cash payment of \$1,500, which they were to retain on account of Thomas Moore's commissions. His commissions beyond the \$2,000 first received were not due under the agreement until the entire \$50,000 was received in cash; and it is evident that, by reason of the secret agreement between Beasley & Co. and Moore and Arents, the retention of this sum probably inured to the benefit of the Beasleys also. No proof has been made that Thomas Moore received any portion of it. The defendant James Moore insists, both in his answer and his evidence, that the complainant Ryder consented to his taking the notes for \$4,000, and also the allowance of \$1,500, to be credited as a cash payment. Ryder positively denies giving such consent, and the burden of proof to show consent is upon the defendant. So far as relates to the acceptance of \$4,000 in notes, instead of cash, on delivering the second installment, I think the defendant has established by the weight of evidence that Ryder authorized Moore to consent to this. This is established by Moore's testimony, confirmed by that of A. W. Beasley, a witness to the conversation of February 23, 1887, when the whole situation as to the condition of the road, the inability of the Beasleys to market the bonds, by reason of the bad condition of the road, or to make the payments required, was talked over at a meeting at Beasley's office (which was also the office of the road), in New York, and at which meeting Moore, Ryder, and A. W. Beasley were present. It was understood on that day, so defendant's witnesses say, that the Beasleys could not make the entire cash payment, but

no agreement was arrived at, and the final adjustment was adjourned until the following day, when the Beasleys would be able to tell them how much they would pay. Ryder, on leaving, said, to use Moore's words: "He didn't think he would be able to come on next day, but any bargain I made with them would be satisfactory to him." Beasley's statement is substantially the same, while Ryder has no recollection of any special conversation on the 23d, and denies generally and positively any consent at any time. Moore's statement that at least \$4,000 in notes was to be given is corroborated by the fact that, although Ryder knew shortly after the payment that only \$2,500 had been paid in, and talked with Moore about it, the only fault, according to his own account, which he found with Moore, was that the \$4,000 had not been paid in cash, but only \$2,500. It is also shown that, at that time, Ryder was acquainted to some extent with the Beasleys' financial condition; that he lent them \$1,000 to help them in the enterprise; and that shortly after, in March, 1887, on Moore's proposing to rescind the contract, he advised giving them time to carry out the contract, for which he relied to some extent on representations made by Arents as to arrangements he had made for placing a large number of the bonds. In view of these facts and evidence, I think the defendant Moore has sufficiently established by the weight of evidence that the delivery of bonds for the \$4,000 of notes, instead of cash, was by the authority of Mr. Ryder. But this authority, given by Ryder to Moore, as testified to by the latter, to make the best bargain he could, was no authority to deliver any bonds without any payment, either in cash or in notes, by the Beasleys, under the agreement, or to deliver any bonds to Beasleys by way of payment or allowance for the commissions of Thomas Moore, which were not due or to be paid until the whole \$50,000 was paid. Even admitting that Ryder, as one of the executors, had authority to bind the estate, by authorizing such an allowance to be made, it should certainly appear satisfactorily that he specially authorized it to be made, and that he did so with as much knowledge of the relations between Thomas Moore and the Beasleys as the defendant James Moore could have communicated to him before making this allowance for unearned commissions. As to so many of the bonds, therefore, as were to be delivered to the Beasleys for this \$1,500, the defendant must be held to account.

On April 20, 1888, the defendant Moore made another delivery of 10 bonds and 30 shares of stock to the Beasleys, this delivery being made without receiving any cash at all from them, but receiving their note at 90 days for \$8,000, they also agreeing to extend that amount in betterments and repairs on the road. In reference to this delivery, the defendant had no conversation with Ryder at all, and his authority to make it was given, as he

says, by the complainant Danforth. Moore's statement is that on the 19th of April he came on to New York on the cars with Mr. Danforth, who, not being able to go with him that day, told him he should go to the Beasleys, and make the best bargain he could with them, "knowing we were not to get all money," and further stating that he (Danforth) had seen Mr. Ryder two days before, and that they would be content. After this interview with Danforth, Moore went on to New York, saw the Beasleys, and talked with them about the payment, but finally came home without making any agreement. "I was to decide," Moore says, "what I would take"; and on the 20th of April he went to New York, and, without any further communication with either Danforth or Ryder, delivered the third installment of bonds (\$10,000) and stock (\$3,000) upon receiving their note of \$8,000 at 90 days, with an agreement that they should spend the same amount for betterments on the road. Mr. Danforth recollects the interview on the train, but denies positively any authority to Moore, stated by him, to make the best bargain he could, and, on the contrary, says that in that conversation he advised Moore not to let the Beasleys have the bonds. "Moore told me that he was going to let them have them, and wanted me to consent, but I did not and would not consent. He wanted to take their note for the \$8,000, but I refused to consent to it, nor did I ever tell him that Mr. Ryder consented to letting the Beasleys have the bonds for promissory notes." The statements of these two witnesses are the only evidence in the case bearing on the consent to delivering the third installment of bonds and stocks for notes, instead of cash; and, upon the whole, I consider the evidence of Mr. Danforth upon this point as entitled to the greater credence. He had but few transactions with Mr. Moore in relation to the estate. It seems probable that he would recollect this particular interview, and the occasion of it, viz. Mr. Moore's desire to procure his consent; and, in his statement of the details of the interview, his recollection corresponds better than Moore's with the facts as they actually occurred. Moore told him the Beasleys desired to give notes for the entire \$8,000, and that this was what Moore desired him to consent to. This was in fact what was done, although Moore says that, when he interviewed Danforth, he did not know how much was to be paid. Danforth's credibility is not impeached in any way, and, taking into consideration Moore's direct personal interest, his unsupported statement is not sufficient to overcome that of Danforth in reference to this transaction. I conclude, therefore, upon this second branch of the case, that it is sufficiently established that the defendant Moore, in violation of the complainants' rights under the agreement, delivered bonds and stock for the \$1,500 on the second installment, and the \$8,000 on the third installment, without re-

ceiving the cash therefor, and, as the notes are admitted to be valueless, is responsible to the complainants for the loss they have sustained from such violation, unless the further claim of the defendant that he was afterwards released from this liability is sustained. This question arises as follows: After the default of the Beasleys in their purchase, in 1888, the vendors retained the remaining stock and bonds along with the control of the road, which soon after became involved in litigations arising out of foreclosure of the mortgage and other claims, and a receiver or receivers of the road were appointed. The sale of the bonds and stock of the Belt Line road still remaining in Moore's hands for the common benefit was made in April, 1892, on the proposition of Mr. Ryder, contained in the following letter: "Elizabeth, N. J., April 1st, 1892. James Moore: There is a remote prospect of getting \$10,000 for the bonds of the S. I. B. L. R. R. If we can all agree to it. Are you willing to accept that amt.? It is that or nothing. If we accept, it will end all further litigation. Please let me know right away, and, if you think favorably, appoint a time and place to meet now. S. B. Ryder." Mr. Moore mailed a reply to this letter, of which reply a duplicate or copy was retained by him, and was put in evidence after a call for the original letter, which was not produced. Mr. Ryder, being afterwards examined, did not, however, deny the receipt of the letter. The reply was as follows: "Elizabeth, N. J., April 1st, 1892. Seth B. Ryder—Dear Sir: Yours of this date is rec'd, informing me 'that there is a remote prospect of getting \$10,000 for the bonds of the S. I. B. L. R. R. If we can all agree to it,' &c. In answer, I say that I will agree to that or any other sum that the parties in interest will agree to, provided, however, that I am forever thereafter relieved from any further responsibility or liability in any way relative to said railroad or the securities thereof. I directed Mr. R. C. Swan, of 115 B. Way, N. Y., to call upon you, with English, the other day, to consult about the sale of the road, and informed him that I would agree to any arrangement that the estate of Brown & Col. Kean would agree to. If well enough, I will call at your office on Monday next, a. m. Yours, truly, James Moore." The bonds and stock were soon afterwards sold by the owners for \$10,000,—\$5,000 in cash, and \$5,000 in notes, with security,—and delivered by Mr. Moore, pursuant to this offer referred to. It is now claimed that, this sale being made upon the condition specified in Mr. Moore's letter, he is relieved from all previous liability as trustee or custodian under the agreement; and at the hearing, before the examination of Mr. Moore, an amendment was permitted to be made to his answer setting up this defense. At the time of the letter, it is shown that several litigations were pending against the Belt Line Company, and that in some or one of them the organization of the railroad and the valid-

ity of the bonds held by the owners were attacked. This was undoubtedly the litigation referred to in Ryder's letter, and, reading Ryder's letter in connection with Moore's reply, I do not think that the provision in the latter that Moore "was to be forever thereafter relieved from any further responsibility or liability in any way relative to said railroad or the securities thereof" can fairly be construed as covering or intended to reach to Moore's liability as trustee or custodian under the agreement of September 1, 1887, for previous violations of its provisions made while it was in force. If Moore intended it to be used for that purpose, this intention should have been specially called to his cestui que trust's attention.

The court scrutinizes closely releases from a cestui que trust to a trustee, and the cestui que trust must have full knowledge of the circumstances of the case. 2 Perry, Trusts, § 851. This would include, I think, knowledge of the purpose for which the release was to be used in relation to the breach of trust. No consideration appears for the release from any previous liability as trustee, because Moore says in the letter that he is willing to sell the bonds and stock for the \$10,000 or any other sum the other parties would agree to; and, if a release had been actually intended to be executed by the complainants on the terms of Moore's letter, it is doubtful whether a court of equity would have required its execution by them, if intended to cover the previous default as trustee, which was not expressly called to the attention of the parties. And inasmuch as no release has actually been executed, and the whole defense upon this point rests on the basis of equitable estoppel, the provision or condition in the letter should, in equity, be applied to the responsibilities and liabilities of Moore, which were evidently in the minds of both parties, and should not be construed to protect him against liabilities for breach of duty as trustee under the agreement, as to which no litigation had then been commenced. I conclude, therefore, that the question of Moore's liability in this suit, based on the agreement, is unaffected by this correspondence or action under it.

The defendant Moore being, then, liable to make good to complainants their loss by reason of the wrongful delivery of the bonds, the next question is as to the amount of the loss with which he is to be charged. This depends upon the value of the bonds at the time of their delivery, but what this value was it is difficult to determine satisfactorily from the evidence. Prima facie, as it seems to me, the bonds, as against the defendant, who offers no proof of their values, must be taken as worth the amount which the vendors would have realized for them under the agreement, i. e. \$50,000, less \$5,000, commission for the whole \$100,000 in bonds, or at the rate of 45 per cent. of the par value. The Beasleys sold some of the first and second in-

installments of bonds at about 90, but there was no regular market value, and it would not be just to take these special sales (the circumstances of which are not known) as the basis of the loss which the complainants sustained by Moore's improper delivery of the bonds to the Beasleys. Nor, on the other hand, can the sale of the remaining bonds and stock made by the parties four years later, and after the new company had failed, and the road was in the hands of a receiver, and while numerous litigations were in progress, be taken as a standard for proving the value in 1888, when the road, although not in good condition, was free from debt. In the absence of direct evidence as to value, it seems to me that the sum fixed on, near the time, by all the parties as their value, may fairly be taken as *prima facie* the basis from which to establish the amount of loss. It must be borne in mind, however, that it has been shown that, at the time of the delivery of these bonds, the road was in bad repair, and that, by reason of its condition, the Beasleys found it difficult or impracticable to dispose of more bonds; that this need of expenditures for improvements was one reason given by them for their lack of funds to pay for the bonds; and that, upon giving the notes for \$4,000 and \$8,000, they agreed to expend these amounts in improvements on the road, which seems to have been treated by the vendors as under the control of the Beasleys, for this purpose at least. These moneys are proved to have been expended by the Beasleys upon the road pursuant to their agreement; and therefore, to the extent of this expenditure, the vendors, as holders of the remaining bonds, and by reason of the delivery to the Beasleys, have been benefited along with the other bondholders, by having the security still held bettered to that extent. This expenditure and benefit must therefore also be taken into account in estimating their loss by reason of the delivery of the bonds; and, in order to arrive at the allowance which should be made for this, I can see no more fair or equitable method than to treat this amount as really expended, or necessary to be expended, by the vendors, upon the road, in order to realize upon the remainder of their securities. Deducting, then, the \$12,000 from the total sum of \$45,000, which was to be realized, the bonds would stand as worth 33 per cent. This is the best estimate I can form on the evidence submitted. I omit all reference to the stock in estimating the values, for the reason that, this being a road whose stock did not have any selling price in the market, it was in fact worth little or nothing; unless the bonds were worth par. The defendant Moore, on this basis, would be chargeable, in favor of the complainants, with bonds to the par value of \$1,875, being the proportionate amount to which the \$1,500 allowance was entitled on the second installment, and with bonds to the par value of \$10,000 on the third install-

ment. At 33 per cent. of their face value, the charge would therefore be of \$718.75 on the delivery of February 20, 1887, and \$3,800 on the delivery of April 20, 1887. This charge, however, in taking the accounts, is to be made only in favor of the complainants, and not in favor of the defendant John Kean or his representatives. In his answer, this defendant makes no claim that Moore's action in the matter was without his authority or consent; and Moore, in his evidence, called as a witness for the defendants, states that he had absolute *carte blanche* authority from John Kean to deal with the Beasleys under the contract. The accounting, therefore, will be upon the basis that, in favor of the complainants, the defendant James Moore will be chargeable with three-eighths of the above amounts, \$718.75 and \$3,800, and with so much more thereof as may be necessary to reimburse the trust fund sufficiently to pay to the complainants the amount which they are entitled to receive for the advances made by Brown in his lifetime, and allowed them, with interest. The accounts of the trustee John Kean, Jr., not being disputed in any respect, the final decree can be made on the evidence already in, unless either party applies for a reference to a master to state the account in conformity with this opinion.

(68 Conn. 121)

STATE ex rel. BULKELEY v. WILLIAMS.

(Supreme Court of Errors of Connecticut.

Aug. 23, 1896.)

For majority opinion, see 35 Atl. 24.

ANDREWS, C. J. (dissenting). I deem it clear and certain that the duty which the act referred to authorized the relators to perform was a town duty. Nowhere in the act are the relators made state officers, and charged with state duties. But, on the contrary, they are spoken of as town officers set to transact town affairs. The maintenance of the highway of which the relators have the care cannot be regarded as anything other than a town duty without imputing to the legislature the intent to inflict on these towns the monstrous injustice of making their inhabitants liable to pay the damages caused by the nonfeasance or a misfeasance of a duty not imposed by law. The relators are totally unlike the commissioners appointed in the case of the Asylum street railroad crossing. In that case the state, in the exercise of its sovereign authority, appointed its own officers to abate a nuisance dangerous to human life, for the existence of which the three corporations created were jointly responsible. *Woodruff v. Catlin*, 54 Conn. 295, 6 Atl. 849; *Woodruff v. Railroad Co.*, 59 Conn. 63, 20 Atl. 17. The relators, although appointed to transact town affairs, are—seven of them—not inhabitants of Glastonbury. They were not

elected by the inhabitants of that town, nor has that town any control over their conduct. And from so much of the opinion as holds that the order of the relators is obligatory on that town through the town treasurer I wholly dissent.

It would be admitted without dispute that it would be incompetent for the legislature to engage in the performance of the affairs of a private corporation by officers of its own appointment. The legislature chartered the New York, New Haven & Hartford Railroad Company, and may alter or repeal that charter at pleasure. But the legislature cannot appoint a superintendent or a general manager of the affairs of that company without its consent, for whose acts or negligence the corporation should be liable. Such an appointment, if by any possibility the legislature should ever make one, would probably be held void, as not being a legislative act. But, if held valid, it could only be on the ground that, as the legislature might put an entire end to the existence of that corporation, it could do the same thing by piecemeal or by indirection.

The difficulty with the appointment of these commissioners is not with the power of the legislature to establish agencies for the execution of governmental functions, nor with its power to provide for the maintenance of certain public highways through the state, as distinguished from municipal agencies, and for the cost of such maintenance by taxation of the inhabitants of those localities most directly interested in such maintenance. The real difficulty is with the power of the legislature, under the provisions of the state constitution, to give the whole execution and control of duties and powers assigned to towns to persons in whose selection the towns have no agency, direct or indirect, and over whose conduct they have no control. It will be a surprising doctrine to the people of this state, even if only suggested, that the constitution, by the grant of legislative power, has conferred on the legislature the authority to take from them the management of their local concerns, and the choice of their own local officers. It would be hardly more surprising to them to be told that by adopting the constitution they had granted to their own representative the legal authority to take away their liberties altogether.

The building and repair of highways has always been one of the principal duties of a town. In Ludlow's Code of 1650, it was ordered that each town should every year choose one of its inhabitants as surveyor, to take care of the highways, with power to call out the persons fit for labor for as many days as may be necessary to keep the same in repair. Subsequently the work was provided for by town taxation, and the oversight committed to the selectmen, who were specially charged with mending and repairing the bridges and roads used by the stage that carried mails. From 1643 to the present time

the duty and the corresponding powers in reference to the support of highways have been recognized as essentially a corporate duty belonging to the towns, to be performed by town officers (*New Haven v. Sargent*, 38 Conn. 53; *Suffield v. Hatheway*, 44 Conn. 521); and it cannot now be maintained that such burdens can be imposed on towns, while all the powers necessary for their performance are committed to persons not officers or agents of the towns, without holding that the inhabitants of the several towns may be held responsible to the whole extent of their property for the performance of every corporate duty without the power of selecting or controlling the persons who are charged with the performance of such duties.

The legislature has appointed the relators, and has authorized them to perform a town duty respecting a highway. If the legislature may do this, it may appoint the same or other commissioners to perform any or all other town duties. There is no argument which will sustain the former which will not sustain the latter. And if this is the law,—that the legislature in this state may take to itself the entire and exclusive government of a town through officers of its own appointment,—then this judgment is correct; and if the legislature may not do so, then this judgment is erroneous. Stated broadly and nakedly, the question in this case can be nothing short of this: Is or is not town government in this state a mere privilege conceded by the legislature in its discretion, and which may be withdrawn at any time at its pleasure? While the majority of the court do not assent to so extreme a view, yet the argument of the majority opinion involves the theory of the existence in the legislature of this plenary and sovereign right; and, unless such right exists, that argument fails. It is true that in some decisions the courts of this state have spoken of towns as possessing an inherent, original, or reserved power, but only such powers as have been delegated to them, and which may be regulated and controlled by the legislature. It is from these expressions that the claim is made that towns are nothing but mere agencies which the state employs for the convenience of government, clothing them from time to time with a portion of its sovereignty, but recalling the whole or any part thereof whenever the necessity or the usefulness of the delegation is no longer apparent. In those cases where these expressions have been used they may not have been inappropriate. In none of them was the actual exercise by the legislature of any such power the subject of the decision. Such expressions, however, are very seldom true in anything more than a general sense. They never are, and in this state never can be, literally accepted in practice. There are also cases the conclusion in which is not consistent with the existence in the legislature of the power claimed, and one in which the conclusion is antagonistic. *Farrel v. Town of Derby*, 58

Conn. 224, 20 Atl. 460; *Taylor v. Public Hall Co.*, 35 Conn. 430; *Town of Burlington v. Schwarzman*, 52 Conn. 181.

The people of this state, when they formed the present constitution, found the whole of its territory occupied by those municipal corporations called "towns," each embracing all the inhabitants of a certain portion of the territory. These corporations were governed by their own inhabitants in town meetings, and their affairs were managed by officers chosen by themselves, and who were always inhabitants of the town. And they provided in that instrument that the rights and duties of all corporations should remain as if the constitution had not been adopted, except so far as therein restricted or limited. Article 10, § 3. They also provided (article 6) that electors should only be admitted from the inhabitants of a town and by the selectmen and town clerk; and by articles 3 and 4 that meetings by the electors for the change of state officers should be held in the several towns, and carried on by town officers; and by article 3 that the house of representatives should consist of representatives from each town, being electors and residents in that town, and that town representatives should be substantially equal, and that no town should be abolished or deprived of its representation without its own consent; and by article 10, § 2, that each town should annually elect selectmen and such other officers of local police as the laws may prescribe.

The relation of the towns in this state to the state government is different from that in other states. Prior to the adoption of the constitution, the state government consisted mainly of an assembly of delegates from the towns; and those towns had been uniformly treated, as entitled to local self-government. While it could not be said that an act of that assembly vesting the functions of a town meeting or the duties of the selectmen in a commission appointed by the assembly, would be unconstitutional,—strictly there was in those days no constitution,—yet every one familiar with our history knows that such an act would have been regarded as revolutionary, and that its passage was practically impossible. This right of the inhabitants of a town to themselves order the municipal duties assigned to the town was plainly one of those "rights and privileges derived from our ancestors" which the constitution has adopted "in order more effectually to define, secure, and perpetuate." By the several articles of the constitution above mentioned that instrument intended to make sufficient provisions to that end. It did guaranty the perpetual existence of the several towns with selectmen to manage their local affairs, and a town clerk to record their doings at town meetings, although it left the variety and duties of the local police subject to legislative change.

In studying these facts of the constitution we should always keep in mind that the

terms used had a settled meaning before it was adopted. So far as it relates to the form of administration, the constitution is in the main no more than a recognition and reenactment of an accepted system. The rights preserved are ancient rights, and the municipal bodies recognized in it and required to be perpetuated were already existing with known elements and functions. And when the constitution guaranties the perpetual continuance of towns, it means towns with the same essential characteristics which towns at that time exercised; for, if these essential characteristics do not remain, the town as known to the constitution does not remain. It is the town as it then actually existed with which the constitution deals. Let us, then, ascertain what a town was as then existing. In that way only can we give to these provisions of the constitution respecting towns their full and true effect. The form of words by which the town corporation was created sufficiently appears in a single instance. In the year 1779 Southington was incorporated, and the record, abbreviated, is that: "Upon the memorial of the inhabitants of the Society of Southington by their agents, * * * showing that * * * etc., and praying to be incorporated into a distinct town it was: Resolved by the assembly that the memorialists (i. e. the inhabitants of the territory named) with all the lands lying within the following limits and bounds * * * be and the same are hereby incorporated into a distinct and separate town with all the powers and privileges that other towns by law have and do enjoy." 2 State Records, 429. For all the general purposes of municipal administration, the state was divided only into towns. And what the town was as an actual, living entity is shown by the statutes then in force. St. 1808, tits. "Towns," "Town Meetings," "Town Clerk," "Selectmen," and "Highways." The towns were substantially the only territorial subdivisions used. Counties, as a municipal corporation or agency, did not exist. They were the mere territorial limits within which the jurisdiction of the county courts was exercised, and they were named and designated in connection with the establishment of such courts. 2 Conn. Records, 35. And the courts administered the construction as well as the management of the jails and courthouses, as well as the other matters pertaining to the maintenance of such courts. St. 1808, tit. "Gaols." Counties had no powers except such as were exercised by the court, and no officers except those appointed by the courts, and a sheriff, appointed by the general assembly. Towns are the only subdivision mentioned in the constitution, save that the general assembly is required to appoint a sheriff in each county, who shall serve for three years.

These statutes and rules respecting the towns were a necessary result from the origin, formation, and history of the peculiar

form of government in this state. In stating this history, in order to have it as connected as possible, some slight repetition will be made. In 1633-34 a strong dissent developed to some prevailing notions as to the powers of the government in the infant colony of Massachusetts Bay. The opposition was strongest in the towns of Dorchester, Newtown, and Watertown. In 1631, Watertown had protested against paying a tax assessed by the board of assistants, on the ground that they could not be taxed, save by their own consent. All these towns were foremost in insisting on a general government based on town representation. From these three towns, induced largely by dissatisfaction with the ecclesiastical and centralizing views of the dominant party in the Bay, the pioneers of Connecticut came. By 1636 these towns or plantations were established in Connecticut, and were called Dorchester, Newtown, and Watertown, but shortly afterwards called Windsor, Hartford, and Wethersfield. In March of that year the general court of Massachusetts named eight persons "to govern the people at Connecticut for the space of a year." At the end of that year the three towns on their own behalf appointed committees and magistrates, who, as a general court, directed the affairs common to the three towns, and so until June 14, 1638-39. At this time the essential features of town government became fixed, and have never since been changed. They were a town meeting, composed of all the inhabitants exercising all power, an executive board for the general management of town affairs, and a constable for the service of the town warrants and the conduct of the necessary physical force; all chosen by the town meeting. The "Fundamental Orders," or constitution of 1639, was a combination and confederation entered into by the inhabitants and residents of Windsor, Hartford, and Wethersfield "to associate and conjoin ourselves to be as one public state or commonwealth," and to be "guided and governed in our civil affairs" according to such laws as should be made in the manner provided. The orders provided that each year there should be held two general courts, composed of deputies from each town, chosen by "all that are admitted inhabitants in the towns."

To said general courts was committed the supreme power of the commonwealth, i. e. they only shall have power (1) to make and repeal laws; (2) to grant levies for the commonwealth; (3) to admit freemen only those already admitted inhabitants by the towns; (4) to dispose of lands undisposed of (not belonging to some particular town); (5) to discipline either towns or magistrates, or any other person, for any misdemeanor, and "may deal in any other matter that concerns the good of the commonwealth." This power, exclusion, and permission given to the general court developed the unlimited extent which afterwards characterized it, not so

much from this (the tenth order) as from the eighth order, which provided that Windsor, Hartford, and Wethersfield should have power, each town to send four of their freemen as their deputies to every general court, "which deputies should have the power of the whole town to give their votes and allowance to all such laws and orders as may be for the public good, and unto which said towns are to be bound." The power which any one of said general courts might exercise was unlimited, but the power was that of the several towns exercised by its deputies for the purpose of binding the towns by all laws and orders made for the public good. For this purpose the inhabitants of the towns as self-governing bodies did associate and conjoin themselves to be as one public state or commonwealth, and did "for ourselves and our successors, i. e., inhabitants of each town—and such as shall be adjoined to us at any time hereafter, i. e., towns hereafter admitted—enter into combination and confederation together to be governed by such laws as are made in accordance with the fundamental orders," and as a further means by which each town may protect itself against unequal treatment by the confederacy the final order prohibits the levy of any tax on the towns unless the amount of the whole tax to be paid by each town is apportioned by a committee consisting of an equal number out of each town. Five years later Farmington was admitted, and the order provided: "They also—the inhabitants—are to have the like liberties as the other towns upon the river for making orders among themselves." 1 Colonial Records, 134. About the same time, Southampton, on Long Island, was admitted. Owing to its separation by the Sound from the jurisdiction of Connecticut, and the greater difficulties of participating in the doings of the general court, as well as the doubt whether its inhabitants were included among those subject to the power of the original towns, a formal combination was negotiated, by which the town of Southampton, as the then river towns had already done, did "by their said deputies for themselves and their successors associate and join themselves to the jurisdiction of Connecticut." 1 Colonial Records, 568. In 1662, fortified by the charter of Charles II. in the claim of jurisdiction the general court admitted by simple vote the town of Southold, Long Island, and the following year ordered that Southold "should have and enjoy the same privileges as Southampton doth by virtue of their combination." 1 Colonial Records, 386, 406.

The fundamental orders consummated the union of independent and self-governing bodies for the purpose of their own better government and of extending their jurisdiction. The combination provided for an exercise of power limited only by the fact that the governing body could last only six months, and must consist of deputies from each town,

clothed with the whole power of the town; but by the very terms of the combination each town must continue a self-governing body; and from that time on the power of local self-government was recognized as necessarily involved in the existence, as well of the original towns who had associated and conjoined themselves to be as one state as of those described as such towns "as shall be adjoined to us at any time hereafter." The fundamental orders were adopted January 14, 1638-39. The first general court was held in May, 1639; the second, in September. There was an adjourned meeting of this court held in October, and in this the existing self-governing power of the towns was recognized. "The towns of Hartford, Windsor, Wethersfield or any other of the towns within this jurisdiction shall each of them have power to dispose of their own lands undisposed of, * * * as also to choose their own officers and make such orders as may be for the well-ordering of their own towns being not repugnant to any law here established." 1 Colonial Records, 36. That this declaration was not regarded as a law necessary to give towns power not before possessed is certain, because, if it were so, such law would have been passed at the first court held in the preceding May, and which held several sessions, or the illegal acts previously passed by the towns would have been validated; because a law necessary to enable a town to exercise any power must have been approved in Ludlow's Code, adopted in 1650; and because, if a law were necessary to enable towns to dispose of their own property, it was equally necessary to have such a law to authorize them to establish and define the duties of their principal officers.

Now, the office and duty of townsmen (not known as selectmen until 1691 or later) had been established in the several towns with powers defined by a town vote prior to the adoption of the fundamental orders (Hartford Town Records, Jan. 1, 1638-39), and these votes remained unchanged except by town meetings for many years afterwards. In fact, the towns after, as well as before, the "constitution" of 1639, conducted by town meeting their own affairs, and chose their own officers, and continued so to do until the constitution of 1818; the only interruption being an edict of Sir Edmund Andros, during his brief usurpation, which strictly defined the duties of selectmen, and prohibited any town meeting except the necessary annual one for their choice. 3 Colonial Records, 429. In 1818 the town was a territorial and municipal corporation exercising the rights of local self-government through a town meeting and officers of its own choosing. It had existed with these rights from a time prior to the combination of the first towns under a joint jurisdiction. It had been continuously the main instrument by which all the operations of the government were set in motion and carried on; and

when the provisions of the constitution speak of "towns" they speak of that kind of a municipal corporation whose character, rights, and privileges had been thus defined and settled for nearly two centuries.

After a struggle of more than 30 years, the general assembly yielded to the popular demand that the people have an opportunity to frame a constitution for their own government; that is, embody in one fundamental plan "their supreme, original will in respect to the organization and perpetuation of a state government, the division and distribution of its powers, the officers by whom those powers are to be exercised, and the limitation necessary to restrain the action of each and all for the preservation of the rights, liberties, and privileges of all, * * * to which the legislature, as well as every other branch of the government, and every officer in the performance of his duties, must conform." Opinion of Supreme Court Judges, 30 Conn. 593. For this purpose, in May, 1818, a resolution was passed, recommending to the people to assemble in their respective towns at their usual place of holding town meetings, and, having chosen their presiding officer, to elect as many delegates as said town now chooses representatives, to meet in convention in the following August, and when so convened, if by them deemed expedient, "to proceed to the formation of a constitution of civil government for the people of this state"; a copy of which constitution, when so formed, to be transmitted by said convention forthwith to each town clerk, to be by him submitted to the voters in his town, assembled at such time as said convention may designate, for their approbation and ratification. Said constitution, "when ratified and approved by such majority of said qualified voters convened as aforesaid as shall be directed by said convention, shall be and remain the supreme law of the state." Journal Court Conn. p. 5. The committee which framed this resolution in their report say that "from resolutions adopted in many towns, and petitions of citizens in others," they can entertain no doubt of a general manifestation of a desire for "the establishment of a constitutional compact," and that the political happiness heretofore enjoyed "is to be ascribed to other causes, rather than to any particular intrinsic excellence in the form and character of the government itself. Destitute of fundamental laws defining and limiting the powers of the legislature, the citizen has no security against encroachment in his most sacred rights, and violations of the first principles of a free government, except what may be found in the dependence of that body on the frequency of popular elections. Yet even these boasted barriers against arbitrary power may at times be prostrated by the legislative will." J. H. Trumbull's Notes on Court of Connecticut, 43.

Upon the ratification by a majority of the people of the state of the constitution formed

by the delegates from each town appointed for that purpose in town meetings, the former government by general assembly was finally and forever dissolved. The people, in the exercise of their sovereignty, established a new government in three separate and independent departments, whose powers were to be exercised, and exercised only, in accordance with their "supreme original will embodied in the constitution." As declared in its preamble, the main object in establishing this constitution by the people was "in order more effectually to define, secure and perpetuate the liberties, rights and privileges which they have derived from their ancestors." This purpose was accomplished—First, by the declaration of certain principles of free government, which were made a fundamental condition on which all powers to each department of government were granted; and, second, by incorporating into the framework of the government established such provisions as were deemed apt and necessary to preserve the most essential of their ancient privileges. Among these the one cherished above all others was the right and privilege of local self-government as represented in the town, the town meeting, and the town officers. The town was the germ from which all government in Connecticut has developed; and under the constitution, as the court has recently said, "the annual town election is the single entrance to our whole system of state government." *O'Flaherty v. City of Bridgeport*, 64 Conn. 165, 29 Atl. 466. Through all its history it had played the most conspicuous part. With all the arbitrary power from time to time exercised by the general court, the ordering of town affairs through its own officers had never been disturbed. The suppression of the town meeting was associated with tyranny under the usurpation of Andros, and its maintenance was by common consent deemed both the source and protection of that sturdy independence and respect for law which had ever characterized our people. It was to be expected that when the delegates from the towns met in convention to form a constitution that should perpetuate their ancient rights and privileges, a local self-government would not fail to be secured, and so we find this principle embodied in the whole framework of the new government. When article 8 provided that electors should only be admitted from the inhabitants of a town and by the selectmen and town clerk of the several towns, the perpetual existence of the several towns with an executive board to manage their affairs and a town clerk to record the doings at town meetings is guaranteed. The same is true when article 3 prohibits any meeting of the electors for the choice of state officers except in the towns, and carried on only by town officers; and the same article, in providing that the house of representatives should consist of representatives from each town, being electors residing in

that town, and that town representation shall be substantially equal, and that no town should be abolished or deprived of its representation without its consent, not only established a legislative department where the people, as corporators of town corporations, are represented in the lower branch and as individuals in the upper branch, but guaranteed the right and privilege in the inhabitants of each town to remain so long as they will a town corporation.

The legislature may regulate the conduct of the town corporations, may determine the local duties to be assigned to them, and in that sense the towns derive their powers from the legislature; but the possession of some local duties and powers, the administration of such duties by themselves or their own officers, is inherent in the towns which the constitution makes the basis of the new government; and the legislature has no power to destroy this town. The constitution assumes the existence of towns as local municipalities, and contemplates that they shall continue as they have hitherto been. It does not expressly provide that every portion of the state shall have a town organization. It names certain officers, who are to be chosen by the inhabitants of the towns, and confers on the inhabitants the right to choose their officers, but it does not define their duties. Nothing precludes the legislature from establishing new officers, and giving the incumbents the general management of the municipal affairs. If, therefore, there are no restraints imposed upon the legislative discretion beyond those specifically stated, the towns of this state might be abolished, and their people subjected to the rule of commissioners appointed at the state capitol. The people of these towns might be kept in a sort of pupillage for any period of time or to any extent the legislature might choose. And it assumes either an intention that the legislative control should be constant and absolute, or, on the other hand, that there are certain fundamental principles in our general framework of government which were within the contemplation of the people when they agreed upon the constitution, subject to which the delegation of authority to the several departments of government was made. That this last is the case appears too plain for serious controversy. The implied restrictions upon the power of the legislature as regards local governments, though their limits may not be as plainly defined as express provisions might have made them, are nevertheless equally imperative in character; and whenever a question arises, that is clearly within them there is no alternative but to bow to their authority.

Article 10, in providing that each town shall annually elect selectmen and such officers of local police as the laws may prescribe, guarantees the management of town affairs by town officers of their own choice. By directing the selectmen—the more modern name for the ancient townsmen to whom had been com-

mitted the important affairs of the town since the first settlement of the river towns—to be elected by each town annually, the direction that all officers and agents of the town shall derive their appointment from the town, is affirmed by an implication so absolute as not to be escaped; otherwise every officer and agent of the town except selectmen and the local police prescribed by law may be appointed by the legislature. The town clerk is certainly not a selectman. If he is an officer of local police he is not such a one “as the laws may prescribe.” His title comes directly from the constitution. Yet no one would have the hardihood to claim that the next legislature may appoint every town clerk for a term of 20 years. The selectmen must be elected by the town annually, because they are the ordinary and permanent agents of the town; and unless this provision means that all these agents must derive their authority from the town, then the legislature may direct that the town duties appertaining to selectmen, as well as every function of a town, shall be performed by special town agents to be appointed by the legislature. I do not understand the majority of the court to justify such legislation. Plainly, it would be void, but it would be void only because the constitution, in placing a town beyond the power of the legislature to destroy, takes under its protection the right (without which the town of the constitution ceases to be municipal corporation, and becomes something unknown to our laws) of self-government through its own officers and agents in all those matters included by law within its municipal powers and duties. This right of local self-government is assured by the provisions of articles 8, 6, and 10 of the constitution. It enters into the whole framework of the government. Because of its existence the continuance of the body of electors, the election of state officers, the constitution of the house of representatives, were made dependent on the towns, and subject to the specific provisions mentioned. A guaranty so bulwarked should be more potent than any naked restriction. When the bill of rights forbids the taking of private property for public use without compensation, it forbids the taking of such property for any but a public use, and the guaranty implied is not less sacred than the guaranty expressed.

When, therefore, the legislature had included within the municipal duties of Glastonbury and the four other towns named the maintenance of the highway described, it could not appoint the agents who, on behalf of the town, were to exercise those duties and powers. “The theory of the constitution is that the several towns are of right entitled to choose whom they will have to rule over them, and that this right cannot be taken from them, and the electors and inhabitants disfranchised, by any act of the legislature, or of any or all of the departments of the state government combined.” *People v. Albertson*, 55 N. Y. 56. “Local self-government having

always been a part of the American and English systems, we shall look for its recognition in any such instrument. And, even if not expressly recognized, it is still to be understood that all these instruments are framed with its present existence and anticipated continuance in view.” *Cooley, Const. Lim.* (6th Ed.) 47; *People v. Hurlbut*, 24 Mich. 44; *Board of Park Com'rs v. Common Council of Detroit*, 28 Mich. 228; *People v. Mayor, etc., of Chicago*, 51 Ill. 17. “The right of local self-government cannot be taken away, because all our constitutions assume its continuance as an undoubted right of the people and as an incident to republican government.” *Cooley, Const. Lim.* 207. “In the examination of American constitutional law we shall not fail to notice the care taken and the means adopted to bring the agencies by which power is to be exercised as near as possible to the subject upon which the power is to operate. In contradistinction to the governments where power is concentrated in one man, or one or more bodies of men, whose supervision and active control extend to all the objects of government within the territorial limits of the state, the American system is one of complete decentralization, the primary and vital idea of which is that local affairs shall be managed by local authorities, and only the general affairs by the central authority.” *Id.* 223; *Ordr. Const. Leg.* 62.

This opinion has been drawn out further than was intended. The question of local self-government as an ingredient essential to constitutional administration has been so clearly set forth in the language of Judge Cooley in *People v. Hurlbut*, 24 Mich. 44, already cited,—a case in which the legislature had undertaken to appoint commissioners to govern the city of Detroit,—that I quote the passage in full. After reviewing the history of local and municipal government in various states, he said: “In view of these historical facts and of these general principles, the question recurs whether one state constitution can be so construed as to confer upon the legislature the power to appoint for the municipalities the officers who are to manage the property, interests, and rights in which their own people alone are concerned. If it can be, it involves these consequences: As there is no provision requiring the legislative interference to be upon any general system, it can and may be partial and purely arbitrary. As there is nothing requiring the persons appointed to be citizens of the locality, they can and may be sent in from abroad; and it is not a remote possibility that self-government of towns may make way for a government by such influences as can force themselves upon the legislative notice. As the municipal corporation will have no control, except such as the state may voluntarily give it, as regards the taxes to be levied, the buildings to be constructed, the pavements to be laid, the conveniences to be supplied, it is inevitable that parties from

mere personal considerations shall seek the offices, and endeavor to secure from the appointing body, whose members in general are not to feel the burden, a compensation such as would not be awarded by the people who must bear it, though the chief tie binding them to the interests of the people governed might be the salaries paid on the one side and drawn on the other. As the legislature could not be compelled to regard the local political sentiments in their choice, and would in fact be most likely to interfere where that sentiment was adverse to their own, the government of towns might be taken to itself by the party for the time being in power, and municipal governments might easily and naturally become the spoils of party, as state and national offices unfortunately are now." All these things are not only possible, but entirely within the range of probability, if the positions assumed on behalf of the relators are tenable. It may be said that these would be mere abuses of power, such as may creep in under any system of constitutional freedom; but what is constitutional freedom? Has the administration of equal laws by magistrates fairly chosen no necessary place in it? Constitutional freedom certainly does not consist in exemption from governmental interference in the citizen's private affairs, in his being unmolested in his family, suffered to buy, sell, and enjoy property, and generally to seek happiness in his own way. All this might be permitted by the most arbitrary ruler, even though he allowed his subjects no degree of political liberty. The government of an oligarchy may be as just, as regardful of private rights, and as little burdensome as any other; but if it were sought to establish such a government over our towns by law, it would hardly do to call upon a protesting people to show where in the constitution the power to establish was prohibited. It would be necessary, on the other hand, to point out to these where and by what unguarded words the power had been conferred.

Some things are too plain to be written. If this charter of state government which we call a constitution were all there was of constitutional command; if the usages, the customs, the maxims that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests, the precepts which have come from the revolutions which overturned tyrannies, the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so,—if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit, which gives it force and attraction, which makes it valuable, and draws to it the affections of the people; that which distinguishes it from

the numberless constitutions so called which in Europe have been set up and thrown down within the last hundred years, many of which in their expressions have seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give,—this living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone. Mr. Justice Story has well shown that constitutional freedom means something more than liberty permitted. It consists in the civil and political rights which are absolutely guaranteed, assured, and guarded in one's liberties as a man and a citizen, his right to vote, his right to hold office, his right to worship God according to the dictates of his own conscience, his equality with all others who are his fellow citizens; all these guarded and protected, and not held at the mercy and discretion of any one man, or of any popular majority. Story, *Miscellaneous Writings*, 620. If these are not now the absolute right of the people of this state, they may be allowed more liberty of action and more privileges, but they are little nearer to constitutional freedom than Europe was when an imperial city sent out consuls to govern it. The men who framed our institutions have not so understood the facts. With them it has been an axiom that our system was one of checks and balances; that each department of government was a check upon the other, and each grade of government upon the rest; and they have never questioned or doubted that the corporations in each municipality were exercising their franchises under the protection of fundamental principles which no power in the state could override or disregard. The state may mold local institutions according to its views of policy or expediency, but local government is matter of absolute right, and the state cannot take it away. It would be the boldest mockery to speak of a town as possessing municipal liberty when the state not only shaped its government, but at discretion sent its own agents to administer it; or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control of their local affairs or no control at all. In this state we are not obliged to invoke the underlying principle of American constitutional law in order to protect the inhabitants of our towns in their right to local self-government. The express provisions and necessary implications of our own constitution plainly guaranty that right. Therefore, the private act by which the legislature undertook to appoint these relators to execute the powers and perform the duties committed by the public act to the town of Glastonbury and the four other towns as town corporations violates a clear mandate of the constitution, and to that extent is void. I think there is error in the judgment of the superior court.

HAMERSLEY, J. I dissent from the decision of a majority of my colleagues, and cannot but believe that a different conclusion would have been reached had it seemed to them as clear as it seems to me that the legislation in question necessarily involves the appointment of the relators by the legislature, not as state officers, but as town officers; not to perform duties directly in behalf of the state, but duties by the very terms of the statute assigned to the towns as the local municipal duties of a town corporation. I dissent from the opinion as announced by Judge **BALDWIN**, and concur in the opinion of Chief Justice **ANDREWS**.

(68 Vt. 478)

KENDALL et al. v. ALDRICH.

(Supreme Court of Vermont. Windsor. July 28, 1896.)

MANDAMUS—To AMEND RECORD OF JUSTICE.

A writ of mandamus will not be granted to compel an inferior court to amend its record where the amendment will avail nothing to the applicant.

Petition by **A. G. Kendall**, **Dorr B. F. Kendall**, and **Fred C. Davis** against **H. L. Aldrich** for a writ of mandamus. Writ denied.

F. C. Davis, for petitioners. **Geo. L. Fletcher**, for defendant.

ROWELL, J. This is a petition for a mandamus to compel a justice to correct his record in a case tried before him, in which one **Spaulding** was plaintiff, and the petitioners were defendants. The action was debt on a recognizance of \$20, entered into by the petitioners in a proceeding before another justice, in which the petitioner **Amos G. Kendall** and his wife were plaintiffs, and said **Spaulding** was defendant, wherein judgment was rendered for the defendant for \$11.98. In the first-mentioned action the defendants pleaded, among other pleas, to the jurisdiction, for that *scire facias* can be brought only to the court in which the judgment was rendered, and, in offset, a justice's judgment exceeding \$20, recovered by the petitioner **Amos G. Kendall** and his wife against said **Spaulding**. Seasonably after judgment against them in the first-mentioned action, the petitioners "read to" the court, as the record says, an affidavit setting forth that the plea in offset was made in good faith, and asked for an appeal, which was denied; the justice, as the record says, "believing the affidavit was not made in good faith, and that the offset was not such as the court had jurisdiction over." The petitioners claim that the case was appealable, both because of the plea to the jurisdiction and the plea in offset, and seek to have the record amended in divers particulars, and especially so as to show that said affidavit was filed with the justice, instead of "read to" him, and also so as to show that they seasonably offered sufficient

security for an appeal, the record stating to the contrary. The plea that is called to the jurisdiction did not make the action appealable, for the action was not *scire facias*, but debt; nor does the plea set up the authority of a court in excuse or justification, as claimed. As to the judgment pleaded in offset, two of the petitioners are not parties to it, and therefore they cannot avail themselves of it at law as an offset, for there is no legal mutuality between them and **Spaulding** in respect of it. This court, having a discretion in the matter, will not require an amendment that can avail the party nothing. **Hall v. Crossman**, 27 Vt. 297. The petition is therefore dismissed, but without costs, as was done in the case cited, for we are satisfied from the testimony that the petitioners did seasonably offer sufficient security for an appeal, and that the record ought to have so stated. It is also apparent that the affidavit was sufficiently brought to the attention of the court to answer the statute, and the justice ought to have treated it as filed, and made his record accordingly.

(68 Vt. 481)

TOWN OF ST. JOHNSBURY v. TOWN OF CONCORD.

(Supreme Court of Vermont. Caledonia. July 28, 1896.)

POOR LAWS—RESIDENCE OF PAUPER.

For a person to retain a residence in a town after leaving it, within the meaning of the pauper law, there must be a definite intention to return, and a place to which the person has a right to return; and a young man who, after his majority, left his mother's house, where he had resided, and, with his tools, went to another state to work, and while there married, and continued to reside there until he became out of work, lost his residence in the town where his mother lived, although he afterwards returned to her house, and resided there with his wife.

Exceptions from Caledonia county court; **Jonathan Ross**, Chief Judge.

Action by the town of **St. Johnsbury** against the town of **Concord** to recover for the support of a pauper. Judgment for plaintiff, *pro forma*, and defendant excepta. Reversed.

The plaintiff sued for the support of a pauper. The pauper was an only son. His father, by will, left all his property to the mother during her life, and what might remain at her death to the son. This property consisted mostly of a farm and stock in the town of **St. Johnsbury**, which was sold, and the proceeds invested in a village residence in the town of **Concord**. In October, 1857, the mother and pauper, who was then of age, moved onto the place in **Concord**, and continued to reside there as one family until April, 1860, when the pauper went to **Manchester, N. H.** It was not claimed that the pauper had a residence in **Concord**, if this removal to **Manchester** interrupted the continuity of his residence there at that time,

and this was the question litigated. Upon this point the referee found the following facts: "Early in the month of April, 1860, being out of employment, said Moses went to Manchester, N. H., to seek employment at his trade as a molder, taking with him his 'kit of tools' and an extra suit of clothes, but leaving some of his clothing, including his 'best suit,' at his then home, at his mother's house. On the day after his arrival at Manchester, he obtained employment, and continued to work there until about the 1st of August, 1860. On the 8th day of July, 1860, while at Manchester, he married a young girl, 16 years of age, who was then a weaver in one of the factories in that city, but whose home was at the time of her marriage in North Groton, N. H. Before his marriage said Moses boarded and occupied a room at some boarding house in Manchester, and after his marriage his wife went to his boarding house to live there with him as boarders; and they so continued to live there until about the 1st of August, 1860, when he, being again out of employment, with his wife went to her father's, in North Groton, for a short visit, on their way to his mother's place, in Concord. After having made their visit of a few days' duration, they went to Concord, to his mother's house, and took up their residence there, occupying the same room that he had occupied before he went to Manchester."

W. P. Stafford and Harry Blodgett, for plaintiff. Geo. N. Dale, for defendant.

TAFT, J. The pauper went to Manchester, N. H., to seek employment, upon his own account, and for his own benefit. He intended to remain away so long as he could make it profitable, and so long as he had work. He found employment, followed it, married a wife, lived with her, and continued there until his employment ceased. When he went to Manchester, he had no then present, definite intention of returning to Concord. He had no home in Concord to return to, as a matter of right, and the case does not show that there was any understanding between him and his mother that he should return to her house. The referee finds that he had no more right to return to his mother's house than any emancipated child has to return to the house of his parents. This, in a legal sense, is not a right. To retain a residence, within the meaning of the pauper law, there must be a definite intention to return, and a place to which the person has a right to return. *Jericho v. City of Burlington*, 63 Vt. 529, 29 Atl. 801. The only sensible conclusion to which we can consistently come is that the pauper was a resident of Manchester, and his residence in Concord was interrupted by it. Under this holding, it is conceded that the defendant is not liable. Judgment reversed, and judgment for the defendant.

(68 Vt. 484)

CROSBY et al. v. VILLAGE OF BRATTLEBORO.

(Supreme Court of Vermont. Windham. July 28, 1896.)

ENTERING PRIVATE DRAINS IN PUBLIC SEWER—APPEAL—BOND.

Acts 1894, No. 170, provides that, on application to the village bailiffs to enter a public sewer with a private drain, the bailiffs shall fix the assessment therefor, and that any one dissatisfied with such assessment may appeal to the county court, and, in case of such appeal, may at once enter such sewer, provided he files a bond. *Held*, that where the bailiffs, without any application and without notice, disconnected a private sewer system, and connected it with a public sewer, and the owners, denying the right of the bailiffs to do this, and complaining of the assessment, preferred a petition relative thereto, it was not necessary, on appeal to the county court, to file the bond required by Acts 1894.

Exceptions from Windham county court; Loveland Munson, Judge.

Appeal by Edward C. Crosby and others to the county court from the sewer assessment of the bailiffs of the village of Brattleboro. The motion of defendant, the village of Brattleboro, to dismiss the appeal, for that no bond had been filed, was overruled, and defendant excepts. Exceptions overruled.

Waterman, Martin & Hitt, for petitioners. Clark C. Flitts, for defendant.

ROWELL, J. This is an appeal from an assessment by the bailiffs of the village of Brattleboro in respect of the petitioner's private sewer entering a common and public sewer. The defendant moved to dismiss the petition, for that the petitioners did not, at the time of the filing their appeal, file a bond for the payment of such assessments as might be finally ordered, and the costs, pursuant to section 2, No. 170, Acts 1894, which is in addition to No. 254, Acts 1872, whereby the village is incorporated. The act of 1894 provides that every person whose particular drain or sewer pipe shall thereafter enter any common sewer or main drain previously built, who, in the opinion of the bailiffs, shall receive benefit thereby for draining his premises, shall be liable to contribute his just share for so entering such common sewer or main drain, and that, on application to the bailiffs to enter any main drain or sewer, they shall fix the assessment required, and that any person dissatisfied with such assessment may appeal to the county court in the manner provided by certain sections of the act of 1872, and in case of such appeal may at once enter such main drain or sewer, provided he files a bond as required by the act. In this case the petitioners did not apply to the bailiffs to enter a main drain or sewer, but on the contrary the bailiffs, as the petition alleges, without notice to the petitioners, disconnected their private sewer system, and connected the same with the new sewer or drain constructed by the bailiffs, their right to do which the peti-

tioners deny; and feeling themselves aggrieved thereby, and also by the amount of the assessments, they preferred this petition. It is evident that the case does not come within the act of 1894 in respect of filing a bond. That act requires a bond only when application is made to the bailiffs, and then only as a prerequisite to the right of at once entering the main drain or sewer in case of an appeal. If the applicant does not wish to enter at once, he need not file a bond on appeal, although he is the appellant. Judgment affirmed and cause remanded.

TAFT, J., being engaged in county court, did not sit.

(63 Vt. 496)

WATKINS v. RIST.

(Supreme Court of Vermont. Windsor. July 28, 1896.)

TRESPASS—EVIDENCE—REBUTTAL.

1. Plaintiff in trespass, in his opening, gave evidence that defendant's animals escaped from his pasture to plaintiff's pasture through a certain gap in defendant's fence, which was the trespass for which recovery was sought. Defendant, in his opening, testified that he examined the fence a little while before arbitrators were there, and it was all right then, and he could find no gaps or tracks of cattle going through it, and that, when the arbitrators were there, its condition was about the same. *Held*, that plaintiff could not, on rebuttal, show by one of the arbitrators that, when he was there, there was a gap in the fence at the place claimed by plaintiff.

2. In an action for trespass, based on defendant's cattle escaping from his pasture to plaintiff's through a gap in the fence, it being claimed that defendant's cattle had depastured plaintiff's premises "for divers long spaces of time," evidence of good condition of the feed in defendant's pasture during the time in question is admissible on the question of damages, as it bears on the probability of the truth of the claim.

Exceptions from Windsor county court; John W. Rowell, Judge.

Action by Frank W. Watkins against Wallace S. Rist. Verdict and judgment for defendant. Plaintiff excepts. Affirmed.

Gilbert A. Davis, for plaintiff. W. W. Stickney and J. G. Sargent, for defendant.

THOMPSON, J. This was an action of trespass on the freehold. In the opening of his case, the plaintiff introduced evidence tending to prove that the defendant's animals escaped from his pasture into the plaintiff's, through a certain gap in the defendant's fence. This was the trespass for which the plaintiff sought to recover. The defendant testified in his opening that he went over his fence in the spring of the year in question, and left it in a fair condition to stop cattle, and with no gaps in it; that he went over it a little while before the arbitrators was there, and that it was all right then; that he looked to see if cattle had been through it, and found no gaps nor tracks; and that, when the arbitrators were there,

he found its condition about the same. In rebuttal, the plaintiff offered to show by one of the arbitrators that, when he was there, there was a gap in the defendant's fence at the place claimed by the plaintiff. The evidence offered was excluded as out of time. The plaintiff now insists that this was error. The rules require the plaintiff in his opening to put in all his evidence in support of the issues which he then makes in the case, and only allow him in rebuttal to introduce evidence to meet and disprove issues first raised in the case by the defendant's evidence. The plaintiff's evidence did not tend to show, nor did he claim, that defendant's animals escaped into the plaintiff's pasture in any way, except through the one certain gap in the fence located and described by the evidence introduced by the plaintiff in the opening of the case. Hence the testimony of the defendant raised no new issue, but only tended to prove the nonexistence of the gap in the fence as claimed by the plaintiff. The court below, therefore, properly excluded the evidence, although, in its discretion, it might have admitted it. *Stevens v. Dudley*, 56 Vt. 158.

The evidence tending to show the condition of the feed in the defendant's pasture during the time in question was properly admitted. The plaintiff claimed that the defendant's animals had depastured his premises "for divers long spaces of time." It bore upon the probability of the truth of this claim. It thus bore only upon the question of damages. It is to be presumed that its effect was properly limited by the charge to the jury. In view of the verdict, it was also harmless to the plaintiff, as the jury must have found that the animals escaped through the plaintiff's fence, and by reason of his fault. Judgment affirmed.

(63 Vt. 488)

WOODSTOCK BURIAL GROUND ASS'N v. HAGER.

(Supreme Court of Vermont. Windsor. July 28, 1896.)

NUISANCE—WHAT IS NOT—MATTERS OF TASTE.

That a cemetery lot "was unsightly and disfigured, and needed to be filled and graded to put it in proper and suitable condition," does not warrant its being declared a nuisance.

Exceptions from Windsor county court; Rowell, Judge.

Action by the Woodstock Burial Ground Association against John W. Hager. Judgment for defendant, and plaintiff excepts. Affirmed.

W. C. French, for plaintiff. F. C. Davis, for defendant.

TAFT, J. This action is one of case. The plaintiff's claim is that "by reason of condition of the defendant's lot, it became and was a nuisance, and that it [the plaintiff] had a right to recover, as damage caused by

such nuisance, the cost of filling the lot." The court found that the defendant's lot "was unsightly and disfigured, and needed to be filled and graded to put it in proper and suitable condition." This is not synonymous with nor equivalent to a finding that the lot became and was a nuisance. The law will not declare a thing a nuisance because it is unsightly and disfigured, nor because it is not in a proper and suitable condition, nor because it is unpleasant to the eye, and a violation of the rules of propriety and good taste, nor because the property of another is rendered less valuable. No fanciful notions are recognized. The law does not cater to men's tastes, nor consult their convenience merely. It guards and upholds their material rights, and shields them from unwarrantable invasion. In the absence of a finding that the lot was a nuisance, the judgment below was correct. Had the finding been that the lot was a nuisance, we do not pass upon the question of the plaintiff's right of recovery, as it is unnecessary. Judgment affirmed.

(68 Vt. 516)

SMITH v. COOLIDGE.

(Supreme Court of Vermont. Windham. Aug. 8, 1896.)

SALE—PRICE PAYABLE IN GOODS—BREACH BY VENDEE—BALANCE DUE IN MONEY—REINSTATEMENT OF CONTRACT.

1. On breach by a vendee of a contract of sale providing for payment in specified goods, to be delivered on order from the vendor, by failure to deliver part of the goods when ordered, the balance of the price becomes payable in money.

2. The fact that the vendor, at the request of the vendee, subsequently ordered another bill of goods, and, on delivery, credited their value as a payment on the balance due, will not reinstate the original contract, without an express agreement to that effect.

Exceptions from Windham county court; James M. Tyler, Judge.

Assumpsit by George G. Smith against H. O. Coolidge. Judgment for defendant, and plaintiff excepts. Reversed.

The action was for the recovery of a balance due the plaintiff on open account. It appeared that the plaintiff in 1888 was a general merchant doing business in South Londonderry, and so remained down to the time of the hearing. The defendants, Coolidge and Batchelder, were in 1888 manufacturers and dealers in confectionery at Brattleboro, under the style of F. L. Batchelder & Co. In September, 1888, the defendant Coolidge purchased of the plaintiff, for the firm, a quantity of maple sugar, and agreed to pay for the same in confectionery, to be delivered to the plaintiff, in South Londonderry, in such quantities and at such times as thereafter ordered. Under this agreement the plaintiff shipped the sugar to the defendants, and sent them, from time to time, orders for confectionery, to be applied on this account.

These orders were filled down to and including April, 1889. In the fall of 1888 the defendant Coolidge retired from the firm, and Batchelder continued the business alone at Brattleboro, filling the orders of the plaintiff, down to February, 1889. He then sold out his business at Brattleboro, and moved to Manchester, N. H., where he engaged in the same business, and where he continued to fill the orders of the plaintiff for the months of March and April. In May and June the plaintiff sent Batchelder several orders, which were not filled. Not being able to obtain payment from Batchelder, the plaintiff wrote Coolidge that he should look to him for payment. And, after some further correspondence, Coolidge wrote the plaintiff that he had made arrangements with one Miller, of Brattleboro, to fill the plaintiff's orders on his account; and the plaintiff sent Miller one order, which was properly filled. About this time the plaintiff and Coolidge had a looking over of accounts, in which Coolidge insisted that the plaintiff had received more confectionery than he had given credit for. Some feeling arose during the conversation, and the plaintiff then said that he claimed that the account had become payable in money, by reason of the failure of Batchelder to fill his orders in May and June, and that he should insist upon the payment of the balance of the account in money; and soon after this he brought this suit. The referee found, in fact, that Coolidge had made an arrangement with Miller to fill the orders of the plaintiff; that Miller had properly filled the order which was sent him, and was at all times ready to fill orders for the balance of the amount due.

A. E. Cudworth and L. M. Reed, for plaintiff. Waterman, Martin & Hitt, for defendant.

MUNSON, J. The referee reports that the defendant purchased of the plaintiff a quantity of maple sugar, and agreed to pay for it in confectionery, to be delivered to the plaintiff, at South Londonderry, at such times and in such quantities as the plaintiff should thereafter order. It is also found, in regard to certain shipments of confectionery, that the price and quality of the goods were satisfactory to the plaintiff. It is evident from these findings that a price was put upon the maple sugar, and that the amount was to be paid in confectionery at the current rates. So the case presented is that of a sale in consideration of a payment to be made in specific articles, and it is to be disposed of in accordance with the rules heretofore held applicable in such cases. In this state, an agreement to pay in specific articles is presumed to have been intended for the benefit of the debtor, and is held to entitle him to make payment either in the property named, or in cash. But, if the obligation is not met when due, this option is lost, and the debtor must then make payment in money, at the price fixed. The demand is afterwards treat-

ed in every respect as if it had always been payable in money, except as regards negotiability, in cases where the obligation is in the form of a note. *Chip. Cont.* 85; *Wilkins v. Stevens*, 8 Vt. 214; *Perry v. Smith*, 22 Vt. 301; *Kent v. Bowker*, 38 Vt. 148. In this case, Batchelder's failure to fill the order sent in May was a breach of the contract, as regards the time of payment, and the unsatisfied balance thereupon became payable in money. It was, of course, competent for the parties, by a sufficient agreement, to reinstate the contract in its original terms; but the ordering of another bill of goods, upon the solicitation of the defendant, without any accompanying expression of intention, was not sufficient to accomplish this. It had no more effect than a similar transaction would have had in the case of an ordinary note. The obligation having become payable in money, the plaintiff could accept part payment in goods, at his pleasure, and still require that the further payment be made in money. Judgment reversed, and judgment for the plaintiff.

TAFT, J., did not sit, being in county court.

(34 N. J. E. 647)

PENNSYLVANIA R. CO. v. NATIONAL DOCKS & N. J. J. C. RY. CO.

(Court of Errors and Appeals of New Jersey.
Sept. 16, 1896.)

APPEALS IN CHANCERY—EFFECT AS SUPERSEDEAS.

1. The effect of filing an appeal to this court is to prevent the decree in the court of chancery from destroying or impairing the subject of the appeal, or being in any degree used for that purpose.

2. The right of appeal in this state is the creature of the statute, confirmed by the constitution, and, as the creation of the right is given in general terms, such right is not to be restricted by the practice of the English courts.

3. The decree, whether interlocutory or final, in the court below will be construed and controlled so as to preserve the appellate cognizance of this court over the entire subject-matter; and for this purpose an injunction will be deemed to be continued or suspended, or a dissolved injunction revived.

(Syllabus by the Court.)

Appeal from court of chancery.

On a bill by the National Docks & New Jersey Junction Connecting Railway Company against the Pennsylvania Railroad Company, an injunction issued, and from a decree adjudging respondent in contempt for a violation thereof (33 Atl. 936) respondent appeals. Reversed.

The respondent, by condemnation, acquired the right to cross the car yard of the appellant by means of a subterranean passageway. The respondent contended that, in the proper construction of the passageway in question, it was necessary that the surface of the car yard should be raised, and that, in making said subterranean roadway, the tracks of the appellant, crossing such proposed excavation, would have to be cut and kept open during the progress of the work.

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The execution of this project being resisted by the appellant, a bill was filed to quell such opposition, the result being a decree (33 Atl. 860), which was thus expressed, viz.: "That the defendants be, and they hereby are, enjoined and restrained from obstructing the complainant in the construction of its railroad and arch upon the route of the complainant, according to the plan and in the manner set forth in the order of amendment of the Hudson circuit court dated September 30, 1893, and in the statement filed July 11, 1895, in the office of the clerk of said court," etc., "and from placing or maintaining any cars within the route of complainant upon defendants' yard tracks 1, 2, and 3, being the most southerly of the yard tracks in the yard of defendants covered by complainant's route, until the complainant shall have completed its arch across said tracks," etc. From this decree the appellant duly appealed within 10 days from its date. In this situation the respondent endeavored to proceed with its work, but such attempt was actively repulsed by the appellant, which, in despite of the decree, maintained in its yard passenger cars on its tracks 2 and 3 at the place of respondent's crossing. As this conduct was in plain violation of the decree appealed from, on motion the appellant was adjudged to be in contempt (33 Atl. 936), and it is this latter decree that was brought before this court by this appeal.

Vredenburg & Garretson (R. V. Lindabury, of counsel), for appellant. Dickinson, Thompson & McMaster (O. L. Corbin, of counsel), for respondent.

BEASLEY, C. J. (after stating the facts). From the statement preceding this opinion, it appears that the appellant was enjoined from opposing the making of a certain subterranean causeway through its car yard by the respondent, and that, notwithstanding such inhibition, the prohibited resistance was made. For that disobedience the appellant has been adjudged to be in contempt, and from this latter judgment the present appeal has been taken. The appellant does not deny that it disobeyed the decree in question, both with respect to its mandatory and its prohibitive command, for it is admitted that it did not remove its trains as directed, and that it did obstruct the respondent in the construction of the archway in the manner that had been approved of by the chancellor. In this respect its contention was and is that by its appeal these mandates of the inferior court had been absolutely suspended, and that the appellant had the right to wholly disregard them. It will be observed, therefore, that the single inquiry on this occasion is with respect to the effect of an appeal to this court from a decree rendered in the court of chancery. The chancellor adopted the theory, insisted on by the respondent, that an appeal has no suspensive

effect on the operative force of a decision in his court, and in this respect he has the support of sundry dicta in our own state and elsewhere. But such expressions of opinion were not called for in any of the cases cited, and must be regarded, consequently, as entirely obiter, while at the same time it must be conceded that a notion has long prevailed in the court of chancery that to a large extent it is one of its prerogatives to establish for this court the boundaries of its jurisdiction, and this assumption has exhibited itself, not only in the dicta referred to, but also in the more imposing form of stated rules of court. When it is provided that an appeal shall not, *per se*, stay an interlocutory decree, and that, when an appeal from a final decree has been put in within 10 days after the filing of such final decree, the same shall be suspended unless otherwise ordered, no room is left for doubt that the conviction exists that it is a function of the inferior court to regulate and define the force of the appellate process of this tribunal. It is difficult to understand how in right reason such a view should have obtained. The only reason that appears to have been assigned is that it is, and for a long time has been, the practice of the court. But when we ask where such a practice has prevailed, the reply must be that it has prevailed only in the court of chancery, for it does not seem that it can be claimed that, in any respect, such a course of law has received the sanction of this court. It is not perceived that this court has ever permitted anything to be done in the lower court that in any degree has established or curtailed the power of this court to control, preserve, and adjudicate the entire appellate controversy. All the cases referred to in the opinion of the learned chancellor are to this effect, for every one of them exhibits a refusal of this court to give such an effect to an appeal as will have even a tendency to interfere with the exercise of its appellate faculty. It has at all times manifested in this matter a purpose to conserve its authority, its decisions in every instance tending in that direction. An example in this line is afforded by the case of *Doughty v. Railroad Co.*, 7 N. J. Eq. 633, which is a leading authority relied upon in the court below. There an injunction had been dissolved, and a stay ordered by the chancellor until the sitting of this court, and the question was whether this court could extend such stay until the hearing of the appeal. The argument against such extension was that an order for the continuance of the stay was an injunction, which mode of proceeding could be taken only by a tribunal exercising original judicature, and not by force merely of appellate authority. But this contention was overruled on the significant ground that the disputed power belonged to this court as a necessity, the chief justice thus stating the *ratio decidendi*. Referring to this tribunal he says: "It may not

exercise original power in acquiring jurisdiction over the cause; but, that jurisdiction once regularly obtained, this court may exercise original jurisdiction over the parties, especially when the proceeding is in rem, and the object of the order to maintain unchanged, as far as practicable, the status or condition of the subject-matter of the controversy during the pendency of the suit. It is on the same principle upon which a court of common law, in an action of ejectment or dower, will make an order upon the party in possession restraining the commission of waste; and a court of equity, prior to the hearing or argument, will, upon the same principle, grant a temporary injunction until the case can be heard. It is an inherent power in all superior tribunals, essential to the attainment of the object of litigation and the ends of justice. I am of opinion, therefore, that this court must of necessity have the power to make the order applied for." And in the same case, in a similar vein, Mr. Justice Randolph thus expresses his views, saying: "The right to grant such an order must exist, in the very nature of things. To deny it is to deny the right of appeal in the case; for, if we have no power to protect the subject-matter of the appeal, then is the right nugatory." Most assuredly this case goes far to show that this court is possessed of whatever power is necessary to the consummate exercise of its functions. The effect of the inherent force of the appeal itself over the decree was not considered. With respect to the cases cited from the reports of the decisions in the courts of the United States it is considered that such determinations are altogether inapplicable, as the force of such appeals is regulated by statute and by a rule established by the supreme court of the United States. And so the authorities referred to from New York, Indiana, and the other states are, in a large degree, subject to the same criticism. It is also proper here to remark that each of these adjudications referred to had the effect of preserving the subject of appeal, and yet they are invoked to show that, after an appeal, its subject may be destroyed.

It consequently follows that, in deciding the present issue, we must take as guides our own laws and constitution. The subject is not at all complicated. Originally, in 1706, Lord Cornbury, by virtue of his commission as governor, established a court of chancery, in which he and his council were to preside, and were "to hear and determine all causes and suits in said court which from time to time shall come before them, in such manner, or as near as may be, according to the usage or custom of the high court of chancery, in the kingdom of England." This establishment continued in force until March 28, 1770, when Gov. Franklin, by virtue of his commission, in 1762, constituted himself chancellor and judge of the high court of chancery or equity of New Jersey. Gov. Franklin continued in

office until the constitution of New Jersey was formed, July 2, 1776; and a few months after that event, on October 7, 1776, the legislature enacted that the several courts of law and equity of New Jersey shall be confirmed and established, and continue to be held with the like powers under the present government as they were held at and before the Declaration of Independence. Pat. Laws, 38. During this formative period and for a short time subsequent, the decrees of the court of chancery were not appealable, the power of this court then being applicable alone to actions in the courts of common law. It was not until the year 1796, when our laws were in the hands of Judge Paterson for revision, that cognizance was conferred upon this tribunal to revise the decrees of the chancellor. These are the terms of the act referred to: "That after final sentence or decree hath been pronounced, in any cause or suit in the court of chancery, any person who may think himself aggrieved by any interlocutory order, or by any final decree in any cause or suit in chancery, may appeal from the court of chancery, against such order or decree, to the court of errors and appeals," etc. Pat. Laws, 484. Afterwards, in the year 1820, a supplement to this act was passed, extending this right of appeal to all orders or decrees not final if made within 30 days after the order, etc. It thus appears that when, in the year 1844, the new constitution of this state was established, this court, by force of its original constitution and of the then existing statutes, had been clothed with an unlimited revisory power over all orders and decrees, whether final or not final, of the court of equity, and in this situation, by the sixth article of such new fundamental law, it was provided that "the judicial power shall be vested in a court of errors and appeals in the last resort in all causes as heretofore." This, in effect, was a declaration that the appellate power of this court should be and remain such as it had been, prior thereto, by the two acts of the legislature just cited. The effect of these two acts is, in my opinion, as plain as anything can be. They give the right to any person aggrieved to appeal; that is, to call upon the superior court to decide whether his rights or property shall be affected by the decree in the court below, and, if so, to what extent. The entire purpose and object of the appeal is to preserve such rights and property from the ill effects of the decision that is challenged. Unless it produces such a result, the procedure is a mere form, and in many cases absolutely useless form. The suitor in carrying his case up, asks for protection against an erroneous decree. Such protection is obviously refused to him if the decree can be enforced before its legality has been tested by the superior court. In fine, the very essence of the remedy by appeal is to prevent, for the time being, the appellant from the execution of the existing decree; and, this being so, it is indisputable that, when the statute grants the right of appeal,

it grants such protection. A decree cannot be used detrimentally to the appellant, pending the appeal, for the plain reason that such a use will for every practical purpose defeat the appellate procedure. Deriving from our own statute the right of appeal, with the inherent force just defined, it becomes unnecessary to examine the remedy as it exists in other jurisdictions. In England, at the time of our Revolution, an appeal to chancery had the effect of wholly suspending all proceedings in that court on the decree appealed from. So that, if we had obtained, by inheritance, the appellate jurisdiction of the house of lords, such would have been the force of this remedy with us at the present time; for the change subsequently made in this respect in the English practice by a rule of the house of lords could have had no effect upon our procedure, inasmuch as such rule was ordained some time after our separation from the mother country. But the legislation referred to does not impart to this court an appellate power similar to that possessed by the English court of last resort, or similar to that of any other court, but confers the prerogative unrestricted by reference to practice or model.

Touching the contention, which occupies so much space in the briefs of counsel, that a power rests in the discretion of the chancellor to execute or to refrain from executing the decree in his court during the pendency of the appeal, the conclusive answer is that such a function would be wholly inconsistent with the paramount cognizance given to this court over the subject. Such a theory would have the effect of reducing the absolute right of appeal, so clearly created by the statute, to a merely conditional right, such condition being the pleasure of the chancellor. If the inferior court can destroy the subject of the appeal, it necessarily follows that the remedy is not of right but of grace. By according to such a doctrine this court would abnegate the greater part of its authority in this domain vested in it by the legislature and the constitution. That such would be the result, the present case exhibits a conspicuous proof. The decree, as it stood when the appeal was filed, enjoined the appellant to refrain from opposing the cutting of its tracks, and to facilitate such cutting by moving out of the way certain of its trains. To prevent such cutting, which the appellant claimed would be an irreparable injury, this appeal was interposed, but the chancellor maintained that, unless he himself intervened, the decree was in full force, and must be in all respects submitted to. In other words, the judicial doctrine was that, although the appellant had taken the proper steps to place before this court the question whether such cutting was justifiable, that, nevertheless, the appellant must stand by and quietly submit to the destruction of the ground of its appeal, and must even actively assist in such destruction. I think it clear that such an hypothesis as this is a manifest invasion of the rightful jurisdiction of this

court, for it deprives it of the ability to render anything more than a merely nominal decree in the given case.

In the case before us, therefore, the opinion of this court is that the decree in question lost, for the time, all its force, and that the appellant could not fall into contempt by resisting its execution. It is likewise the opinion of this court that an appeal in all cases will have that effect given to it which shall be necessary to preserve the subject to which the appellate procedure relates in such a condition as will enable this court to render an efficacious decree in the premises, and that for this purpose an injunction decree will be suspended or continued, or a previous injunction revived, by the act of filing an appeal, whenever such construction shall be necessary for the end just stated. Let the decree before us be reversed.

(55 N. J. E. 78)

**WOODBURY HEIGHTS LAND CO. v.
LOUDENSLAGER.**

(Court of Chancery of New Jersey. Aug. 20, 1896.)

**CORPORATIONS — PROMOTERS — OFFICER DEALING
WITH CORPORATION — PROFITS — RECOVERY.**

1. One who engages with the owner of a tract of land in organizing a corporation to purchase the land, by procuring subscribers, frames the prospectus, and becomes one of the first subscribers, is a promoter of the corporation.

2. Defendant joined with the owner of a tract of land in procuring options of doubtful validity on adjoining tracts, and then organized a corporation, of which he became president, to purchase the land at an advanced price, under an agreement with his co-promoter alone that he was to receive part of the profits thus to be realized. He then procured deeds to himself of all the land for an actual consideration of \$66,223, recited in the deeds as \$80,000, and conveyed to the corporation for \$80,000 and 400 shares of stock. He distributed the stock pro rata among the stockholders, and kept the profits. No part of the money paid the vendors of the land belonged to defendant or his co-promoter, but all was furnished by the corporation. *Held*, that the corporation was entitled to recover the profits so withheld.

Bill by the Woodbury Heights Land Company against Henry C. Loudenslager. Decree for complainant.

The bill is filed by a corporation against one of its former officers for an account and recovery of profits realized by him, as is alleged, in the purchase of certain lands for the company while he was president. The bill alleges: That in the year 1889 the defendant procured options of purchase of several tracts of land lying together in Gloucester county, and making a compact body, with the view and for the purpose of forming and incorporating a land company to purchase the same at a price much above the option price, and making a large profit from the transaction. That in furtherance of that scheme he prepared and procured subscribers to a prospectus as follows: "Prospectus for the form-

ing of a syndicate to purchase a tract of land along the line of the West Jersey Railroad, between Woodbury and Winonah, Gloucester county, New Jersey, for the purpose of improving the same, and laying out in building lots, and offering the same for sale. This tract of land comprises about four hundred acres, at the price of two hundred dollars per acre. The West Jersey Railroad Company runs through the center of the tract, and the officials have consented to build a station for the benefit of the company. The main water main of the Woodbury Waterworks runs through the tract, which can easily be used for the benefit of the purchasers of lots. The tract is high land, and commands a fine view of the surrounding country, and is one of the finest locations for a town within fifteen miles of the city of Philadelphia. The capital required is about eighty thousand dollars; about one-half of this amount to be raised in cash, by stock subscriptions, and the balance to be raised by mortgage. We, the subscribers, agree to pay the sums set opposite our names as subscribed by us, upon the organization of the company." That the defendant himself subscribed to the same for \$2,500, but concealed at all times from his co-subscribers the fact that he expected to make a profit in the transaction. That, having procured about \$40,000 to be subscribed by about forty different subscribers, he on the 17th of March, 1890, procured the organization of the company (the complainant herein), himself being one of the incorporators named in the certificate of incorporation, and upon its organization became one of its directors, and president of the board. That afterwards the said sums so subscribed were paid into the treasury of the corporation by the subscribers. That the defendant procured to be conveyed to himself, individually, six several parcels of land, by six several owners, namely, by Joseph B. Roe, April 14, 1890, two tracts, containing together about 114 acres; by the executors of Susan Roe, deceased, April 15, 14 acres; by John H. Dilks, 71 acres; by Ann Reeves and others, 21 acres; by West Jessup, 114 acres; and by Caleb C. Pancoast, 80 acres,—all on the 16th of April,—and on the same day conveyed the several tracts of land, or so much of them as amounted to 400 acres, to the complainant, for \$80,000 (that is, \$38,900 in cash, subject to mortgages for \$41,100, and the further consideration of \$40,000 in shares of stock of the corporation), which sum of cash and shares of stock were paid and delivered to the defendant in entire ignorance on the part of the stockholders of the said company that defendant was making any profit in the transaction, when in fact the sum so paid in cash was much in excess of the amount actually paid by defendant to the several owners of said several tracts of land. That such excess was as much as \$20,000, but just how much was unknown to the complainant. That defendant in the pur-

chase of said lands acted as the agent of complainant, and was in fact its president, and had no right to derive any profit therefrom. And the bill prays discovery of the amount so received by defendant in excess of the amount paid by him to the vendors of the land, and a decree for its payment.

Defendant, by his answer, denies the concoction of the plan to procure options and form a company, and sell to the company, but alleges that such plan, if it existed, was formed and carried out by Joseph B. Roe, one of the grantors of one of the tracts of land, who himself procured the options mentioned in the bill, on his own account, for the purpose of making sale of his own farm to a company to be formed, and himself framed a prospectus to sell the same to a company at \$250 an acre, which project proving unsuccessful, the project set out in the bill was set on foot, but that it was not a part of the plan that the title of the land should be made to the defendant, and that the several titles were subsequently made to the defendant, instead of to the said Roe, because a specialty creditor of the said Roe threatened to enter judgment against him, the result of which would have been to excite action by other creditors of the said Roe, and embarrass the carrying out of the project, and that in that affair he acted as the agent for said Roe. He denies that he prepared the prospectus, or that he procured subscriptions thereto, except in a few instances. He denies that he concealed his interest in the affair from any of the subscribers, and alleges that it was generally known and understood among the subscribers that Dr. Roe was the holder of the options, and was to convey to the company at \$200 per acre, which was an advance over the option price. He denies that he procured the organization of the company, except that he joined with the other corporators in the certificate of its incorporation. He admits the payment of the subscription, and his election as president, which he says was unsought by him and against his will. That the amount paid to him in cash was only about \$30,000; the balance, of about \$9,000, being paid by the complainant directly to one of Roe's creditors. That the \$30,000 paid to the defendant was used in paying the several vendors other than Dr. Roe, and the debts of Roe, and the balance was paid to Roe, except that Roe allowed defendant one-half the profits made by him upon the options from the other vendors. That this allowance was in pursuance of an agreement made between Roe and himself when Roe first undertook to make a market for his land. That he divided the 400 shares of stock issued to him in part payment of the conveyance among all the subscribers ratably, so that each received two shares, of \$100 each, for each \$100 paid by him.

D. J. Pancoast and Howard M. Cooper, for complainant. M. P. & S. H. Grey, for defendant.

PITNEY, V. C. (after stating the facts). There is little or no dispute as to the facts of the case. In 1889 Dr. Joseph B. Roe was the owner of a farm of about 235 acres lying about two miles southerly from Woodbury, Gloucester county, and on or near the line of the railway. It was heavily mortgaged, and the doctor was otherwise financially embarrassed. In this condition he devised a scheme whereby he might make an advantageous sale of a portion of his farm, in connection with some of his neighbors' adjoining farms, to some institution which needed such a tract, or to a land company which would develop and prepare it for market, at retail, for villa sites. With that view he approached his neighboring owners, Messrs. West Jessup, Caleb C. Pancoast, and John H. Dilks, who controlled about 260 acres of land, and procured from each of them written options to purchase their farms at certain prices, averaging considerably less than \$200 per acre. The form and precise character of these option papers is not shown. None of them are produced, though complainant seems to have used every reasonable means to obtain and procure them. It is fairly to be inferred that the options were at first merely verbal, and it is clear enough that nothing was at any time paid for them, and no obligation imposed upon Dr. Roe to purchase. They were one-sided contracts,—options, pure and simple. In this situation, and, as I infer, before all the options were actually secured, Dr. Roe employed a Mr. Long to try to get subscriptions to a stock company to take these lands at \$250 per acre. This attempt failed. He then applied to the defendant, who was then clerk of the county of Gloucester, and had recently launched, with apparent success, a land company in the neighborhood, acting as its president and manager. Defendant arranged with Dr. Roe to assist him in securing the land options, and promoting and organizing a land company to purchase the lands, upon the terms of having one-half the profits that should be realized from the sale of the lands held under option at a price greater than that paid to the owners. In pursuance of this arrangement, defendant wrote out the several options, and assisted Dr. Roe in making the bargain in one or two instances. The defendant then drafted the paper called the "Prospectus," which was engrossed in duplicate, and circulated for subscriptions of stock. He was himself one of the first group to subscribe, and did subscribe \$2,500 to the stock. He also personally solicited and obtained subscriptions in a few instances, and generally, in casual conversation, as opportunity offered, recommended the enterprise. When \$40,000 had been subscribed, he, on March 15, 1890, joined with six other subscribers (viz. Dr. Joseph B. Roe, Isaac Moffett, John Cooper, David J. Pancoast, J. Alfred Bodine, and William N. Moland) in organizing the corporation; and at a meeting of the subscribers on the same day he acted as chair-

man, and was elected one of the directors, with the other six named, and on March 20th, at a meeting of the board of directors, was elected its president. Calls were then issued for payments on the subscriptions, and were apparently responded to promptly, the subscribers being of undoubted pecuniary responsibility. At the first meeting of directors, March 20th, after the officers were elected, and a call for payments of stock subscriptions was directed, the following resolution was adopted: "The vice president and secretary were authorized to enter into an agreement, in the name of the company, with Henry C. Loudenslager, for the purchase of the proposed tract, of about four hundred acres, at the price of two hundred dollars per acre, to be paid as follows: The land to be purchased subject to mortgage debts of forty thousand dollars or more, and the balance in cash. The president and manager were authorized to proceed with the purchase and securing of title to the land, and engage an engineer and such other help as may be needed, and proceed with the survey of the land, and laying out the same, or a portion of it, for market, as building lots." In the record of this resolution in the book of minutes the word "vice" is interlined before the word "president," and the words "Henry C. Loudenslager" are written over an erasure. No explanation was made of these alterations. The stated secretary was George E. Pierson, but he does not appear to have been present at the meeting in question, as the minute is signed "Joseph B. Roe, Secretary pro Tem." The first pages of the minute book, including that in question, were evidently written up all at one time, and immediately after the certificate of incorporation and the by-laws, so that it is very plain that the minute of March 20th was written in the book by Mr. Pierson from a loose slip which was probably in the handwriting of Dr. Roe. At that date—March 20th—defendant did not hold the title to any land contemplated to be sold. In pursuance of this resolution a formal contract in writing was prepared, and entered into between the complainant corporation, by its vice president, and the defendant, dated April 10, 1890, whereby, in consideration of \$200 per acre, and \$40,000 in shares of stock of the company, defendant agreed to convey to complainant a tract of land containing 399 acres and $\frac{99}{100}$ of an acre, described by metes and bounds, contained in 14 courses, evidently the result of a new and independent survey. At this date he held title to no part of the land. On April 14, 1890, Dr. Roe conveyed to the defendant about 114 acres of land, for the expressed consideration of \$23,000, and defendant executed a declaration of trust as follows: "Declaration of Trust Made by Henry C. Loudenslager. To All to Whom It may Concern: Whereas, Joseph B. Roe and wife have this fourteenth day of April, A. D. 1890, conveyed to me two certain tracts of land in Deptford township, Gloucester county, New

Jersey, for the consideration named in said deed of twenty-three thousand dollars: Now, know ye, that I, Henry C. Loudenslager, declare that I hold title to said land for the benefit of the Woodbury Heights Land Company, a corporation of the state of New Jersey, and the consideration named in said deed is to be paid as follows by the said company: The amount of the mortgages now held by the trustees and executors of the estate of R. K. Matlock, on part of said land, for the principal sum of forty-five hundred dollars, are to remain a lien on said lands, the interest on the same to be paid in cash by the said company. The company to pay to James M. and David Roe, exrs., the sum of nine thousand dollars on account of a certain mortgage and judgments they hold against said land and said Joseph B. Roe, less any amount that may be due from said James M. and David Roe, exrs., on account of any taxes paid by said Joseph B. Roe for their account; and, when said sum is paid, they, the said James M. & David Roe, executors, are to release said land from the operation of said mortgage and judgments. The said company is also to pay the amount of certain executions now in the hands of Frank B. Ridgway, sheriff, issued on judgments against said Joseph B. Roe in favor of John Clement and Daniel J. Packer, and to pay the amount of tax recorded against the same, and any other liens that may be against said land and real estate, and to pay to me, the said Henry C. Loudenslager, the sum of two thousand dollars, the amount due me from the said Joseph B. Roe, and also to deduct from the said consideration money the amount of the subscription to the capital stock of the said company by said Joseph B. Roe, being the sum of twenty-five hundred dollars; and then the said company to pay any balance that may remain of the said sum of twenty-three thousand dollars to the said Joseph B. Roe, his heirs and assigns. Witness my hand and seal this 14th day of April, A. D. 1890."

The immediate occasion of this conveyance was, apparently, as was stated in the answer, that a creditor by bond and warrant of Dr. Roe was pressing him; and defendant, on receiving this conveyance, gave his personal undertaking, by duebill, to pay that creditor. Immediately following this conveyance were the following conveyances: April 15th, the executors of Susan Roe to the defendant, consideration \$1, conveying 14 acres and $\frac{13}{100}$. This parcel was substantially controlled by Dr. Roe, and it appears that the executors of Susan Roe were afterwards paid \$942.80. On April 16th, John H. Dilks conveyed to the defendant 65 acres and $\frac{34}{100}$, at an expressed consideration of \$13,000. The actual amount afterwards paid to Dilks was \$8,000, viz. \$3,000 in cash, over and above a mortgage for \$5,000. On the same day, West Jessup conveyed to defendant 120 acres, less 6 acres conveyed to the railway company, leav-

ing 114 acres, at an expressed consideration of \$23,284, but the amount actually afterwards paid to Jessup was \$17,463. On the same day, Caleb C. Pancoast conveyed to the defendant 78 acres of land, at an expressed consideration of \$15,000, but the actual amount afterwards paid him was \$12,200. On the same day, the heirs of one Reeve conveyed to the defendant 20 acres and 29/100, at an expressed and actual price of \$4,717, or about \$250 per acre. The result of all these conveyances was that there were conveyed to defendant about 413 acres of land, by six several deeds, at an expressed consideration in each of about \$200 per acre, amounting in the aggregate to \$79,817, to which, if we add the amount actually paid to the executors of Susan Roe, \$842.80, we have a little over \$80,000, while the actual cost was \$68,223. The difference between these sums, \$13,936.80, and the cost of 13 acres not conveyed, \$1,586,—in all, \$15,522.80,—is the sum claimed by the complainant. Of these 413 acres, 400 were conveyed by defendant to the complainant for \$80,000 cash, including mortgages left upon the property, and \$40,000 in 400 shares of stock of the company. These shares were issued to the defendant, but were by him distributed among the several subscribers to the stock, in the proportion of their subscriptions, so that each subscriber received in the end two shares of stock for each \$100 paid in cash. The \$80,000 of consideration was paid by complainant to defendant as follows:

Mortgages left upon the property.....	\$41,100
April 17. Cash.....	\$21,500
May 26. Cash.....	5,000
June 4. Cash.....	3,400

Total cash	\$29,900
Judgment in favor of Roe's executors against Joseph B. Roe, paid by the company to the executors	9,000

Total 38,900

Added to the \$41,100 makes...\$80,000

Defendant claims to have paid nearly all of the sum of \$29,900 so received by him to Dr. Roe, in cash, either directly or upon his order; but as he claims, and Dr. Roe admits, that he (defendant) was entitled to one-half the profit of about \$15,000 made on the transaction, it is difficult to believe, and in fact it was not insisted, that he has not in some way retained control of his share of that sum. At the time of the transaction none of the directors, except defendant and Dr. Roe, had any knowledge or notice that this profit was made; and, so far as appears, none of the stockholders, except the same gentlemen and West Jessup and C. C. Pancoast, two of the grantors to defendant, had any knowledge of it. No money was paid by the defendant or Dr. Roe, or either of them, to the vendors, at the delivery of their several deeds. The consideration actually paid went from the corporation, through the hands

of defendant, to the several vendors or their creditors. From the foregoing facts, and the proper inferences to be drawn therefrom, the true relations of the parties are to be deduced.

And, first, I think that at the date of the organization of the corporation, March 20, 1890, and the formal contract to purchase, April 10, 1890, neither Dr. Roe nor defendant were in any true sense the owners of any of the land held under options. They had neither paid nor given anything of value for it, nor had they come under personal obligation with regard to it, nor did they intend to exercise their options until they had secured a purchaser. Indeed, it does not affirmatively appear that the option papers which they held were such as could be enforced, either at law or in equity, against the vendors. Two of them—Pancoast and Jessup—seem to have been so far interested in the completion of the sale as to subscribe for stock liberally, and to execute deeds expressing a consideration largely in excess of the amount actually paid to them, and to deliver them without consideration presently paid. So that the inference of the validity of these options arising from the actual carrying out of the sale is not very strong. These circumstances seem to me to prevent the application here of the equitable notion that in cases of executory contracts for the purchase and sale of land the title is, in equity, to be treated as being in the vendee, and the purchase price as a debt due the vendor. I think that doctrine is not properly applicable to the case of an uncertain, and, at best, bare, option to purchase, like those here in question. This characteristic—namely, that neither Roe nor the defendant were the owners of these lands at the date of this transaction—distinguishes this case from a line of authorities which hold that a party, being already the actual or potential owner of property, either by having the legal title vested in him, or by holding it under contract with part of the consideration paid, and mutual obligations to pay the balance of the consideration, and to convey the property, may innocently promote and organize a company to buy it at an advance.

2. Both defendant and Dr. Roe were active in procuring subscribers to the stock, and in organizing the company. Defendant was present when the first batch of large subscriptions was made, and himself subscribed among them, and solicited subscriptions and advocated the enterprise. He framed the subscription paper or prospectus. This he admitted on the stand, though denied in his answer. In fact, Dr. Roe swears, and it is manifest from all the circumstances, that he took the defendant into the enterprise mainly to have the benefit of his assistance in this very work of organizing the company, and managing the delicate business of procuring the carrying out of the options, and the vesting the title in the corporation. These facts

show that defendant was a "promoter" of this corporation, in any and every sense of that word, as used in such connection by either the American or the English jurists. In this capacity of promoter, as well as that of president of, and one of, the board of directors, he was clearly acting in a fiduciary capacity. He was, in effect, a trustee for the several subscribers to the stock.

3. Although the contract of sale took the form of a contract by defendant as vendor and the complainant as vendee, yet it is manifest that defendant acted therein in the same fiduciary capacity. He contracted to sell property which he did not own, and agreed to take in payment of it, besides the cash consideration mentioned in the contract, 400 shares of the stock of the company, which he actually took and held as trustee for the stockholders; and, as to so much of the cash as he actually received, it must have been known and understood by everybody that he was a mere conduit for that, as well as of the title to the land. He paid for the land with the funds of the complainant.

4. Another aspect of the case, arising out of the prospectus, is that he assumed the position of a purchaser jointly with the other subscribers to these lands, and therein acted as the agent of his partners in the enterprise.

5. While thus acting in a fiduciary capacity, and, in effect, as a mere conduit of title, he not only conveyed to the company property at a greater price than he paid to the actual grantors, but he concealed from the company the fact that he had received a greater price than he paid, and even went further, and, in effect, asserted the contrary to the company, by inserting in the deeds to himself a greater price than he paid. Defendant swears that these prices were intentionally arranged so that the sum of the whole should amount to about \$80,000. In fact, in all those purchased under the options the consideration was untruefully stated at about \$200 per acre. Now, when we consider that these deeds were sure, in the ordinary course of business, to come under the inspection of the counsel of the company,—already elected, as the minutes show,—in the examination of the title to these lands, it seems impossible to look upon that untrue statement of the consideration in these deeds as anything short of a positive assertion by the defendant that he had paid, or, rather, was obliged to pay and expected to pay, that much money for those lands. In this connection, the language of the prospectus on the subject of price should be noticed: "This tract of land comprises about 400 acres, at the price of \$200 per acre." This clause was not much commented upon by either counsel at the argument. It was probably introduced for the purpose of having the assent of the subscribers to purchasing at that price, and such is undoubtedly its effect. But the question remains,—purchased from whom at that price? And it is impossible to escape the

conviction that it meant that the land was to be purchased from the present actual owners. This, I conclude, would not, under the circumstances, include Dr. Roe or the defendant, as to lands other than those actually owned by the doctor. But I am inclined to the opinion that, like the statement of consideration in the several conveyances, it amounted to an assertion that the amount necessary to be paid was \$200 an acre, and that view of similar clauses has been taken by the courts.

6. The unexplained erasure in the minutes of March 20th, over which the words "Henry Q. Loudenslager" are written, leaves it in doubt whether or not any resolution authorizing a contract between the defendant and the company was ever approved by the board of directors. The general rules covering dealings between trustees and cestuis que trustent, and by the trustee with the trust property, are not open to question. They forbid the retention by a trustee of any secret profit made by him in such dealings. He cannot take and retain any commission or bonus, or other profit, out of any sales or purchases made for the cestui que trust. *Lewis, Trusts*, p. 275 et seq. The law applicable to this particular class of trustees has recently undergone thorough and careful examination and consideration in this court by the late Vice Chancellor Green, as reported in *Fruit Co. v. Buck*, 52 N. J. Eq. 219, 27 Atl. 1094, and his result is stated at page 230, 52 N. J. Eq., and page 1097, 27 Atl., as follows: "I take the law applicable to this case to be that 'no rights, legal or equitable, arise in favor of a corporation, in respect of transactions, whether complete or inchoate, merely because entered into in contemplation of the creation of such corporation,' and that it was open to Dr. Buck to buy the property on his own account, for any price he could, with the intention or in the hope of selling it at a higher price to a company to be formed, and, dealing independently, to sell it for such higher price to such company, so long as he obtained his higher price fairly. That would be clearly unobjectionable. But if he, at the time of his original agreement with White, entered into it on behalf of the future company, under such circumstances that the company, when formed, could say that the purchase made by him was made for the company, or if, at the time the actual purchase was made from White, Dr. Buck was a trustee, officer, or agent of the company, he cannot be permitted to make any profit from the sale to the company. Buck, as the promoter of the corporation, stood in a fiduciary relation to the company as soon as it was organized. As such promoter, it was open to him to sell property which he owned, to the company, on making full and fair disclosure of his interest and position with respect to that property. Not only was such disclosure necessary, but it was incumbent on him, as sole

promoter of the company formed to purchase this specific property, controlling and molding its organization, to furnish it with an executive or board of directors capable of forming competent and impartial judgment as to the wisdom of the purchase, and the price to be paid; and if he, as such promoter, procured the company to be formed, and to be managed in such a way as to transfer from the moneys of the company to himself a certain sum, without informing the company of that fact, or, what is the same thing, if he took, without such disclosure, to his own use, stock of the company issued for the purchase of property, ostensibly to or for another, he cannot retain the same." He then supports his conclusion by citations of authorities and extracts from the judgments of the English jurists. At page 234, 52 N. J. Eq., and page 1099, 27 Atl., he points out that, in determining the true character of the transaction, it is always important to inquire whether the party sought to be charged as a trustee originally purchased the property with his own money, or whether he used the funds of the company for that purpose. If he did use the funds of the company for that purpose, it is a circumstance strongly tending to characterize his position as that of a trustee.

In addition to the authorities cited by Vice Chancellor Green at page 233 of 52 N. J. Eq., page 1099, 27 Atl., I refer to *Brewster v. Hatch*, 122 N. Y. 349, 25 N. E. 505; *Land Co. v. Case*, 104 Mo. 572, 16 S. W. 390; *Mining Co. v. Spooner*, 74 Wis. 307, 42 N. W. 259; *Parker v. Nickerson*, 112 Mass. 195; *Getty v. Devlin*, 54 N. Y. 403, at page 411, 70 N. Y. 504; *Stove Co. v. Wilcox*, 64 Conn. 104, 29 Atl. 303; *Porter v. Woodruff*, 36 N. J. Eq. 174; and *Iron Ore Co. v. Bird* (1886) 83 Ch. Div. 85. *Brewster v. Hatch* was an action by individual stockholders against the promoters of a corporation organized to purchase certain mines held under option by the promoters, much in the same manner as were the lands here by Dr. Roe and defendant. The opinion of the court (page 362, 122 N. Y., and page 508, 25 N. E.) refers to, and relies upon, the fact that the promoters, held by the court to occupy a fiduciary capacity, did not disclose to their cestuis que trustent the amount they were to pay for the mines, and that they did not intend to exercise their options unless the company was successfully launched. *Getty v. Devlin* was a case much like the present. Four persons combined, and purchased an interest in oil lands at a cost of \$30,000, already paid. Then, as here, they prepared and circulated a subscription paper, by which the subscribers agreed to pay the amount by each subscribed, to purchase the lands in question, at \$125,000. The four promoters themselves, as here, subscribed liberally, but concealed the fact from the other subscribers that they were the proprietors, and also concealed the cost to them of the property. In an action

by the stockholders against the promoters, the court of appeals of New York held them liable for the profits made. At page 411, 54 N. Y., Judge Earl used language applicable to this case. He said: "The subscription paper itself contained, substantially, a representation that the subscribers were to purchase the land in Ohio at a cost of \$125,000. It imported a joint adventure for the purchase of lands from persons not subscribers, at the price named, in which all the subscribers were to be interested as purchasers, upon the same footing, in proportion to their subscriptions. When the four defendants sent forth this paper, with their names subscribed to it, they represented that they would pay the sums by them subscribed for the purchase of the land." And again, at page 412, he says: "There is another ground of liability. The subscribers to the paper agreed jointly, and for their mutual benefit and advantage, to purchase certain lands, designated, for a price named. No one of the subscribers could, after this, purchase the lands for a less price, and compel his associates to allow him more than he paid. His purchase would inure to the benefit of all the subscribers." In *Land Co. v. Case*—a thoroughly argued and well-considered case—the defendants Case and Redburn held options to purchase certain property of one Carter, and promoted a corporation to buy that property at \$32,000, whereas in fact their option compelled them to pay a trifle less than \$30,000. It was held, after a full consideration of the authorities, that Case and Redburn were liable to pay to the corporation—which was, as here, the plaintiff—the amount of the profit which they had received. At page 581, 104 Mo., and page 393, 16 S. W., in delivering judgment, the court say: "It is argued that the directors finally consented to take the land and unsold lots at the price of \$32,000; that they got all they contracted for, and the company has no just ground of complaint. They did so consent, but it was upon the representation that \$32,000 was the true consideration paid Carter, and that the notes did not go to Case. For money and property acquired by Case under these untrue representations, occupying the position he did, he must account. What the company might have done, had Case made full disclosure of his profits, we cannot say, nor is it material to inquire. The argument made by defendants on this question is as bad in law as it is in morals." In *Mining Co. v. Spooner* the defendants obtained a right to purchase a mining option for \$20,000, and then proceeded to form a corporation to make the purchase, representing that the option would cost \$90,000, and having got stock to the amount of \$100,000 subscribed, and the defendants becoming officers of the corporation, purchased the option nominally for \$90,000, paying for it only the \$20,000 which it actually cost, with the money by them re-

ceived from the subscribers, and retaining \$70,000 for their own use. It was held that the company was entitled to recover. The court held that the defendants, acting first as promoters, and afterwards as officers of the corporation, occupied the position of trustees for the stockholders, and could make no profit out of the transaction. In *Iron Co. v. Bird*, two brothers (Birds, the defendants) undertook to make sale of a mineral property for the owners, who were desirous to sell for £90,000, out of which £5,000 might be used for the expenses of promoting a company to purchase the property, leaving £85,000 as the net price. The Birds organized a company to take the property at £100,000, out of which they (the Birds) should receive £10,800 for their profits. An agreement in writing was then made by the owners with a trustee for the prospective company, to sell to him for £100,000. The Birds then employed a solicitor, who got up the prospectus for the company, which stated that the purchase money was £100,000. The Birds subscribed to the memorandum of association for 50 shares each, of £100. The action was brought to recover £10,800 received by them. Held by the court of appeal that they were promoters, and, as such, liable. In delivering judgment (page 92, 33 Ch. Div.), Lindley, L. J., said: "James Bird in fact procured the formation of the company. He suggested its formation; he took an active part in the preparation of its prospectus and memorandum and articles of association, in the appointment of two of its first directors, in the appointment of its secretary; and he procured his own firm to be engaged to conduct the sales of the company, at a large commission. He fixed the purchase money at £100,000, and stipulated for the payment of £10,800 to his own firm; and he procured the payment of that sum by the company, and he was himself a director when the last installments of it were made. He was, in truth, the person who fastened the contract to pay £100,000 on the company, without disclosing the fact that his firm were to get £10,800 out of the purchase money." Applying to the case in hand the principles thus enunciated, I am unable to perceive how the defendant can escape liability.

Counsel for defendant contended that neither Dr. Roe nor the defendant were in fact promoters of the company, nor did either of them occupy towards it a fiduciary relation which rendered it incumbent on them to disclose the terms upon which they were to obtain title to the outlands, and that neither made any untrue representations in the premises. For reasons already given, I am unable to adopt those views. I think they did occupy fiduciary relations, and I also think that the insertion in the deeds to Loudenslager of a greater price than they paid was an untrue assertion.

It was also urged that the circumstance that the title in this case passed through de-

fendant was not a part of the original plan of the defendant and Dr. Roe, but was the result of fortuitous circumstances, not connected with the case, and ought not to operate to the prejudice of the defendant. I am inclined to the opinion that the defendant's contention of fact in that respect is correct. But, admitting it to be true, the question still remains, how would the case stand if the conveyances from the outside parties had been made to Dr. Roe, and by him to the company, and the suit had been against Dr. Roe and the defendant jointly? In that case it seems to me that, as against the defendant, the complainant's right to recover his share of the profit would be quite as clear, if not clearer, than it is under the present state of the case. He would then, as now, still stand in the position of aiding Dr. Roe in making a secret profit out of the company, and dividing it with him, and all while he was acting as a trustee of the company. In short, the essence of the transaction would not be changed.

It is further urged that, at the last, the company dealt with the defendant at arm's length, as with a stranger, and at an agreed price. But this is not true, as a matter of fact. The terms of the resolution and of the written contract show, as before observed, that all concerned must have known that defendant was a mere conduit. In the first place, the consideration named was not only the \$200 per acre, in cash or its equivalent, but also, in addition thereto, 400 shares of stock, which defendant took in trust for the stockholders, and actually distributed among them; and then all the directors must have known that defendant, at the moment of making the contract with him, was not the actual owner of either of the several tracts. In truth, the title to the Roe tract, afterwards acquired, was held by him under a written declaration of trust in favor of the complainant, subject to the payment of the purchase money. These circumstances render it quite impossible to treat the transaction as a dealing with the defendant at arm's length.

Defendant's counsel took the further ground that an additional value was given to the property by the labor and management of the defendant and Dr. Roe in procuring these several options, and thereby consolidating the several tracts held by different titles in one body, and that having thus increased the value of the property, and being, in the view of a court of equity, its owners, they were entitled to sell it to a company to be formed, at the price they did. And in this connection they rely upon the fact that the subscribers to the stock were mainly residents of the neighborhood, and familiar with the land and the situation, and entirely competent to judge of its value, and that they must be presumed to have purchased on the strength of their own judgment of the value of the property and not upon the actual or implied representation of its cost contained in the documen-

tary evidence hereinbefore referred to. But I think the complete answer to that is found in the fact that, occupying a fiduciary capacity, the defendant failed to disclose to his cestui que trust the fact that the actual cost of the property was less than that demanded for it. The actual cost was a factor which the purchasers were entitled to know, in forming their judgment as to the value of the property; and they were also entitled to judge for themselves as to whether the labor of the defendant and Dr. Roe in procuring these options in point of fact added to their value in the manner and to the extent argued by the defendant's counsel.

The authority mainly relied upon by the defendant in a case cited by Vice Chancellor Green in the *Plaquemines Case*, namely, *Gover's Case* (1875) L. R. 20 Eq. 114; s. c., on appeal, 1 Ch. Div. 182. But that case is clearly distinguishable from the one in hand in this respect: That it was not an action brought by a corporation, or by individual stockholders in a corporation, to recover from its promoter or president a profit made by him in dealing with the company, but it was a motion by a subscriber to the stock of a corporation, against the official liquidator thereof, to be relieved from the burden of her subscription, and to that extent diminish the fund to be distributed, and it was based on the ground that a statutory fraud was practiced upon her, in the prospectus and in the formation of the company; so that it was, in effect, a suit between creditors of a corporation and its stockholders. The case shows that one Skoines was the owner of a patent. He agreed, in writing, to sell it to one Mappin for £65,000, to be paid £1,000 in cash, and £4,000 within 21 days after the allotment of shares in a company to be formed and registered by Mappin for the purpose of working the patent; £15,000 in preferred shares of the company, bearing interest at 15 per cent. per annum; and £45,000 in fully paid up ordinary shares of the company. By the agreement, Mappin undertook to form a company. Three months later, Mappin entered into an agreement in writing with one Wright, as a trustee for the intended company, to sell the patent to Wright for £125,000,—£75,000 in cash, and £7,500 two months later, and £45,000 in paid-up shares entitled to a preferential dividend of 10 per cent, and £65,000 in deferred shares. The company was formed, and Miss Govers was a subscriber to the stock. It failed, and a liquidator was appointed. It does not appear that there were any fraudulent statements in the prospectus. The alleged statutory fraud consisted in suppressing the existence of the contract between Skoines and Mappin. The application to be relieved was based upon the idea that Mappin was a promoter of the company. It was held, by Sir James Bacon, V. C., in the court below, that she was not entitled to be relieved, on two grounds: First, that the fiduciary relation of a promoter was not established

against Mappin; and, second, if it were established against him, its existence did not affect the contract between the company and the shareholders, and that her remedy was by action against Mappin. The appeal was heard by four judges, viz. James and Mellish, L. JJ., Bramwell, B., and Brett, J. (now Lord Esher). It was held by James, L. J., and Bramwell, B., (1) that Mappin was not, when he made the first agreement with the patentee, a promoter, and the omission to specify that agreement in the prospectus was not fraudulent, under the statute; and (2) that, where the omission to specify any agreement renders the prospectus fraudulent under the statute, a shareholder has his remedy against the person making the omission, but cannot therefore have his name removed from the list of shareholders. It was held by Mellish, L. J., that Mappin was a promoter, and that he ought to have disclosed his agreement to the company, but that the omission so to do did not, under the statute, make the prospectus fraudulent on the part of the company, and that the shareholder, therefore, could not have his name removed, but had his remedy against Mappin. It was held by Brett, J., that the omission to disclose the first agreement was not a fraud, independently of the statute, but that the omission to disclose a contract formerly made by a promoter, and likely to affect the mind of a subscriber for shares, was fraudulent, under the statute, and that the remedy of the shareholder was to have her name removed from the list of shareholders. Mellish, L. J. (page 191), says: "Now, I agree that, if the contract between Skoines and Mappin is to be looked at as an unconditional contract for the sale of the patent from Skoines to Mappin, the company had no interest in the contract, and were not entitled to have its contents disclosed to them. The contract, however, between Skoines and Mappin, was a contract, as it appears to me, upon the condition that Mappin should procure the patent to be sold to a company formed for the purpose of working the patent, and, if such sale was effected, £64,000, partly in money and partly in shares, was to be given to Skoines, and the residue of the price, whether money or shares, was to be retained by Mappin. Now, when the company became the purchaser of the patent,—that is to say, when the directors, after the formation of the company, adopted the contract made by Mappin with Wright,—Mappin was both a promoter and director of the company. The purchase of the patent by the company, who were the only company then in existence formed for the working of the patent, enabled him, without the knowledge of the company, to fulfill his contract with Skoines, and to earn an enormous profit. It seems to me that there are grounds for contending that, under these circumstances, Mappin ought not to be considered as the owner of the patent, but only as a person who, by a contract with the owner of the patent, had the disposal of the pat-

ent; and in that case he was bound to communicate his contract with Skolnes to the company, and as he did not do so the company were entitled to the benefit of that contract." That language applies here, and commends itself by its clear appreciation of what is equitable and just. Its author had the reputation of being the best lawyer of his day in England. The opinions each show that the decision was influenced by the fact that the question was between Miss Govers and the creditors of the company, and not between the company or Miss Govers and Mappin; and it was conceded by all the judges and by counsel that as well the company as the de-luded stockholders, individually, might maintain an action or actions against Mappin, either to recover his profits, or the damages which they had sustained by his conduct.

Again, if I am wrong in either or both of the positions above taken,—that Roe and the defendant were not the owners, in any proper sense, of these lands at the organization of the company, and were its promoters,—and we treat them as actual or potential owners, and not promoters, still it seems to me not to follow that they were relieved from the duty, under the circumstances, of making full disclosure to the stockholders of such ownership. That duty arose from their present position as officers of the company, and they are clearly within the canon laid down by Vice Chancellor Green, above quoted; for it is to be observed that the mention of the price of \$200 per acre in the prospectus subscribed by the stockholders did not constitute a contract on their part to purchase any lands at that price. The absence of any contractual force in the language so used was conceded at the argument. It was no more than a statement or assertion of the probable cost of the property, and a limit fixed to its price. Nor is there room to contend, upon the evidence, that the part conveyed by Dr. Roe was worth so much more by the acre than that held by option, and purchased from his neighbors, as to make the average cost of the whole plot \$200 per acre? No proof was adduced or offered in that direction, and there is nothing in the case to warrant the assumption that the part of Dr. Roe's farm conveyed to the company was any more valuable than that conveyed by his neighbors. The fact that the consideration mentioned in the deed from Dr. Roe to the defendant—which, it must be remembered, was, in effect, in the view of a court of equity, a conveyance to the complainant—amounted, like the others, to just about \$200 per acre, together with the fact that the difference between the price paid to the option givers, and the price received for the same lands from the company, was treated between the doctor and the defendant as profits to be divided equally between them, forbid the idea that the doctor's lands were worth more than his neighbors. I repeat, then, that I am unable to see how the defendant can escape liability to account to the complainant for the profits

which he has made in the transaction in question.

The question whether complainant's decree should be for the whole profit made in the transaction, or for one-half thereof only, was not discussed by counsel, and I express no opinion on it. There may be a reference to ascertain the amount of the profits, and the question as to the amount of the decree may be discussed upon the coming in of the master's report.

McMAHON et al. v. WEART et al.

(Court of Chancery of New Jersey. Sept. 5, 1896.)

INJUNCTION—APPLICATION BY ADMINISTRATORS TO ORPHANS' COURT TO HAVE ESTATE DECLARED INSOLVENT—ACCOUNTING—RIGHTS OF NEXT OF KIN.

1. The right of an administrator to apply to the orphans' court to have the estate declared insolvent being expressly given by statute (Orphans' Court Act, § 91), prosecution of such application will not be enjoined, the orphans' court having power to adjudicate, on the hearing of the application, on the questions raised by the bill to enjoin, whether debts proved against the estate were barred by limitations at the time of the hearing, and whether the claims, after being proved, having been purchased at a discount by a debtor of the estate, and by connivance with the administrator, for the purpose of offsetting against his debt, can be allowed for anything beyond the amount paid therefor.

2. An accounting in the orphans' court by an administrator will not be enjoined on the ground that the said court may exceed its power by sanctioning in advance a proposed compromise by the administrator with a debtor, it being presumed that it will not exceed its power, and the remedy being by appeal if it does.

3. Next of kin entitled to the estate, if claims against it are barred, as they claim, may question not only the administrator's account, but also his application to have the estate declared insolvent.

Suit by Bernard J. McMahon and another against Jacob Weart, administrator of Bernard McMahon, deceased, and another, for injunction. Heard on demurrer to bill.

C. Linn and Mr. Edwards, for complainants, R. H. McCarter, for defendants.

EMERY, V. C. This bill is filed by the two next of kin of Bernard McMahon, deceased, against Jacob Weart, his administrator, against the F. O. Mathieson, etc., Company, a debtor of the estate, and F. O. Mathieson, who has procured assignments of claims proved against the estate. The administrator having been cited to account by the Hudson orphans' court, on the application of one of the complainants, filed his accounts in that court, and filed therewith a petition to have the estate declared insolvent, under section 91 of the orphans' court act. Exceptions were filed to the account by one of the complainants, and in these proceedings the orphans' court directed that the hearing on the accounting should be stayed pending the application to have the estate declared insolvent, and proofs have

been taken on both sides on this proceeding. The present bill is filed to enjoin the prosecution of the application to the orphans' court upon the petition for insolvency, and to require the settlement of the accounts in this court. The defendants have demurred, assigning specially the want of jurisdiction pending the orphans' court proceedings. The right of an administrator to make this application in insolvency to the orphans' court is expressly conferred by statute, and, unless it is clear that the facts now relied on to enjoin its prosecution cannot be considered by the orphans' court in adjudicating upon the application, this court should not interfere with the orphans' court. As it now strikes me, the orphans' court, under this ninety-first section, would have the right to refuse the application of the administrator upon sufficient grounds, either legal or equitable, and to apply the principles of equity in determining the issues raised. But, whether or not it has this general power, it would seem to be clear that the orphans' court has power to adjudicate upon the questions raised by the bill as to this application. One is whether the debts proved against the estate were barred by the statute of limitations at the time of the application, more than 20 years having elapsed between the time of proving the claims and the application in insolvency; another is whether the claims, after being proved, having been purchased at a discount by the debtor of the estate, or in its interest, and by connivance with the administrator for the purpose of offsetting against the debt, can now be allowed as claims for anything beyond the amount paid. These are questions which seem to me to be within the jurisdiction of the orphans' court to consider and determine on this application, and no sufficient reason is shown for ousting their jurisdiction. One other reason for transferring the jurisdiction, strongly urged, is that by the administrator's account, filed under order of the court, it appears that the administrator has entered into an agreement with the Mathieson Company, the judgment debtor of the estate, agreeing to compromise the judgment which on February 24, 1894, the date of the agreement, amounted, principal and interest, to over \$28,000, for \$2,500, upon the condition that the administrator should charge himself with this amount in his account, and pay it if the account was confirmed; and that, if rejected as fraudulent and void by the orphans' court, and this order should be sustained on appeal, the agreement for settlement should be void. Counsel for complainant urges that the orphans' court has no authority or right to pass upon the validity of the proposed compromise. I agree with counsel in this view as to the power of the orphans' court to sanction a compromise in advance. If a compromise is actually made by an executor or administrator, and allowance is prayed in his account, then, on the question of allowing or disallowing the account, so far as relates to the compromise, the

orphans' court has authority to act upon the question of the compromise; but when, as here, the agreement is practically an agreement to submit the question of its fairness to the orphans' court before it is carried out, I think it is clear that the orphans' court cannot thus adjudge in advance, nor advise the administrator; nor does it now strike me as certain that in this matter of adjudicating in advance the court of equity has any greater power. And if the orphans' court has not, as counsel claims, the power to adjudicate upon the validity of this compromise, it must be presumed that it will not exceed its power. If it should do so, the remedy will be by appeal, but there is no remedy in advance by injunction based upon the theory that it will proceed beyond its powers. All the questions relating to this application for insolvency seem to be fairly within the jurisdiction of the orphans' court, and can be as fairly disposed of there as here. So far, therefore, as relates to the right to proceed upon the petition, that must be decided in the court which has the statutory jurisdiction. So far as relates merely to the accounting of the administrator, no sufficient reason is shown by the bill why the account should not be settled in the orphans' court. On this ground, therefore, the demurrer is sustained.

The ground of demurrer that the complainants have no interest, because the estate, on their own showing, will or may be all exhausted in paying the debts, does not seem to me to be well founded. The principle laid down in *Dunham v. Marsh* (Err. & App., 1894) 52 N. J. Eq. 831, 31 Atl. 619, seems to control the case on this point. As next of kin entitled to the estate, if the debts are barred, as they claim, they have the right to question, not only the administrator's account, but also his application to have the estate declared insolvent.

(54 N. J. E. 545)

HARE v. HEADLEY et al.

(Court of Chancery of New Jersey. Sept. 3, 1896.)

FIRE INSURANCE—AGREEMENT BETWEEN INSURERS AND MORTGAGEES—SUBROGATION TO MORTGAGEE'S RIGHT—FORFEITURE—WAIVER—ASSIGNMENT.

1. The claims of a fire insurance company, which paid insurance to a mortgagee, to a part of the proceeds of the mortgage sale, through subrogation to the rights of the mortgagee, are assignable.

2. Insured is the sole and unconditional owner of the insured property, notwithstanding he had previously mortgaged it.

3. Insured cannot be held to have forfeited his rights under the policy because not commencing suit on it within a year after loss, the insurer having within the time paid the whole loss to the mortgagee of insured; and this whether the payment be considered as made to him simply as the appointee of the owner, or by reason of an independent contract between the insurer and the mortgagee that the rights of the latter, as mortgagee, to any insurance, should not be lost on account of any act or default of the insured.

4. Forfeiture of insured's rights by reason of his failure to give notice or proofs of loss as required by the policy cannot be considered waived by the payment of loss to insurer's mortgagee; the insurer having at the time of payment claimed that no liability to the insured existed, under the policy, and that, under the independent agreement of the insurer with the mortgagee, the insurer was entitled to subrogation to the mortgagee's rights under the mortgage.

5. An independent contract between the mortgagee of property—for whose benefit the owner insures it—and the insurer that the insurance shall continue good, as to the mortgagee, notwithstanding any forfeiture by the owner, and that, if any loss is paid the mortgagee under such circumstances, the insurer shall be subrogated to the rights of the mortgagee under the mortgage, is valid, though the owner does not know of it.

Suit by J. Montgomery Hare against Albert G. Headley and others to obtain money paid into court on a foreclosure suit.

The principal question involved in this case is whether fire insurance companies, who have paid to a first mortgagee the loss to the mortgaged property occasioned by fire, are entitled to be subrogated therefor to the rights of the first mortgagee, or whether the second mortgagee is entitled to have the payment credited or applied as a payment on the first mortgage. The complainant is the assignee of the fire insurance companies. The defendant Headley is the assignee of the second mortgage. The case is heard upon bill, answer of defendant Headley, replication, and written state of facts agreed on; and, so far as relates to the question of subrogation, now involved, the case in detail is as follows:

The first mortgage, to secure \$40,000, was given to the Mutual Life Insurance Company of New York, on March 21, 1888, by Riley & Osborn, then the owners of the property mortgaged, and the mortgage contained the usual insurance clause, providing that the mortgagors should insure the buildings on the premises, and assign the policies to the mortgagee, as a further and collateral security for the payment of the debt; and on their failure so to insure the mortgagees had the option to insure, and any premiums paid by them, with interest thereon, were made a lien on the mortgaged premises, and to be secured by the mortgage. On the same day (March 21, 1888) Riley & Osborn executed a second and subsequent mortgage on the premises to one John H. Kase for \$8,000, being the mortgage afterwards assigned to the defendant Headley. On January 25, 1890, Riley & Osborn conveyed the mortgaged premises to Gabriel Schwab and others, partners trading as G. Schwab & Bros.; and on or about March 1, 1891, these owners insured the property for the total amount of \$30,000 in seven different fire insurance companies, the insurances to run from March 1, 1891, to March 1, 1892 (except the California Insurance Company policy for \$3,010, which ran from March 28, 1891, to March 28, 1892), and in each policy was

written, "Loss, if any, payable to Mutual Life Insurance Company of New York, mortgagee." On the policy issued by the Phoenix Assurance Company this indorsement was made April 11, 1891. On all the other policies the indorsement, for all that appears, was made on issuing the policies. Each of the policies was in the form known as the "Standard Fire Insurance Policy of the State of New York," and contained, among others, the following conditions and provisions avoiding the policies by reason of acts, omissions, or defaults of the insured: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale of any property covered by this policy, by virtue of any mortgage or trust deed, or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured, or otherwise." In relation to acts of the insured after the fire, there were conditions that "if fire occur the insured shall give immediate notice of loss, in writing, to the company," and should, within 60 days after the fire, render proofs of loss, with the further provisions that the company should not be held to have waived any provision or condition of the policy, or any forfeiture of it, by any act or proceeding on its part relating to the appraisal or examination as to loss provided for by the policy, and that "no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months after the fire." These policies did not contain the clause known in insurance as the "mortgage clause," but, at the time of the delivery of these policies to the Mutual Life Insurance Company as collateral, this company had in force, with each of the insurance companies, an existing, independent contract, giving it the benefit of the mortgage clause, the form of the agreement being as follows:

"In consideration of one dollar by each of the parties hereto to the other in hand paid, the receipt of which is hereby acknowledged, and for other valuable considerations, the Mutual Life Insurance Company of New York, party hereto of the first part, and —, party hereto of the second part, hereby mutually covenant and agree as follows:

"That all policies of fire insurance issued by the said party hereto of the second part, which are or may be assigned to or held by the party hereto of the first part aforesaid, as mortgagees, shall have written upon or attached or appended thereto the following clause, which it is hereby agreed is necessary to clearly express all the facts and conditions of insurance on each particular risk covered

by said policies of insurance, respectively; the said clause being as follows:

"Mortgage Clause. Loss or damage, if any, under this policy, shall be payable to the Mutual Life Insurance Company of New York, as mortgagee, as interest may appear; and the interest of the said mortgagee shall be considered absolutely insured, and subject to no plea in bar of its right to recover from this company, under this policy, such sum or sums of money as shall save the said mortgagee from loss in consequence of any fire which may happen, except such loss as may take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, and shall not be invalidated by any act or neglect of the mortgagor or owner of the within-described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title, occupation, or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy: provided that, in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee shall, on demand, pay the same.

"It is agreed that the mortgagee shall notify this company of any change of ownership (other than transfer of the title to itself) or occupancy or increase of hazard which shall come to the knowledge of said mortgagee, and, unless permitted by this policy, it shall be noted thereon; and the mortgagee shall, on demand, pay the additional premium for such increased hazard for the term of the use thereof.

"Whenever this company shall pay the mortgagee any sum for loss or damage under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage, and of all such other securities; but no subrogation shall impair the right of the mortgagee to recover the full amount of its claim.

"Dated _____,

"Attached to, and forming part of, Policy No. _____,

"[Signature of Company].

"And it is further agreed that in the event that the said clause should, by oversight or neglect, be not written upon, attached or appended to, any one of said policies of insurance, that the rights of the parties hereto under said policy of insurance shall be determined, established, and settled with like force and effect as if their intention to write upon, attach, or append the clause aforesaid to said

policy of insurance had been fully carried out and effectuated. In witness whereof, the parties hereto, by their duly-authorized officers, * * * have executed this agreement upon this _____ day of _____, in the year one thousand eight hundred and ninety-four."

The existence of this independent contract between the mortgagee and the insurance companies was not known to Schwab & Bros., or to the defendant Headley, or to the owners. On November 28, 1891, a portion of the buildings was destroyed by fire. The insured did not give any notice of loss thereby to the fire companies, or either of them, nor within 60 days, or ever, render proofs of loss or statements to the fire companies, as required by the policies. Previous to the fire, and in March, 1891, while all the policies were running, four writs of attachment were issued against G. Schwab & Bros., under and by virtue of each of which the sheriff of the county of Essex attached the insured property, and all of these attachments were at the time of the fire outstanding and pending. On May 9, 1891, a bill to foreclose its mortgage was filed by the Mutual Life Insurance Company in this court, to which suit Schwab & Bros. were made parties defendant, and were brought in by publication, and the usual notice to absent defendants, which was mailed to them at their correct address in New York City. On February 9, 1892, and more than 60 days after the fire, the Mutual Life Insurance Company, as mortgagee, entered into an adjustment with the several fire companies, submitting the amount of the loss to appraisers, who on March 9, 1892, appraised the loss at \$6,114.04; and on July 15, 1892, the several companies paid this award to the mortgagee. In the appraisal and the settlement which was entered into and made by the fire companies with the Mutual Life Insurance Company as mortgagee, the fire companies claimed to the mortgagee that, as to the mortgagors or owners of the property, no liability under the policies existed, and that, under their independent agreements with the Mutual Life Company, they were entitled to subrogation to its rights as mortgagee under the mortgage. No assignment, however, was made by the Mutual Life Company to the fire companies, at the time of the payment or at any time, of any of its rights.

The above statement gives substantially, I believe, the facts which are material to the decision of the main question involved,—the right of the fire insurance companies to subrogation. But a question is also raised, whether in this present contest (which, in form, arises over the disposition of surplus money in the foreclosure suit) the money which has been paid to the life insurance company must not be considered as actually credited by it on the mortgage debt, and whether the fire companies are not thereby remitted altogether to their remedy on the contract with the life insurance company.

For a decision of this question a reference to the proceedings in the foreclosure suit is essential. The final decree in the foreclosure suit was made January 27, 1892,—more than 60 days after the fire, and before any adjustment of loss. This decree, and the execution thereon, which was issued February 9, 1892, directed that the mortgaged premises be sold to pay, in the first place, complainant's decree, \$44,762.74, with interest from October 30, 1891, besides costs; and, in the second place, decree for defendant Kase for \$8,520, with interest from the same date,—and execution was delivered to the sheriff on February 10, 1892. After receiving payment of the sum of \$6,114 from the fire companies in July, 1892, as above stated, the life insurance company, without making any credit on its execution, proceeded to a sale of the premises as if the whole amount thereof was due; and on August 23, 1892, the property was sold for \$45,100 to the complainant in this case, who on the 22d day of August, 1892,—the day previous to the sale,—had received from the fire insurance companies assignments of their interests in the bond, mortgage, decree, and execution, and moneys due or to grow due thereon. On August 27, 1892, this sale was reported to the chancellor for confirmation, and on September 6, 1892, the sale was confirmed, and the sheriff directed to execute a conveyance. On September 8, 1892, and before the deed had been delivered by the sheriff, the defendant Headley filed a petition claiming that the payment by the fire companies to the life insurance company after the decree operated as a payment on the decree for his benefit, and reduced the decree to less than \$42,000, and stating also that the fire insurance companies insisted that the life insurance company should take from the sheriff the whole proceeds of sale, and pay back to the fire insurance companies the surplus over and above the amount due the life insurance company, after crediting the payment, and that the fire insurance companies had notified the sheriff to pay the whole proceeds of sale to the complainants, or else to pay over the surplus to them. Headley claimed the surplus, and so notified the sheriff. On this petition, and without any notice, so far as appears, to either the life insurance company or the fire companies or the purchaser, an order was made on the same day (September 8, 1892) directing that, pending proceedings to ascertain what disposition should be made of the surplus moneys, the sheriff should pay into court any surplus in his hands over and above the amount of complainant's decree, with interest, costs, and sheriff's fees, after deducting the sum of \$6,114, appearing to have been paid to complainant since issuing execution, and \$14.57 interest thereon. Pursuant to this order the sheriff paid into court \$3,484.02, and on January 31, 1893, the complainant in this case, as assignee of the fire insurance companies, filed a petition praying to be admitted as a

party, either complainant or defendant, in the foreclosure suit, for the purpose of obtaining the surplus money; but after hearing before Vice Chancellor Green this application was denied, as raising questions which should be determined upon formal bill. The bill in this cause was thereupon filed by the present complainant for the purpose of obtaining by decree in this suit payment to it of the money directed to be paid into court by the order in the foreclosure suit, to which it was not, and by order of the court could not become, a party, either as complainant or defendant. Upon the argument two preliminary questions raised by defendant are—First, that the claim of the fire companies is not assignable, and that the complainant, therefore, has no standing in court; and, second, that the Mutual Life Insurance Company in fact credited the money received from the fire insurance companies on the decree as a payment, and the defendant Headley is entitled to the benefit of that credit, and, if the credit was made in violation of the contract between the life insurance company and the fire companies, the latter must look to the life insurance company for reimbursement.

E. A. Day and James S. Stearns, for complainant. E. Q. Keasbey and J. Franklin Fort, for defendant Headley.

EMERY, V. C. (after stating the facts). On the above facts, I reach the following conclusions:

1. As to the assignment of the claim of the fire insurance companies to complainant, I can see no objection to its validity, nor have counsel referred me to any authority calling in question the assignability of a chose in action of this character.

2. The claim of defendant that the money received by the life insurance company for the insurance was credited on the decree does not seem to be well founded in point of fact. Since the point was raised at the argument, I have examined the record and proceedings in the foreclosure suit, which were offered in evidence; and this record plainly shows that no credit of the insurance money was made upon the decree by the life insurance company, but that on Headley's application, and without notice to the fire insurance companies or complainant, the credit was made by order of the court, in order that the dispute between Headley and complainant might be settled on the application for surplus money. The complainant is certainly entitled, under these circumstances, to raise the question as to his right to subrogation, and has not been deprived of it by any act of the life insurance company.

3. As to the main question in the cause,—the complainant's right to subrogation,—this must clearly rest, as it seems to me, upon the establishment of two propositions: First, that as between the fire insurance companies and the owner insured, the policies were in fact void, by reason of acts or neglects of the

mortgagor or owner which avoided the policy; and, second, that an agreement between the fire insurance companies and the mortgagee, providing for payment of loss to the mortgagee in case of such invalidation of the policy by act of the owner, is valid, although not incorporated within the policy itself, but is an independent, existing agreement, becoming applicable to all policies as they are assigned to the mortgagee. The defendant disputes both of these propositions, and also claims that, as to the alleged forfeiture by the acts and neglect of the owner, these were waived by the adjustment and payment of the loss to the mortgagee as the appointee of the owner under the policy. The question of forfeiture is one of fact, and several acts of forfeiture were relied on by complainant at the argument, one of the grounds alleged in the bill not being pressed. This was the claim that the insured were not the unconditional owners of the insured property, by reason of conveyances previously made to one Domnick and F. Butterfield & Co. These deeds, on their face, were clearly mortgages, and under the doctrine settled in *Carson v. Insurance Co.* (1881) 43 N. J. Law, 300, and other cases cited, were no violations of the condition in question. The forfeitures relied on, as against the owner, are (1) the seizures and levies on the property under the attachments; (2) the commencement of foreclosure proceedings with knowledge of the insured; (3) the failure of the owners to give immediate notice of the loss, or to give any notice thereof; (4) their failure to render statements or proofs of loss within 60 days; and (5) the failure to commence suit on the policy within 12 months. There is no basis for this last claim, as it appears to me, because, the whole loss secured by the policy having been in fact paid within the 12 months to the mortgagee, there could be no other recovery by the owner on the policy if suit were brought. This results from the mere fact of payment, and is the case whether the payment made to the mortgagee be considered as made to him simply as appointee of the owner, under a policy in force in favor of the owner, or as a payment in favor of the mortgagee only made under the independent contracts. As to the other alleged forfeitures, my view is that the seizures and levies under the attachments were a change in the interest of the insured in the insured property, by legal process, within the terms of the policy. In relation to the second ground of forfeiture relied on,—the owner's knowledge of the commencement of foreclosure proceedings,—the facts relied on to prove such knowledge are that prior to the commencement of the suit the solicitor of the mortgagee mailed a notice to the owners that the suit would be commenced unless interest was paid, and that the notices to absent defendants were mailed to them to the correct addresses in New York City. No direct proof is made of receipt of the letters by the owners, nor, on the other hand, has any proof been

made by the defendant that the letters were not received. The question on this point, therefore, is whether the general rule of evidence that a letter properly mailed is presumed to have reached its destination at the proper time, and to have been received by the person to whom it was addressed, is applicable to a case where, if presumed to have been received, the effect will or may be to result in a forfeiture. That courts construe strictly statutes, contracts, and other sources of obligations, where the forfeiture of rights under them depends upon construction, is, and always has been, the undoubted rule; but the question here relates to a rule of evidence, and not of construction, and is whether a rule of evidence generally applicable in relation to the *prima facie* proof of a fact is made inapplicable by reason of the effect on property rights of the operation of the rule. The weight of authority is that the rule of evidence must operate without regard to the contents of the letter, or its effect. *Rosenthal v. Walker*, 111 U. S. 185, 193, 194, 4 Sup. Ct. 382, and cases cited. I am inclined to adopt this view, supported as it is by another consideration, viz. that the method of mailing notices of foreclosure to absent defendants at their post-office addresses, having been adopted and enforced by the legislature and the courts as a method of fulfilling the obligation of giving the notice necessary in every judicial proceeding, such method, in view of its continued public recognition for such purposes, must be considered as sufficient *prima facie* proof that the notice required by law accomplished the object of the law, and was received. But the determination of this question is not necessary for the decision of this cause; for, in my opinion, there are two remaining causes of forfeiture, which are made out as against the owner, and these are his failure to give notice of the loss and the failure to render proofs as required by the policy. Such failure, if not waived by the company, avoids the policy. *Insurance Co. v. Snyder* (N. J. Sup.; June, 1896) 34 Atl. 931.

The defendants, not controverting these failures of the owner to comply with the conditions of the policy, rely upon the subsequent adjustment and payment of loss to the mortgagee as a waiver of these failures. This contention is not well founded; for this payment, under the circumstances of this case, and in view of the contract existing between the companies and the mortgagee, must be taken as made by the companies under the claim that they were satisfying an obligation to pay the mortgagee, which existed after the obligation to pay the owner ceased. Such payment so made to the mortgagee, who held this additional contract for payment, cannot be held as intended by the companies to be a payment in waiver of the owner's violation. Waiver, as between persons entitled to insist on the performance of conditions, ultimately depends on the intention of the parties; and, if the act relied on as indicating the intention

is referable to other causes or reasons than a waiver of a right, it should not be construed to be such waiver. The contention of defendants on this point, if valid, would, of necessity, make the mortgage clause nugatory; for the main object of this clause is to provide for a continuance of the policy as to the mortgagee when it has been avoided by the neglects of the owner, and for a payment to the mortgagee after such avoidance as to the owner. To treat the payments made or claimed to be made under this mortgage clause, and while the company deny the obligation to the owner, as having the effect of reinstating the policy in favor of the owner, under the theory of waiver, is to hold that the mortgage clause cannot practically be carried out as against the owner. I conclude, therefore, that the policies were void as between the owner and the fire companies; and the next question is whether a payment of the loss to the mortgagee, who has been appointed by the owner to recover the loss, if made after the policy is void as against the owner, operates to the benefit of the owner's subsequent mortgagee. This depends upon the question whether the contract between the mortgagee and the companies is valid as against the owner, or whether the payment, although voluntarily made, so far as the owner is concerned, must, when received by the mortgagee, be credited upon the debt which the policy was assigned to secure. If there were no mortgage clause, either in the policy or independent, and the fire insurance companies were under no other obligation to the mortgagee than to the owner, then such payment made to the mortgagee would, as it seems to me, clearly operate for the benefit of the owner, and the mortgagee would hold the money received for insurance in trust to apply it to the debt. The question, therefore, as I view this part of the case, is narrowed down to the simple one, whether the contracts in this case, independent of the policies, and unknown to the owner, are, as against him, valid contracts, payments under which are to be considered as payments made to the mortgagee, not under his appointment by the owner, but as made to it in an independent right, with which the owner was not concerned.

Mortgage clauses, so called, continuing the insurance covered by a policy, in favor of a mortgagee, where they are void as to the owner or mortgagor by reason of his acts or defaults, have for many years been used and acted on in connection with policies; and where the clause is either incorporated in the policy itself, or otherwise attached by the consent of all parties,—owner, mortgagee, and insurance companies,—no plausible ground can be urged against their validity, and the uniform opinion of the courts has sustained them. The reason is that the interest and relations of the mortgagee and of the owner to the insured property are in some respects, and to a certain extent, so distinct that the parties, being competent to make the contract,

may provide that the policy may be good to the mortgagee, although not to the owner. *Hastings v. Insurance Co.* (1878) 73 N. Y. 141 (earliest and leading case); *Allen v. Insurance Co.* (1882) 132 Mass. 480; *Insurance Co. v. Bohn* (1894) 12 C. C. A. 531, 85 Fed. 165, 172. The validity of such clause, if included in the policy, was assumed in a late case in the supreme court. *Kase v. Insurance Co.* (Oct., 1895) 32 Atl. 1057, 58 N. Y. Law, 34. *Davis v. Insurance Co.*, 135 Mass. 251, the only case cited by counsel as questioning the validity of such clauses, does not have this effect, and could not have been so intended; for it does not overrule, or even call in question, the previous direct decision in *Allen v. Insurance Co.*, supra, expressly sustaining them. The objection pressed here against the validity of such an agreement between the mortgagee and the insurance company is that it was not contained in the policy, but was a secret agreement, of which the owner is ignorant, providing for the continuance of the policy in the mortgagee's favor after it has become invalid in favor of the mortgagor or owner by reason of his default. The validity of such independent contract between the mortgagee and insurance companies, existing at the time of the issuing of the policy, was expressly sustained in *Institution v. Leake* (1878) 73 N. Y. 161, upon grounds which, as it seems to me, are solid and unquestionable. "The contract," says *Church, C. J.* (page 165), "does not affect or purport to interfere with rights of any mortgagor who may procure, or for whose benefit an insurance may be procured. It merely provides for protecting the interest of the mortgagee after the interest of the mortgagor has ceased; and I am unable to perceive any valid reason why such a contract may not be made and enforced." And again (page 166): "The mortgagor was not injured by this contract. If it had not been made, she could not have received any benefit from the policy. It was an independent contract for the benefit of the mortgagee, and the circumstance that the mortgagor also had a policy does not affect it, when the contingency rendering it operative occurs." These reasons, in my judgment, control this case. Defendants' counsel insist that the owner is harmed, inasmuch as the expense of the insurance is borne by him. But his insurance premium is paid for his own insurance, under his own contract as to terms, conditions, etc.; and his bargain with the mortgagee for payment of insurance only binds him to continue the insurance of his own interest, and under his own contract. So long as the owner has all the interest in the insurance policy which he has contracted and paid for, it is difficult to see how he can be said to suffer any legal harm because the premium which he has paid does not give him the benefit of an additional insurance obtained by the mortgagee, to take effect after his interest has terminated. For this additional insurance the mortgagee has, in this case, given additional con-

sideration, viz. its own personal obligation to the insurance company to pay the premiums on demand if the mortgagor did not. I conclude, therefore, that the contract is valid, so far as relates to the independent insurance of the mortgagee after the policy had become forfeited as against the owner by reason of his failure to give notice of loss, or to make proofs of loss, as required by the policy, and that, the payments of loss having been made by the fire insurance company in satisfaction of the mortgagee's separate insurance of his interest under the independent contracts, the insurance companies are entitled, by reason of such payments, to be subrogated to the mortgagee's interest in the security, and that the subsequent mortgagee, claiming under the owner, is not entitled to have the payments credited on the decree. It was claimed by complainant's counsel that the right to subrogation arose under the contract by mere claim of nonliability as to the owner. The contract does, indeed, so provide in terms; and although it might therefore be good against the owner, if included in the policy, or entered into by him, it clearly can have no effect on his rights, or of those claiming under him, when made between other parties. As to the owner, in such case, subrogation can arise only as a right given by law, upon facts proved; and the forfeiture in fact of the policy, as against him, is the legal prerequisite to any independent insurance of the mortgagee under this contract, and must be proved as one of the issues in the cause which the owner, and those claiming under him, may require to be proved. If the policy was not in fact forfeited as to the owner at the time of the payment, then the payment to the mortgagee must be considered as a payment to the mortgagee as appointee of the owner, and not under the independent contract, and the owner would be entitled to have the payment credited on the mortgage debt. Complainant is entitled to decree for payment of the surplus money to him, with costs against the defendant Headley.

CRESSEE v. SECURITY LAND IMPROVEMENT CO. et al.

(Court of Chancery of New Jersey. Sept. 4, 1896.)

BILL TO FORECLOSE—MULTIFARIOUSNESS—BONA FIDE PURCHASERS.

1. A bill to foreclose a mortgage is not multifarious because alleging that certain persons, made defendants, claim to have liens on the property, and praying that they be declared subject to complainant's mortgage.

2. A deed reciting a dispute between adjoining landowners, the parties to the deed, as to the boundary line, and agreeing on a boundary line in consideration of a release of mortgage on certain lands, takes precedence, in equity at least, over a deed, executed before, but recorded after, it, of which the one giving the consideration had no notice.

Suit by Ruhamah W. Cressee, administrator, against the Security Land Improvement Company and others, to foreclose a mortgage.

William A. Logue and Potter & Nixon, for complainant. H. M. Snyder, Jr., for defendants.

PITNEY, V. C. The case is easy of solution, though very complicated in the facts. I will try to state now, orally, my views of the case. The bill has two aspects. One is the foreclosure of a mortgage made by Rebecca A. Simpson to Humphrey Cressee, dated the 1st day of January, 1891, to secure the payment of \$38,000, covering certain lands on an island called "Five-Mile Beach," Cape May county, between Cape May and Atlantic City. The bond, which is secured by the mortgage, was executed not only by Rebecca A. Simpson, but by John T. Ryon and Frederick E. Swope. Miss Simpson was a figurehead for Ryon and Swope. They were the real purchasers of the property, and immediately, or shortly after, conveyed it to the Security Land Improvement Company, which is now the owner of the equity—I believe I am right, Colonel; if not, set me straight—now the owner of the equity, and is one of the defendants. Swope and Ryon are also defendants. The mortgage was given for consideration money on the sale of the premises by Cressee, by contract, to Swope and Ryon, conveyance being, by their direction, made to Miss Simpson. The contract between them was dated two days before the deed, 30th of December, 1890. The deed sets out the contract to convey the lands and to take a mortgage back for the consideration money,—the land was to be divided into lots, and sold,—and an agreement to release the lots upon the payment on account of principal of a certain sum for each lot. The contract also provides for a conveyance by Ryon to Cressee of his interest in a certain portion of the land to be conveyed. That part of the agreement is in these words: "As there has been a difference of opinion as to the proper line of property between said Humphrey Cressee and the said John T. Ryon, and for the purpose and end of settling every and all such differences, it is agreed that the said John T. Ryon will give to Humphrey Cressee a quitclaim deed for all his right, title, and interest to all land as set forth on the plan of lots of the Five-Mile Beach Improvement Company between the northeast side of Twenty-Sixth avenue and the northeast side of Twenty-Ninth avenue and low-water mark in the Atlantic Ocean and the sound or channel on the northwest of the tract, clear of all claims and incumbrances, so that the said Humphrey Cressee can make a proper deed and title to the parties of the second part as set forth above, and receive the said mortgage of \$38,000; at which time the said Humphrey Cressee is to deed to the said John T. Ryon all his right, title, and interests and claim to any lots as set forth on the above plan of the Five-Mile Beach Improvement Company between the northeast side of Twenty-Sixth avenue and the southwest side of Twenty-

Fourth avenue and between the low-water mark in the Atlantic Ocean and the channel or sound on the northwest," etc. That is, Cressee agreed to convey to Ryon all north-east of Twenty-Sixth avenue, and Ryon agreed to convey to Cressee all southwest of Twenty-Sixth avenue. The mortgage ran for five years, and, interest and taxes being in arrears, the bill was filed. There is no dispute between the parties but that interest was in arrears, and taxes not paid. That is not set up as a defense, as I understand.

Mr. Swope and Mr. Ryon, the bondsmen, are made parties. Mr. Swope has not answered or set up any defense. Mr. Ryon has answered, and by his answer sets up that the procurement of the deed from him to Cressee, and then the sale from Cressee to him and Swope, were procured by fraud practiced upon him by Cressee, through Swope, as Cressee's instrument and aid; and that the whole transaction should be set aside, and he be restored to his original rights as they stood before the transactions which I have just attempted to state. The allegations of fraud are denied by the complainant, who was the administrator of Humphrey W. Cressee, and Mr. Ryon is put to his proof. He called Mr. Swope as his witness, and Mr. Swope denies in the most positive manner that there was any fraud, and says that it was a straightforward transaction. He says that the three—Cressee, Ryon, and himself—got up the scheme to put these lands on the market, and they combined and formed—or rather, intended to form—a corporation, and all go in substantially on an equal footing, but that he (Swope), as I recollect his testimony, declined to have Mr. Cressee interested in the corporation to be formed, and therefore at his request, and by Mr. Ryon's consent, the transaction took this present form; that is to say, the corporation was formed, and the conveyance was made through Miss Simpson to the corporation, and the stock was equally divided between Mr. Swope and Mr. Ryon, and Mr. Cressee's interest was secured by this mortgage and another one, and that that was intentional, deliberate, and well understood. I cannot find any basis in the evidence for a change of the legal character which the parties gave the transaction. It seems to have been taken voluntarily and without any mistake, and everything seems to have been put in writing, and there is no allegation of any misapprehension as to the true character of the transaction. Hence it would be idle to ask the court to tear up the transaction, and put it back in its original status, and give these three parties an interest at the rate of four, three, and three, out of ten. Mr. Swope complained of Mr. Cressee that he didn't make the title good; that the property was subject to incumbrances put upon it and suffered against it by Mr. Ryon,—first a mortgage, and then three or four judgments. Now, Mr. Swope hasn't set up any defense

on that ground. He has merely been called as a witness by Mr. Ryon. Now, as those incumbrances were all suffered by Mr. Ryon, it clearly does not come within his right to set that up here. He conveyed by a deed a block of this property to Mr. Cressee the day before Cressee conveyed to Miss Simpson at the request of Swope and Cressee, and Mr. ——— [looking at deed from Cressee to Miss Simpson]. There are no conveyances at all which affect those incumbrances. If there is anybody here at this stage of the case who is to blame for any default in selling, or inability to sell, by reason of those judgments, it is Mr. Ryon, and not Mr. Cressee. Mr. Ryon cannot have any footing in this court, the transaction being as I have stated it, based upon the idea that the enterprise of selling these lands failed by any fault of Mr. Cressee. There is no pretense that between them—between Cressee and Ryon—they didn't convey a perfect title—excepting incumbrances for which Ryon was responsible—to the premises to Miss Simpson, and from her to the Security Land & Improvement Company; and I repeat, the only person to blame for the inability to make sale was Mr. John T. Ryon, and he is the only answering defendant here. Therefore, so far as the enforcement of the mortgage goes against Mr. Ryon, there has nothing appeared in this cause that can stay the hand of the court for a moment.

Now we come to the other aspect of the case, and about that I have had some doubt; not as to the merits, but as to the propriety of this proceeding. The bill, after the usual clauses for foreclosure of the mortgage, sets out that certain persons claim to have a lien upon that portion of the premises which lies between Twenty-Sixth and Twenty-Ninth avenues by virtue of having mortgages and judgments,—a mortgage executed by Ryon, and judgments against him; and it prays that those liens may be declared to be subject to the complainant's mortgage. I believe that is right, is it not, Colonel?

Col. Potter: That is the general effect of it.

THE COURT: That is the effect of the prayer, and it states the reason; and upon consideration—the best consideration I can give the case—I think there is no misjoinder of causes of action, no multifariousness about the bill; and, if there were such misjoinder or multifariousness, the point has not been taken by any of the answering defendants. I think there is no multifariousness, for this reason: The object of the bill is to have the property sold, and the proceeds applied to the payment of this debt. Now, it is clearly to the interest of all parties to have the title ascertained and settled before the sale takes place, and it is also quite in line with the proceeding in a foreclosure suit to have the order of priority settled. And while it is well settled that a mortgagee who admits that there are other incumbrances prior to his cannot bring them in, and compel them to

come into court, and join in the sale by him, if those incumbrances are apparently prior, yet if he alleges by his bill that they are in equity subsequent to his, and asks that they be subrogated and made subsequent to his lien, then I think he is perfectly justified in bringing them into the bill to foreclose, to have the title settled at once. That, now, brings us to the incumbrances. That goes back to another transaction a little more than 10 years earlier, very much the same in its character and surroundings as the one that I have just been dealing with, and to understand the case it is necessary to keep them entirely separate in your mind; and I confess that, owing to the desultory and fragmentary manner in which this cause has been tried, I have at times been confused because there were introduced two transactions very much alike. Now, Mr. Humphrey Cressee seems to have been first and last an owner of considerable land on Five-Mile Beach, and some time in the year 1878 he conveyed a block of Five-Mile Beach to Messrs. Swope and Laverty,—the same Swope here sworn as a witness; and Mr. Laverty? I do not know whether he was sworn or not.

Counsel: He was.

THE COURT: To those two gentlemen; and he took back a big mortgage, precisely as he has done here. Those two gentlemen—Messrs. Swope and Laverty—also formed a corporation called the "Five-Mile Beach Improvement Company,"—precisely as Swope and Ryon formed a corporation in 1890 to exploit the second purchase from Cressee. Cressee conveyed that property to them in 1878, I think. Give the date of that, please.

Col. Potter: He didn't convey directly to Swope and Laverty; conveyed to Sperry.

THE COURT: Mr. Humphrey Cressee, in 1878, 19th of May, conveyed to William H. Sperry a tract of land on Five-Mile Beach, and William H. Sperry conveyed later to Swope and Laverty. Swope and Laverty formed the Five-Mile Beach Improvement Company, and conveyed the premises to that company. They, however, were the company; one was the president, and the other the secretary. The Five-Mile Beach Company, on the 26th of December, 1879, conveyed to Mr. Ryon what was supposed to be a portion of the land conveyed by Cressee to Sperry, and by Sperry to Swope and Laverty, and from them to the company; and that deed, I shall assume for the present purposes, conveyed to Mr. Ryon the whole or a portion,—that part of the premises here in question that laid between Twenty-Sixth and Twenty-Eighth avenues,—so that Mr. Ryon became seised—

Col. Potter: For the purpose of conveying the land between Twenty-Sixth and Twenty-Seventh avenues.

THE COURT: Where do you get the others?

Col. Potter: Two deeds made subsequently.

THE COURT: This is between Twenty-Sixth and Twenty-Seventh?

Col. Potter: Yes, sir.

THE COURT: Between Eighteenth avenue and Twenty-Seventh avenue: that would be just one strip, between Twenty-Sixth and Twenty-Seventh avenues, included in this conveyance?

Col. Potter: Yes, sir.

THE COURT: When were the others conveyed?

Col. Potter: There they are on your desk.

THE COURT: And on the 29th of March, 1881, the Five-Mile Beach Improvement Company conveyed to Mr. John T. Ryon all the lands between Twenty-Seventh and Twenty-Ninth avenues. The third deed was dated 1882, 14th of July, which amounts to nothing here. There were two deeds, then. I will repeat: One dated in December, 1879, conveying the tract between Eighteenth and Twenty-Seventh avenues, which included one strip between Twenty-Sixth and Twenty-Seventh avenues, here in dispute; and the other dated March 29, 1881, which included the strip between Twenty-Seventh and Twenty-Ninth avenues, and covered the rest of the land here in dispute. Those deeds I shall assume conveyed the title—the legal title—to Mr. Ryon, so far as they appear on their face, and for a valuable consideration. On the 19th of June, 1880, after the first of the deeds I have just recited, but before the second one, Swope and Laverty on the one part, and Cressee on the other part, entered into a written agreement by which they fixed—an informal agreement—by which they fixed a division line on Five-Mile Beach between the lands of the Five-Mile Beach Improvement Company on the northeast and of Cressee on the southwest, at a line which was to run across the beach from northwest to southeast at a distance of $4\frac{1}{2}$ rods northeast from where Lemuel Leaming's cabin used to stand; and if it is admitted that Lemuel Leaming's cabin has been properly located by the evidence in this cause, that line will run through Twenty-Sixth avenue. That informal agreement was carried out by a more formal deed, which was dated, executed, and recorded on the 22d day of June, 1880, executed by the Five-Mile Beach Improvement Company, by F. E. Swope as president, and Laverty as secretary, and by Humphrey Cressee, under his seal, and properly proven and acknowledged in all respects, and recorded on the same day at Cape May courthouse. That has been called the "deed poll," to distinguish it from a deed of grant. It is not a deed of grant, and conveyed no title to anybody. Its language is this: "Whereas, the said Humphrey Cressee is the owner of other lands lying to the southwest of the premises described in the above-recited deeds" (which are the deeds from him to Sperry, and Sperry to Swope and Laverty, and Laverty and Swope to the Five-Mile Beach Improvement Company), "and whereas, there has been a misapprehension between the said the Five-Mile Beach Improvement Company and the said Humphrey Cressee as to the boundary line between the

property of the said the Five-Mile Beach Improvement Company and the property of the said Humphrey Cressee, and this deed poll is executed by the said parties in order that all doubts as to the same may hereafter be quieted and set at rest forever: Now know ye that the said the Five-Mile Beach Improvement Company and the said Humphrey Cressee, for and in consideration of the premises and of the sum of one dollar, lawful money of the United States of America, paid by the one to the other at or before the time of the execution and delivery hereof, receipt whereof is acknowledged by these presents, have, and by these presents do, mutually agree with each other that the boundary line between their several properties shall be fixed and determined hereafter as follows,"—then describing the line running through Twenty-Sixth avenue, precisely as it was described in the preliminary agreement. Now, let us stop a moment to see what that deed amounts to. If it could be treated as what is called now at law a "practical location," it would amount to a conveyance. It would be recognized at law as a "practical location," passing title on each side of it. I am by no means sure that a court of law would not so treat it. What I mean by "practical location" is this: Two adjoining owners are in some dispute about the line between them. They deliberately go together to mark it out, build a fence or put other monuments on that line; and in old times it was held that that did not pass any title; it only bound them in equity; but modern decisions, for the last 50 years, I think, have held that such conduct does pass the title, and may be set up at law. I am not sure that this deed is not good at law as a conveyance. I do not find it necessary to determine that question, for it is undoubtedly good in equity, and binds those parties.

Now, who were the parties to it? The Five-Mile Beach Improvement Company and Humphrey Cressee. But here comes the difficulty. I have already found as a fact that some six months prior to that the Five-Mile Beach Improvement Company had made a conveyance for a valuable consideration to John T. Ryon for a part of those premises, and that title was vested in him. Now, so far as his creditors are concerned (so far as John T. Ryon individually is concerned), it was all cured by the conveyance of December 31, 1890, or January 1, 1891; but, so far as his creditors are concerned, they stand on a different footing, and they must be dealt with. Now, there was only one of the two deeds made by the Five-Mile Beach Improvement Company to Mr. Ryon, which was executed prior to that agreement of June, 1880, called the "deed poll," and that deed is the one of December 26, 1879, and it was not recorded until November 18, 1880, four or five months after the recording of the deed poll. But that failure to record did not prevent the title passing when the deed was delivered; and if the Five-Mile Beach Improvement Company

had made this settlement of the line by the deed poll without any consideration, a very serious question would arise as to whether or not Mr. Cressee could set it up against the prior holder of the title; the rule in equity being this: that where a man has the legal title he can only have that divested—the only way known for the present purpose—by a bona fide purchase without notice. Now, there was no pretense—there was no proof offered here—that Mr. John T. Ryon took any immediate possession under that conveyance of December 26, 1879. None of his creditors set it up. None of the creditors show any facts which gave Mr. Humphrey Cressee the least notice of that deed to Ryon when he made the deed poll of June 22, 1880. Therefore, if Cressee paid anything for that deed poll, he is a bona fide purchaser for value, in equity, and is entitled to take precedence of the unrecorded deed. Now, the contemporaneous agreement is produced, dated the same 22d day of June, 1880, entered into between the Five-Mile Beach Improvement Company and Cressee, by which the consideration is fully shown, and Mr. Swope proves it orally. Mr. Swope says that Mr. Cressee held the mortgage on all the Five-Mile Beach Improvement Company land, and they wanted to release a block—a large block—to a gentleman (Col. Brook, or some one who was interested in it, having negotiated its sale, or something of that kind, and wanted a block of six lots freed of the incumbrance), and in order to induce Mr. Cressee to release those lots they were obliged to accede to his demand to fix the line where it was fixed by the deed poll of June 22, 1880. Now, I shall not recite the contents of that contemporaneous agreement of June 22, but, as I recollect, it sets up a full consideration, and it is such a consideration as cannot be now measured in money, because, if it had been taken in time—if Mr. Ryon had asserted his right in time, and said, "Here, to be sure, you have cut my title out, because I didn't get it recorded by paying so much money; yet I am willing to pay you that money back"—I say that might have been done if it had been taken in time, but the thing has gone too far, and the equitable title has become vested in Mr. Cressee. Now therefore Mr. Cressee, at least in equity, I say, has got a paramount title, because he has shown the consideration. He cannot be restored to his original position. The lots that he released are gone, and he took this location of the line in payment of it, and the result is that this deed stands as against Mr. Ryon.

How is it as against his subsequent incumbrances? I have not looked at the statute, but at that date—the time when this deed poll was made, in 1880—there was a provision in the statute for the recording of contracts, was there not, long before that? and, granting that it was a mere contract, it was such a one as the law provided for the record of. It passed an equitable title, and it seems to me is clearly within the record—

ing acts. Then let us see where any of the subsequent incumbrances come in on the original title which was made by the first deed from the Five-Mile Beach Improvement Company to Ryon, which was really paramount in date to the deed poll. First is a mortgage,—a mortgage given to the Bethlehem Iron Company. They do not appear here and make any defense, and it does not appear whether their mortgage has been paid or not, and they took subject to the deed poll; and therefore, if I am right in my conclusion that it was a writing,—a deed of such a character as that all persons subsequently purchasing the title must take notice,—then they have no standing in this court.

In regard to the judgment creditors, their position is not so favorable as that of the mortgagee, for I held in *Harney v. Bank*, 52 N. J. Eq. 697, 29 Atl. 221, that a mere judgment creditor is never a purchaser for value, upon all the authorities except those of Pennsylvania. A purchaser under a judgment may be a bona fide purchaser, but the creditor himself is never a bona fide purchaser; and, quite independent of the recording of this deed poll, it would take precedence over these judgment creditors.

Now, that ends the case, as I understand it. There was a proceeding to settle this title by a bill in chancery, and very properly, because Mr. Ryon did appear to have a conveyance for a part which antedated this deed poll; but that was abandoned and all settled, so far as Mr. Ryon was concerned, by the transaction of 1891; and I do not see that it has any bearing on this case, except to show the deliberateness of the transaction of December 21, 1891, when the parties were acting by counsel,—Mr. Ryon had counsel,—when he deliberately discontinued his suit.

There has been no ground suggested to me in this court by which this transaction should be torn up. An immense amount of testimony and very interesting evidence has been given about where the old line was, and it seems to me that there is strong evidence that Richard Ludlum did, by some means, move his line to the northeast, and naturally everybody would think that the rest of the lands were carried to the northeast up to what is called the "Twin Holly," and out of that arose a confusion. That of itself is a matter out of which a dispute might arise. The location of that line 40 or 50 years ago—and I have no doubt it is 40 or 50 years ago—was passed through the Twin Holly by Mr. Ludlum, whereas the true line was some distance to the southwest. And I may repeat here that a careful examination, not only of the evidence, but of the piece of the tree itself brought to me here in court, satisfies me that that tree was marked with a surveyor's mark, viz. a blaze and three notches below it. I have never seen a plainer surveyor's mark of that age, and I have seen a great many; and I must repeat my astonishment that a gentleman of Mr. Haines' standing could

come here in front of anybody who knows anything about surveyors' marks on trees, and swear that there was no surveyor's mark on that tree. He says it was 40 years old, and Mr. Rhodes says about 50. That would bring it about the time that Mr. Rhodes says they settled on that place as the line. That location may be erroneous; probably was. Possibly it was further to the southwest, but the question is, was that not sufficient to justify Mr. Cressee in making a claim which he finally succeeded in having recognized for a consideration,—fixing his line at Twenty-Sixth street? I think, therefore, that the complainant is entitled to his decree of foreclosure, and that he is also entitled to a decree declaring that none of the other parties can have a lien on this land.

Mr. Snyder: How about the usury?

THE COURT: I haven't considered that, because usury was not set up.

Mr. Snyder: Yes, it is.

THE COURT: If it is in the original agreement, I don't think that makes it usury.

(59 N. J. L. 56)

WILLARD v. MEEKS et al.

(Supreme Court of New Jersey. Aug. 15, 1896.)

TRESPASS—POSSESSION—EVIDENCE.

In an action of trespass to land, the plaintiff, who, as owner of the legal title, was in actual occupancy of part of the locus in quo, offered testimony competent to prove that the disputed part of the locus was within the boundaries of the same title deed. He also testified to acts of entry upon and apparent dominion over this part of the locus. Held that it was error to withdraw from the jury the question of his disputed possession.

(Syllabus by the Court.)

Error to court of common pleas, Middlesex county; Rice, Judge.

Trespass by Walter Willard against Sarah J. Meeks and others. There was a judgment for defendants, and plaintiff brings error. Reversed.

Argued February term, 1896, before BRASLEY, C. J., and DIXON and GARRISON, JJ.

Willard P. Voorhees, for plaintiff in error. Alan Strong, for defendants in error.

GARRISON, J. This contest was before this court upon a previous occasion. 57 N. J. Law, 22, 29 Atl. 318. The proofs there failed to show that the plaintiff was in actual possession of the locus in quo at the time the injury was committed, and, as there was no proof that such part was within the metes and bounds of his title deed, no question of constructive possession arose. It was thereupon held that the motion for a nonsuit should have been granted. The case has now been retried, and the plaintiff has presented proof of his actual occupancy of part of the locus as owner of the legal title, and that the disputed portion was within the boundaries of the same title deed. He has

also testified to acts of entry upon and apparent dominion over a part of the locus, to wit, the strip of land lying upon the defendants' side of the weatherboarding of the plaintiff's storehouse and of the fence that extends to the rear thereof. No motion to nonsuit was made, but at the close of all the testimony the court withdrew from the consideration of the jury that part of the plaintiff's case that rested upon his disputed possession.

The bills of exception do not present with entire clearness the precise error of which plaintiff complains. His substantial grievance, however, is thus set out, viz. that the court "takes away from the jury the question of determining the possession of the land to the east of the fence in the rear of the plaintiff's storehouse," and "of the land lying under the eaves of the storehouse." Such was undoubtedly the designed effect of the judicial action, and in this we think that the trial court was in error.

The previous judgment in this case was reversed upon the ground, among others, that it was error to hold, as matter of law, that the call in plaintiff's deed for the "side of the storehouse" carried his line to the edge of the eaves.

This description was regarded as giving rise, not to a presumption of law to be applied by the court, but merely to an inference of fact to go to the jury with the other circumstances that entered into the debatable question of possession. "The solution of this question," it was then said, "whether it be regarded as one of practical location, or of ambiguity in the description of a monumental boundary, is one of fact for the jury, and should have been left to them under proper instructions." This language appears to be still pertinent to the testimony that is again marshaled upon either side of this dispute. Indeed, it is not perceived how this issue can ever be passed upon otherwise than by the verdict of a jury. There must be a *venire de novo*.

(54 N. J. E. 632)

CAREY et al. v. MONROE et al.

(Prerogative Court of New Jersey. Sept. 14, 1896.)

RIGHT OF WIDOW TO STATUTORY RESERVATION—EXECUTORS AND ADMINISTRATORS—EXCEPTIONS TO ACCOUNT—PROBATE PRACTICE.

1. The "family" of a decedent does not take title to the reservation which is contemplated in the fifty-second section of the orphans' court act (Revision, p. 762) until selection shall be made as the statute requires.

2. Where, by his will, a decedent has directed the payment of his debts, and has bequeathed and devised the entire remainder of his estate, a reservation under the fifty-second section of the orphans' court act will conflict with the will, and hence cannot be had.

3. An exception to the account of executors must make objection to the justness of the account in charge or discharge, and not merely seek the recovery of a demand from the estate.

(Syllabus by the Court.)

Appeal from orphans' court, Passaic county; Hopper, Judge.

Exceptions filed by Jennings A. Monroe and Laura J. Francisco, executor and executrix of Sarah Ann Carey, deceased, to the account of George Carey and James Montross, executors of James Carey, deceased, were sustained, and from the decree sustaining them the accountants appeal. Reversed.

James Carey, while residing with his wife in Passaic county, on the 28th of April, 1892, died testate. By his will, which was dated three days before his death, he directed his executors to pay his debts and funeral expenses, gave to two grandchildren each \$50, devised and bequeathed the remainder of his estate, real and personal, to his eight children in equal shares, and appointed executors with power to sell his real estate. No provision for the wife was made by the will, nor was she mentioned in it. The wife, Sarah Ann Carey, survived Mr. Carey six days, dying on the 4th of May, 1892, leaving a will which disposes of her estate. Upon the 13th of May, in the same year, the will of Mr. Carey was admitted to probate by the surrogate of the county of Passaic, and on the same day an inventory and appraisement of his personal estate, made by appraisers who were not appointed by the surrogate, was proved before the surrogate. On May 27th, in the same year, the will of Sarah Ann Carey was proved, and, later, the executors thereof inventoried her personal estate, including therein \$200 which they claim is due to them from the estate of James Carey in virtue of the statute (Revision, p. 762, § 52), the payment of which they subsequently demanded from the executors of the will of James Carey. The money so demanded was not paid. Later, the executors of the will of James Carey filed their account, in which they asked credit for debts of the decedent and legacies bequeathed by his will which they had paid, and also for the payment of moneys in partial distribution of the remainder of his estate according to the terms of his will, and exhibited a balance, exceeding \$200, for further distribution under the will, but in which account they did not make any reference to the \$200 demanded by the executors of Mrs. Carey. To that account the executors of Mrs. Carey's estate excepted upon the ground that the accountants had refused to reserve goods, chattels, moneys, and effects of the estate of James Carey to the value of \$200 for the use of their testatrix, and had refused to pay that sum to them after her decease. The orphans' court sustained the exception, and decreed that \$200 be paid from the estate of James Carey to the executors of his wife's will. From this decree the appeal considered is taken.

John W. Griggs, for appellants. Eugene Emley, for respondents.

McGILL, Ordinary (after stating the facts). The appeal presents two questions: (1) Whether

er, by exception, like that which is now considered, to the account of executors or administrators, the statutory reservation for the family of a decedent may be enforced; and, if so, (2) whether Mrs. Carey took a title or right to \$200 of her husband's estate which survives to her representatives.

The statute (Revision, p. 762, § 52) is a growth from the statutes respecting executions, in pursuance of a legislative policy that neither a living debtor with a family, nor the family of a deceased debtor, resident with him in this state at his death, shall, without his express assent, be liable to be wholly impoverished by the payment of his debts. It provides that the wearing apparel of any person who shall die, leaving a family, resident in this state, and goods, chattels, moneys, and effects of his estate to the value of \$200, shall be reserved to and for the use of his family against all creditors, and before any distribution or other disposition thereof. It makes it the duty of the executor or administrator to apply to the surrogate, who is to appoint two discreet and judicious persons, not interested in the estate and not of kin to the widow or children, who are to be sworn to truly value the property, and who shall proceed to inventory and appraise all the goods, chattels, moneys, and effects of which the decedent died possessed. It provides, also, following the language of the act, that "the widow of the deceased, or his executor or administrator, may select from such inventory, goods and chattels, moneys and effects to the value of two hundred dollars and annex to said inventory a list thereof; and the goods and chattels, moneys and effects, so selected shall thereupon become the property of the said family and remain for their use." The next section of the statute defines those who shall constitute the family, entitled to the benefit of section 52, to be the widow and child or children who shall reside in the family of the person dying at his death, and adds that nothing in section 52 "shall be permitted to conflict with the provisions of any last will." It is observed that the apparel of the decedent and the \$200 in value of his personal estate are to be reserved against creditors, and prior to any distribution or other disposition of the estate, if the reservation does not conflict with the provisions of his will. The statute contemplates that this reservation for the family, if due, shall be the first disposition of any part of the assets of the estate. The object of an executor's or administrator's accounting is to determine the amount of money with which he is chargeable. That amount is the balance in his hands after all proper charges shall be made against him and he shall be credited with all lawful allowances. The office of an exception to an account is to question the justness of the account in failure to charge, or in the discharge sought. The requirement of the statute, that the executor shall make reservation for the family against creditors, and before any distribution or disposition of the

estate, while uncompiled with, perhaps disentitles him to any discharge from his receipts because of payment to creditors or distribution until that duty shall be performed; and it may be, and, I think, is, true that the family, therefore, is interested in the estate and settlement of the account, to the extent, at least, of this right, and, for the absolute security of the reservation, should be permitted to except to any allowance being made to the account-ant for payments to creditors, or for distribution or other disposition of the estate, until the reservation shall be made. But the exception considered does not object to the account in any particular. It does not either insist upon charge or object to the discharge which the accountants seek. It merely objects that a duty remains unperformed, and impliedly seeks to enforce performance of that duty through payment of money. Although called an exception to the account, it is in reality a demand that the executors may be required to do their duty by paying a sum of money to the exceptants. Any creditor, with equal propriety, might, by similar exception to the executor's account, demand the payment of his claim, and seek to have its validity established. That the orphans' court regarded it as a mere money demand is manifested by the decree appealed from, that the accountants pay money. I think that the exception, in the form in which it was presented, should not have been allowed.

But I think that I should not rest the reversal of the decree upon this ground alone. The merits of the main controversy between the parties may and should be settled. The provision of the fifty-second section of the statute is the establishment of a pure bounty of the law, for the preservation of the immediate family of a decedent, presumably dependent upon him, from the distress of extreme poverty at his death. It has, for its objects, defined individuals whom it intends to assist or relieve personally. It does not purpose to augment the estate of those individuals for the benefit of others who may be entire strangers to the decedent. In many cases the bounty is accorded at the expense of creditors, who suffer from the insolvency of their debtor. It is apparent, from its scheme and the detriment it may be to creditors, that while the courts should construe the statute with sufficient liberality to accomplish its charitable intent, they should not be too ready, in absence of a clear manifestation in the law itself of a purpose to the contrary, to give it an interpretation which will tend to facilitate injustice to creditors for the benefit of others than the objects of the bounty. The statute considered, after provision for inventory, appraisement, and selection for the family, concludes in this language: "And the goods and chattels, moneys or effects, so selected, shall thereupon become the property of said family and remain for their use." The plain import of such language, by force of the

words, "shall thereupon become," is that, upon the selection, that which shall be selected, not having theretofore been the property of the family, shall "thereupon become" its property. Before the selection it, with the other personal estate, is the property of the personal representative of the decedent, for the execution of his trust, and therein primarily reserved for selection for the use of the family. Until the selection is made, and title to that which is selected is thereby secured to the family, all that the family has is a personal right to take by selection, which does not survive to personal representatives. It is, perhaps, otherwise as to the wearing apparel, which is not dependent upon the selection. *Mitcham v. Moore*, 73 Ala. 542. But with that I do not now deal. In reaching this conclusion I have examined many of the adjudications of other states upon statutes having similar general objects. They, of course, vary with the terms of the statutes passed upon, many of which, without doubt, contemplate the absolute bestowal of the bounty at the death of the owner of the estate. I have not been referred to, nor have I found, a case upon a statute exactly like our own. The principal value I have derived from the cases is in the reasoning upon which their respective conclusions are based. From a class of them, dealing with statutes which require some action to ascertain the bounty, such as an allowance by a court, an allotment by commissioners, a selection, and the like, I have been satisfied that, in the interpretation of statutes giving this bounty to the family, the courts, so far as the terms of the statutes will admit, should favor a construction which will extend the bestowal of the bounty only to and through the persons for whom it is intended. *Adams v. Adams*, 10 Metc. (Mass.) 170; *Cox v. Brown*, 5 Ired. 194; *Ex parte Dunn*, 63 N. C. 137; *Barnum v. Boughton*, 55 Conn. 117, 10 Atl. 514; *Tarbox v. Fisher*, 50 Me. 236; *Henderson v. Tucker*, 70 Ala. 381; *Mitcham v. Moore*, supra; *Hardin v. Pulley*, 79 Ala. 381. In the present case, before the decedent's will was proved, and before an inventory, appraisement, and selection could be made, the widow, who constituted the family, died. I do not think that the right she took at the death of her husband survived to her representatives.

Upon another ground I reach the same conclusion upon the merits of the controversy. It is noticed that the will of James Carey disposes of his entire estate. It directs the payment of all his debts, and thereby indicates that he did not mean that there should be a reservation against creditors. It gives two legacies, and bequeaths and devises the entire remainder and residue of his estate to his eight children, who were not living with him when he died, and were therefore not of his family, within the meaning of section 52 of the statute. Thus the will undertakes to dispose of the whole es-

tate. If \$200 is to be paid to the representatives of his wife's estate, his will must to that extent be defeated. He had the right to disregard the bounty of the statute. The law which gives it life says that his will shall be supreme. The will leaves nothing undisposed of from which the bounty can be paid. Does there, under such circumstances, exist a conflict between the legislative bounty and the will, such as the fifty-third section of the statute contemplates shall defeat the bounty? I have thought that, perhaps, in interpreting the provision of the fifty-third section, the word "conflict," taken in its sense of violent, active collision, should induce the holding that the will must expressly override the bounty of the fifty-second section; but, after having regard to the whole statute, I incline strongly to the opinion that such was not the legislative intent. I conclude that, if the will disposes of the whole estate, the bounty is lost; the word "conflict" meaning that the will shall be supreme where the complete execution of its provisions does not admit, expressly or impliedly, of the bestowal of the bounty. See *Mulford v. Mulford*, 42 N. J. Eq. 68, 73, 6 Atl. 609. I am of opinion that the decree appealed from should be reversed.

(54 N. J. E. 657)

JERNEE v. JERNEE.

(Court of Errors and Appeals of New Jersey.
Sept. 16, 1896.)

COMMITMENT FOR CONTEMPT—SUFFICIENCY.

When a party is committed, by an order in equity, for the nonpayment of alimony, a fine, and costs, the amounts must be specified in the commitment.

(Syllabus by the Court.)

Appeal from court of chancery.

Application by William R. Jernee for a discharge from imprisonment under a commitment for contempt in failing to pay alimony decreed in an action by Abbie M. Jernee against him for divorce. From a decree denying the application, applicant appeals. Reversed.

William R. Jernee, in pro. per. (Wilhard P. Voorhees, of counsel). Amzi D. Taylor, for respondent.

BEASLEY, C. J. This is an appeal in the course of a proceeding for divorce. The appellant, having been committed for contempt on account of his failure to pay alimony as directed, made a motion to be discharged from such imprisonment, and it is the refusal of such application that forms the subject for review by this court. The warrant of commitment thus challenged was directed to the sheriff of the county of Middlesex, and, after the usual recitals, contained the order following, viz.: "Therefore we command you that you take the body of the said William R.

Jernee, and him safely and closely keep in your custody in the common jail of the county of Middlesex until he shall have paid to the said complainant the alimony now due her, and the costs of such contempt, to be taxed, and also a fine, \$5, for the use of the state, together with the costs of this writ, or until our said court shall make order to the contrary," etc. On the hearing of the motion to discharge the defendant, as above mentioned, it was urged before his honor, the vice chancellor who sat on that occasion, that this commitment was fatally defective, inasmuch as neither it nor the order that authorized it specified the amount of the alimony to be paid, nor the sum of the costs. The complaint was that the appellant was committed to jail until he should pay a sum of money that was not fixed. In denying the motion the court expressed the view that it was the proper practice in such cases for the party to secure his discharge by an application to the court, upon satisfying the court that he had purged his contempt. No precedent for such a course has been produced or found. Such a procedure would be dilatory, oppressive, and absolutely without usefulness. The punishment for the contempt has already been determined and announced, and the method of purgation has also been made known. Why should the contemner be again set before the court? The only result would be a reiteration of the existing mandate to pay the fine, the alimony, and the costs, and then go free. Besides, this recurrence to the court is inconsistent with the command of the writ, which did not direct the bringing in the appellant for further judgment, but simply his imprisonment until he had paid certain moneys. There was no order that he should be confined until he should be again placed before the chancellor, and his imprisonment for such a purpose would therefore have been obviously illegal. Nor is the practice that was adopted by the vice chancellor in any respect in harmony with the nature of the writ of commitment as it existed in this case. That process was not in use to vindicate the power of the court, or to punish a disrespect towards it when exercising its judicial functions. On the contrary, its sole purpose was to enforce the right that had been adjudged in favor of the respondent in this appeal, and such a writ is, in substance, not to be distinguished from a *capias ad satisfaciendum* founded on a judgment at law. There seems to be no good reason why the moneys to be levied by them, respectively, should not be definitely stated, as well in the one case as in the other. Our conclusion is that the appellant was entitled to a discharge from imprisonment upon the payment by him of the alimony, fine, and costs, and that, to effectuate that right, it was necessary that the amounts so to be fixed should have been specified in the warrant of commitment. There being a defect in this particular, the decree before us must be reversed.

(68 Vt. 459)

WILLIS v. CHAPMAN et al.

(Supreme Court of Vermont. Windsor. July 28, 1896.)

PARTNERSHIP—JOINT-STOCK COMPANY—ATTEMPT TO INCORPORATE—DISSOLUTION.

1. Members of a joint-stock company procured the passage by the legislature of an act incorporating a company with themselves as incorporators, and under a name similar to that of the joint-stock company, with the intention of changing it into a corporation. The stockholders voted to accept the act, but no stock was issued by the corporation, no property was transferred to it, nor was any meeting ever held for the election of officers, but the company continued to do business as before. *Held*, that the joint-stock company did not become a corporation.

2. A joint-stock company differs from an ordinary partnership in that the death or withdrawal of a member, or a transfer of his interest, does not work a dissolution.

3. The fact that a joint-stock company has conducted business for 23 years without making dividends for its stockholders, and has no better prospect for the future, is good ground for its dissolution at the suit of a stockholder.

Appeal in chancery, Windsor county.

Bill by Mary H. Willis, administratrix of Joel H. Willis, against Joseph H. Chapman and others. From a dismissal of the bill *pro forma*, the oratrix appeals. Reversed.

W. O. French, for oratrix. Joel O. Baker, for defendants.

THOMPSON, J. In the fall of 1869, Oscar D. Young and 12 other persons formed an association under the name of the Smithtown Cheese Company, for the purpose of manufacturing cheese in a factory. As a part of the original agreement under which the association was formed, they adopted a constitution for their government in carrying on the business of the association. This constitution, among other things, provided that the capital stock should be \$3,000, divided into 60 shares of \$50 each; that the business of the company should be managed by a board of directors to be chosen by a majority of the voters present at the annual meeting to be held in January in each year; that a stock book should be kept showing the number of shares of stock of each member, and all transfers thereof; that any stockholder wishing to dispose of his stock should give at least six days' notice thereof to the clerk of the board of directors, and that, in the sale of stock, preference should be given to persons contributing milk to the factory; that each stockholder should have one vote for each share of stock owned by him, and one additional vote for each five cows whose milk he had manufactured into cheese at the factory of the company, subject to the limitation that no member should cast more than twenty votes; and that the constitution might be changed or amended at any time by two-thirds of all the votes which all the members of the company were entitled to cast at a meeting warned for that purpose, the notice for such meeting to set forth the

proposed change or amendment. Article 4 of the constitution was as follows: "The stockholders of the company shall receive twelve per cent. per annum on all the stock actually paid in, and this shall be paid out of the general fund before dividing all the proceeds of the cheese for the season, meaning that the stockholders shall have twelve per cent. per annum, free and clear of all expenses of repairs, taxes, insurance, and other expenses." Young subscribed for four shares of the stock, and paid for the same at its par value, and each of his associates also subscribed and paid for stock at its par value, such subscription amounting in the aggregate to \$3,400. Directors and other officers of the company appear to have been elected that fall, and in October, 1869, land was secured by the company upon which to erect its cheese factory, and such factory was erected thereon, at an expense of \$1,700, for labor and materials and machines and material purchased, so that in the spring of 1870 the company commenced to do business. In 1870 it was thought best by some of the stockholders to procure an act of incorporation under which to do business at said cheese factory; and, accordingly, Act No. 156, St. 1870, approved November 22, 1870, and to take effect from its passage, was procured to be enacted by the general assembly, incorporating the Smithtown Cheese Factory Company. The five persons named in the act as corporators were then stockholders and members of the board of directors and the treasurer of the Smithtown Cheese Company, appointed at a meeting of that company held January 18, 1870. Young was not one of the corporators named in the act. At a meeting of the stockholders of the Smithtown Cheese Company, duly notified, and held June 3, 1871, it was voted to adopt the act of incorporation (No. 156, St. 1870), and to so amend article 3 of the constitution that the rate of interest to be paid on the capital stock should thereafter be determined by the directors of the company. Stockholders representing more than two-thirds of the stock were present at this meeting, and voted unanimously in favor of the action then taken. Young was not present, and had no notice of this meeting, but soon after learned of the result of the vote then taken. The act of incorporation provided that the first meeting of the corporation should be held at such time and place as the corporators therein named, or a majority of them, might agree upon, and that notice thereof should be given to all the corporators at least six days prior to such meeting. The stock of the corporation was fixed by the act at not less than \$3,000, and not more than \$10,000, to be divided into shares as the corporation should direct. No stock was ever subscribed under the act. No meeting was ever called by the corporators or held by them to organize the corporation, nor was any action ever taken by any one in respect

to the act of incorporation, except the vote of the Smithtown Cheese Company, passed June 3, 1871, as before stated. From and after this vote, the members of the Smithtown Cheese Company understood that they thereby became a corporation. The business has always been carried on under the original constitution and some slight amendments thereto, and the notices of the annual meetings since held have been directed to the stockholders of the Smithtown Cheese Company. July 5, 1871, after due notice, Young sold and transferred his four shares of stock to Joel H. Willis, the oratrix's intestate, and the transfer thereof was duly entered upon the stock book of the company, and Willis was recognized and accepted as a member thereof, in the stead of Young. Some of the defendants are original stockholders, and the rest are owners of stock purchased of former owners subsequent to January 1, 1875. In January, 1872, 8 per cent. was paid the stockholders on the par value of their stock. In this payment, Young received \$10.67, the same being 8 per cent. on his stock to the time of sale to Willis, and Willis received \$7.61, being his share to December 1, 1871. No payment of interest or dividends has since been made to the stockholders, and since then the directors have voted annually not to pay any interest or dividends on the stock. The business has been so conducted that no profit has been made to the stockholders as such. It is found that the business has been so run in good faith, and in order to successfully compete with other neighboring cheese factories. All the stock is now owned by the individuals named as defendants, except the four shares owned by the oratrix's intestate, and four shares owned by the heirs of one Hitchcock, deceased.

The oratrix claims that the relation existing between her intestate and the defendants was that of partners, and that the partnership was dissolved by his death, which occurred in April, 1892. She prays for a settlement of the affairs of the partnership, the appointment of a receiver, the sale and distribution of the assets, and that, before the distribution of the same among the stockholders, she may be decreed the proportion that belongs to her intestate's estate, in consequence of no interest nor dividends having been paid on his stock, so as to be made equal with the defendants in respect to the business of the company. She also prays for such further or other relief in the premises as the nature of the case may require. The defendants insist that by the vote of June 3, 1871, the Smithtown Cheese Company was changed into a corporation, and that, consequently, the relation of partners never existed between them and Willis, and that a dissolution of the corporation cannot be decreed in this proceeding if cause therefor existed, because *scire facias* is the exclusive remedy by which a corporation can be dissolved. The company was not changed into a corporation by that vote. No corpora-

tion was ever organized under the act of incorporation, and, had there been, it would not have extinguished the Smithtown Cheese Company, nor deprived it of its property, nor affected the right of its stockholders therein. No attempt has ever been made to convey its property to the so-called "corporation," and no such conveyance could be made without the unanimous consent of all the stockholders. Since the vote, the title to the property has remained in the stockholders of the company, and the business has been carried on, just the same as it was before the vote. No organization has ever existed in respect to this business, except the original association; and the rights of the parties must be determined by the agreement under which it was formed. This agreement was expressed by the constitution adopted as the basis of the association. The association was not in any sense a corporation. It was a joint-stock company, which is defined to be "an association of individuals for the purpose of profit, possessing common capital, being divided into shares, of which each member possesses one or more, and which are transferable by the owner." 11 Am. & Eng. Enc. Law, 1038. It was a partnership, but differed from an ordinary partnership in some respects. "In an ordinary partnership, the death or withdrawal of a member works the dissolution of the firm. In joint-stock companies, however, the death or withdrawal of a member, or transfer of his interest, does not involve a dissolution of the company. In such companies there is no *delectus personarum*." 11 Am. & Eng. Enc. Law, 1038. The provisions of the constitution clearly show that it was the intention of the parties that a transfer of stock or the death of a stockholder should not work a dissolution of the company. Consequently, the death of Willis did not dissolve it. *Tenney v. Protective Union*, 37 Vt. 64; *Walker v. Wait*, 50 Vt. 668; *McNeish v. Hullett Oat Co.*, 57 Vt. 316. The oratrix, therefore, is not entitled to have the company treated as dissolved by the death of her intestate. It must now be considered whether she is entitled to a decree dissolving the company upon the facts stated.

The court of equity has a wide discretion in the matter of decreeing the dissolution of a partnership and the settlement of its affairs. It should seek to protect the rights and interests of all the partners, viewing the partnership in the light of its success or failure in respect to the purpose for which it was formed. It is apparent from article 3 of the constitution that this company was formed for the purpose of realizing profits for its stockholders. It has been said that expectation of profit is implied in every partnership. *Lindl. Partn.* *576. For over 23 years, this company has struggled for business against competing cheese factories, without having realized any profits for the stockholders during that time. The case does not disclose any better or different business outlook for it in the future. In effect, the defendants propose

to continue the business indefinitely in the future, in the same manner and with the same probable results as in the past. Some of them, as patrons of the factory, are directly interested in having the business so continued, although they receive nothing as stockholders in the way of profit. The hopelessness of a firm's success is recognized in equity as a sufficient ground for the dissolution of a partnership. *Lindl. Partn.* *576, *577; *Story, Partn.* (6th Ed.) § 290; 3 Kent, Comm. (11th Ed.) 68; *Baring v. Dix*, 1 Cox, Ch. 213; *Reeve v. Parkins*, 2 Jac. & W. 390; 98 Am. Dec. 261, note; *Sieghortner v. Weissenborn*, 20 N. J. Eq. 172. This doctrine is applicable to the case at bar. The prospect for profit or equal benefit to all the stockholders is hopeless. On this ground, the oratrix is entitled to a decree dissolving the company, settling its affairs, and distributing its assets.

The contention of the oratrix that she is entitled to receive 12 per cent. upon her intestate's stock from the time of the last dividend, out of the assets, before distribution to the stockholders, is not sustained; nor is her claim that the master erred in admitting oral evidence to prove that the requisite number of shares were represented by the vote of June 8, 1871, to amend article 3 of the constitution. The acts of unincorporated associations are provable by parol, though they keep a record. 6 *Thomp. Corp.* § 7747; *Newell v. Borden*, 128 Mass. 81. This amendment was made before the oratrix's intestate became a stockholder. After this amendment, stockholders were only entitled to such dividends as were thereafter declared by the directors. Therefore it is not necessary to consider the effect of article 3 as originally adopted. The pro forma decree is reversed, and cause remanded, with mandate that the court of chancery enter a decree dissolving the Smithtown Cheese Company, with costs to the oratrix, and that a receiver be appointed, and that such other proceedings be had as may be necessary to settle the affairs of said company, and adjust matters between its stockholders and that, upon the payment of the just debts owing by said company and other proper charges, the residue of its assets, if any, be distributed among its stockholders, in proportion to the number of shares of stock owned by each; the oratrix to recover her costs in this court.

(68 Vt. 484)

KAVANAUGH v. VERMONT SAV. BANK.

(Supreme Court of Vermont. Windham.
Aug. 14, 1896.)

SAVINGS BANK—ACTION FOR DEPOSIT—CLAIMANT
—PROCEEDING ON APPEAL.

In an action against a savings bank for money deposited by plaintiff in the name of another, the bank defended on the ground that its contract was with such other person, who it appeared had refused to sign a transfer of the account to plaintiff. *Held*, that the appellate court should of its own motion reverse the

judgment for defendant pro forma, and remand the case, that such third person may be cited in under V. S. § 4089, providing that, where action is brought against a savings bank for a deposit, and there is a person, not a party to the action, who claims the same fund, the court, on the petition of the bank, may order the proceedings amended by making such claimant a party defendant. Start, J., dissenting.

Exceptions from Windham county court; James M. Tyler, Judge.

Assumpsit by Bridget Kavanaugh against the Vermont Savings Bank. Judgment for defendant. Plaintiff excepts. Reversed pro forma.

Haskins & Stoddard, for plaintiff. Waterman, Martin & Hitt, for defendant.

MUNSON, J. The plaintiff deposited certain sums of her own money with the defendant in the name of Mary Kavanaugh, which were credited in a book issued in the name of Mary Kavanaugh, and delivered to the plaintiff. Under the date on which the first of these deposits was made, the name of Mary Kavanaugh appears in a book kept by the bank in which depositors were required to sign their names when making their first deposit. It is found that the plaintiff always kept the deposit book in her possession and under her control, but it nevertheless appears that Mary Kavanaugh once presented the book, and drew a portion of the deposit. Some years after this, the plaintiff requested Mary Kavanaugh to sign a transfer of the account to her, which she refused to do. The plaintiff brings this suit to recover the amount due on the book, and the bank defends on the ground that its contract is with Mary Kavanaugh. The judgment below was for the defendant. An affirmance of this judgment might embarrass the plaintiff in the enforcement of any equitable right she may have to the deposit. The rendition of a judgment for the plaintiff would not be determinative of the defendant's liability to Mary Kavanaugh. This being the situation, the court will, of its own motion, reverse the judgment pro forma, and remand the case, so that Mary Kavanaugh may be cited in under the provision of V. S. § 4089,¹ and the matter be disposed of in this proceeding with all possible interests represented.

Judgment reversed pro forma and cause remanded.

START, J., dissents. TAFT, J., absent in county court.

¹ Section 4089 provides that in an action against a savings bank, savings institution, or trust company to recover for moneys on deposit, if there is a person claiming the same fund, who is not a party to the action, the court, on the petition of such corporation, and on such notice as it considers proper to the plaintiff and such claimant, may order the proceedings to be amended by making such claimant a party defendant, and the court shall thereupon hear and determine the rights and interests of the parties to said action in and to said fund.

(68 Vt. 490)

JONES v. DILLIHANTY et al.

(Supreme Court of Vermont. Rutland. Aug. 21, 1896.)

ACTION AGAINST NONRESIDENT—SERVICE.

V. S. §§ 1641, 1643, providing that a defendant out of the state, a nonresident, or one temporarily absent, so that process cannot be served on him, may be notified of the pendency of the action, and given opportunity to defend, by service out of the state, and that if so notified the same proceedings may be had, so far as to affect the title or right to possession of property in the state, as if service had been had in the state, do not repeal sections 1319, 1644, et seq., authorizing attachment by trustee process of the debt of a resident to a nonresident or absent person, for a debt due from the nonresident or absent person, by merely leaving with the trustee a copy of the writ for the defendant, and publishing notice, but providing that in case of default judgment, without proof of personal notice, execution or writ of possession cannot issue without the giving of security for the absent defendant.

Exceptions from city court of Rutland.

Action by John Jones against P. H. Dillihanty, defendant, and M. B. Mayhas, trustee. The defendant resided in the state of New York, and the only service upon him was by leaving a copy for him with the trustee, and by publication. Judgment against the principal defendant by default, and against the trustee upon his disclosure. The trustee objected that sufficient service had not been made upon the defendant, and excepted to the judgment of the court overruling this objection. Affirmed.

Jones & Rice, for plaintiff. F. S. Platt, for trustee.

START, J. This action was commenced by trustee process, returnable before the city court of Rutland. The principal defendant being a nonresident, and absent from the state, the writ was served on him by leaving a copy thereof with the trustee, as is required by V. S. § 1319. The court continued the cause, pursuant to V. S. § 1645, for notice to the defendant; and judgment was finally rendered against him by default, and the trustee adjudged liable. The only question presented for consideration by counsel for the trustee is whether notice should have been given to the defendant by serving the writ upon him without the state, as is authorized by V. S. § 1641. This section provides that, when an action is commenced, an absent defendant, residing or being without the state, so that process cannot be served on him, may be notified of the pendency of such action, and given opportunity to make defense therein, by the delivery to him personally, at any place without the state, of copies of the process and pleadings, and of an order for such delivery, stating the time and place when and where he is required to appear,—all under the hand of the clerk, or judge of the court, or a justice. V. S. § 1643, was enacted at the same time as section 1641, and provides that upon such notice, so given to a

party at least 20 days before the time when he is required to appear, the same proceedings may be had, so far as to affect the title or right to the possession of goods, chattels, rights, credits, land, tenements, or hereditaments in the state, as if such process or pleading had been served on a party in this state. These sections were first enacted in 1878. Before their enactment the statute did not provide for personal notice to an absent defendant by service of the process or pleadings upon him without the state, but did contain provisions for appropriating a debt due from a resident of this state to a non-resident or absent person to the payment of debts due from such nonresident or absent person, without actual notice to him. Such debts could be attached on trustee process by leaving a copy of the writ in the hands of the trustee for the defendant. V. S. § 1319. If the writ was returnable before the county court, notice was required to be given by publication, unless it appeared to the court that the defendant had notice of such service of the writ 12 days before the sitting of the court. Id. § 1644. If the writ was returnable before a city or justice court, it was the duty of the court to continue the cause for notice, when it appeared to the satisfaction of the court that the defendant was out of the state at the commencement of the suit, and had not returned in season to attend the trial. Id. § 1645. But in all such cases, when judgment was rendered against such absent defendant, upon default, without proof of personal notice, execution or writ of possession could not lawfully issue until the plaintiff, his agent or attorney, gave security by way of recognizance, with sufficient surety, taken to the absent defendant, in double the value of the estate or money recovered by the judgment, conditioned to pay such sum as should be recovered by such absent defendant by writ of review. Id. §§ 1644-1651. These statutes were first enacted long before the passage of the enactment providing for the service of the process or pleading upon an absent defendant, without the state; and they were in force at the time the process in this case was served, and the proceedings had before the court below, unless the act of 1878, providing for service of process or pleadings without the state, by implication, repealed some of them. We think that the passage of this act did not have the effect to repeal any of the statutes then in force relating to the appropriation of the property, rights, or credits of a nonresident or absent debtor, situate in this state, to the payment of debts due from him; that these statutes are still in force; and that, under them, the property of an absent debtor may be appropriated to the payment of debts due from him, by a strict compliance with their provisions, notwithstanding the act of 1878. It is evident that one of the purposes of the act of 1878 was to enable a creditor, if he so elected, to give notice to an absent defendant

of the pendency of a suit against him, by service of process or pleadings upon him without the state, and thereby obtain an execution or writ of possession without entering into a recognizance, with sureties, conditioned as is provided by V. S. § 1646-1652. The act of 1878 does not require that the process or pleading shall be served on an absent defendant, without the state. If his whereabouts were unknown, it would be impossible to do so. It only provides that they may be so served; and, when so served, the same proceedings may be had, so far as affecting the title or right to the possession of goods, chattels, rights, credits, land, tenements, or hereditaments in this state is concerned, as if such process or pleading had been served on the party in this state. When a writ is served on a party in this state, execution or writ of possession may lawfully issue without giving security for the payment of such sum as may be recovered by writ of review. Since the passage of this act, a party plaintiff may have his writ served on an absent defendant, without the state; and if this is done, and judgment is recovered upon default, or otherwise, he may have execution, and appropriate the property of the debtor, found in this state, and taken on the original writ by attachment or trustee process, to the payment of the judgment recovered, without giving security, by way of recognizance, conditioned for the payment of such sum as the absent defendant might recover by writ of review. If this is not done, and judgment is rendered upon default, without proof that the absent defendant had personal notice of the pendency of the suit, execution or writ of possession cannot lawfully issue until such security is given. We therefore hold that the service of the writ and procedure in the court below were in conformity to the mandatory requirements of the statute. Judgment affirmed.

(68 Vt. 497)

DOMESTIC & FOREIGN MISSIONARY
SOCIETY OF THE PROTESTANT
EPISCOPAL CHURCH et al.
v. EELLS et al.

(Supreme Court of Vermont. Addison. July 28, 1896.)

CHANCERY COURT.—SPOILIATED WILLS—JURISDICTION.

1. The jurisdiction vested in chancery courts to set up spoliated, suppressed, and destroyed wills, by Const. c. 2, § 5, authorizing its creation with such powers as are usually exercised by such courts, or shall appear to be for the interest of the commonwealth, and St. 1788, p. 10, creating it with powers substantially the same as are given by V. S. § 907, providing that its powers and jurisdiction shall be the same as those of the court of chancery of England, except as modified by the state constitution and laws, was divested, and exclusive jurisdiction thereof vested in the probate court, by the statutes vesting in the probate court the control of estates; and section 2356, providing that no will shall pass either real or personal estate until

proved and allowed in the probate court, or by appeal in the county or supreme court, and, when so probated, shall be conclusive as to its due execution.

2. Pending appeal from a probate decree disallowing a petition by devisees against heirs for the probate of a will alleged to have been destroyed by the heirs, the petitioners filed a bill in chancery against the heirs to establish the will, to restrain defendants from disposing of the property, and other equitable relief. The heirs by demurrer pleaded want of jurisdiction of the chancery court. *Held*, that chancery, though without jurisdiction to establish the will, should require defendants to answer and retain the bill till determination of the appeal, in order that, if the will is established on appeal, it may grant complainants such equitable relief as is necessary to make good their title, and is beyond the jurisdiction of the probate court.

Appeal in chancery, Addison county; Jonathan Ross, Chancellor.

Bill by the Domestic & Foreign Missionary Society of the Protestant Episcopal Church and others against Isaac L. Eells and others to establish a destroyed will, and for other relief. From a pro forma decree sustaining defendants' demurrer, orators appeal. Reversed.

C. M. Wilds and W. H. Bliss, for orators.
J. C. Baker and Seneca Haselton, for defendants.

THOMPSON, J. The orators claim to maintain this bill in chancery as legatees and devisees under an alleged last will and testament of Lydia E. Conroe, deceased, which it is charged was fraudulently destroyed in her lifetime by the defendant Isaac L. Eells. After the decease of Conroe, the orators, the wardens and vestrymen of the First Episcopal Society of Addison county, presented the alleged will for probate to the probate court for the district of Addison, in which district she resided at the time of her death, and probate thereof was refused. From this decision an appeal was taken by the proponents to the county court, and the question of the probate of the will is still pending therein. The orators have no standing in court if Lydia E. Conroe died intestate. If they have any title to any part of her estate, personal or real, it is derived through her last will. If she left no will, the possession of the property alleged to belong to her estate by defendants Eells and Sperry is sufficient title to enable them to hold the same as against the orators, who, in that event, would be mere strangers and intermeddlers as to her estate. Hence, at the outset, the orators must establish that Conroe died testate, and must establish the contents of the will so far as they claim the same constitutes them devisees and legatees thereunder. Defendants Eells and Sperry, by demurrer, have raised the question whether in this state the court of chancery has jurisdiction to establish spoliated, suppressed, and destroyed wills. Chapter 2, § 5, of the constitution of Vermont, so far as it relates to this question, is as follows: "A future legislature may, when they

shall conceive the same to be expedient and necessary, erect a court of chancery, with such powers as are usually exercised by that court, or shall appear for the interest of the commonwealth." This article of the constitution was adopted in 1786, and has since been retained. It was thus left with the legislature to determine the powers and jurisdiction of such court when created. They might be the same as were possessed at that time by the court of chancery in England, or they might be modified as in the judgment of the legislature the best interests of the state might require. Under this grant of power a court of chancery was created by the legislature as early as 1788. St. 1788, p. 10. From that time to the present the powers of that court as defined by statute have been substantially as now declared by V. S. § 907, which section reads: "There shall be a court of chancery, the powers of which shall be vested in a chancellor; and the powers and jurisdiction shall be the same as those of the court of chancery in England, except as modified by the constitution and laws of this state." It is necessary to consider whether, at the time of the adoption of this provision of the constitution, the court of chancery in England had jurisdiction to set up spoliated, suppressed, and destroyed wills. At that time there was no way in England by which a will devising real estate could be established and probated, once for all. It was considered as a muniment of title, and was required to be proven whenever necessary to establish title, and might be attacked whenever offered in evidence before a court. The ecclesiastical courts had jurisdiction over wills of personalty. Probate of such wills against the world, and once for all, could be made in them. If the will was of personalty and realty, the ecclesiastical court could probate it, but the probate was not noticed by the common-law courts in respect to the realty. If the devisee was in possession, he could not maintain ejectment against the heir, and thus establish his title under the will. To obviate this dilemma, courts of chancery entertained a bill in favor of such devisee against the heir to establish the will and title thereunder. This was in the nature of a bill to quiet title. 3 Pom. Eq. Jur. § 1158, and note 3; Adama, Eq. (6th Am. Ed., with Sharswood's notes) *248, *249, and notes; Buchanan v. Matlock, 8 Humph. 390; Harris v. Tisereau, 52 Ga. 153. There are cases where chancery formerly exercised jurisdiction to relieve against a will fraudulently obtained. But since the decision of *Kerrich v. Bransby*, 7 Brown, Parl. Cas. 437, and *Webb v. Claverden*, 2 Atk. 424, it seems to be considered as settled in England that equity will not set aside a will for fraud and imposition. The reason assigned is, where personal estate is disposed of by a fraudulent will, relief may be had in the ecclesiastical court, and at law on a devise of real property. *Bennet v. Vade*, 2 Atk. 324, 3 Atk. 17; *Jones v. Jones*, 3 Mer.

171. In *Gaines v. Chew*, 2 How. 620, Justice McLean, on this subject, said: "In cases of fraud, equity has a concurrent jurisdiction with the court of law, but in regard to a will charged to have been obtained through fraud this rule does not hold. It may be difficult to assign any very satisfactory reason for this exception. That exclusive jurisdiction over the probate of wills is vested in another tribunal is the only one that can be given." *Kieley v. McGlynn*, 21 Wall. 508; 3 Pom. Eq. Jur. §§ 913, 914. There are not many English cases bearing directly upon the question of the jurisdiction of chancery to set up a suppressed, spoliated, or destroyed will. *Haines v. Haines*, 2 Vern. 441, was decided in 1702. That case was this: The uncle having devised his real estate, part to the orator and part to other relatives, and disinherited the heir at law, at the funeral of the uncle a younger brother of the heir at law snatched the will out of the hands of the executor, and tore it into many small pieces, and most of them, particularly such part wherein was the devise of the land, were picked up, and stitched together again. The bill was to have the will established, and it was decreed that the devisees should hold and enjoy against the heir, and he to convey to the devisees, although no direct proof was made that the heir directed the tearing of the will. The report of the case does not show that it was argued, and no reasons are given by the court for its judgment. This case is quite analogous to the class of cases before suggested in which the devisee in possession could maintain a bill against the heir at law to set up the will to quiet his title. *Hampden v. Hampden*, 3 Brown, Parl. Cas. 550, was first heard and decreed by the master of the rolls in December, 1708, then affirmed by the lord chancellor on appeal, and afterwards by the house of lords in 1723. In *Dalston v. Coatsworth*, 1 P. Wms. 781, *Hampden v. Hampden* is stated thus: The orator claimed as devisee under the will of the defendant's father. By proof it appeared there was such a will, though no exact account was given of its contents; but, inasmuch as the court was satisfied the defendant had suppressed the will, and for that, though no exact proof was made of its contents, the defendant might clear this by producing the will, therefore it was decreed that the orator, the devisee, should hold and enjoy until the defendant produced the will and further order. In 1719 was decided, in chancery, the case of *Woodroff v. Burton*, which is stated in *Dalston v. Coatsworth*, supra, as follows: "A devisee brought his bill against the heir, and, it being made to appear that there was such a will as the plaintiff had suggested, and that the defendant had destroyed it, Lord Chancellor Parker decreed the defendant to convey the premises to the plaintiff in fee, and to deliver up the possession, which," his honor said, "seemed to him to be the most effectual and reasonable decree." *Tucker v. Phipps*, 3 Atk.

359, was decided in 1746. The bill in that case was brought by the plaintiff, suggesting that his wife's father had by his will left a legacy of £1,500 to the plaintiff's wife, his daughter, and that the defendant had destroyed or concealed the will. The prayer was that defendant be decreed to pay the plaintiff £1,500, with interest. The defendant put in three answers. In the first he admitted the will as set forth in the bill, but made no mention of any insanity in the testator; in the third he denied he ever had any such will, and averred that, if there ever was any such, he could not say whether his father was of sound mind at the time of making such will, and insisted that the plaintiff came too soon into chancery, for that he ought to have cited the defendant into the ecclesiastical courts, where he might equally well have had the benefit of a discovery. Lord Chancellor Hardwicke, in passing upon the case, said: "As to the spoliation, consider it generally as a personal legacy, where the will is destroyed or concealed by the executor, and I think, in such case, if the spoliation is proved plainly, though the general rule is to cite the executor into the ecclesiastical court, the legatee may properly come here for a decree upon the head of spoliation and suppression. * * * But here the case is stronger to entitle the plaintiff to a decree, because the legacy is out of real and personal estate both, and as to the real estate there is no occasion to prove the will in the spiritual court to entitle the legatee to recover the legacy out of the real estate. This would be clearly the case where the charge is upon the real estate, and, though the heir is entitled to have a personal estate to exonerate his real, yet, if he is made executor, and has by a voluntary, fraudulent act put the legatee under such difficulties as to make it almost impossible for him to prove the will, it is reasonable to let in the legatee to have his legacy, and leave the executor to pay himself out of the personal estate." And the plaintiff had a decree for the immediate payment of the legacy, notwithstanding the probate of the will had not been granted. Among cases in the United States holding that chancery has jurisdiction in such case, are *Bailey v. Stiles*, 2 N. J. Eq. 220; *Buchanan v. Matlock and Harris v. Tisereau*, supra; *Dower v. Seeds*, 28 W. Va. 113; *Anderson v. Irwin*, 101 Ill. 411; *Hall v. Allen*, 81 Wis. 691; *Banks v. Booth*, 6 Munf. 885; *Brent v. Dold*, *Gilmer*, 211. Among text writers adopting this view are 3 Redf. Wills, 16; *Perry, Trusts*, § 183; 1 Story, Eq. Jur. § 254. In the case of *Mead v. Langdon's Heirs*, not reported, but decided in Washington county in 1834, and cited in *Adams' Heirs v. Adams*, 22 Vt. 59, this court set up and decreed the payment of legacies given in a will never proved in a probate court, but which had been suppressed by those interested in the estate, and administration obtained without regard to the will. We think that at the time of the adoption of section 5,

c. 2, of our constitution, and the establishing a court of chancery by the legislature, the court of chancery in England had jurisdiction to set up spoliated, suppressed, and destroyed wills, and that the same jurisdiction is possessed by our court of chancery, unless it has been modified or taken away by statute.

Has this jurisdiction been taken from the court of chancery by the legislation of this state? At an early date in its history probate courts were established, and have ever since been retained. They are courts of record. V. S. § 2322. They have jurisdiction of probate of wills disposing of personal or real estate or of both, of the settlements of estates, the appointment of guardians, and the powers, duties, and rights of guardians and wards, of the issuing of letters testamentary, and the appointment of administrators, and issuing letters of administration. Id. §§ 2325, 2371-2373. The probate of a will by the probate court having jurisdiction thereof, upon due notice, is conclusive as to its due execution as against the whole world. Id. § 2356; *Foster's Ex'rs v. Dickerson*, 64 Vt. 233, 24 Atl. 253. The probate court has jurisdiction to probate lost, suppressed, spoliated, and destroyed wills. *Minkler v. Minkler's Estate*, 14 Vt. 125; *Dudley v. Wardner's Ex'rs*, 41 Vt. 59; *Tynan v. Paschal*, 84 Am. Dec. 628, note; *Schouler, Ex'rs*, § 84. It has power to vacate its decree admitting a will to probate. It may thus revise its proceedings for fraud, mistake, or illegality. *Hotchkiss v. Ladd's Estate*, 62 Vt. 209, 19 Atl. 638; *Smith v. Rix*, 9 Vt. 240; *Adams v. Adams*, 21 Vt. 162; *French v. Winsor*, 24 Vt. 407; *Waters v. Stickney*, 12 Allen, 1; 3 Redf. Wills, pp. 56, 64, 123, 124; *Perry, Trusts*, 182. With this power, there would seem to be no necessity for resorting to chancery to establish rights to property under a will fraudulently spoliated or destroyed, or fraudulently set up or suppressed, by decree of the probate court or otherwise. The probate court has full jurisdiction in respect to the settlement and allowance of accounts of executors and administrators, of the allowance of claims at law against the decedent's estate, and of marshaling and distributing the assets thereof. It also has an extensive chancery jurisdiction, by which claims in some respects of purely equitable cognizance may be there adjusted. *Adams v. Adams*, 22 Vt. 59. But it does not follow that, because jurisdiction to probate all kinds of wills has been granted to probate courts, courts of chancery have been deprived thereby of a concurrent jurisdiction to establish a will like the one in question. The rule in such case, as stated in 3 Pom. Eq. Jur. § 1153, is this: "One fundamental principle should be constantly kept in mind. It underlies all particular rules, and furnishes the solution for most of the special questions which can arise. In all those states which have adopted the entire system of equity jurisprudence, whatever be the legislation concerning the powers and functions of

the probate courts, and whatever be the nature and extent of the subjects committed to their cognizance, the original equitable jurisdiction over administrations does and must still exist, except so far and with respect to such particulars as it has been abrogated by express, prohibitory, negative language of the statutes, or by necessary implication from affirmative language conferring exclusive powers upon the probate tribunals. This equitable jurisdiction may be dormant, but, except so far as thus destroyed by statute, it must continue to exist, concurrent with that held by the courts of probate, ready to be exercised whenever occasion may require or render it expedient." When exclusive jurisdiction is conferred upon probate courts in respect to wills and the probate thereof, chancery has no jurisdiction to establish and carry into effect a destroyed, suppressed, or spoliated will. *Gaines v. Chew*, 2 How. 619; *Kieley v. McGlynn*, 21 Wall. 503. And it seems to be now the settled law in England that the court of chancery will not entertain jurisdiction of questions in relation to the probate or the validity of a will which the ecclesiastical or probate court is competent to adjudicate. *Kieley v. McGlynn*, supra. V. S. § 2356, is as follows: "No will shall pass either real or personal estate, unless it is proved and allowed in the probate court, or by appeal in the county or supreme court; and the probate of a will of real or personal estate shall be conclusive as to its due execution." This section was enacted subsequent to the decision of *Mead v. Langdon's Heirs*, supra, in the revision of 1839, and has ever since been retained in all subsequent revisions. Rev. St. c. 45, § 37. V. S. § 2355, provides that attested copies of wills devising real estate and of the probate thereof shall be recorded in the office of the clerk of the town in which the land lies. Id. §§ 2365, 2369, provide for probate by probate courts of wills made out of the state pursuant to the laws of the state or country in which they were made, and of wills allowed in any other of the United States or in a foreign country according to the laws of such state or country.

The case of *Morningstar v. Selby*, 15 Ohio, 345, was a bill in chancery to establish a spoliated will, and the question adjudicated was whether chancery, under the Ohio probate system, had jurisdiction to establish such a will. The fifth section of the constitution of Ohio provided that the court of common pleas in each county should have jurisdiction of all probate and testamentary matters, granting administration, the appointment of guardians, and such other cases as should be prescribed by law. Section 4 of the act to organize the judicial courts had this provision: "The court of common pleas * * * shall have power to examine and take the proof of wills, grant letters testamentary, etc., and to hear and determine all causes of probate and testamentary nature."

Swan, St. p. 222. The supreme court of Ohio in that case held that chancery had no jurisdiction in respect to establishing such a will. It said, referring to the court of common pleas as a probate court: "The act relating to wills still keeps up and sustains the same separation of jurisdictions. The probate is of the original jurisdiction of that court, and so recognized by the act in which the proof is prescribed, the mode of proceeding, and the effect of the record. And in Swan's Statutes (page 996, § 33) it is declared that 'no will shall be effectual to pass real or personal estate, unless it shall have been duly admitted to probate, etc., as provided by the act.' The act makes no mention of any method of establishing a will by chancery proceeding. The probate is treated as a judicial act at law, binding upon all parties, and final and conclusive upon all parties. * * * To test the propriety of encroaching in any manner upon a jurisdiction so peculiar, and which, from its nature, ought to be exclusive, let us anticipate some of the difficulties that might flow from entertaining this bill. A decree in chancery is not the probate of a will. Hence a decree establishing a will cannot operate to give it vitality, and is utterly powerless, or else the thirty-third section of the statute relating to wills must be taken and held pro tanto repealed by the decree. The decree and the statute would speak different language on the same subject. One would say the will of Morningstar is effectual to pass real and personal property, without admission to probate, as the act provides; the other, that it is of no effect. The conflict is irreconcilable, and the weaker in the contest must give way. Again, what would be the effect if, after rendering a decree either for or against the validity of the supposed lost will, a real and different will should be produced? Is the litigation a bar to its probate? Does it oust the court of common pleas of jurisdiction? Might not the will then be called for, be produced, be proved, and admitted of record, and would it not be effectual to vest titles according to the devises and bequests of the testator? We think it would, because the chancery proceeding would be regarded wholly *coram non judice*, and void, and because the statute would enforce its production, and is express as to the effect of the probate." The decision of this case turned on the provision of the law of Ohio like V. S. § 2356. The jurisdiction of chancery in the settlement of estates under our system of probate courts has been frequently passed upon by this court. One of the recent decisions on that subject is *Blair v. Johnson's Heirs*, 64 Vt. 538, 24 Atl. 764, in which case the orator brought a bill for the construction of a will. The prayer of the bill was denied by this court on two grounds, one of which was that no occasion had arisen, or was likely to arise, requiring a construction of the will, assuming it to be doubtful. The other ground is stated

in the opinion of the court by Rowell, J., thus: "But there is another point, not much touched on in that case (*Morse v. Lyman*, 64 Vt. 167, 24 Atl. 763), that is involved in this class of cases. In respect of the settlement of estates of deceased persons, the jurisdiction of the court of chancery in this state is not original, nor concurrent with that of the probate court, but is special and limited, and only in aid of the probate court when its powers are inadequate. Further than that the court of chancery has nothing to do with the settlement of such estates. It follows, therefore, that if, at the time a question as to the construction of a will needs to be decided, the probate court can be resorted to, and its jurisdiction is adequate for the purpose, that court must be resorted to, and chancery cannot be. It may be that this point has not always been kept in mind by our courts, but it is the inevitable deduction from our decisions." To the same effect are *McCollum v. Hinckley*, 9 Vt. 143; *Morse v. Slason*, 13 Vt. 296; *Adams' Heirs v. Adams*, 22 Vt. 50; *French v. Winsor*, 24 Vt. 402; *Merriam v. Hemmenway*, 26 Vt. 565; *Boyd v. Ward*, 38 Vt. 630; *Bank v. Weeks*, 53 Vt. 115; *Angus v. Robinson's Adm'r*, 62 Vt. 60, 19 Atl. 993; *Morse v. Lyman*, 64 Vt. 167, 24 Atl. 763; *Brown v. Brown*, 66 Vt. 81, 28 Atl. 686; *Ward v. Congregational Church*, 68 Vt. 490, 29 Atl. 770; *Davis v. Eastman*, 66 Vt. 651, 30 Atl. 1.

It is said that *Wetherbee v. Chase*, 57 Vt. 347, supports the contention of the orators that equity has jurisdiction to establish the will in question. That case was this: Ichabod Chase, by his last will, devised to his son, Wait Chase, 87 acres of land, upon condition that he pay to the orators, the testator's infant grandchildren, who were not his heirs, \$600, to be equally divided among them. Wait Chase was named as executor in the will. It was allowed by the probate court, and he took an appeal from the decision allowing it to the county court. An agreement was then entered into by the heirs and widow of Ichabod, by which the estate was divided among them, by mutual conveyances to each other. In such division Wait Chase took absolutely the 87 acres of land upon which the legacy to the orators was charged. By consent a judgment was entered in the county court disallowing the will, which judgment was certified to the probate court, and there recorded. At the time of these proceedings the orators were minors, without the appointment or intervention of any guardian, and in no wise parties to the agreement. The bill was brought to charge the land still owned by Wait Chase with the payment of the \$600 to the orators. It was originally brought against him alone, but by a pro forma ruling of the chancellor the other heirs and the widow were made parties defendant. Decree was that the legacy of \$600, with interest, was due the orators, and that the payment of the

same be made a charge upon the land. In passing upon the case this court, by Taft, J., said: "It is said that the doctrine is settled that a court of equity will not entertain jurisdiction to set aside a will obtained by fraud, or establish one suppressed by fraud; for in such cases the proper remedy is exclusively vested in the probate or ecclesiastical courts. *Smith, Man. Eq. 57; Story, Eq. Jur. § 184, and note.* But it is also as well settled that, 'where fraud does not go to the whole will, but only to some particular clause, courts of equity will lay hold of the circumstances to declare the executor trustee for the legatees.' *Id. § 440; Smith, Man. Eq. 57; Mitf. Eq. Pl. 257; 1 Perry, Trusts, § 183.* It is insisted, and we think correctly, that the reason why a court of equity has no jurisdiction, either to establish or set aside a will, is that those questions are within the exclusive jurisdiction of the probate courts; but that reason does not extend to the case at bar. The proceedings in this cause do not seek to establish the will of Ichabod Chase, but to charge upon the land in question the legacy given the orators, of which they have been deprived by the fraud of the defendant, Wait. To make the payment of the legacy a charge upon the land, without reference to establishing the will, the probate court has no power whatever. The case, therefore, falls within the general rule that courts of equity have jurisdiction in all matters of fraud.

* * * As between the parties to this cause, the will may well be considered as proved in the probate court, and the appeal vitiated by the fraud of Wait Chase. The orators' title to the legacy or the land is by virtue of the decree of the court of chancery, not by virtue of the will. The effect of the decree below was not to establish the will, and the persons made defendants by order of the chancellor are not proper parties to this proceeding; and the pro forma decree making them such is reversed. As to them, the bill should be dismissed; in all other respects the decree is affirmed, and the cause remanded." It may be difficult to reconcile this case with the adjudged cases or other authorities bearing upon the subject. The county court, as the appellate probate court, had ample power to set aside the disallowance of the will, and on proper proof to allow it, thus establishing the legacy charged upon the land. The judgment disallowing the will, though obtained by fraud, as against the orators in that case, was a valid judgment of a court of competent jurisdiction, and binding, until vacated and set aside by proper proceedings in that court, or in some court having jurisdiction to set it aside; yet the decree for the orators was rendered without setting it aside. The difficulty is not met by saying that the judgment of the probate court might well be treated as in force, and the appeal vacated by the fraud, because the appeal was in

fact perfected, the judgment of the probate court vacated, and the judgment of the county court rendered disallowing the will. Neither the probate court nor the court of chancery had any power to establish the legacy except by force of the will. If there was not a valid will, there was no legacy, and no fraud, and nothing to give either court jurisdiction in respect to the legacy. The alleged fraud was not of the character in which executors have been declared trustees for the legatees, under a will properly proved and allowed; and the decision does not finally go on that ground. *Allen v. Macpherson, 1 Phil. Ch. 133, affirmed in 1 H. L. Cas. 191; Kieley v. McGlynn, supra.* In *Allen v. Macpherson*, it was claimed that a final codicil to the will in question, which revoked certain provisions in the will favorable to the orator, and which was established by the ecclesiastical court, was obtained by the fraud of the defendant. A demurrer to the bill having been sustained, and the bill dismissed, the case went to the house of lords on appeal, and the whole discussion turned upon the question whether or not the ecclesiastical court had jurisdiction to inquire into the matters of fraud alleged; and, the court being of the opinion that it had jurisdiction, the decree was affirmed. Lord Lyndhurst also reviewed the cases in which a legatee or executor had been declared a trustee for other persons, and came to the conclusion that they had been either questions of construction, or cases in which the party had been named a trustee or had engaged to take as such, or in which the probate court could afford no adequate or proper remedy. The effect of his reasoning was that where a remedy is within the power of the ecclesiastical court, either by granting or refusing probate of the whole will or codicil, or of any portion thereof, a court of equity will not interfere. And this was the view of a majority of the law lords on that occasion, Lords Brougham and Campbell agreeing with Lord Lyndhurst. This seems to be now the settled rule in England. In the case of a foreign will, it was held by the United States supreme court in *Armstrong v. Lear, 12 Wheat. 170*, that a bill in equity could not be maintained against the personal representative of the alleged testator for a legacy until the will had been admitted to probate by the court in this country having jurisdiction of the probate of wills and other testamentary matters. The division of the estate of Ichabod Chase by the heirs and widow, would in no wise have affected the jurisdiction of the probate court over the same if the will had been established in that court. But, whatever may be thought of the law or the logic of the decision in *Wetherbee v. Chase*, it explicitly declares that it does not establish the will, and that a court of equity in this state has no jurisdiction to establish or set aside a will, and that such jurisdiction is exclusively

within the jurisdiction of the probate courts. Hence it is not an authority for the orators in the case at bar.

The question as to the effect of R. L. § 2049, which is the same as V. S. § 2356, was before this court in *Walton v. Hall's Estate*, 68 Vt. 455, 29 Atl. 803. The will of John Walton had been legally probated in Illinois, but not here; the administration there being ancillary. In passing upon the effect of the will here, the court, by Rowell, J., said: "We have no statute allowing that probate to make the will effective to pass property having its situs here, but, on the contrary, our statute provides that no will shall pass either real or personal estate unless it is proved and allowed in the probate court or on appeal in the county or supreme courts. R. L. § 2049. This, of course, refers to property located here. It follows, therefore, the will not having been proved and allowed here, that it cannot pass property located here." The probate court, and the county court as an appellate probate court, have ample jurisdiction for establishing spoliated, suppressed, and destroyed wills. It logically follows from the express provisions of V. S. § 2356, our probate laws, and our decisions, as well as the decisions of other courts, American and English, that the jurisdiction of chancery to establish such wills is abrogated, and we so hold. To hold otherwise would, in effect, repeal *Id.* § 2356, and would contravene the decisions of this court in respect to the exclusive jurisdiction of the probate courts. It is apparent, in view of the fact that this section was enacted subsequent to the decision in *Mead v. Langdon's Heirs*, supra, that it was intended to confer exclusive jurisdiction over the proof and allowance of wills upon the probate courts, and thus, by way of appeal to the county court, secure to all persons interested the right of trial by jury of all issues of fact involved in the probate of a will. V. S. §§ 2584, 2595. Our probate system is thus made harmonious and in accord with the spirit of the common law, which regarded wills as muniments of title, and to be established as such. The enactment of that section in the revision of 1839 overruled *Mead v. Langdon's Heirs*.

The defendants Eells and Sperry claim title to the property in question by virtue of a certain conveyance and transfers of the same to them by Conroe in her life, and the orators claim title thereto under the alleged spoliated will. Hence the issue pending between the parties in the county court, though in form the question of the probate of the will, is in fact, so far as the orators are concerned, a question of title. The case standing thus, jurisdiction is not conferred upon the court of chancery to establish the will, because the orators' bill prays for an injunction, or for equitable relief other than the setting up of the will. The case is analogous in principle to *Griffith v. Hilliard*, 64 Vt. 643, 25 Atl. 427, and *Stetson v. Stevens*, 64 Vt. 649, 25 Atl. 429, in which the title of the orator was in-

volved, and which the court of chancery refused to determine, although a temporary injunction was granted, and remitted him to the court of law to establish his title. In view of the effect of V. S. § 2356, chancery cannot draw to itself jurisdiction to set up a will by granting some other equitable aid. It can only supplement where there is a shortage in the powers of the probate court to protect the rights of the parties, by supplying such shortage if it comes within the scope of equity, and no more.

In a cause like this, the court of chancery may, in its discretion, and for sufficient cause shown, issue a temporary injunction to prevent any disposition of the property in controversy, and may make such further orders as may be necessary to preserve the same, and continue such injunction and orders in force for such reasonable time as may be necessary to enable the orators to establish the will in the county court. If the will is there proved and allowed, such allowance does not necessarily establish the right of the orators to the property, as Conroe may have been competent to contract at the time she executed the conveyance and transfers to Eells and Sperry, although not of sound mind at the time of the alleged destruction of her will. If the will is established, letters testamentary or of administration issued, and the estate settled in due course in the probate court, it may be found that the powers of the probate court are inadequate to give the orators such relief as they may be entitled to have to make good their title under the will, and relieve it from any cloud that defendants Eells and Sperry may have cast upon it by any unlawful acts of theirs. In such event chancery may, upon proof of the probate of the will in the county court, proceed with the cause in aid of the probate court, and grant such relief as the orators may establish that they are entitled to, which the jurisdiction of the probate court is inadequate to give. To this end the cause may be retained by the court of chancery. *Griffith v. Hilliard*, and *Stetson v. Stevens*, supra; *French v. Winsor*, 24 Vt. 402; 3 Atk. 17. This view of the case renders it unnecessary to pass upon the effect of the orators having elected to proceed in the probate court for the proof and allowance of the alleged will and the pendency of such proceedings in the county court on appeal. The pro forma decree of the court of chancery is reversed; the demurrer contained in the answer of the defendants Isaac L. Eells and A. Elizabeth Sperry is overruled, and the orators' bill adjudged sufficient; and the answer of defendants Eells and Sperry is ordered brought forward, from which, and the orators' bill, it appears that the proof and allowance of the alleged last will and testament of Lydia E. Conroe, deceased, late of Middlebury, in the county of Addison, and under which will the orators claim title, is in controversy. Therefore, the cause is remanded to the court of chancery, with direction to that court to re-

tain the case, and to make such further temporary orders as may be necessary to preserve the property in controversy, and to continue such orders and the injunction for such time as, in the opinion of said court, may be necessary to enable the orators to prove and establish said will in the county court where proceedings for the probate thereof are now pending; and, in default of the orators so proving and establishing said will within the time limited as aforesaid, their bill to be dismissed, with costs to the defendants. If within the aforesaid time the orators prove and establish said will by a final judgment of the county or supreme court, let the court of chancery further retain said cause; and if, in due administration of the estate of said Conroe, the jurisdiction and powers of the probate court for the district of Addison prove inadequate to establish and protect the rights and title of the orators under said will in the property, personal and real, in controversy, the court of chancery is directed to further proceed with said cause to the extent of granting the orators such relief in the premises as they may be entitled to in equity, and which the powers and jurisdiction of said probate court are inadequate to grant. If such ancillary aid of the court of chancery shall not be needed, then, finally, let the bill be dismissed upon such terms in respect to costs as that court may deem equitable; defendants Eells and Sperry to recover their costs in this court.

(68 Vt. 529)

STATE v. STEVENSON.

(Supreme Court of Vermont. Franklin. Aug. 21, 1896.)

MISCARRIAGE—INDICTMENT.

1. An indictment under R. L. § 4247, declaring guilty of an offense one who administers anything to a pregnant woman, or employs any means, to procure a miscarriage of such woman, unless the same is necessary to preserve her life, must allege that the miscarriage was not necessary to preserve her life; it is not enough to allege the means employed were not necessary to preserve her life.

2. Nor is an averment that "the performing of said operation, and the entering * * * of said instrument, * * * not * * * being necessary to preserve the life," equivalent to an allegation that a miscarriage was not necessary; it nowhere having been alleged that a miscarriage was produced by the acts charged to have been performed.

Taft, J., dissenting.

Exceptions from Franklin county court; Loveland Munson, Judge.

Lydia A. Stevenson, tried for attempting to procure an abortion, was found guilty, and excepts. Indictment quashed.

I. N. Chase, State's Atty., and Geo. A. Ballard, for the State. C. G. Austin and F. W. McGettrick, for respondent.

START, J. The respondent was tried on an indictment containing six counts, the last two of which were abandoned by the

prosecution before the trial commenced. The respondent interposed a general demurrer to each count. The court pro forma overruled the demurrer, and adjudged the indictment sufficient.

It is insisted by the respondent that the indictment is insufficient, in that it contains no averment that a miscarriage was not necessary to preserve the life of the woman. In each count it is averred that the means employed with intent to procure a miscarriage were not necessary to preserve her life. R. L. § 4247, provides that a person who willfully administers, or advises or causes to be administered, anything to a woman pregnant, or supposed by such person to be pregnant, or employs or causes to be employed any means, with intent to procure a miscarriage of such woman, or assists or counsels therein, unless the same is necessary to preserve her life, shall, if the woman die in consequence thereof, be imprisoned in the state prison not more than 20 years, and not less than 5 years, etc. This statute renders all acts done and performed upon a woman pregnant, or supposed to be pregnant, with intent to procure her miscarriage, criminal, unless the same are necessary to preserve her life. "The same" here refers to the miscarriage, and not to the means employed to produce a miscarriage, as is contended by the counsel for the state. The purpose of the statute is to suppress, by penal inflictions, the evil of procuring miscarriages; and it prohibits the employment of any means with intent to procure a miscarriage, unless a miscarriage is necessary to preserve the life of the woman. Any other construction would render the exception nugatory. It cannot be said that the thrusting of an instrument into a pregnant woman, who is otherwise in perfect health, is necessary to preserve her life, or that the employment of any of the means commonly used to procure a miscarriage is necessary to preserve her life; but it may be necessary to procure a miscarriage in order to save her life, and the exception provides for such a necessity, and nothing more. Therefore, under the statute, it is an offense to employ means with intent to procure a miscarriage, unless a miscarriage is necessary to preserve the life of the woman; and it is not an offense if the miscarriage is necessary to preserve her life. If a miscarriage was necessary to preserve the life of the pregnant woman, all acts done with the intent to procure it were lawful, but, if unnecessary, criminal. Hence the acts antecedently charged to have been done or performed upon the alleged pregnant woman by the respondent, with the intent to procure a miscarriage, may be of either character, and are not necessarily criminal, because in none of the counts is it charged that the miscarriage was not necessary to preserve the life of the woman. If all the allegations of the counts should be fully proved, they would not con-

clusively establish that the respondent was guilty.

In order to charge an offense under the statute, it is necessary to negative the exception. *State v. Stokes*, 54 Vt. 179. An averment that the means employed to procure the miscarriage were not necessary to preserve the life of the woman is not equivalent to an averment that the miscarriage was not necessary to preserve her life, and does not negative the exception; and the failure to negative the exception renders the indictment fatally defective. In *Bassett v. State*, 41 Ind. 303, it was held, under a statute making an attempt to procure a miscarriage a criminal act unless the miscarriage is necessary to save the life of the woman, that an indictment charging that an instrument was used to procure a miscarriage, the employment of the instrument not being necessary to preserve the life of the woman, without averring that the miscarriage was not necessary to preserve the life of the woman, should be quashed.

The first and second counts contain the following averment: "That the performing of said operation, and the entering, forcing, and thrusting of said instrument into the womb and private parts of her, the said M. Estella Houghton, not then and there being necessary to preserve the life of said M. Estella Houghton." It is insisted that the word "operation" refers to a miscarriage, and that the averment that the operation was not necessary to preserve her life is equivalent to an averment that a miscarriage was not necessary to preserve her life. The word "said," before the word "operation," confines the meaning of the latter to some act antecedently charged; and the clause "the performing of said operation" naturally confines the reference to a completed or fully performed act, antecedently charged. This is manifest from the pleader's subsequent use of the words "said operation," in charging "that thereby the death of M. Estella Houghton was caused." These last words cannot refer to a miscarriage, because it is nowhere charged that a miscarriage was produced by the acts charged to have been performed. It cannot therefore be held that by the words "said operation" is meant a miscarriage. If it had been antecedently charged that a miscarriage was produced, the word "operation" might naturally refer to that act. Hence "said operation" can only refer to some one of the acts antecedently charged to have been performed with the intent to procure a miscarriage. None of the counts contain an averment that an operation was performed, and the word "operation" can have reference to no averment in the indictment unless it refers to the acts averred to have been done with the intent to procure a miscarriage. Therefore the averment that the "operation" was not necessary to preserve the life of the woman is, in effect, an averment that the forcing and

thrusting of an instrument into the womb of the woman were not necessary to preserve her life, and can have the effect only of an averment that the acts done were not necessary to preserve her life. As we have seen, it cannot refer to a miscarriage; for it is nowhere averred that there was a miscarriage, nor is it averred that an operation was performed with intent to procure a miscarriage, nor that a miscarriage resulted from an operation. Therefore the averment that the operation was not necessary to preserve the life of the woman does not obviate the necessity of an affirmative averment that the miscarriage was not necessary to preserve the life of the woman. Indictment adjudged insufficient, and quashed. Respondent discharged.

TAFT, J., dissents.

(63 Vt. 525)

BICKFORD v. BICKFORD'S ESTATE.

(Supreme Court of Vermont. Bennington.

Aug. 21, 1896.)

PROBATE COURT—JURISDICTION—IMPLIED TRUSTS.

1. Under V. S. § 2494, providing that, where a deceased person held land in trust for another, the probate court may grant license to the executor to deed such land to the person for whose benefit it is holden, and may decree the execution of such trust, whether created by deed or by law, such court has jurisdiction of a trust in land arising or resulting, by implication of law, from facts found by it.

2. A petition to the probate court, under such section, alleging that petitioner bought the land, paid the purchase price, and caused it to be conveyed to decedent, his wife, with her consent, solely that the wife might hold the legal title in trust for him, overcomes the presumption that the conveyance was a gift to the wife, and shows a trust for the benefit of the husband, though the deed did not recite the trust, notwithstanding section 2219, providing that no trust concerning lands, except such as may arise or result by implication of law, shall be created or declared unless by instrument in writing signed by the party creating or declaring the same.

Exceptions from Bennington county court; Loveland Munson, Judge.

Petition by George W. Bickford for license to convey real estate standing in the name of Electa Bickford, deceased. Petition dismissed, and petitioner appeals. Reversed.

Batchelder & Bates, for petitioner. C. H. Darling, for petitionee.

START, J. The petitioner preferred his petition to the probate court for the district of Bennington, setting forth that Electa Bickford, at the time of her decease, held the legal title to certain real estate in trust for him; that the trust is not expressed in the deeds conveying said real estate, but rests wholly in implication of law, and in oral evidence,—and praying that the court decree the execution of the trust, and grant license to the administrator to convey said real estate to him. The probate court and the

county court on motion dismissed the petition; and the only question presented for consideration is whether the probate court had jurisdiction to grant the relief prayed for.

The petitioner relies upon section 2494 of the Vermont Statutes, which reads as follows: "Where a deceased person in his life time held lands in trust for another person, or lands have passed under a decree of foreclosure or sale on execution to such deceased person, or to his executor or administrator, on a debt in the name of such deceased person, but being in fact the debt of some other person and not belonging to the estate of the deceased, the probate court may, after notice given as required in the preceding section, grant license to the executor or administrator, to deed such lands to the person, his executor or administrator, for whose use and benefit they are holden; and the probate court may decree the execution of such trust, whether created by deed or by law." The petition negatives a trust by deed, and it becomes important to consider what trusts, under our statute, are created by law. V. S. § 2219, provides that no trust concerning lands, excepting such as may arise or result by implication of law, shall be created or declared, unless by an instrument in writing, signed by the party creating or declaring the same, or by his attorney. If we give effect to this statute, there can be no trust in real estate, except such as arises or results by implication of law, or is created by an instrument in writing signed by the party creating or declaring it, or by his attorney. Therefore no trust is created by law, except such as arises or results by implication of law; and, to give effect to the statute giving probate courts jurisdiction of trusts created in land by law, it must be held that trusts created by law are trusts that arise or result by implication of law. We think it was intended that probate courts should have jurisdiction over trusts in real estate arising or resulting by implication of law, to the extent of granting license to executors and administrators to convey the same. Any other construction of the statute would render that part of it relating to trusts created by law meaningless. All trusts in real estate, not created by an instrument in writing, arise or result by implication of law. When the facts are found in a given case, the law implies, or does not imply, a trust. We therefore hold that the probate court had jurisdiction to find the facts, and under what circumstances and conditions the conveyances were made; and, if the law implied a trust from the facts and circumstances found, then a trust was created by law.

In order to give the court jurisdiction, it was necessary for the petitioner to show by his petition that one, at least, of the conveyances was made under circumstances from which the law will imply a trust. We think that the petitioner shows by his petition a

resulting trust in respect to the piece of land first conveyed. He purchased this of Rollin Smith, paid the full purchase price thereof, and caused it to be conveyed to his wife, with her consent, solely that she might hold the legal title in trust for him. When a husband purchases real estate, pays the consideration thereof, and has it conveyed to his wife, the law presumes the payment a gift to the wife; but this presumption may be rebutted by evidence that there was a mutual understanding between them, and it was their intention and purpose, that the wife should take the conveyance, and hold the title, not as the title to her own property, but as the title to the property of the husband. If this presumption is overcome, a trust exists in favor of the husband, notwithstanding the statute of frauds, above cited. *Wallace v. Bowen*, 28 Vt. 638; *Bent v. Bent*, 44 Vt. 555. The petitioner, by his petition, rebuts this presumption. It therefore appears that the court has jurisdiction to grant the relief prayed for, in respect to the piece of land first conveyed. The court having jurisdiction in respect to this piece of land, it is not necessary, for the purposes of the jurisdictional question raised, to consider the allegations of the petition respecting the piece of land last conveyed; and, as counsel have not discussed the question of whether the petition shows that this was conveyed under circumstances from which the law will imply a trust, we express no opinion in regard to this conveyance. Judgment reversed and cause remanded.

TAFT, J., being engaged in county court, did not sit.

(68 Vt. 530)

STATE v. TOWN OF BRATTLEBORO.

(Supreme Court of Vermont. Windham. Aug. 21, 1896.)

LIQUOR LAWS—RETROSPECTIVE EFFECT—ANNUAL SETTLEMENT OF TOWN OFFICERS' ACCOUNTS.

1. Under V. S. § 3062, requiring all persons authorized to receive or disburse money belonging to a town to annually settle their accounts with the town auditors on or before the first Tuesday of March (the date of the annual town meeting); and section 3059, requiring town auditors to examine and adjust the accounts of town officers "immediately" before each annual town meeting, and report such accounts at such meeting,—it is not necessary that the accounts be adjusted and reported to the day of the annual town meeting, but a reasonable time before that may be fixed as the end of the fiscal year, and January 31st is such a reasonable date.

2. Acta 1894, No. 72 (approved November 20, 1894, and taking effect February 1, 1895), providing that if, on the annual settlement of the accounts of the town liquor agency by the auditors, there is found a balance in favor of the town in excess of 10 per cent. of the total sales of liquor for the year, such excess shall be paid into the state treasury by the town, does not apply to profits that accrued during a fiscal year which ended before the act took effect, but after it was approved.

Exceptions from Windham county court; Loveland Munson, Judge.

Action by the state of Vermont against the town of Brattleboro. Heard on an agreed statement of facts. Judgment for plaintiff. Defendant excepts. Reversed.

J. C. Baker, for plaintiff. Waterman, Martin & Hitt, for defendant.

START, J. The action is brought under No. 72, Acts 1894, to recover the balance found in favor of the defendant at the annual settlement of the accounts of its liquor agency for the fiscal year ending January 31, 1895. The act was approved November 20, 1894, and took effect February 1, 1895. It provides that if, upon the annual settlement of the accounts of the town or city liquor agency by the auditors, there is found a balance in favor of the town or city in excess of 10 per cent. of the total sales of liquor for the year, such excess shall be paid into the treasury by said town or city; and it is made the duty of the auditors to report within 15 days after making such settlement to the state treasurer the standing of such accounts. The defendant's auditors have been in the habit of making their annual settlement with town officers and the liquor agency for the fiscal year ending January 31st. The act in question does not require a settlement of the accounts of liquor agencies for its purposes. It only appropriates to the use of the state such balances as may be found in favor of towns and cities on annual settlements provided by law. The statute in force at the time the act took effect (V. S. § 3062) required all persons authorized to receive or disburse money belonging to a town to annually settle their accounts with the auditors of such town on or before the first Tuesday of March. V. S. § 3059, requires town auditors to examine and adjust the accounts of town officers immediately before each annual town meeting, and report such accounts at such meeting. These sections must be construed together, and effect given to the word "immediately," as used in section 3059. For this purpose, it is not necessary that the settlement be made instantly before the meeting. It is sufficient if made within such reasonable time before the annual meeting as will enable the auditors to perform their duties in the examination of the accounts and vouchers of the town officers, and to prepare and have printed itemized reports for the use of the voters at such meeting. This holding does not permit the officers to fix an arbitrary date for the end of the fiscal year, but it must end within a reasonable time before the annual meeting. Considering the duties required by law of the defendant's auditors, and the number and extent of the accounts they would naturally have to adjust and report upon, we think the time taken by them, as shown by the agreed case, was a reasonable time, within the meaning of the statute, in which to adjust the accounts, and pre-

pare and have printed their report. It was not necessary that the accounts should be adjusted and reported to the day of the annual town meeting. We therefore hold that the settlement of the accounts of the liquor agency for the fiscal year ending January 31, 1895, and the ascertaining of the balance then in its favor, was a reasonable compliance with the requirements of the statute.

In determining whether this balance can be recovered, it becomes important to inquire whether the legislature intended by the enactment to require a town to pay to the state treasurer any balance that might be found in its favor on settlement of the accounts of its liquor agency for the fiscal year that ended before the act took effect. If the legislature did thus intend, it intended the act to have retrospective force. The act does not, in terms, express such an intention; and, if it has such force, it is by necessary inference. It is a rule of construction that an enactment shall be so construed as to operate prospectively only, unless the intention to give it retrospective force is clearly expressed in the act, or to be inferred by necessary implication from the words of the act, taken by themselves and in connection with the subject-matter and the occasion of the enactment. There is nothing in the language of the act to indicate that it was to have retrospective force. On the contrary, the language would indicate that it was to have prospective force only. It provides that if, upon the annual settlement, there is a balance, it shall be paid to the state treasurer. There is nothing in the subject-matter or the occasion of its passage to indicate that retrospective force was intended or necessary. The act deals with profits arising from sales of intoxicating liquor, and relates more properly to future balances in favor of towns, which would naturally be on hand when annual settlements were made, ready to be paid to the state treasurer. Profits that accrued during a fiscal year which ended before the act took effect would ordinarily be expended for town purposes, and not be available for the purposes of the act, if it had retrospective force. The purpose of the act was not to raise revenue for state expenses. The entire history of legislation upon the subject of intoxicating liquor rebuts such an inference. It has been the policy of the state to restrict the sale of intoxicating liquor to medicinal, chemical, and mechanical purposes only, without profit. The purpose of the act was not to tax towns or impose a penalty because of profits that have been determined and possibly expended before the act took effect, but to prevent the sale of intoxicating liquor for purposes other than those authorized by law, by removing the pecuniary motive to increase sales. The statute in force at the time the act was passed made it the duty of the selectmen to fix the price of intoxicating liquor sold by town agents, as nearly as possible at its actual cost price to the town, including the expense of sale there-

of, but for a neglect of this duty the statute then in force did not provide a remedy; and it is clear that one of the purposes of the act in question was to secure a better enforcement of this statute. For this purpose, retrospective force to the act could have no effect, except by way of punishment. It is clear that the legislature did not intend to impose a penalty upon towns for past neglect of duty by its officers. By giving the act prospective force only, its object and purpose is effectuated. We therefore hold that the legislature did not intend, by the enactment in question, that towns should pay to the state treasurer balances found in their favor on settlement of their liquor agencies for fiscal years that had ended at the time the act took effect. Judgment reversed, and judgment for the defendant, without costs.

TAFT, J., being engaged in county court, did not sit.

(68 Vt. 534)

BUFFUM et al. v. HAYNES' ESTATE.
(Supreme Court of Vermont. Franklin.
April 25, 1896.)

PROBATE PRACTICE—JURISDICTION—VESTING JUDGMENT OF COUNTY COURT.

A judgment of the county court, affirming on appeal a judgment of the probate court adjudging an instrument the last will of deceased, and admitting it to probate, cannot be vacated by the probate court.

Exceptions from Franklin county court; Loveland Munson, Judge.

Petition by Emma E. Buffum and others to the probate court to vacate judgment establishing the will of J. M. Haynes, deceased. From the decree of the probate court, petitioners appealed to the county court, which dismissed the appeal, and petitioners except. Affirmed.

The petitioners were heirs of James M. Haynes, deceased. The said Haynes had resided in his lifetime in the county of Franklin, state of Vermont. The petitioners alleged that, after his decease, what purported to be his last will and testament was presented to the probate court for the district of Franklin, and was by said court admitted to probate; that from this decree of the probate court one King, a legatee and heir at law of the said Haynes, took an appeal to the county court; that said appeal was entered in the county court, but that no contest was made by the said King, and that such proceedings were had that the will was admitted to probate in the county court, and the judgment of that court certified to the probate court; that the petitioners, who were among the heirs at law of the said Haynes, resided in the state of Ohio; that they had no knowledge of the death of the said Haynes, and no notice or knowledge of the proceedings for the establishment of his pretended will in either the probate or county court until after the judgment of the county court had been

rendered; that in point of fact the pretended will of the said Haynes had been procured by undue influence; and that testator was not of sound mind at the time he made the same. The petition prayed that the judgment of the probate court admitting the will to probate might be stricken off, and the questions upon the probate of the will reheard by the probate court. The petitioners objected that the probate court had no jurisdiction to vacate the judgment, but said court ruled otherwise, and vacated the decree, admitted the petitioners to a hearing, and decreed, after such hearing, that the will was the last will and testament of the said Haynes. From this decree the petitioners appeal. The petitioners renewed in the county court their motion to dismiss upon the ground that the probate court had no jurisdiction in the premises.

Watson & Flinn and Ballard & Burleson, for petitioners. Farrington & Post, for petitioners.

THOMPSON, J. January 5, 1895, the probate court for the district of Franklin adjudged a certain instrument in writing, presented to it for probate, to be the last will and testament of J. M. Haynes, late of St. Albans, in that district, deceased. From this decree an appeal was taken by parties in interest, other than the appellants, to the Franklin county court, and duly entered therein at its April term, A. D. 1895. At that term such proceedings were had that the county court adjudged the instrument to be the last will and testament of Haynes, and certified its judgment to the probate court. The judgment of the county court has never been reversed, and is still in force. Subsequent to the rendition of this judgment by the county court, the appellants petitioned the probate court to vacate the judgment establishing the will, for reasons alleged in their petition; and such proceedings were had in the probate court on this petition that September 25, 1895, it, so far as it had the power so to do, vacated the judgment, and, upon further hearing, adjudged the instrument to be the last will and testament of Haynes. From this decree the appellants appealed to the county court, and duly entered their appeal therein. The county court dismissed this appeal, to which ruling the appellants excepted.

It is now contended that the probate court had no jurisdiction to vacate or modify the judgment of the county court establishing the will. If this contention is correct, the appeal was properly dismissed by the county court. V. S. § 2582, provides that the county court shall have appellate jurisdiction of matters originally within the jurisdiction of the probate court. On appeal from the probate court to the county court, the latter acts as a higher probate court, with powers fully commensurate with those of the probate court. The county court is, in other words, an appellate probate court for the rehearing and re-exam-

ination of all subjects which have been acted upon by the probate court below. *Adams v. Adams*, 21 Vt. 162; *Boyden v. Ward*, 38 Vt. 628; *Holmes v. Holmes*, 26 Vt. 536. Its judgments in probate matters, not reversed by the supreme court on exceptions, are final, and the action of the probate court must be in conformity to its decisions. *Green v. Clark*, 24 Vt. 136; *Atherton v. Fullam*, 55 Vt. 388; V. S. § 2599. *Atherton v. Fullam*, *supra*, is cited by the appellants in support of their contention that the vital force of the judgment of the county court is in its certificate to the probate court, and that such judgment is simply a finding of fact, and is not of full force and complete until spread upon the records of the probate court. That case raised the question whether the claim in suit was presented to the defendant executor within one year after it accrued, as required by R. L. § 2208, now V. S. § 2521. It was an action against a surety on an administrator's bond for an alleged default of his principal, in not paying over to his successor, the plaintiff, the amount adjudged to be in his hands as administrator. From the judgment of the probate court fixing such sum, the principal appealed to the county court, and that court rendered judgment against him for a certain sum, and certified its judgment to the probate court. Thereupon the probate court decreed that the principal should pay to the plaintiff the sum adjudged by the county court to be due from him. This court held that the cause of action did not accrue until the probate court had decreed payment, following its former holding that an action for other than nominal damages cannot be maintained upon an administrator's bond until after the probate court has decreed that he make payment of the funds found to be in his hands as administrator. *Probate Court v. Slason*, 23 Vt. 306; *Probate Court v. Chapin*, 31 Vt. 373; *Probate Court v. Kimball*, 42 Vt. 320. Thus it is apparent that *Atherton v. Fullam* does not support this contention of the appellants; for in that case the judgment of the county court determined the amount of the funds of the estate in the hands of the principal, for which he must account, while the judgment of the probate court simply decreed payment of the sum thus adjudged to be in his hands as administrator, and in no way affected, or attempted to modify, the judgment of the county court. The judgments of the county court, as an appellate probate court, are of record in that court, and are of full force and operative, whether certified to the probate court or not. *Green v. Clark*, 24 Vt. 136. The purpose of the certificate is not to give additional force to the judgment of the county court, by having it spread upon the records of the probate court, but to furnish the probate court with authentic evidence of the judgment, so that it may conform its subsequent action to the law as settled upon the appeal. It would be a strange anomaly if an inferior court could

reverse or modify the final judgment or decree of the higher, appellate court. Such is not the law in this state. The probate court had no jurisdiction to vacate or modify the judgment of the county court. This holding renders it unnecessary to consider the other questions attempted to be raised in argument. Judgment affirmed, and to be certified to the probate court for the district of Franklin.

(33 Vt. 568)

GENO v. FALL MOUNTAIN PAPER CO.
(Supreme Court of Vermont. Rutland. Dec. 5, 1895.)

INJURY TO EMPLOYE—DANGEROUS MACHINERY—COMMON USE—NEGLIGENCE—EVIDENCE.

1. In an action by an employé against a master for injury by being caught by a projecting set screw on a shaft while attempting to oil bearings, defendant is not entitled, on the question of negligence in using a projecting set screw, instead of one countersunk flush with the surface, to an instruction that he was not negligent if the set screw with the projecting head was in common use; the question being whether, in the circumstances of the case, the projecting head was reasonably safe.

2. On an issue as to whether the employer was exercising ordinary care in using a projecting set screw on a shaft, evidence as to whether it was necessary to have the head project beyond the shaft, and what would have been the expense of replacing the projecting set screw with a countersunk set screw, is admissible.

Exceptions from Rutland county court; Start, Judge.

Action on the case by Edward H. Geno against the Fall Mountain Paper Company for personal injuries. Verdict and judgment for plaintiff. Defendant excepts. Affirmed.

The defendant was the proprietor of a pulp mill, and the plaintiff was employed by it at work upon certain screens in said mill at the time he was injured. His evidence tended to show that he had been engaged by the defendant something like a week before the injury; that he was 16 years of age; that he had no knowledge of the operation of the machinery which he was required to run, nor of any machinery, and that the defendant knew this when he employed him; that he received no instruction whatever as to the oiling of the countershaft from which his machine was driven, and which was fastened to the ceiling, some 8 or 10 feet above the floor; that upon the night of the injury he was instructed by the foreman of the mill to oil this countershaft; that he attempted to do so by walking up over the screens, and by reaching with his hand to the bearings; that while attempting to do this the sleeve of his frock was caught upon a projecting set screw, and he was drawn violently around the shaft and seriously injured. The plaintiff claimed that the defendant was negligent in two respects: First, in using a projecting set screw; and, second, in having given him no instruction as to the oiling of this shaft. The set screw in question projected about three-fourths of an inch from

the collar, and the evidence of the plaintiff tended to show that the set screw ought to have been countersunk so that the head would be flush with the surface of the collar. He was allowed to show, under the exception of the defendant, by witness McEvoy upon direct examination, and by the witness Hall upon cross-examination, that the expense of replacing the projecting set screw with one properly countersunk would be trifling. The defendant claimed that the projecting set screw was one in ordinary use in the vicinity, and that the plaintiff, when he attempted to oil the countershaft by walking up over the screens, went into a place of obvious danger, and could not, for this reason, recover. The question raised by the exceptions of the defendant to the charge of the court upon these two points fully appears in the opinion.

O. A. Prouty and Butler & Moloney, for plaintiff. L. M. Reed and J. O. Baker, for defendant.

TYLER, J. The defendant's counsel requested the court to instruct the jury as follows: "If the jury shall find that the plaintiff was caught upon a set screw, notwithstanding this fact, if at the time of the accident said set screw was an approved appliance then in common use in that vicinity for the purpose for which it was used, then the defendant was not chargeable with any neglect in this respect." "If the set screw with the projecting head was the common and ordinary way of attaching collars to shafting in the manufactories of this vicinity, that method was reasonably safe, in the eyes of the law. It was not enough that some persons regarded a countersunk set screw as a valuable safeguard, nor can the jury set up its judgment against the general custom of the business. The test, in law, is general use." "The employer is not bound to use the newest and best appliances for his employé, but he performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to style of implements, method of attachment, or nature and mode of performance of any work, 'reasonably safe' means safe according to the usages, habits, and ordinary risks of business." The court declined to so charge, but did charge as follows: "It is claimed that the defendant was negligent in having this projecting set screw, in view of the circumstances in which the plaintiff was required to oil the shafting, in the circumstances which the plaintiff claims he was directed to do it." "The plaintiff seeks to recover for the negligence of the defendant. No recovery can be had for the damages suffered by the plaintiff, unless they were caused by the wrongful neglect or default of the defendant. Negligence is the failure on the part of the defendant to perform a legal duty that it owed

to the plaintiff. The duty incumbent on the defendant, as the employer of the plaintiff, was to use the diligence and care of a prudent man to furnish the plaintiff a reasonably safe place to work, and reasonably safe machinery, tools, and appliances with which to do his work. If the defendant, in the use of this set screw in the place where it was used, was in the exercise of the care and prudence that prudent men are accustomed to exercise in like circumstances, then the defendant is not liable on account of negligence in using this set screw in that place, and for the purpose it did use it. The employer is not bound to use the newest and best appliances for his employé, but he performs his duty when he furnishes those of ordinary character, and reasonably safe; and the former is the test of the latter, for in regard to style of implements, methods of attachment, or nature and mode of performance of any work, 'reasonably safe' being or meaning safe according to the ordinary risks of the business." "Now, it is claimed that it was negligence for the defendant to have this projecting set screw in a place such as is disclosed by the evidence here, projecting from the collar upon this countershaft. It is claimed that the defendant was negligent in having that set screw there, projecting in the manner it did, in view of the claim of the plaintiff that this boy had not been instructed in respect of that danger; in view of the claim that he was in fact sent up there to oil the bearing of the countershaft." "Was the defendant negligent in having this set screw projecting in the manner that it did, in view of the facts as you find them in respect to the direction that was given to the plaintiff about oiling the bearings upon that countershaft? In having this projecting set screw, in the circumstances, was the defendant in the exercise of that care and prudence that prudent men are accustomed to exercise in like circumstances? This is a question for you to determine, in connection with what the plaintiff was required to do with respect to the countershaft by the authority of the defendant, or by the authority that the plaintiff believed, from the conduct of the defendant, was the authority of the defendant. Was the defendant negligent in that respect, and did this injury come to the plaintiff by reason of that neglect, while he was in the exercise of care and prudence on his part, and without any contributory negligence on his part? If the defendant was thus negligent, and this injury was the result of that negligence, and without any contributory negligence on the part of the plaintiff, then the plaintiff is entitled to recover. If the defendant was not negligent; if, in this respect, it was in the exercise of the care and prudence that prudent men exercise in like circumstances,—then the plaintiff cannot recover by reason of the negligence, in the circumstances disclosed by the evidence." "If the jury should find that the plaintiff was

caught upon a set screw, notwithstanding the fact that at the time of the accident said set screw was such a set screw and appliance as a prudent man would use in like circumstances for the purpose for which it was used, then the defendant is not chargeable with any neglect in this respect."

The requests were framed in accordance with the doctrine of several cases that are cited by the defendant, which we will briefly state.

In *Manufacturing Co. v. McCormick*, 118 Pa. St. 519, 12 Atl. 273, the plaintiff, who was employed by the defendant as a laborer, was ordered, with two other men, to paint an empty water tank in one of the defendant's shops. They took with them into the tank several buckets of paint, known as "black varnish," largely composed of asphaltum and benzine. The tank being dark, the men carried an ordinary railroad lamp. While they were engaged in their work an explosion occurred, and the three men were injured,—two of them fatally. It was shown by the defendant that the paint was of a kind which had been used in its shops, to the amount of 15 to 40 barrels yearly, for 15 years; that it was in the same condition as when procured from the manufacturers; and that no explosion had ever occurred. The plaintiff claimed that the defendant was bound to know the composition of the paint, the effect of spreading it on the interior of the tank, and the danger of explosion. The defendant claimed that upon the facts there could be no recovery, and the supreme court so held, upon the ground that the paint was one in common use for the purpose for which it was used by the defendant, and reasonably safe. In *Shipbuilding Co. v. Nuttall*, 119 Pa. St. 149, 13 Atl. 65, the plaintiff was employed in removing material from the left to the right side of a circular saw, so as to be within easy reach of the sawyer; and, while passing behind the saw in this occupation, a loose piece of wood was caught by the saw, and thrown backwards, striking the plaintiff and injuring him. It appeared that there was a liability of sticks being caught and thrown by the saw, but that such an accident had not happened in the defendant's shop in many years. The plaintiff claimed that it was the defendant's duty to warn the plaintiff of the danger; also, to provide a guard for the saw. The supreme court held it was error to submit these questions to the jury,—the danger being obvious, and a guard not being in common use,—and said: "It is not enough that some persons regard it as a valuable safeguard. The test is general use. * * * The saw * * * was such a one as the company had a right to use, because it was such as is commonly used by mill owners." The same doctrine is recognized and applied in *Coal Co. v. Hayes*, 128 Pa. St. 294, 18 Atl. 387, when the negligent act complained of was the employer's failure to provide any appliance for warning em-

ployés that a draw of coal was to be made, there being no evidence that such appliances were in general use. In *Titus v. Railroad Co.*, 136 Pa. St. 618, 20 Atl. 517, the negligence charged was the use of a particular broad-gauge car body upon a narrow-gauge truck, not adapted thereto. The court said that an employer performed his duty when he furnished appliances of ordinary character and reasonable safety, and that the former was the test of the latter; that in regard to the style of the implement, or the nature of the mode of performance of a work, "reasonably safe" means safe according to the usages, habits, and ordinary risks of the business. The same rule was applied in *Augerstein v. Jones*, 189 Pa. St. 183, 21 Atl. 24, where an employé was injured by the bursting of an emery wheel not shown to be defective, or constructed out of the usual way, and where it was claimed that the accident might have been prevented by the adoption of a certain device. In *Smith v. Railroad Co.*, 69 Mo. 32, it is said that, while railroad companies are bound to use appliances that are not defective in construction, as between themselves and their employés they are not bound to use such as are of the very best or most approved description; that, if they use such as are in general use, it is all that can be required. In *Marshall v. Furniture Co.*, 67 Mich. 167, 34 N. W. 541, the court remarked, "That which has been approved as safe by reasonable experience may be presumed safe by those who rely on that experience to justify them in selecting it." But there an employé was killed by a knife flying out of a rapidly revolving shaper head, the first time it was used as then arranged, which was upon a new plan, got up by one of the defendant's managers. The court considered that there was no evidence of negligence, and directed a verdict for the defendant, which was held error, there being some evidence tending to show that the device was not made in accordance with well-known rules of mechanics. *Salters v. Canal Co.*, 3 Hun, 338, and *Sweeney v. Envelope Co.*, 101 N. Y. 520, 5 N. E. 358, are to the effect that the servant accepts the service of his employer, subject to the risks incident to it, and that when the machinery and implements of the employer's business are at the time of a certain kind or condition, and the servant knows it, he can make no claim upon the master to furnish other or different safeguards. In the former case the court remarked that a railroad company was bound to place its employés under no risk from imperfect or inadequate machinery, or other material, means, or appliances, known, or which but for their negligence would have been known, to them. In *Sisco v. Railroad Co.* (N. Y. App.) 39 N. E. 958, a brakeman was injured upon a stationary arm of a mail crane, while climbing up the side of a car in the performance of his duty. It appeared that cranes of similar construction were in common use on many

other extensive lines of railroad. There was no evidence that the crane would have performed its work if placed further from the car, nor that it was nearer than on other roads. It appeared that there was a crane in use on some lines, the arm of which, being movable, would, when not extended by the mail bag, rise automatically, but the uncontradicted evidence of the defendant was that the stationary arms were preferable. It was held error to submit any question of fact to the jury.

The defendant relies upon the statement of the law in the Pennsylvania cases, especially upon what is said in the opinion in *Titus v. Railroad Co.*: "That the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business;" that "no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way, for which liability shall be imposed." It is unnecessary to consider here whether the rule above stated might or might not be correct, as applied to particular cases, as where the direct cause of the injury was the use of a certain paint which was one in common use, or of a stationary arm to a mail crane, or where a wheel or other appliance such as is in common use bursts or breaks, and injures an employé. But the doctrine of "common use," "the ordinary usage of the business," as one of general application, we are not inclined to adopt, though it might apply to the facts in a given case. We think the more reasonable rule is to require the employer to use the care of a prudent man in like circumstances, in the selection and setting of machinery. If a machine or appliance were not such as would commend itself to the judgment of a prudent man, and an injury occurs from its use, it ought not to be a defense to say that it is one of a kind in common use. It cannot always be assumed that machines in common use would meet the approval of prudent men. They might remain, and often do remain, in such use, when they ought to have been superseded by others of an approved pattern. It would hardly be a defense for an employer to say that a certain machine upon which an employé had been injured was one of a kind in common use, if the employer was compelled, as a prudent man, to admit its use was, in his own judgment, dangerous. "Common use," and "the care of a prudent man," are not necessarily equivalent terms. That a machine is in common use is, at the most, a circumstance bearing upon the question of negligence. A machine might be one of a kind in common use, or even the best in use, and yet its safety, in respect to its position or setting in a mill, be questionable. In this case, even if the set screw with a projecting head had been the most approved kind, and in universal use, it could not be held, as a matter of law, that its employment, for that reason, would shield the defendant from liability.

It would still be an open question, beyond the province of the court to decide, whether its use, in the place where it was set, was reasonably safe, in view of the fact that the plaintiff was required to oil the bearings upon the countershaft, and was liable to come in contact with the head of the set screw. So the real question was not whether this kind of a set screw was one in common use, but whether, in the circumstances of the case, this projecting head was reasonably safe. In any event, the defendant was not entitled to the instruction, as an abstract proposition, that "reasonably safe" means safe according to the usages, habits, and ordinary risks of business," disconnected from the question whether the plaintiff received proper instructions about oiling the bearings. The words, "according to the usage and habits of business," of the omission of which from the charge the defendant complains, would not have expressed the true idea of the law, unless they would have been understood by the jury to require the positive quality of care and prudence as defined by the court. The charge was a correct statement of the law, and in accordance with the uniform decisions of this court. *Congdon v. Scale Co.*, 68 Vt. 255, 29 Atl. 253, and cases there cited. It must have appeared at the trial that a countersunk set screw was in use. This fact, together with the evidence tending to show that the set screw with a projecting head was in common use in the vicinity, was for the jury to consider, in determining the question whether the defendant was in the exercise of that degree of care which the law requires.

The testimony of McEvoy and Hall was properly admitted. The question for the jury being whether or not the defendant was in the exercise of ordinary care, it was proper that they should know whether it was necessary to have the head of the set screw project beyond the shaft, and what would have been the expense of exchanging the set screw in use for a countersunk set screw. Whether the appliance was reasonably safe or not might depend somewhat upon the difficulty and expense of exchanging it for a better one.

There seems to have been no question made about the authority of Keefe to order the plaintiff to oil the bearings. Upon the questions whether the plaintiff required instructions as to the danger; whether he acted in pursuance of the orders, or went without orders, and unnecessarily, upon a wet and slippery place,—the jury were charged fully, and in substantial compliance with the defendant's request, as follows: "If the plaintiff, climbing upon and over the screens and spout, when they were wet and slimy and slippery, and knowing the danger, unnecessarily went up there, and by reason of his voluntary act fell upon the shaft, or was caught by it, his own negligent act contributed to his injury, and he cannot recover." "If the plaintiff was directed by Keefe to use the long-handled oil filler in oiling these bearings upon the overhead shaft,

and, instead of using it as directed, he climbed into a dangerous position,—one where danger was obvious, and could be seen by careful observation,—he assumed the risk incident to that method of doing the work, and cannot recover in this action." "The plaintiff had been at work more than a week upon the screens of this machine, and had seen the shaft and pulleys revolving from one hundred to one hundred and twenty-five times a minute; and, if he observed that the screens and spouts were wet and slippery, there was no instruction necessary to inform him of their danger, and he did not need to be told that it was dangerous to come in contact with revolving shafts." "In order to show negligence on the defendant's part, the plaintiff must show omission to inform him of something that he needed to know in order to be safe. It must be assumed that the plaintiff had the intelligence and understanding that boys of his age usually have." Judgment affirmed.

(68 Vt. 540)

STATE v. SULLIVAN.

(Supreme Court of Vermont. Franklin.
April 25, 1896.)

RAPE—ASSAULT WITH INTENT—INDICTMENT.

1. Under V. S. § 4908, making it an offense punishable the same as rape for a person over 16 years old to carnally know a female under 14 years old, with or without her consent, a conviction for an assault with intent may be had where the indictment alleges, and the evidence shows, the female to be under 14, though it alleges that defendant committed the crime by force and against her will, and the evidence shows that he assaulted her with intent to carnally know her with her consent.

2. To convict of an offense under such statute, it is not necessary to allege or prove that defendant was over 16 years old, it being a matter of defense if he was not.

Taft, J., dissenting.

Exceptions from Franklin county court; Loveland Munson, Judge.

James P. Sullivan was convicted under an indictment for an assault with intent to commit rape, and appeals. Exceptions overruled.

The person upon whom the assault was alleged to have been made was a girl nine years of age, named Bessie Pomeroy. The respondent was engaged upon the day of the assault in driving a delivery wagon for the Cash Store in St. Albans. The evidence of the state tended to show that the respondent asked Bessie and several other girls to ride with him upon the delivery wagon; that after a time they came back to the Cash Store, and stopped there; that respondent asked them if they wanted to go into the cellar; that they all refused, except Bessie, whom he led down; that they were gone about 15 minutes; that when Bessie came back she looked pale, went directly home, running a portion of the way, and at once made complaint to her mother. Upon the trial, Bessie testified that when they got into the cellar the respondent put his hand upon

her private parts, and asked her to have connection with him, and that when she refused he proposed to her to meet him that night, or the next morning, at Mr. Northrop's barn. The respondent moved in arrest of judgment, and for a new trial, for that the verdict was against the law and evidence, and for that the evidence did not tend to show that the respondent made the assault with intent to commit a rape.

I. N. Chase, State's Atty. H. M. Mott, for respondent.

THOMPSON, J. The respondent was convicted of an assault with intent, unlawfully and feloniously, carnally to know and ravish a female child under the age of 14 years. The information is in the usual form for an assault to commit rape, with the exception that it alleges that the person assaulted is a female child under the age of 14 years. At the time of the assault she was 9 years old. The evidence tended to show that the respondent assaulted her with intent to carnally know her with her consent. He now contends that the conviction cannot stand, because the information alleges that he committed the crime charged by force, and against her will. He further contends that the effect of V. S. § 4917, which declares the punishment for an assault with intent to commit rape, precludes a conviction for an assault upon a female under 14 years of age with intent to have carnal knowledge of her with her consent, because the essence of the crime of rape is that it is committed by force, and against the will, or without the consent, of the woman. V. S. § 4908, makes it an offense punishable the same as rape for a person over the age of 16 years to unlawfully and carnally know a female person under the age of 14 years, with or without her consent. Discussing statutes like this, it is said in Bish. St. Crimes (2d Ed.) § 486: "One cannot be convicted of this offense on an indictment in the ordinary form for a rape on an adult. There must be the allegation of the age, which means the age at the time of the commission of the offense, not the time of finding the indictment. Such averments as 'with force,' 'against her will,' and 'ravish,' are unnecessary, though, if inserted, they may be treated as surplusage. In other respects, the statutory words should be pursued according to the rule governing other indictments on statutes, and no more will be required." State v. Wheat, 63 Vt. 875, 22 Atl. 720. If the female is under the age of 14 years, the element of consent is eliminated. If the words, "with force," "against her will," and "ravish," do not vitiate an indictment for the offense itself, it must follow that they do not render an information bad which charges an attempt to commit it. The offense charged is indictable at common law. Bish. St. Crimes (2d Ed.) § 499. It is also indictable under V. S. § 5163.

It is said that the information is bad because it does not allege the age of the respondent, and that there was no evidence tending to prove him to be over 16 years old, and that, consequently, the conviction cannot be sustained. It was not necessary to allege his age. If he was under 16, it was a matter of defense. *Bish. St. Crimes* (2d Ed.) § 482; *Com. v. Scannel*, 11 Cusb. 547. Not being necessary to allege it, it was not necessary to prove it. However, there was evidence before the jury tending to prove his age, in the respondent himself,—a grayheaded old man.

It is strenuously urged that the evidence did not tend to show a purpose to have carnal knowledge of the child at the time of the assault, but that its tendency was to show an intent to have it at some future time. But it cannot be said, as a matter of law, that the evidence did not tend to show that the respondent would not then and there have consummated his purpose by having carnal knowledge of her then and there, if she had not refused and repulsed his solicitations. The only questions before this court are those presented by the exceptions to the denial of the respondent's motions in arrest of judgment, and to set aside the verdict. Judgment that there is no error in the proceedings, and that the respondent take nothing by his exceptions. Let sentence be pronounced and mittimus issue.

TAFIT, J., dissents.

(63 Vt. 579)

RUTLAND ELECTRIC LIGHT CO. v. BATES.

(Supreme Court of Vermont. Rutland.
March 14, 1896.)

CORPORATIONS—ACCOUNTING BY TREASURER.

1. A treasurer of a corporation, who gets commissions for himself and for certain other directors on a sale by T. to the corporation, by issuing stock of the corporation, worth par, to T. (which is then transferred to him and said other directors), charging himself with receiving the price thereof, and then crediting himself with paying to T. that much more than he did pay, must account to the corporation for the whole of such sum.

2. Subscribers for stock of a corporation, which was never transferred to them, gave their notes therefor, payable to its order, which were delivered to its treasurer. The notes were not paid, but the treasurer failed to account for them, or to transfer them to his successor, and denied that they ever were the property of the corporation. *Held*, that this amounted to a conversion, and that though the corporation might have a lawful right to collect them of the makers, who were responsible, it could recover of him for the value thereof, but that in this case he was entitled to control the stock for which the notes were given.

3. Where a contract to do work for a corporation is made with W., who in fact merely represents the treasurer and certain other directors of the corporation, and the money paid on the contract to W. is by him turned over to them, the treasurer, on the election of the corporation to treat the contract as void, by suing him for the money, must account therefor, except for such part thereof, not exceeding its

cost, as he shows to be the reasonable worth of the work; and it is immaterial that the corporation might have pursued the other interested directors, or him and them jointly.

Appeal in chancery, Rutland county.

Bill in equity by the Rutland Electric Light Company against Harry M. Bates. Heard on the pleadings, a master's report, and exceptions thereto. Decree dismissing the bill pro forma. The orator appeals. Reversed.

The orator seeks to compel the defendant to account in various respects for his administration as a director, and as its treasurer and general manager. The master found that during the time covered by the transactions in suit the defendant was director of the orator, and also its treasurer and general manager. Most of the items involved were disposed of by the report of the master, only three of them being litigated in the supreme court: (1) The master allowed the orator \$3,006.25 as commission upon the Thomson-Houston contract. In respect to this item the following facts were found: The defendant proposed to the Thomson-Houston Electric Company to purchase of it certain apparatus for the orator. One Wing was the agent of the Thomson-Houston Company. Wing proposed to allow the orator a discount of 33 per cent. from the list price. Thereupon the defendant said to Wing that he and two other directors ought to have something out of the transaction, and the Thomson-Houston Company must allow them a commission in addition to the discount allowed the orator. This Wing refused to do, but it was subsequently arranged that the defendant and his co-directors should be paid a commission of 25 per cent., and that the orator should be allowed a discount of 10 per cent. For the purpose of covering up this transaction, Wing then subscribed for \$4,000, par value, of the capital stock of the orator. When settlement was made for the apparatus, this stock was issued to Wing; the Thomson-Houston Company gave the orator credit for \$4,000, by way of this stock; the defendant and his fellow directors gave the Thomson-Houston Company their note for the difference between \$4,000 and the amount of the commission; and Wing transferred the stock, a portion to the defendant and his father, under the firm name of A. C. Bates & Son, and a portion to one Abraham. Abraham and A. C. Bates were the two directors who were to share in the commission. The defendant, as treasurer, charged himself with \$4,000 received from the sale of the stock, and credited himself with the full amount of the bill of the Thomson-Houston Company. The stock was at that time worth par. (2) The master allowed the orator for the amount of two promissory notes, one signed by Dr. Hanrahan, and another by Valiquette and Abraham. The facts as to the two notes were the same. In each case the makers of the notes subscribed for a certain amount of the capital stock of the orator. Hanrahan paid a small sum down, and gave his note for the

balance. Valiquette and Abraham gave their note for the full amount of the subscription. The notes were payable to the order of the orator, and were delivered to the defendant. They never were paid, and the stock never was issued, but for what reason did not appear. When demand was made upon the defendant for these notes, he said that the notes did not belong to the orator, and that he did not know where they were, and he did not deliver them to the orator. The master found that the makers were financially responsible. (3) The orator claimed to recover the sum of \$8,960 in respect to what was known as the "Wing contract." About the time of the purchase of the material from the Thomson-Houston Company, the orator made a contract with Wing to install a certain number of arc lights, at a given price per light. Before Wing took this contract, it was agreed between him and the defendant that the defendant and certain other directors were to execute the contract, and were to receive the contract price, but that Wing was to act as the nominal contracting party. In point of fact, the defendant and other directors did execute the contract. He procured a vote to pay Wing \$1,000 upon this contract, and, in pursuance of that, paid to himself the sum of \$1,000. When the contract was completed he paid to himself the further sum of \$5,960, making the full amount of the contract price. The master found that the defendant and his fellow directors made some profit from the execution of this contract, but, since he could not determine from the evidence before him the amount of this profit, he disallowed the entire claim. The orator excepted to the report of the master, for that he disallowed this item.

C. A. Prouty, Geo. E. Lawrence, and C. H. Joyce, for orator. J. C. Baker, for defendant.

ROSS, C. J. During the period covered by the accounting the defendant was a director, treasurer, and principal manager of the orator. His solicitor does not contend that while occupying these relations he could make purchases for the orator which would authorize him to pay therefor, as treasurer, more than the price required by the vendor, nor that he could make contracts in the name of the orator which would authorize him, as treasurer, to pay thereon more than required by the other parties to the contracts. He could not, from such purchases or contracts, obtain authority to pay himself a commission or profit, nor to pay any other director or manager of the orator a commission or profit thereon. Such is the well-established law, by many decisions. In *Cook, Stock & S.* § 649, it is stated: "The law is well settled that a director cannot become a contractor with the corporation, nor can he have any personal and pecuniary interest in a contract between the company of which he is a director, and third persons. The director cannot

be interested in the construction company at the time the contract is made, nor subsequently; and it is immaterial that the contract is fair, or even to the advantage of the corporation. The corporation, upon discovering the fact that the director is interested in the construction company, may compel him to pay over to the corporation all profits that he has derived from the construction contract. * * * Nor is a contract valid, and enforceable against the corporation, where the parties contracting with the corporation have given to the directors of the corporation a secret interest in the profits of the contract." These propositions the author sustains by the citation in the notes of a large number of well-considered decisions of courts of last resort. Rarely are there found in a single case more or more pronounced violations of these well-settled principles of the law than are contained in the report of the master in this case, and from his report it is evident that the violations were knowingly and fraudulently committed. Some of the items allowed by the master were errors in the defendant's accounts as treasurer. Some, which were not such errors, are now uncontested. We shall notice only the items contested.

1. The first contested item which the master allowed is item 5. In this the master allows against the defendant \$3,006.25 commission allowed to the defendant and two other directors by Thomson-Houston Company on a purchase made by the defendant in the name of the orator. This commission was paid through an apparent purchase of the stock of the orator by the Thomson-Houston Company. The stock was transferred to an agent of the Thomson-Houston Company, and by him to the orator and the two other directors. The defendant charged himself with the price of this stock, as so much cash received, and credited himself with having paid the Thomson-Houston Company \$3,006.25 more than in fact he did pay them. The stock was worth the price at which it was charged. The defendant signed the stock certificates as treasurer of the orator. The whole scheme was gotten up and carried out by the defendant secretly, and unbeknown to the directors who did not share in this sum. The defendant insists that no recovery can be had for this sum of him alone, and, for this reason, none in this suit, to which the other directors are not parties. But this stock was assets of the orator, for which the defendant was accountable, as fully as for its money. He treated it as so much money received by him. But, whether treated as stock or money, the defendant is accountable for it. If treated as stock, he has converted so much to his own use by transferring it to himself and the others wrongfully. Whether considered as stock or money, it was the property of the orator in his hands. He is accountable for it. His accountability is not lessened nor affected

because he unlawfully transferred a part of the stock to two of the other directors, who are not parties to this suit. In thus transferring the stock, the defendant knew that he was parting with the property of the orator without receiving anything for it in fact, and without accounting for it. To cover the fraud, he charged himself with having sold the stock at its par value, and with having received the money therefor, and then he credited himself with having paid the Thomson-Houston Company this sum more than he in fact paid them. He is clearly accountable, in any view, for this amount charged him by the master.

2. In item 7 the master has charged the defendant with the amount of the two notes given the orator for the purchase of its stock. The stock has never been transferred to the makers of the notes. The makers are financially responsible. The defendant has not turned these notes over to his successor in office, and claims they never were the property of the orator, and says he does not know where they are. The master has found that the notes are valid, against responsible makers, belong to the orator, were in the hands of the defendant, and that he not only does not pass them to his successor in office, but denies that they belong to the orator. They were the property of the orator in his hands, as its treasurer, and he has not accounted for them. It is contended that on the facts found by the master the orator could lawfully collect these notes of the makers, and therefore the defendant is not accountable for them. The lawful right of the orator to collect them of the makers does not show an account for them by the defendant. He does not show that they have been lost without his fault. He claims they never were the property of the orator, and does not account for them as such. As its treasurer, it was his duty to keep them safely, and pass them to his successor in office. It was his duty to know where they were. When he denies that they are the property of the orator, and says he does not know where they are, he impliedly admits that he has wrongfully parted with them,—has exercised wrongful dominion over them. Under the circumstances, we think his denial that they ever were the property of the orator, and failure to pass them to his successor in office, or to account for them, is a conversion of the notes. *Robbins v. Packard*, 31 Vt. 570. This entitles the orator to recover for the value of the notes. But in that case the defendant is entitled to control the stock of the orator for which these notes were given.

3. The orator excepts to the master's report because he has failed to allow item 37. This item is for \$6,960 paid by him in fact to himself, for installing 50 arc lights. The defendant caused the contract for doing this work to be made with Wing, the agent of the Thomson-Houston Company, on the understanding that it should be transferred to him-

self and other directors. It was so assigned, and the defendant and the other directors performed the contract. The defendant procured votes to be passed by the directors of the orator, directing him to pay this sum to Wing, under the contract. This was done to carry out his fraudulent scheme, and to keep all knowledge of it from the directors not engaged in it. Under these votes, the defendant paid himself this sum. The master has found that a profit was made on the contract, but, from the manner in which the books were kept under the defendant's management, the master is unable to ascertain the amount of profit, and for that reason wholly disallows this item. It is apparent that this disallowance is made upon the basis that the burden was upon the orator to show the amount of profit realized. In this consists the master's mistake. From public policy, and from the general principles governing the law of agency and of trusts, as well as from the authorities cited by the solicitors for the orator, the defendant, in either capacity,—of director, treasurer, or general manager,—could not, by contracting in legal effect with himself, or with himself and other directors, bind the orator. Such contracts are void at the election of the orator. Doubtless the orator could hold the defendant and the other interested directors to the fulfillment of the contract, if it so elected. The defendant and other interested directors could not take advantage of their own wrong, if the orator, on being made aware of the contract, elected to hold them to its performance. By bringing this suit, and calling upon the defendant to account for the money he paid to himself for the performance of the contract, or for installing the 50 arc lights, the orator has elected to treat the secret contract, entered into in the name of Wing, but in legal effect in the name of the defendant and the other interested directors, as void, and has called upon the defendant to account for \$6,960 of its money which the defendant in fact paid to Wing, but in fact paid to himself, for performing this work. The orator having thus elected to treat the contract for the performance of this work as void, the contract is no longer the measure of the price of its performance. The defendant and other interested directors can be allowed for its performance only such a sum as it was reasonably worth, not to exceed its cost. The defendant must account for this sum of money belonging to the orator. But showing this a contract with himself and other interested directors in fact, though in form a contract with Wing, and its performance by them, and their receipt of the money under it, does not legally account for the sum of money, because, as regards the orator, the contract had no binding force. The burden is therefore upon the defendant to show that he has lawfully paid out this sum of money for the performance of the work. This he can only do by showing that the performance of this

work, under all the facts and circumstances, was reasonably worth not to exceed what it cost. He stands charged with this sum of money, and the burden is upon him to show that he has legally paid out every dollar of it for the benefit of the orator. It matters not that other directors were interested with him in doing this work, and that he paid some of it to such other directors. He knew his and their relations to the orator and to this work, and can be credited in reduction of this sum only for so much as he can show that the performance of this work, under all the attending circumstances, was reasonably worth and cost. If he has paid some of it unlawfully to other interested directors, he did it at his peril. Neither is his accountability lessened nor waived by the fact, if such is the fact, that the orator might have pursued the other interested directors, or himself and other interested directors jointly. He had the orator's money, and must stand charged therewith until he can show such facts as legally justified and authorized him to part with it. This he has not done. From the facts reported, it is evident that the master proceeded upon the wrong basis, in wholly disallowing this item. The orator's exception in regard to this item is sustained, and the case must be recommitted to the master, for him to proceed in regard to this item on the basis indicated. Upon all the other items the acceptance of the master's report is sustained. Decree reversed and cause remanded, with a mandate in accordance with the views herein expressed.

(68 Vt. 598)

ALGER v. MORRILL.

(Supreme Court of Vermont. Orleans. Aug. 11, 1896.)

EVIDENCE—ADMISSIBILITY—PROOF OF FACTS INCONSISTENT WITH DIRECT TESTIMONY.

In an action for the price of hay sold, where the amount taken by the buyer from the barn of the seller was in issue, the buyer testified that he weighed all that was taken, and gave the weight, which testimony was not directly contradicted. *Held*, that evidence was admissible on the part of the seller to show the space occupied by the hay in the barn, and the space occupied by a ton, as tending to show that the amount accounted for could not have filled the space.

Exceptions from Orleans county court; Start, Judge.

Assumpsit by George Alger against Lewis Morrill. Judgment for plaintiff, and defendant excepts. Affirmed.

Cook & Redmond, for plaintiff. John Young and Theophilus Grout, for defendant.

TYLER, J. It appeared that the plaintiff sold the defendant all the hay in the barn on the plaintiff's farm, to be weighed as drawn by the defendant, and paid for by him at its actual weight; the first load, which was to be as large as the defendant could draw, to be at the rate of \$8 a ton, and the

remainder, which was of a better quality, at \$10 a ton. The defendant's evidence tended to show that he drew all the hay at four loads, and that its total weight was 9,830 pounds. The plaintiff claimed that the defendant did not account for all the hay he drew, and it was an issue at the trial whether the 9,830 pounds comprised all the hay drawn by him. The plaintiff was permitted to introduce evidence tending to show the extent of the space in the barn from which the hay was taken, and how much space a ton of hay would occupy. The defendant contends that this was error, on the ground that no evidence had been introduced tending to show that the defendant in fact drew more than four loads, or that their weight was more than 9,830 pounds. The evidence was admitted upon a statement being made by the plaintiff's counsel that later in the trial he would introduce evidence "tending to show that the defendant took hay from the barn that he did not get weighed under the agreement." But it was clearly admissible as substantive evidence tending to establish the plaintiff's claim. It was competent to show that the amount of hay accounted for could not have filled a given space; that it would have required more than 9,830 pounds to fill it. The question whether this evidence could be relied upon, considered by itself, and in connection with the defendant's denial that he drew more than four loads, seems to have been carefully submitted by the court to the jury. Judgment affirmed.

(68 Vt. 603)

SHEERAN v. SPARHAWK.

(Supreme Court of Vermont. Chittenden. Aug. 16, 1896.)

IMPRISONMENT FOR DEBT—COLLATERAL REMEDIES.

The right of action on a recognizance entered into by defendant on taking an appeal from a judgment against him in a suit by plaintiff to recover possession of land, conditioned to enter the suit in the county court, and pay the rent then due, and intervening rent, damages, and costs, is not suspended by the fact that defendant is in prison, committed on an execution on said judgment.

Exceptions from Chittenden county court; Russel S. Taft, Judge.

Action by Elenor Sheeran against George E. Sparhawk. A demurrer to defendant's plea in bar was sustained pro forma, and defendant excepts. Affirmed.

D. J. Foster, for plaintiff. Henry Ballard and J. H. Macomber, for defendant.

MUNSON, J. The plaintiff brings this action of debt upon a recognizance entered into by the defendant upon the taking of an appeal by Rockwood from a judgment rendered against him in a suit brought by this plaintiff to recover the possession of certain premises. The condition of the recognizance prescribed in such cases is that the defendant shall enter the action in the county court, and

pay the rent then due, and intervening rent, damages, and costs. The defendant pleads in bar that the plaintiff caused said Rockwood to be committed to jail on an execution issued upon said judgment. The plea is demurred to. Upon this state of the pleadings, it is to be assumed that the debtor is still in prison. *Kinsman v. Page*, 22 Vt. 628. And it is said in some of our cases that as long as the debtor continues in prison the creditor can have no other remedy. *Farnsworth v. Tilton*, 1 D. Chip. 297; *Kinsman v. Page*, 22 Vt. 628. But it will be noticed that the cases in which this language was used were suits on the judgment, and that in the latter case the exact point of decision was that while a debtor's body is held in execution the right of action on the judgment is suspended. It has also been held that a creditor cannot hold his debtor's body in execution, and pursue his estate at the same time, and that the lien of an attachment is lost by committing the debtor to jail. *Willard v. Lull*, 20 Vt. 373. This restriction upon the pursuit of other remedies is put upon the ground that the taking of the body in execution is a quasi satisfaction of the debt, and it can be urged with some force that this reason would require the suspension of all remedies while the debtor remained in prison. But a distinction is generally made between direct and collateral remedies, and this distinction has been repeatedly recognized in our decisions. It is said in the case last cited that the commitment does not operate as a release of collateral remedies which are so far perfected as not to depend for their support upon proceedings under the execution, and that the creditor may pursue bail for costs, for appeal, or review, and still hold the body of his debtor. The same doctrine was recognized in the earlier case of *Roger v. Davis*, 1 Aiken, 296. It is claimed, however, that *Town of Hartland v. Hackett*, 57 Vt. 92, is an authority for the defendant's position. In that case the plaintiff held its delinquent tax collector in jail on an extent, and prosecuted a suit on his bond as collector; and it was held that the two remedies were elective, and not concurrent, and that the prosecution of one was a bar to the other. The case was disposed of on this ground, without considering whether the imprisonment of the defendant was in any sense a satisfaction of the debt. This case may have been rightly decided, but it is certain that the opinion fails to distinguish properly between consistent and inconsistent remedies. Clearly, the remedy upon this recognizance is not inconsistent with the remedy against the debtor's body, and the case cannot be disposed of on the ground of election. If the plea is to be held sufficient, it must be upon the ground that the taking of the body in execution is a quasi satisfaction of the debt. But this court, while holding that the imprisonment is to be treated as a quasi satisfaction, as regards other remedies against the debtor or his estate, has said

that it was not to be so treated as regards collateral remedies. If it be urged that a logical treatment of the rule would require its application to all remedies, it may be remarked that the rule itself is founded upon a fiction, and that mere inconsistency is not a sufficient ground for overturning an established distinction by which the scope of an arbitrary rule is arbitrarily restricted. But we think the exclusion of the remedy invoked here from the operation of the rule is not without reason. In appeals under this statute, which is designed to afford a summary remedy, the defendant is permitted to retain possession of the premises pending the appeal, upon furnishing a distinct and independent security in addition to that afforded by his person and estate. It would seem that a security of this character should be at once available to the creditor, whatever the course taken as between the debtor's body and his estate, and whatever temporary effect be given it in other proceedings against the debtor. We see no reason why the creditor should not be permitted to follow both the debtor and his surety until he obtains a real satisfaction. Judgment affirmed.

(68 Vt. 590)

FULLAM et al. v. FOSTER et al.

(Supreme Court of Vermont. Rutland. July 28, 1896.)

BOUNDARIES—REPUGANT DESCRIPTION—TRESPASS—TITLE—ADVERSE POSSESSION.

1. A survey after giving three sides of the tract, the first commencing at a monument, and the last ending at another monument, proceeded: "Thence [in a certain direction, and a certain distance] to ye begun bound." Held, that as the quantity and location of the land called for would be preserved by running that line from one monument to the other, and would not by retaining its length as stated in the survey, such length would be rejected.

2. Where, by the description of a lot in a deed, its northwest and southwest corners and its north and south lines were made to coincide with the same corners and lines of a certain survey, which were then established boundaries and monuments, these will prevail over the distance called for by the description of the east and west lines of the lot.

3. Possession by a grantee of part of the tract included in his deed, giving at least color of title, gives him constructive possession of the whole, no one being in the actual possession, so that he can, without showing further title, maintain an action for trespass against one not the owner of the land.

4. One cannot acquire title by adverse possession to land outside the description in his deed by actual possession only within such description, constructive possession being limited by the boundaries fixed by the deed.

Exceptions from Rutland county court; James M. Tyler, Judge.

Action by Fullam & Adams against Foster & Jaquith. Verdict and judgment for plaintiffs. Defendants except. Affirmed.

W. W. Stickney and J. G. Sargent, for plaintiffs. J. C. Baker and O. L. Howe, for defendants.

THOMPSON, J. This is an action, founded upon R. L. § 4208, to recover treble damages for cutting wood and timber—trees standing and growing—on land, in the town of Mt. Holly, claimed to be owned by the plaintiffs. The defendants claimed that the land in dispute is a part of the north end of the College lot, so called, owned by them; and the plaintiffs claim that it is a tract of land next north of the College lot, and that the south line of the land in dispute is the north line of the College lot. The defendants claim that the county court erred in not submitting to the jury the question whether they had acquired title to the land in dispute by adverse possession. This contention makes it necessary to determine the construction to be given to the description of the 400-acre lot, so called, in the survey thereof by Joseph Crary, county surveyor, made June 16, 1795, and recorded March 10, 1808. That description is as follows: "Ludlow, 16th June, 1795. Then surveyed for Mr. Josiah Fletcher 400 acres of land in said township, with small allowance on the original right of William Lee, Joel Potter, Jared Lee, David Clark, and David Clark, Jr. Beginning at a spruce tree in Andover north line, and about 80 or 40 rods from the southeast corner of a large tract of land lately surveyed to Doctor Asaph Fletcher; thence easterly, on Andover north line, about 470 rods, to a beach tree at the southwest corner of a tract of land surveyed to Captain Miles Johnson; thence north, 6 degrees east, 160 rods, to a spruce tree; thence north, 56 degrees west, on a parallel line with Andover, 422 rods, to a maple tree in the east line of the large tract aforesaid; thence south, 24 degrees west, 160 rods, to ye begun bound,—and contains as aforesaid. About 158 acres of said tract, in the westerly line part, is included within the bounds of Mount Holly." This description makes the north and south lines of this lot parallel, and the east and west lines of equal length, but not parallel. It is apparent that the east and west lines are not of equal length, and that there must be an error in the statement of some of the distances. There is no dispute as to the location of the south line and the southeast and southwest corners of this lot. In determining what part of this repugnant description shall be rejected, effect should be given to the intention of the surveyor, as shown on the face of the survey bill. *Gates v. Lewis*, 7 Vt. 511. It is apparent that he intended this tract to contain 400 acres, "with small allowance," about 158 acres of which should be in Mt. Holly, and that the north and south lines should be parallel, and that the south line should coincide with the north line of Andover. If the length of the west line is rejected, and it is taken to have been the intention to run from the maple tree standing at the west end of the north line to the bound begun at, without regard to distance, the lot then contains about 400 acres,

158⁴⁵/₁₀₀₀ acres of which are in Mt. Holly, as stated in the survey. Thus the quantity and location of the land is found, without disturbing any of the other courses and distances. This result cannot be obtained by retaining the length of the west line as stated in the survey. Hence the distance named in connection with the west line must be rejected as repugnant, and it must be taken to have been the intention to run that line, without regard to distance, from the maple tree to the bound begun at, being the southwest corner of the 400-acre lot, and a fixed monument. In 1799 a part of Andover was taken to form the town of Weston, so that after that date about 260 rods of the 400-acre tract bordered on Weston, instead of Andover. The College lot was conveyed to Middlebury College by Josiah Fletcher, July 12, 1818, and, in his deed, was described as follows: "Beginning at the southwest corner of a four hundred acre tract surveyed to Josiah Fletcher, June 16, 1795, and in Weston north line; thence easterly, on said Weston town line, 100 rods, to a corner; thence north, 6 degrees east, and 160 rods, to the north line of said before-mentioned tract of four hundred acres; thence north, 56 degrees west, 100 rods, to the northwest corner of said tract; thence 160 rods to place of beginning,—and contains one hundred acres, by measure." All the deeds in the defendants' alleged chain of title contain this description, and it is the description of the College lot in their deed thereof from Sarah H. Ayers, dated May 31, 1886, and by virtue of which they claim title thereto by deed. If the north line of the College lot coincides with the north line of the 400-acre tract, the land in dispute is not a part of the College lot, as the construction given to the survey of the 400-acre lot locates its north line in accordance with the claim of the plaintiffs.

It is well settled that when, in the description of land in a conveyance, courses and distances, and also known boundaries or monuments, are given to describe the same line, and there is a discrepancy between the courses or distances, on the one hand, and the boundaries or monuments, on the other, the latter, as a general rule, govern and control the former. This rule is always applicable when it effectuates the intent of the grantor as shown by the deed. *Beach v. Stearns*, 1 Aiken, 325; *Gilman v. Smith*, 12 Vt. 150; *Barnard v. Russell*, 19 Vt. 334; *Morrow v. Willard*, 30 Vt. 118; *Spiller v. Scribner*, 36 Vt. 246; *Park v. Pratt*, 38 Vt. 545; *Keenan v. Cavanaugh*, 44 Vt. 268; *Bundy v. Morgan*, 45 Vt. 46; *Clary v. McGlynn*, 46 Vt. 347; *Railway Co. v. Dyer*, 49 Vt. 74; *Wilder v. Davenport*, 53 Vt. 642, 5 Atl. 733; *Cummings v. Black*, 65 Vt. 76, 25 Atl. 906; *Graves v. Mattison*, 67 Vt. 630, 32 Atl. 498; *Martin v. Carlin*, 19 Wis. 454, 88 Am. Dec. 696, and note; *Galvin v. Collins*, 128 Mass. 525. By the description of the College lot in Fletcher's deed, its north-west and southwest corners and its north and

south lines are made to coincide with the same corners and lines of the 400-acre tract, which were then established boundaries and monuments. By measure, the distance between the northwest and southwest corners of the 400-acre tract, as the survey is construed, is about 143 rods. It is apparent that the grantor intended to make the north line of the 400-acre tract the north line of the College lot, and that line was such a fixed and certain boundary that it must prevail over the distances called for by the description of the east and west lines of the College lot. On trial below the defendants did not claim that the north end of the College lot projected further north than the north line of the 400-acre tract, but they contended that that line was located so far north as to include the disputed land within the boundaries of the College lot. The construction given to the survey of the 400-acre tract, and to the defendants' deed, by the court below, was correct; and the jury have found that the disputed land was not included in the description of the College lot, but was included in the land described in the deed of the plaintiffs from Jacob G. Hovey, receiver, dated September 18, 1887. That deed makes the north line of the defendants' land, being the College lot, the south line of that part of the land therein described, which includes the land in dispute. In the fall of 1887, immediately after the execution and delivery of their deed by Hovey, the plaintiffs went into possession of the land therein described, which had been surveyed, and the lines located by the parties to the deed. That fall they cut timber on the disputed land, at the south line and near the center, and the following fall again cut timber upon it, beginning where they left off the previous year. This deed gave them at least color of title to the land therein described; and a possession of a part thereof, claiming title to the whole, under their deed, gave them constructive possession of the whole, unless the land was in the actual possession of the true owner, or some other person claiming title, at the time they took possession of it. *Aldrich v. Griffith*, 66 Vt. 401, 29 Atl. 376, and the cases there cited. At the time the plaintiffs took possession, the defendants were not in the actual possession of the land in dispute. The possession of the plaintiffs is sufficient, without showing further title, to enable them to maintain this action against the defendants, unless the latter are the owners of the land in question. *Ellithrop v. Dewing*, 1 D. Chp. 141; *Sawyer v. Newland*, 9 Vt. 383; *Sturgis v. Warren*, 11 Vt. 433; *McGrady v. Miller*, 14 Vt. 128; *Hibbard v. Foster*, 24 Vt. 542; *Austin v. Bailey*, 37 Vt. 219; *Ames v. Beckley*, 48 Vt. 395. The defendants base their claim to title to the land in dispute, by adverse possession, upon the alleged adverse possession of one Gardner Carlton, to whom Middlebury College conveyed the College lot March 27, 1847. Carlton took possession of that lot under his deed, and performed acts of ownership and posses-

sion upon the southwest part of it. His deed gave him color of title to the College lot, and the evidence tended to show that he had constructive possession of the whole of it; but such possession was limited by the boundaries fixed by his deed, and would not extend to the land in dispute, which was not included therein. "Where there is a paper title, as in this case, it requires very distinct occupancy to extend the possession beyond the limits described in the deed, inasmuch as the deed, while it is notice of claim of title to the extent of the boundaries therein set forth, is also a distinct disclaimer of any further pretensions." *Shedd v. Powers*, 28 Vt. 652. The record does not show that Carlton, or any one else in the defendants' alleged chain of title, ever did any act of possession or ownership upon the land in dispute. When the defendants went into the possession of the College lot under their deed, their constructive possession was limited by the boundaries described in it. Hence, at the time of the committing of the alleged trespasses the defendants did not have possession of the land in dispute, nor did they have title or color of title thereto, so far as appeared by the evidence. The case standing thus, the court below properly refused to submit the question of adverse title on the part of the defendants to the jury.

It was not error for the court below not to comply with the defendants' third request to charge the jury. Lot O on the Severance plan was not referred to in the plaintiffs' deed. As already stated, as the case stood their possession of the land in dispute under color of title was sufficient to enable them to maintain this action. Judgment affirmed.

(68 Vt. 607)

**WILLIAMS & CLARK FERTILIZER CO.
v. RUDD.**

(Supreme Court of Vermont. Bennington.
Aug. 28, 1896.)

EXECUTION AGAINST PERSONS—APPEAL—REVIEW.

1. Under V. S. § 1726, providing that no one shall be imprisoned on a judgment recorded in an action founded on a contract, except as thereafter provided, and section 1734, providing that, when judgment is rendered in an action for money received by defendant in a fiduciary capacity, and the court, at the time of its rendition, so adjudges, execution may issue against the body of defendant, a judgment being founded in part on a contract not within the exception provided, execution against the person cannot be awarded on the judgment to the extent that it was for money received by defendant in a fiduciary capacity.

2. Error of the trial court in awarding an execution against the body of defendant for part of the judgment, when the balance of the judgment was founded on a contract not within the exception provided by the statute relating to arrest of debtors, cannot be cured in the appellate court by allowing plaintiff to remit as to the part recovered on the contract, or by allowing a reversal of the judgment, that plaintiff may try the case over and obtain a different judgment, exception having been taken only to the awarding of the execution against the body.

Exceptions from Bennington county court; Loveland Munson, Judge.

Action by the Williams & Clark Fertilizer Company against L. F. Rudd. Judgment for plaintiff on the report of the auditor. The court granted a certified execution as to so much of the judgment as was for money held in a fiduciary capacity, and to this defendant excepted. Reversed in part.

C. H. Darling, for plaintiff. W. B. Sheldon, for defendant.

START, J. The action is on book account. The writ issued as an attachment. The court rendered judgment for the plaintiff to recover \$385.41, and adjudged that as to \$296.35 of this sum the cause of action arose from the willful and malicious act or neglect of the defendant, and ordered that execution on the judgment be certified accordingly. The defendant excepted to the judgment of the court granting a certified execution. V. S. § 1726, provides that no person who is a resident of the United States shall be arrested or imprisoned on mesne process issuing on a contract express or implied, nor on an execution issued on a judgment recovered in an action founded on such contract, except as hereinafter provided. Id. § 1734, provides that if the plaintiff praying out a writ files with the authority issuing the same an affidavit stating that the defendant is the receiver of money of the plaintiff in a fiduciary capacity, which he has not paid on demand, and that such action is instituted to recover the same, such writ may issue against and be served upon the body of the defendant. This section also provides that when judgment is rendered in an action for money received by the defendant in a fiduciary capacity, and the court at the time of its rendition so adjudges, execution may issue and be served upon the body of the defendant. Id. § 1752, provides that in an action for the recovery of money or property held in trust or in a fiduciary capacity, if it appears to the court that a defendant intentionally converted said money or other property to his use, or diverted or misapplied the same or the use thereof, it shall adjudge that the cause of action arose from the willful or malicious act or neglect of such defendant, and that he ought to be confined in close jail, and the court shall issue execution against his body, with a certificate thereof stated in or upon such execution, and such execution, with such statement or indorsement, shall have the same effect as an execution issued on a judgment founded upon tort, with a like statement or indorsement. It appears from the auditor's report that the plaintiff delivered fertilizer to the defendant, pursuant to a written contract, by which the fertilizer and proceeds from sales of the same were to remain the property of the plaintiff, the defendant guarantying all sales. The judgment was for goods sold by the defendant under this contract, for which he had not received payment, and for money collected and

appropriated to his own use. The court granted a certified execution for so much of the judgment as was for money collected and not paid over as the contract provides. If there is any authority for rendering a judgment in an action founded on contract, enforceable in part against the debtor's property and in part against his body, it must be found in the statutes above referred to. We think such authority is not conferred, and that the court erred in granting a certified execution. A part of the judgment was not for fiduciary debt, but was for a liability incurred when the defendant contracted to guaranty all sales. A judgment founded in part upon the defendant's contract of guaranty could not be enforced against his body, nor could an execution on such a judgment lawfully issue against the body. V. S. § 1726, expressly prohibits the arrest or imprisonment of a debtor on an execution issued upon a judgment founded upon a contract, express or implied, except as is thereafter provided. The statute nowhere provides for the arrest and imprisonment of a debtor upon an execution issued on such a judgment as was recovered in the court below. Id. § 1734, provides for the issuing of a writ against the body of the defendant, after the filing of an affidavit, when he has received money of the plaintiff in a fiduciary capacity, which he has not paid over on demand, and, when judgment is rendered for such money, the court may adjudge that the defendant is a receiver of money in a fiduciary capacity, and issue execution against the body of the debtor. But the court has no authority to thus adjudge, and award a body execution, unless the entire judgment is for money thus received and held. If the judgment is founded in part upon a contract for a breach of which the debtor is not subject to arrest and imprisonment, the court cannot adjudge that the cause of action upon which the judgment is founded is for money received and held in a fiduciary capacity, and a judgment that a part of the cause of action is such is of no avail. There can be but one judgment in such a case, and the judgment must extend to all causes of action for which judgment is rendered, and affect all the causes of action alike. The remedy, after judgment, for each cause of action on which the judgment was founded, was the same, and the court could not award a distinct remedy for the respective causes of action. When judgment was rendered, the several causes of action were merged in the judgment. The judgment was an entirety. But one execution could issue, and that against the property of the debtor. Execution could not issue against the body of the debtor, because the judgment was in part founded on a contract which does not come within the exception provided by the statute, exempting debtors from arrest and imprisonment. The plaintiff was not entitled to a certified execution as to a part of its judgment, under V. S. § 1752. As we have seen,

this section provides only for a body execution in actions for the recovery of money or property held in trust, or in a fiduciary capacity, and, in its application to this case, it does not admit of a construction different from that given to section 1734. When the plaintiff blended its fiduciary debt and the defendant's liability under his contract of guaranty in one judgment, it lost its right to have execution against the body of the defendant, and a certificate on a property execution would be irregular and of no avail. A debtor cannot be imprisoned on an execution which does not run against his body, although it has indorsed thereon a certificate as to a part of the judgment. In *Witt v. Marsh*, 14 Vt. 303, the judgment was founded in part upon a cause of action accruing before January 1, 1839, when a creditor was entitled to an execution against the body of a debtor, and in part upon a cause of action accruing after that date, when a creditor was not entitled to an execution against the body of the debtor, and it was held that the plaintiff could have only such an execution as the law gave for the collection of the demand that accrued after the act of 1839.

We think the error in granting a certified execution cannot be cured by the plaintiff's remitting a sum equal to the sum that entered into the judgment by reason of the defendant's contract of guaranty. The plaintiff is not entitled to have the judgment reversed, and the cause remanded, to enable it to try the case over and obtain a different judgment. The plaintiff was entitled to recover in respect to the defendant's liability on his contract of guaranty. No objection being made, this liability is now properly merged in the judgment, and permeates every part of it. The only exception taken was to the granting of a certified execution for the enforcement of a judgment, founded in part upon the defendant's contract of guaranty, and no other question is properly before us. We have nothing to do with the amount of the recovery in the court below. Both parties were content with the judgment of that court, so far as it related to the amount recovered. There is no error in this that calls for a remitter or a reversal. The error complained of, and the only question which was passed to this court for its consideration, relates solely to the execution awarded for the enforcement of the judgment. The plaintiff having elected to blend its fiduciary debt in a judgment founded in part on the defendant's contract of guaranty, the certificate, when granted, was without authority of law. The error was not in the judgment, but in awarding a wrong execution for its enforcement. The duty of this court is limited to correcting this error and awarding a proper execution. The plaintiff having elected to blend its several causes of action in one judgment, it must now be content with a property execution for their enforcement. The judgment granting a certified execution is reversed,

and the certificate vacated. In other respects, the judgment is affirmed.

TAFT, J., being engaged in county court, did not sit.

(88 Vt. 544)

JONES v. ELLIS' ESTATE.

(Supreme Court of Vermont. Washington.
Aug. 16, 1896.)

SURVIVAL OF ACTION—EVIDENCE OF WARRANTY—APPEAL—EXCEPTIONS.

1. An action to recover for false representations made by the seller of personal property does not survive, as against his estate, under V. S. § 2446, which provides that, among other actions, those of trespass, and trespass on the case, for damages done to personal estate, shall survive.

2. On an issue as to a warranty by a seller of the value of certain stock sold plaintiff, evidence that he made such a warranty of the same kind of stock sold another is inadmissible.

3. Upon the question of the value of the stock of a corporation at the time it was sold to plaintiff, evidence of its value more than four years afterwards, without a showing as to the relative condition of the company on the two dates, is inadmissible.

4. A general exception to a charge of the court as a whole will not be sustained where some parts of it are correct.

Exceptions from Washington county court; Leforrest H. Thompson, Judge.

Appeal by Edwin K. Jones from a decree of the probate court accepting the report of commissioners for the allowance of claims against the estate of J. W. Ellis. Verdict and judgment for defendant, and appellant excepts. Affirmed.

The plaintiff claimed to recover in respect to the sale of certain shares of stock in the Sioux City Valley Land Company, upon the ground—First, that the plaintiff was induced to purchase said stock by the fraudulent representations of the intestate; and, second, that the intestate, at the time of the sale, warranted the stock to be of the value for which it was sold. With respect to the first of these claims, the defendant insisted that an action for such fraudulent representations would not survive against the defendant's estate. The court so held, and the defendant excepted. It appeared that in April, 1890, the plaintiff purchased from the intestate 50 shares of the above-mentioned stock, for the price of \$40 per share; that he then paid the cash for such stock to the intestate; and that the intestate remitted the same to the company, less a commission of 10 per cent. The evidence of the plaintiff tended to show that before and at the time of the sale the intestate made such representations to the plaintiff as to the value of said stock as amounted to a warranty that the stock was worth \$40 per share; that these representations were false, as the intestate knew; and that the stock was, in point of fact, worthless at the time it was sold to the plaintiff, and continued to be utterly worthless from then on. The plaintiff introduced the deposition

of one George May, who testified that he first became a stockholder in 1892, at which time he was elected director and president of the company; that he was at the time of the taking of his deposition a resident of Massachusetts; that he had in his possession a great number of books and papers relating to the affairs of the company, which he was willing to have examined, but which he declined to permit to be taken to Vermont. Certain questions and answers of the witness were excluded, relating to his own connection with the company; the amount of stock held by him and other stockholders, aside from the intestate; the names of the holders of the bonds of the company, and the amount of their holdings, aside from the intestate; and also the value of the assets and the amount of the liabilities of the company at the time of its suspension, in 1894. The plaintiff excepted to the exclusion of this testimony. The plaintiff introduced as a witness one William Boynton, and offered to show by him that at about the time of the sale to the plaintiff the intestate had several conversations with the witness in reference to the sale of some of this same stock; that in these conversations the intestate made the same representations to the witness as to the value of the stock; that, in consequence of these representations, the witness purchased a quantity of this stock; and that the intestate warranted it to be worth \$40 per share. This testimony was excluded, and the plaintiff excepted.

S. C. Shurtleff and J. P. Lamson, for plaintiff. Dillingham, Huse & Howland, for defendant.

TAFT, J. The plaintiff purchased of Ellis, the deceased, 50 shares of the capital stock of the Sioux City Valley Land Company, and paid \$2,000 therefor. The plaintiff claimed that the sale was effected by fraud on the part of Ellis, and the first question before us is:

1. Does the action survive? Can it be maintained against the estate of Ellis? This depends upon the construction given section 2446, V. S., which provides that, among other actions, those of "trespass and trespass on the case for damages done to * * * personal estate shall survive." The fraud which the plaintiff claims was committed by the deceased was in making false representations in regard to the stock sold by him to the plaintiff. As a result of it, the plaintiff claims he paid money for property of no value. This was not doing damage to the plaintiff's personal estate, within the meaning of the statute. A fraud committed by one, the result of which creates a liability upon another to pay money, is not such a damage done to the latter's personal estate as will create a cause of action which survives. The ruling of the court in this respect was correct.

2. After the above ruling, the cause was tried under the contract aspect of the declara-

tion. The plaintiff claimed that the deceased, in making the sale, warranted the stock. Upon this question the plaintiff proposed to show that the deceased, in a sale of stock in the same corporation to one Boynton, warranted the stock to the latter to be of value. This testimony was excluded, and correctly so, upon the authority of *Phelps v. Conant*, 30 Vt. 277, and *Aiken v. Kennison*, 58 Vt. 665, 5 Atl. 757. Whether the deceased warranted stock he sold Boynton was "*res inter alios*," etc.

3. The depositions of May and Baldwin were offered, and answers to certain interrogatories excluded. The plaintiff claimed it was competent to show the interest Ellis had in the corporation, and his knowledge of its affairs. Conceding this, none of the excluded testimony had any tendency to show that Ellis had any interest in the company, nor any knowledge of its affairs. Testimony that Ellis was a bondholder, and received a discount and commission on sales of stock, was admitted. There was nothing else in the excluded answers relevant upon the questions. The plaintiff further claimed the excluded testimony was admissible in that it tended to show the value of the stock. Its value in April, 1890, the time of the plaintiff's purchase, was pertinent. The questions, the answers to which were excluded, were, what were the assets and liabilities of the company in August, 1894? The court ruled that, without anything to connect the condition of the company at that time with the state of its affairs at the time of the sale, its condition in August, 1894, was immaterial. This ruling was correct. The solvency of the company in August, 1894, was collateral and immaterial.

4. The remaining question relates to the charge. The court charged as to the survival of the action, and as to the warranty. The charge covered three printed pages, and the exception was general, viz. "to all that part of the charge hereinbefore referred to." The charge that the action, in its tortious aspect, did not survive, was correct. The charge not being erroneous in all respects, the exception, being general, to the whole charge, cannot be sustained, even if there was error in some respects, which it is necessary for us to consider. *Morrill v. Palmer*, 68 Vt. 1, 83 Atl. 829. Judgment affirmed, and ordered certified to the probate court. All concur.

(68 Vt. 549)

BETTS v. JOHNSON et al.

(Supreme Court of Vermont. Rutland. Aug. 29, 1896.)

REVIVAL OF JUDGMENT—SCIRE FACIAS—JURISDICTION—LIMITATIONS.

1. Where judgment is entered under a power to confess judgment, contained in the note on which the judgment is based, a judgment rendered on scire facias to revive it will be void if the proceeding be treated as an independent action of debt; there having been no service on, and no appearance by, defendant.

2. If the proceeding on *scire facias* be considered as a mere continuation of the original action, and a revival of the original judgment on two returns of nihil for the purposes of execution, it will not stop the running of limitations in another state where defendant resides.

Exceptions from Rutland county court; Jonathan Ross, Chief Judge.

Debt on judgment by N. N. Betts, cashier, against Charles Johnson and trustees. A general demurrer to the declaration was sustained, and plaintiff excepts. Affirmed.

The plaintiff declared upon a judgment of the court of common pleas for the county of Bradford, in the state of Pennsylvania, entered January 15, 1895. The record showed that this judgment was rendered upon *scire facias* proceedings to revive a judgment obtained at the September term of said court, 1881; that no service was made upon the defendant; but that the prothonotary was directed to enter judgment against him "for want of an appearance," whereupon judgment was entered in the sum of \$754.94, with interest from the date of the original judgment, and cost of suit.

F. G. Swinington, for plaintiff. Frank O. Partridge, for defendants.

TAFT, J. A provision of the United States constitution (article 4, § 1) declares that "full faith and credit shall be given in each state to public acts, records, and judicial proceedings of every other state." It is the duty of the courts of this state to give full force and effect to such provision. It has been held by the supreme court of the United States, the final arbiter of such questions (*Machine Co. v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. 94), "that the jurisdiction of a foreign court over the person or subject-matter, enforced in the judgment or decree of such court, is always open to inquiry; that in this respect a court of another state is to be regarded as a foreign court; and that a personal judgment is without validity if rendered by a state court in an action upon a money demand against a nonresident of the state, upon whom no personal service of process within the state was made, and who did not appear." The rule is not otherwise in Pennsylvania, where the judgment in question was rendered (*Guthrie v. Lowry*, 84 Pa. St. 533); nor in Vermont (*Plerson v. Mudget*, *Addison Co. Ct.*, Jan., 1881, cited in *Newcomb v. Peck*, 17 Vt. 302; *Price v. Hickok*, 39 Vt. 292; *Prosser v. Warner*, 47 Vt. 667; *Bank v. Peabody*, 55 Vt. 492). In the case before us, the plaintiff obtained judgment against the defendant in the state of Pennsylvania, August 13, 1881. It was entered under a power to confess such judgment, contained in the note upon which the judgment was based, and had all the qualities and effect of a judgment entered on a verdict. *St. Bartholomew's Church v. Wood*, 61 Pa. St. 96; *Hageman v. Salisbury*, 74 Pa. St. 280. *Scire facias* was twice issued with returns of nihil; and on January 15,

1895, judgment against the defendant was taken, a prothonotary being directed to enter judgment for \$754.95, with interest and costs,—"for want of an appearance." The plaintiff declares upon this judgment in a plea of debt. This judgment was rendered upon a *scire facias*, without service of process upon the defendant, and without any appearance by him. By common law, after a year and a day, the plaintiff cannot (with certain exceptions) take out execution upon a judgment without reviving the judgment by *sci. fa.* 2 Bl. Com. 421; 2 Tidd, *Prac.* 994; *Porter v. Vaughn*, 24 Vt. 211. An action of debt on the judgment may be brought, but after a year and a day the only way of obtaining an execution is by a writ of *sci. fa.*, to which the defendant may plead such matter as he has to allege, in order to show why process of execution should not issue. *Sci. fa.* is a judicial writ, and, because the defendant may plead thereto, it is considered an action. *Grey v. Jones*, 2 Wils. 251; *Fenner v. Evans*, 1 Term R. 267; 2 Tidd, *Prac.* 1090.

Scire facias is generally to obtain execution on a judgment. The proceeding is ancillary to the judgment. It is not an original suit, but a continuation of the former one. No damages are allowed, nor were costs, until 8 & 9 Wm. III. c. 11. The judgment is that the plaintiff have execution, and the execution issues on the original judgment. *State v. Foster*, 7 Vt. 52; *Hall v. Hall*, 8 Vt. 156; *Gibson v. Davis*, 22 Vt. 374. But, by statute in this state, the process now issues a summons or attachment, and the judgment is *quod recuperet*, and is entered as in debt on judgment. V. S. §§ 1061, 1685; *Howard v. Randall*, 58 Vt. 564, 5 Atl. 403; *Slayton v. Smilie*, 66 Vt. 197, 28 Atl. 871. In Pennsylvania, while *sci. fa.* is generally to obtain execution, and regarded as a continuation of the original suit, and the plaintiff has execution of the original judgment, in many instances it is, as stated in *Duff v. Wynkoop*, 74 Pa. St. 300, a substitute for an action of debt elsewhere, and the judgment on it is *quod recuperet*, etc., instead of a bare award of execution. *Hays v. Shannon*, 5 Watts, 548. The trouble with the plaintiff's case is that at the time of the judgment, in January, 1895, he treated the case as an independent action, and took a judgment *quod recuperet*, instead of an execution.

We hold that the warrant of attorney contained in the note in pursuance of which the original judgment was rendered did not authorize the entry of the judgment declared upon, and that the judgment must be treated as rendered without notice and without appearance, and of no validity as a judgment in this jurisdiction. The power contained in the note "to appear and confess judgment" was exhausted when the judgment of August 13, 1881, was entered. A warrant to appear for the defendant, and

confess judgment, should not be given greater force and effect than a warrant to appear and prosecute the action for the plaintiff; and at common law an attorney's authority only continued in force until judgment and a year and a day afterwards, in order to have execution. He may sue out and pray the *sci. fa.* perhaps; "but (per Holt, C. J., in *Burr v. Atwood*, 1 Salk. 89), when the *sci. fa.* is returned, then the plea commences, and a new warrant of attorney ought to have been entered, * * * for a warrant to appear in the principal action is no warrant to appear in the *sci. fa.* against the bail, because this is a new cause and a different record." See, also, 2 Tidd, Prac. 1090; *Herd v. Burstowe*, Cro. Eliz. 177; *Tipping v. Johnson*, 2 Bos. & P. 357. The rule is the same in *sci. fa.* against the principal, for in all cases it is in the nature of an action, for the defendant may plead any matter in bar of execution; as, for instance, a denial of the existence of the record, or a subsequent satisfaction or discharge. A late case (*Owens v. McCloskey*, 161 U. S. 642, 16 Sup. Ct. 693), in its main features, is similar to the one before us. *Owens*, in 1861, recovered a judgment against Henry, in the state of Pennsylvania. The latter then removed to Louisiana. *Sci. fa.* and an alias were issued in 1866, with nihil returns, and a judgment was entered thereon, and like proceedings were had in 1871; the judgment at the latter time being entered "for want of an appearance on two returns of nihil." Suit was brought in Louisiana, to recover upon the latter judgment. The original judgment in that case and in the one before us were both Pennsylvania judgments, and both entered under a power to confess or warrant of attorney, and the two judgments sought to be recovered were both entered upon nihil returns, "for want of an appearance." The only distinction between the two cases that can be claimed is that in the case before us the attorneys "for plaintiff filed a paper directing prothonotary to enter judgment," while in the case referred to no such direction appears. As we hold that the prothonotary was not authorized to appear for the defendant and confess judgment, the cases are "on all fours" with each other. The case referred to is disposed of by Fuller, C. J., giving the opinion, as follows: "Conformably to the exigency of the writ, the judgment on *sci. fa.*, the proceeding being regarded as a continuation of the original action, usually is that plaintiff have execution of the judgment mentioned in the writ, with costs. Lill. Ent. 398, 638; Chit. Forms (9th Ed.) 635; Black, Judgm. § 498. But in Pennsylvania it is held that a *scire facias* is in such wise a substitute in that state for an action of debt elsewhere that the judgment should be quod recuperet, instead of a bare award of execution, and hence that a judgment on *scire facias* cannot be avoided because the original judgment might have

been. *Duff v. Wynkoop*, 74 Pa. St. 300; *Buehler's Heirs v. Buffington*, 43 Pa. St. 278; *Conyngham Tp. v. Walter*, 95 Pa. St. 85. Accordingly, the judgment of May 10, 1871, was a judgment for the recovery of the amount of the judgment of 1866, with interest added thereon to date, and the judgment of 1866 was a similar judgment on the original judgment of June 17, 1861. Viewed as a new judgment rendered as in an action of debt, it had no binding force in Louisiana, as Henry had not been served with process or voluntarily appeared; and considered as in continuation of the prior action, and a revival of the original judgment for the purposes of execution, on two returns of nihil, it operated merely to keep in force the local lien, and could not be availed of as removing the statutory bar of the *lex fori*, for the same reason. *Thompson v. Whitman*, 18 Wall. 457; *Pennyroy v. Neff*, 95 U. S. 714; *Machine Co. v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. 92; *Steel v. Smith*, 7 Watts & S. 447; *Evans v. Reed*, 2 Mich. N. P. 212; *Hepeler v. Davis*, 32 Neb. 556, 49 N. W. 458."

It does not appear from the record whether the defendant ever resided in Pennsylvania. In argument, the counsel assume he resides in Vermont, and we have so treated the question. We do not trench upon the doctrine stated in *Weaver v. Brenner*, 145 Pa. St. 299, 21 Atl. 1012, "that, if a judgment be confessed by an attorney, neither its regularity nor his authority can be questioned in a collateral action"; for the question of the authority of the prothonotary appears upon the record, and the warrant gave him no power to confess the judgment declared upon. In whatever view we look at the proceedings in Pennsylvania, the plaintiff is entitled to no relief; for if he stands upon the judgment entered in January, 1895, that is invalid, as rendered without notice and without appearance, and, if upon the original judgment, that is barred by the statute of limitations. Judgment affirmed. All concur.

(88 Vt. 600)

RUGG et ux. v. DAVIS, County Clerk, et al.
(Supreme Court of Vermont. Franklin. Sept. 8, 1896.)

MANDAMUS TO CLERK OF COURT.

Mandamus will not be granted to compel a clerk of court to complete the record of a judgment by inserting the amount of damages, though the parties to the suit and their counsel agree that there was a hearing before the clerk in the matter of damages, and that he held the matter for consideration, where it does not appear that any memorandum of an assessment of damages was made, and the clerk has no recollection of making an assessment, and no one on defendant's side was informed of one, and the ascertainment of the amount depends solely on the recollection of plaintiff and his attorney and a person testifying in his behalf, and of these the attorney only claims to have received the amount directly from the clerk, and only recollects the amount after having his memory refreshed by conversations with his client.

Mandamus proceedings by W. H. Rugg and wife against Wilbur P. Davis, clerk of Franklin county court, and Theophilus Archambault, to compel said clerk to complete the record of a judgment of that court in an action by relators against said Archambault, by inserting the amount of the damages. Petition dismissed.

Adams & Mott, for relators. Farrington & Post, for defendants.

MUNSON, J. The petition alleges that the relators obtained a judgment against the defendant Archambault at the April term of the Franklin county court in 1890, and that their damages were afterwards assessed by the defendant Davis as clerk of said court; that a record of the rendition of a judgment, with blanks for the filling in of damages and costs, was duly made by the clerk, but that he inadvertently omitted to fill the blanks when the assessment was made; and that he now refuses to perfect his record by entering the amount of such assessment. The answer of defendant Davis states that he has no recollection of a hearing in the matter of damages, and is unable to find any minutes of one, and admits that, if an assessment was made, he inadvertently omitted to enter the amount. The parties to the suit and their counsel concur in deposing that there was a hearing, and that the clerk held the matter for consideration. The plaintiff's attorney deposes that the clerk announced a decision soon after the hearing, and that the sum allowed was \$123 and some cents; but he is unable to state the place where, the persons to whom, or the circumstances under which, the decision was announced. He had given the matter no thought until the fall of 1895, supposing the amount was upon record, and could not have given the amount at the time he examined the records; but, finding it was not upon record, he called the matter to mind, obtained from a conversation with his client some facts and circumstances which refreshed and aided his recollection, and now feels able to state confidently the number of dollars assessed. The client deposes that, a few days after the hearing, he learned that he had been given \$123 and some cents, and had some conversation with the counsel in regard to it. A witness who testified for the plaintiff at the hearing deposes that, a few weeks after the hearing, he was told of the decision, either by the plaintiff or his counsel, and that the amount as stated to him was about \$125. The defendant in the suit and his counsel both depose that they were not informed of any decision, and have no knowledge in regard to one. It is said that the issuance of a writ of mandamus is within the judicial discretion of the court, and that it ought not to be granted in a matter of doubtful right. *Association v. Nichols*, 45 Vt. 7. This rule clearly requires that the writ be denied when the fact upon which the

relief is claimed cannot be satisfactorily established. The case presented by the relators is lacking in this respect. It appears that no memorandum of the assessment can be found, and that none was made by any one who now testifies to the amount. The clerk has absolutely no recollection of making an assessment, and no one on the defendant's side was informed of one. The ascertainment of the amount depends solely upon the recollection of the plaintiff and his attorney and a person who testified in his behalf. Of these three, the attorney is the only one who received the amount directly from the clerk, and he suffered it to pass entirely from his mind, and now produces it, after the lapse of five years, from a recollection refreshed by conversations with his client. We think the ascertainment of the amount does not rest upon a basis sufficiently certain to justify the court in directing a completion of the record. Petition dismissed, with costs to defendant Archambault, but without costs to defendant Davis.

(68 Vt. 659)

STATE v. BRINK et al.

(Supreme Court of Vermont. Franklin. Aug. 1, 1896.)

ADULTERY—INDICTMENT—MARRIAGE CERTIFICATE—VARIANCE—EVIDENCE—SUFFICIENCY.

1. On the trial of an indictment charging that defendant and "Ida B.," wife of "S. B.," committed adultery, a certificate showing the marriage of "Ida O." to "C. B." was competent evidence to establish the marriage, where a witness testified that he knew "C. B." and his wife, and pointed them out in court, and the question as to whether he was the person called "S. B." in the indictment was submitted to the jury.

2. On a trial for adultery it was error to admit a copy of a certificate, which was offered to prove defendant's marriage, in which the town clerk certified to the name and official title of the person who solemnized the marriage, but which lacked the attestation and official signature of that person.

3. The law does not require a different kind of evidence in criminal prosecutions for adultery from that required in civil suits. The difference is only in the conviction which the evidence carries to the minds of the triors of the facts.

4. On a trial for adultery, circumstantial evidence of the uncertain kind—that from which the conclusion is probable only—should not be limited merely to corroborating the direct evidence, but should be admitted to prove the corpus.

5. Evidence that a married man and a married woman, not his wife, introduced themselves to others and represented themselves as man and wife, and cohabited as such for two weeks; that they afterwards, at a boarding house, passed themselves off in the same manner, for the evident purpose of being allowed to occupy a room together that night; that they went to a room at their own request, and occupied the same bed that night,—though uncertain, renders the fact of adultery so probable that it should be submitted to the jury to decide whether they are guilty or not, under the rule that, to warrant a conviction, the jury should be satisfied of their guilt beyond any reasonable doubt.

Taft and Thompson, JJ., dissent.

Exceptions from Franklin county court; Loveland Munson, Judge.

Ida Brink and another were indicted for adultery. Plea, "Not guilty." Verdict, "Guilty." Respondents except. Exceptions sustained.

L. N. Chase, State's Atty. L. C. Moody and C. G. Austin, for respondents.

TYLER, J. 1. It is alleged in the indictment that "George Gibbs, of * * *, and Ida Brink, wife of S. Brink, of * * *, did commit the crime of adultery." The transcript of the record of the marriage certificate, which was admitted in evidence without objection, shows the marriage of Ida Culver to Consider W. Brink, by E. H. Bartlett, a minister of the gospel. It is contended that there was no evidence tending to show that respondent Ida was the person named in the certificate, and consequently that there was no proof of her marriage. Assuming that she was the same person, her husband is incorrectly named either in the indictment or in the certificate. Evidence tending to identify S. Brink and Consider W. Brink as the same person was admissible. In *People v. Stokes* (Cal.) 12 Pac. 71, the certificate was that John Stokes and Rebecca Gibson were married to each other. A witness was permitted to testify that he was present when a marriage ceremony was performed between the respondent and Rachael Gibson. Held, that this testimony was admissible as tending to identify the parties named in the certificate. In this case a witness testified that he had been acquainted with C. W. Brink 12 or 15 years, and with his wife a little more than a year, and pointed out Mrs. Brink, the respondent, as sitting beside her husband, within the bar, at the trial. The court submitted the question of identity to the jury as a question of fact. There was evidence tending to show that the man who sat beside respondent Ida in court was her husband, and that his name was C. W. Brink. It was properly left to the jury to say whether or not he was the same person called in the indictment "S. Brink." The respondents' request that the court should hold that the certificate was not evidence in support of the indictment was therefore properly denied.

2. The court pro forma admitted the copy of the certificate which was offered to prove the marriage of respondent Gibbs, to which the respondents excepted. The town clerk therein certifies to the name and official title of the person who solemnized the marriage, but as it lacks the attestation and official signature of that person it is fatally defective, and it was error to admit it. *State v. Colby*, 51 Vt. 291.

3. The state's evidence tended to show that the respondents were at Abercorn, P. Q., in the latter part of May and fore part of June, 1894, and lived in the house of one Rulter for about two weeks; that they were known as and called man and wife while in that locality; that there was no other evidence tending to show adultery while there. It further tended to show that on the night of June 5, 1894, they went to the house of Louis St. Ger-

main, in the town of Richford, in this state, and engaged board for the respondent Ida Brink, that she might work in the overall factory at that place; that they were supposed to be man and wife when application was made for board, and were called Mr. and Mrs. Gibbs by respondent Brink, and were together introduced to Mr. St. Germain, by his wife, as Mr. and Mrs. Gibbs; that they spent the evening together at that house; that they spoke about retiring, and were shown to and occupied the same room in that house that night; that there was but one bed in the room; that the bed had the appearance the next morning of having been occupied by two persons; that they took breakfast with the family, after which respondent Gibbs left, and did not return; that respondent Brink retained the room, and boarded at the same place about two weeks, and worked at the factory, when she left town, and neither of them returned afterwards; that while at Richford respondent Brink represented herself as the wife of respondent Gibbs. It was held in *State v. Way*, 6 Vt. 311, on trial for adultery, that proof that the parties were found in bed together was not sufficient to convict of adultery; that in prosecutions of this crime, as in all others, the corpus delicti must be proved; that a person should not be presumed guilty of a crime from mere opportunity of committing it; that, if this were permitted, there would be great danger that the inference would be made in some cases without adequate proof. In most crimes the corpus delicti may be established independently of the parties accused. In larceny, burglary, arson, and murder the commission of the crime may be fully established, and yet the evidence point to no particular person as the perpetrator. But in adultery the corpus of the crime is the fact of sexual intercourse, and the crime cannot be proved independently of the persons on trial. It is laid down in the books as an elementary rule that the proof of this crime is the same whether the issue arises in an indictment, a libel for divorce, or an action on the case. This, of course, relates to the kind, and not to the measure, of evidence. In 2 Greenl. Ev. § 40, the rule is stated, quoting from Lord Stowell in 2 Hagg. Consist. 2, 3: "That it is not necessary to prove the direct fact of adultery, because, if it were otherwise, there is not one case in a hundred in which that proof would be attainable. It is very rarely, indeed, that the parties are surprised in the direct act of adultery. In every case, almost, the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion, and, unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion cannot be laid down universally; though many of them, of a more obvious nature, and of more frequent occurrence, are to be found in ancient books. At the same time it is impos-

sible to indicate them universally, because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances, apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case. The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion." In section 40 the writer says: "The rule has been elsewhere more briefly stated to require that there be such proximate circumstances proved, as by former decisions, or in their own nature and tendency, satisfy the legal conviction of the court that the crime has been committed;" and cites *Pollock v. Pollock*, 71 N. Y. 137, as holding that general cohabitation as man and wife excludes the necessity of proof of particular facts. It is also laid down in the same section, and sustained by authorities cited in the notes, that, where an adulterous disposition of the parties has been established, the crime may be inferred from their being found together in a bedchamber under circumstances authorizing such inference. This rule is recognized in *Bish. Mar. & Div.* (2d Ed.) § 422. In 1 Am. & Eng. Enc. Law (2d Ed.) p. 752, the law is stated as follows: "From the nature of the offense of adultery it is not, save in exceptional cases, susceptible of direct and positive proof. It can more often only be established by evidence more or less circumstantial in its nature. Hence it is considered that direct proof of the carnal act is not necessary. It is sufficient to show circumstances from which the jury may reasonably infer the guilt of the parties. So it has been held that the act of adultery may be proved by evidence that a man and woman occupied the same bed and room, undressed, in the nighttime; or even that they occupied a room with a bed in it most of the night." In the notes is cited *State v. Green*, Kirb. 87, where the facts were that persons, suspecting that Green was with a certain woman, went to the house, looked in, and saw Green in bed with the woman, and that she turned from Green while in bed undressed. It was argued for the respondent that this was not proof of the crime of adultery, but that the case fell under another statute, which made it a crime for "any man to be found in bed with another man's wife." It was held by the whole court that the jury were the judges of the weight of evidence on the whole circumstances of the case, and that, though the prisoner, by the same evidence, might have been proceeded against and convicted under the other statute, for a lower offense, yet it could not from thence be inferred that the evidence was not sufficient to convict him of adultery. In *Com. v. Bowers*, 121 Mass. 45, the respondents were found in a bedroom, at an hotel, about 12 o'clock at night, the man in bed, the woman not in bed, with her clothes

on, except her corset and shoes. Held, that the circumstances, unexplained, would warrant the jury in finding them guilty of adultery. *Colt, J.*, in *Thayer v. Thayer*, 101 Mass. 111, said: "The evidence by which the act of adultery is proved is seldom direct. The natural secrecy of the act makes it ordinarily impossible to prove it, except by circumstantial evidence. * * * But when an adulterous disposition is shown to exist between the parties at the time of the alleged act, then mere opportunity, with comparatively slight circumstances showing guilt, will be sufficient to justify the inference that criminal intercourse has actually taken place. The intent and disposition of the parties towards each other must give character to their relations, and can only be ascertained, as all moral qualities are, from the acts and declarations of the parties. It is true that the fact to be proved is the existence of a criminal disposition at the time of the act charged; but the indications by which it is proved may extend, and ordinarily do extend, over a period of time both anterior and subsequent to it. The rules which govern human conduct, and which are known to common observation and experience, are to be applied in these cases, as in all other investigations of fact." He further said that when an adulterous disposition is once shown to exist between two persons, a strong inference arises that it will have continuance; that the rule is that a condition once proved to exist is presumed to have continuance till the contrary be shown. It is in this view that the rule is generally stated that, an adulterous disposition being proved to exist between the parties, and an opportunity being shown for them to commit the crime, the fact may be inferred, if the circumstances are such as to lead the guarded discretion of a reasonable and just man to the conclusion of guilt. See *State v. Brecht*, 41 Minn. 50, 42 N. W. 602; *State v. Ean* (Iowa) 58 N. W. 898; *People v. Girdler*, 65 Mich. 68, 31 N. W. 624, cited in 1 Am. & Eng. Enc. Law, 753. It was held in *Com. v. Clifford*, 145 Mass. 97, 13 N. E. 345, that: "If a married man is found with a woman, not his wife, in a room with a bed in it, and stays through the night with her, then it is sufficient to warrant a finding of adultery against him." A familiar instance given in the books of the competency of circumstantial evidence to prove this crime is that of a married man visiting a brothel, and remaining for some time alone in a room with a common prostitute; another, that of a woman going to such a place with a man. 2 Greenl. Ev. § 43. The birth of children to a married woman whose husband is living, and proof of his nonintercourse, is always proof of the corpus delicti. So it is not necessary that parties be detected in the act. In *State v. Hart* (Iowa) 64 N. W. 279, the charge of the court was: "You are instructed, in cases of this kind, that it is not necessary to prove the direct fact of adultery by the evidence of witnesses who can testify

from personal knowledge of the actual fact of adulterous intercourse in every case. Almost always the fact of adultery, if established at all, must be by circumstantial evidence; by the proof of circumstances that lead the mind, honestly searching for the truth, to the conclusion necessarily that the act of adulterous intercourse had actually taken place. The circumstances, however, offered by the state to prove the fact of adultery, must be such that, when fairly and honestly considered, exclude all reasonable doubt, and can be explained upon no reasonable hypothesis but that of the defendant's guilt." The charge was sustained as stating the law correctly.

The cases and text-books above cited clearly sanction the admission of circumstantial evidence as tending to establish the corpus of the crime, and not merely in corroboration of direct and positive testimony. This was held in *State v. Bridgman*, 49 Vt. 202. A quotation from the syllabus of that case is as follows: "Evidence of other acts of improper familiarity and adultery between the parties to the alleged offense, continuing from before until after the offense charged, and after indictment found, is admissible, although it proves other and distinct offenses, to show the true relation of the parties to each other, to show that the restraints and safeguards of common deportment and conventionality and of natural modesty that is presumed to exist have been broken through and displaced by the adulterous disposition and the habits of adulterous intercourse." In *State v. Poteet*, 8 Ired. 23, a witness testified that he went early one morning to the house of one of the defendants, and, on knocking, was, after some delay, admitted by the female defendant, who came to the door with her frock on, but unfastened; that the male defendant was in the only bed in the room; that the woman's shoes were near the head of the bed, and that the bed seemed to be very much tumbled. Held, that the court did right in refusing the instruction prayed for, that there was no evidence from which the jury might infer the criminality of the defendants; that, in the absence of express and positive testimony, the law authorized the conviction of the defendants on presumptive evidence, if it was so strong as to leave no reasonable doubt in the minds of the jury that they were guilty. This doctrine was reaffirmed in *State v. Eliason*, 91 N. C. 564, the court saying that it was sufficient to show facts and circumstances that would satisfy the jury of the existence of such intercourse. In *Richardson v. State*, 64 Tex. 142, the facts were that a married man and a colored woman, not his wife, lived together for a series of months, in the same room, wherein was but one bed, and with no attendant but a small child. Held to be strong evidence of cohabitation in adultery, and sufficient to warrant a verdict of conviction. In *Pollock v. Pollock*, supra, Folger,

J., said: "And though it is an act of darkness and great secrecy, and not often provable by direct means, and the evidence must in most cases be circumstantial, yet the circumstances must be sufficient to satisfy the mind that the adulterous intercourse has taken place. Though presumptive evidence alone is sufficient to establish the fact, the circumstances must lead to it, not only by fair inference, but as a necessary conclusion." In *State v. Potter*, 52 Vt. 33, the exceptions state that there was no direct proof of the commission of the act alleged within three years before the finding of the indictment, but the state's evidence "tending to raise a presumption of the commission of the act was" that the respondent and his unmarried stepdaughter had for a number of years, and within the three years, occupied the same sleeping room; that the girl had borne three children, the respondent procuring and paying for the services of doctor and nurse; that he was present when the children were born; that he called them his, and supported them, and said he could have sexual intercourse with the girl. This was submitted by the court to the jury, not as direct, but as circumstantial, evidence. Evidence was also admitted tending to show that the parties had intercourse with each other five, six, and seven years before. This was objected to on the ground that the corpus delicti had not been proved. This court held that evidence admissible; also that, the birth of children to the alleged particeps criminis having been proved, "any evidence tending to show that the respondent committed the act charged in the indictment would be legitimate, however that evidence might stand related to the corpus delicti as distinguished from other elements of the crime." In the opinion no reference is made to *State v. Way*, and the former case cannot be construed as supporting the latter, but rather as elucidating the doctrine here laid down. As before observed, the law does not require a different kind of evidence in criminal prosecutions for adultery from that required in civil suits. The difference is only in the conviction which the evidence carries to the minds of the triors of the fact. The court, in *State v. Potter*, in respect to the admission of a marriage certificate, said: "The rule governing the legitimacy of documentary evidence is the same in criminal as in civil cases. The difference of the rule of evidence as between the two classes of cases is in respect to the measure and weight of the evidence addressed to the jury upon the matters on which they are to pass." It has not been the practice to apply the rule in *State v. Way* in the trial of divorce cases for the cause of adultery. In an action on the case for crim. con. it would not be error if the court submitted to the jury evidence like that in the present case, as tending to prove the fact in issue. It would therefore be illogical to hold it error in this case that the court submitted the evi-

dence to the jury with proper instructions, as having a tendency to prove the crime alleged, though not conclusive of it. If the doctrine of *State v. Way* is adhered to, that the fact of a respondent's illicit intercourse must be first proved, then the only office of circumstantial evidence is to corroborate the direct evidence, perhaps identify the participants criminis, and a conviction can rarely be had, on account of the secret nature of the crime. We think that proof of the corpus should not be limited to direct evidence, as detection in the act, nor to what Greenleaf (volume 1, § 13a) denominates circumstantial evidence that is certain (that from which the conclusion in question necessarily follows), but that circumstantial evidence of the uncertain kind should be admitted (that from which the conclusion is probable only, and is arrived at by process of reasoning). The birth of an illegitimate child to a married woman would be a circumstance of the certain kind that the woman had committed adultery. But where the evidence is that the parties had previously introduced themselves to others and passed themselves off as man and wife, and cohabited as such for two weeks; that they came to a boarding house in this state, introducing and passing themselves off in the same manner, for the evident purpose of being allowed to occupy a room together that night, spending the evening in conversation with the family, going to a room at their request, occupying the same room and the same bed that night,—such evidence, though uncertain, renders the fact of adultery so probable that it should be submitted to the jury to decide whether they are guilty or not, under the general rule in criminal cases that to warrant a conviction the jury should be satisfied of their guilt beyond any reasonable doubt.

For the reasons stated in the second point the exceptions are sustained, judgment reversed, verdict set aside, and cause remanded.

TAFT and THOMPSON, JJ., dissent.

(68 Vt. 618)

MITCHELL v. PREPONT et ux.

(Supreme Court of Vermont. Franklin. March 14, 1896.)

EJECTMENT—SUFFICIENCY OF DEFENDANT'S TITLE—
CONSTRUCTION OF DEED—EASEMENT OR
FEE—ADVERSE POSSESSION.

1. The owner of land erected thereon a dwelling house and a shoeshop, separated by a passageway, and thereafter conveyed the shoeshop, with the lands necessarily appurtenant thereto, and also the "passageway between said shoeshop and my dwelling house." Both buildings were below the level of the street, the street embankment being upheld by a wall extending across said passageway so as to close it up in front. Prior to such deed the grantor's tenants of the shoeshop property had used the intervening land as a driveway for delivering produce and coal into their basement, and as a place for depositing their wood, and for drying clothes.

Held, that the deed conveyed a fee simple in the passageway, and not merely an easement.

2. In ejectment for a strip of land lying between plaintiff's dwelling and a shoeshop conveyed to defendant's predecessor by deed, which also conveyed the intervening strip as a passageway, title by adverse possession in plaintiff is not shown where it appears that though defendant's predecessor in title had made no open claim to the intervening land, by reason of his belief that no one disputed his title, he had used the same for storing wood, and as a driveway for bringing coal and produce into his building, and the only evidence of an assertion of ownership by plaintiff's predecessor in title was that she had told a tenant of defendant's predecessor to take down a clothesline which he had placed between the two buildings, and that he removed it.

Exceptions from Franklin county court; Loveland Munson, Judge.

Action of ejectment by F. W. Mitchell, administrator of the estate of Miranda Smith, deceased, against Joseph Prepont and wife. Defendants pleaded not guilty, and, after trial by the court, a judgment was rendered for plaintiff. Defendants except. Reversed, and judgment rendered for defendants for costs.

A. K. Brown and Hogan & Royce, for plaintiff. Rustedt & Looklin and Farrington & Post, for defendants.

ROWELL, J. Before and on March 13, 1857, Silas P. Carpenter owned all the land referred to in the finding of facts. On that day he conveyed the easterly part thereof to Gardner Davis. The deed described the land conveyed as the tannery as then owned and occupied by the grantor. It then proceeded to bound it, and made the westerly line thereof a straight line, commencing at a certain point in the southerly line of the highway (now River street, in the village of Richford), and running thence on a certain course to the river at high-water mark; thence the boundary line ran up the river on the bank at high-water mark, etc. On September 25, 1857, Davis deeded two thirds of said premises to Orville J. Smith; and on January 16, 1858, he deeded the other third to him. On May 30, 1859, said Carpenter conveyed the westerly part of said land to said Smith. The deed commenced the boundary "in the southerly line of the highway, at the northwesterly corner of the land now owned by said Smith, on which his tannery stands, as deeded" by the grantor to Gardner Davis, and made the easterly line of the land conveyed the westerly line of the tannery property, and the southerly line thereof the bank of the river at high-water mark. Thus, Smith came to be the owner of all the land that Carpenter originally owned. The line between these two properties is not located by the case. After Smith became sole owner of the easterly part, or the "Tannery Property," as it is called, he built thereon a shoeshop, which was afterwards converted into a tenement. There were doors in the basement thereof on the easterly side and in

the rear, but none on the westerly side. After he built the shop, and in 1839, he built a dwelling house on the westerly part, called the "Union Block Building." This building forms the easterly end of a solid line of buildings situate on the south side of River street, next east of Main street, and has a veranda extending along its entire easterly end. Said building and the shoeshop were built on the line of the street, and so located as to have between them a strip of land about 20 feet wide, which is the demanded premises. The Union Block Building is now held by the plaintiff, as administrator of the estate of Miranda Smith, who was the widow of the said Orville J. Smith, and the shoeshop building is the property of the defendants. The alleged ouster is the erection by the defendants of an addition to the shoeshop building that entirely fills the space originally left between it and the Union Block Building, except the part covered by the veranda above described. Partly in the rear of said addition stands a building between which and said addition there is a passageway of a few feet in width.

On November 14, 1876, Orville J. Smith conveyed certain premises to said Carpenter by the following description: "The tannery, shoeshop, and buildings belonging therewith, the water power and privilege belonging with said tannery, and all the land on which said buildings stand and connected therewith, extending to the highway in front of said shop, and to the road leading to William Corless' dwelling house, and to said Corless' land, and to the river, with passageway between said shoeshop and my dwelling house and to river." A material question is whether the words "with passageway," etc., conveyed the fee of the demanded premises, or only an easement therein. This deed, though absolute in form, was in fact a mortgage, as shown by the contemporaneous unrecorded agreement between Carpenter, of the one part, and Orville J. Smith and his son, Cortis W. Smith, of the other part, providing for redemption by Orville J., and his occupancy of the shoeshop, and Cortis W.'s occupancy of the tannery, for a stipulated rent. In 1877, Orville J. Smith was adjudged a bankrupt, and H. E. Rustedt was appointed assignee of his estate, which was duly assigned to him by the register in bankruptcy. On March 12, 1878, said Rustedt, assignee as aforesaid, conveyed to the said Miranda Smith "that part of the block known as the 'Union Block' formerly owned and occupied by Orville J. Smith as a homestead"; and a question much discussed at the bar is whether this deed covers the demanded premises. If it does, and the deed of November 14, 1876, from Smith to Carpenter, does not, then the plaintiff has title by deed; otherwise, it depends on adverse possession whether he has title or not. Smith did not redeem Carpenter's mortgage; and on the same day that Rustedt deeded to Mrs. Smith, as aforesaid, he deeded to Carpenter all that was covered by said mortgage; and on the same

day Carpenter and Cortis W. Smith executed a writing, which was not recorded, whereby Carpenter agreed to convey to said Smith all of said premises in five years, on certain conditions. This time was subsequently extended two years, and on October 3, 1883, Carpenter conveyed the same to said Smith and his wife, by a deed containing the following: "The premises hereby intended to be conveyed consist of the tannery, shoeshop, water power, and privilege belonging with said tannery, and the land on which said buildings stand, and belonging therewith." On November 11, 1885, Cortis W. Smith having died, his widow conveyed the same premises to H. E. Powell, who sold the easterly portion thereof to Foster, and on November 29, 1892, the remainder to Shufelt, except the shoeshop and the land with it lying within certain bounds, which he sold to the defendants on July 17, 1893, bounding it on the west by the place owned by Miranda Smith in her lifetime. The shoeshop was used by Orville J. Smith in connection with the tannery; and, before the erection of the Union Block Building, all the land originally owned by Carpenter was also used in connection with it. As soon as the Union Block Building was completed, said Smith moved into it, and continued to reside there until his death, about 12 years ago; and after that his widow lived there till her death, in 1892, since which time it has been occupied by tenants under the plaintiff. The space between said building and the shoeshop was some eight feet lower than the street, and a wall of that height, holding the embankment of the street, extended between the front corners of the two buildings. By reason of this difference in levels, the Union Block Building had a basement above ground, which could not be reached from the street except by way of the main floor. There was no way of entering the basement directly except across the piece of land between the two buildings. This piece could be reached by teams coming from a street east of the shoeshop building, and passing in the rear of that building, and between it and the tannery buildings, which stand in or near the southwesterly corner of the tannery property, as conveyed by Carpenter to Davis. In thus coming to this piece with teams, the tannery property is crossed, and the piece could not be reached by teams in any other way. From the commencement of said Smith's residence in the Union Block Building, until 1893, when the erection complained of was made, the occupants thereof continually made use of the space above described in connection with their occupancy of the building. They came upon it to deliver coal, potatoes, and other heavy articles to the basement, as occasion required. They ordinarily had their wood thrown from the street over the wall above described upon this ground, and worked it up there preparatory to storing it in the basement. They had a clothesline stretched here, and made regular use of it. During the time said Smith was carrying on the tannery, he boarded his workmen, and he and his workmen regularly crossed this

piece in passing between the tannery and the house. It does not appear that, after the Union Block Building was erected, the space between it and the shoeshop building was made use of in connection with the tannery in any other way than that above stated.

In view of all that appears, we think the fair construction of the deed of November 14, 1876, from Smith to Carpenter, is that it conveyed the fee of the demanded premises, and not an easement therein. Although Smith had been and then was using said strip of land in the manner stated, yet said deed was in fact a mortgage, so that he was not thereby depriving himself of its further use, only in the event of his failure to redeem, which most likely he did not then contemplate, as the property was worth much more than the debt. Nor does it appear that a mere way there would have been of any value to Carpenter, though he should become absolute owner under his mortgage, for the place was not accessible as a way from the street, and there was no occasion for passing from the rear of the shop to the westerly end of it, as the basement was constructed; and, as to the tannery building, that was reached from the other side of the shop, and there is no suggestion of occasion for a way in the rear of it to the river, which the deed conveyed if a way was intended. It seems to have been the intention of the parties to carve out by that deed the tannery property substantially as it was carved out originally by the deed from Carpenter to Davis. Its language pretty clearly indicates this, when read in the light of the facts. It conveys the tannery, shoeshop, and outbuildings, and all the lands on which said buildings stand and connected therewith. Now, it seems reasonably certain that the demanded premises were included in the Davis deed, for it certainly included the tannery building, as does the deed in question; and that building, as shown by maps, photographs, and deeds in the case, especially by the deed from Powell to Shufelt, stands at least as far west as the front line of the veranda on the Union Block Building. This deed makes the river and Mrs. Smith's line from the north bank thereof to the southeast corner of her house the western boundary of the land thereby conveyed, and makes the east line of her residence and the continuation thereof to the "Tannery Block," as it is therein called, the west line of the shoeshop property, as therefrom excepted. If, by the east line of her residence, the east line of the veranda is meant, it would seem that a continuation of that line towards the river would strike the Tannery Block, and not run west of it; hence it is safe to say that the Davis deed included the demanded premises. The deed in question, after stating in a general way what was conveyed, goes on to bound the premises. It bounds them on the north and on the east, extend-

ing them to the river. The southern boundary is not given, as it need not have been, for it was manifestly the river. The words "with passageway between said shoeshop and my dwelling house, and to river," were intended to fix the western boundary. The passageway did not extend to the river, but only between the buildings; and the words "to river" were used for the purpose of carrying the purchase beyond the passageway and to the river on the west, as it was carried to the river on the east. We can give no other construction to that deed.

It follows, therefore, that the plaintiff has no title by deed, and the remaining question is whether he has title by adverse possession. He cannot tack Smith's possession to that of Mrs. Smith, for it was not adverse, but permissive, as we have seen. So, he must rely on her possession alone. It does not appear that there was any use of the demanded premises, other than above stated, until November, 1885, when Powell bought the tannery property. He claimed under his deed to own the land up to the Union Block Building; but he made no assertion of his claim to any one, as nothing came to his knowledge to call for it. At times during his ownership, the tenants of the shoeshop building had their wood thrown over the wall onto that part of the demanded premises adjacent to their tenement, and stored it there. One tenant had an old cart that he kept between the buildings "quite a while," under a "kind of shelter" that he made for it close to the shoeshop building. Another tenant, who occupied about two months, had a wagon that he kept at times between the buildings, close to the shoeshop building. The tenants of the latter building hung their washings on lines between the buildings. It does not appear that anything was said by Mrs. Smith regarding this use of the yard; and, in the case of the old cart and the washings of the same tenant, it appears that nothing was said. Once during Powell's ownership, a tenant of the tannery building put up a clothesline between the two buildings, and Mrs. Smith told him to take it down, which he did; but it does not appear that this ever came to Powell's knowledge. This makes a clear case of mixed possession during the ownership of Powell, whose deed covered the demanded premises, and who, by his tenants, occupied the same in the manner stated, claiming under his deed; hence Mrs. Smith's possession and the plaintiff's were not sufficiently exclusive for the requisite length of time to ripen into title.

It is unnecessary to consider the objection made to Powell's competency to testify to Mrs. Smith's asking leave of him for one of her tenants to keep a wood pile on the demanded premises, and string a clothesline there, for we take no note of the finding on that subject in determining the question of

adverse possession. Judgment reversed, and judgment for the defendants to recover their costs.

(57 Conn. 577)

WHEELER v. THOMAS.

(Supreme Court of Errors of Connecticut.
June 5, 1896.)

**EVIDENCE—CONDUCT OF DEFENDANT INCONSISTENT
WITH DEFENSE—DISCREDITING PARTY'S
OWN WITNESS—INSTRUCTION.**

1. Where a defendant pleads payment as a defense, evidence is admissible to show conduct on his part, since the alleged payment, inconsistent with the defense made.

2. A party cannot introduce testimony to show that his own witness has made statements out of court inconsistent with his testimony.

3. It is not error for the court to advise a jury that it is their duty to try to agree.

Appeal from court of common pleas, New Haven county; Hotchkiss, Judge.

Action by Herbert P. Wheeler against Frank L. Thomas. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles S. Hamilton, for appellant. George A. Tyler, for appellee.

ANDREWS, C. J. The complaint in this action claimed to recover the balance due on a contract. The answer admitted the contract, and the balance as stated in the complaint, but alleged an accord and satisfaction, viz. that one Wallace W. Ward was on the 16th day of May, 1890, indebted to the defendant in a greater sum than the amount due on said contract, which debt the defendant on said day assigned to the plaintiff, and the plaintiff accepted the same in full payment and satisfaction of the balance due on said contract. This assignment and acceptance the plaintiff denied. There was a trial to the jury upon the issue so formed, and the plaintiff had a verdict. The defendant has appealed.

It appears that the only witness before the jury, other than the parties themselves, was the said Ward, who was called by the defendant. The court finds that, since the suit was brought, Mr. Ward had had a serious illness, had suffered a paralytic shock, and that his mind and memory were very greatly impaired. There are ten reasons of appeal. Nine are from rulings in respect to the admission of evidence, and, of these, the decision of the court upon the first, fourth, fifth, sixth, and eighth are so clearly correct that no comment is necessary. The second and third reasons really present but one error. There was an error in point of form in the answer given by the witness Ward; but, under the circumstances disclosed in the case, it was within the discretion of the judge to allow the answer to stand. Besides, no possible harm could have been done to the defendant. The seventh reason is that the judge erred in admitting certain testimony of the plaintiff concerning an order given by him upon the defendant to the J. Gibbs Smith Company. The evidence was admissible, because it tended to show that at that time the defend-

ant made no claim that he had paid the plaintiff the balance due on the contract, by an assignment to him of the Ward debt. The evidence showed conduct by the defendant inconsistent with the claim he was making in court. The ninth reason of appeal was this: The defendant had called Mr. Ward as a witness, and he had testified to the state of the account between himself and the defendant. The defendant sought to show that Mr. Ward had, since giving his testimony, made a statement out of court respecting that account entirely contrary to the testimony he had given. This was ruled out, and, we think, properly. The evidence of what Mr. Ward had said out of court was offered to show the real state of the account between himself and the defendant. For that purpose it was not admissible. As to that fact it was hearsay. It was admissible, if at all, only for the purpose of discrediting Mr. Ward as a witness. The rule is very strict that a party may not directly discredit his own witness, although he may show a fact to which the witness has testified to be different from what the witness has stated. The tenth reason is that the judge erred in various particulars in his charge to the jury. So far as these relate to comments on the testimony, they were fully warranted by many decisions of the court. *Setchel v. Keigwin*, 57 Conn. 473, 18 Atl. 594, and the cases there cited; *Hardware Co. v. Wallace*, 59 Conn. 336, 22 Atl. 330. It is strenuously argued that the judge misinstructed the jury in saying to them that there was no evidence that Ward knew that he owed the defendant the \$319. The remark, taken by itself, would seem to be somewhat objectionable; but, when read in connection with what the judge said before and after, it means that there was no evidence coming from Mr. Ward, who had been called as a witness before them by the defendant, that he knew that he owed the defendant the sum named. Read in this way, the remark was perfectly proper. *Collins v. Stove Co.*, 63 Conn. 356, 28 Atl. 534. The advice to the jury that it was their duty to try to agree was not erroneous. *State v. Smith*, 49 Conn. 376. There is no error. The other judges concurred.

(57 Conn. 484)

MORGAN v. CITY OF DANBURY.

(Supreme Court of Errors of Connecticut.
April 15, 1896.)

**JUDGMENT—CONSTRUCTION—WORDS GIVEN THE
MEANING IN WHICH USED IN PLEAD-
INGS—NUISANCE.**

1. Where, in a complaint to enjoin the deposit or discharge of sewage by a city in a stream, the word "sewage" is used as describing matter which is foul and noxious, polluting the stream, and as containing solid matter which lodged in the stream to plaintiff's damage, the word, when used in the decree enjoining the discharge of "any sewage" in the stream by the city, is to be understood in the same sense as used in the pleadings, and not as prohibiting the discharge in the stream of any fluid which is not foul or noxious, or polluting to the waters, and which contains no solid matter.

2. Sewage discharged into a stream, though sterilized and rendered colorless and apparently innocuous of itself, may become a nuisance, and its further discharge into the stream may be enjoined, when, by reason of its combination with other substances in the stream, it becomes noxious and pollutes the waters, though the other substances were wrongfully deposited in the stream by others than the defendant.

Appeal from superior court, Fairfield county; George W. Wheeler, Judge.

Action by George Morgan against the city of Danbury to restrain the pollution of a stream by the discharge of sewage into it, to the injury of plaintiff's mill property and farm situated on the stream below the city. Decree for plaintiff, enjoining the depositing or discharging of any sewage by the city into the stream, or the polluting of its waters by discharging sewage into it. Defendant appeals. Affirmed.

Samuel Fessenden and Lyman D. Brewster, for appellant. James H. McMahon and Charles W. Murphy, for appellee.

BALDWIN, J. The defendant complains that the injunction granted by the superior court goes beyond the claim for relief in the complaint, because it forbids both the discharge of sewage into Still river, and also the pollution of the river by any such discharge. The complaint alleged that the city was discharging waste matter, sewage, and other noxious, corrupt, and impure substances, from its sewers, so as to pollute the river, and to cause much of such discharges to be deposited on the plaintiff's land and mill privilege, and that thereby he had been largely deprived of the use of a valuable mill and mill privilege, he and his workmen injuriously exposed to noxious odors, the air in the neighborhood corrupted and poisoned so as to endanger the health of himself and others, his milldam partly filled up with filth, the value of his property greatly diminished, and he disabled from disposing of his land for building purposes. It was also averred that the defendant intended greatly to increase the pollution of the river, and to cause much greater quantities of filth and poisonous and offensive matter to be deposited in the river, to his irreparable injury, and that by the acts of the defendant, unless restrained, his dam and millpond would be filled up with filth and sewage, and the value of his land destroyed. The relief claimed was an injunction "against the continuance of said nuisance, and to restrain the pollution of the waters of said river temporarily and permanently."

The nuisance thus complained of consisted, then, of discharging into a river, above the plaintiff's premises, certain substances, of such a kind and in such a manner that the water came to him polluted, and a deposit was made upon his land and in his millpond, whereby noxious odors were created, dangerous to his health and that of others, his dam partly filled up by filth, and the use and

value of his property largely taken away,—injuries which the defendant intended to increase by enlarging its sewer system, and adding to the amount of the deposits made from the sewers in the river, the result of which would be to fill up his millpond with filth and sewage, and make his property valueless. These allegations were denied, but have been found true, and there is nothing inconsistent with their truth in the special finding of facts. They stated that the deposits from the sewers both filled up the plaintiff's millpond and polluted the air he breathed, and the waters that flowed over his property. These, though proceeding from the same act, produced separate injuries. A nuisance was created with a double aspect. That to the waters of the stream, and the air above it, it was found, constituted a public nuisance, though it was one which also wrought a special and peculiar injury to the plaintiff. That from filling up the millpond, constituted simply a private nuisance. *Haskell v. New Bedford*, 108 Mass. 208, 216; *Brayton v. Fall River*, 113 Mass. 218, 229. It was proper that the injunction should be so framed as to protect the plaintiff against every serious and irreparable injury which he might suffer by the continuance of the nuisance, and its terms are fully conformable to the claims stated in his complaint.

The defendant contends that the decree is too broad, in that it restrains the discharge into the river of any sewage, even if not of a noxious or polluting character, or though entirely and permanently disinfected and purified. The primary meaning of the term "sewage" is that which passes through a sewer. *Cent. Dict.*; *Webst. Int. Dict.* A secondary meaning is derived from the usual character of the contents of a sewer, and as used in that sense the word signifies the refuse and foul matter, solid or liquid, which is so carried off. In the plaintiff's complaint the connection in which the term is employed is such as to indicate that it was intended to carry the secondary meaning. He avers that the city is causing to flow into the river "large quantities of acids, impure substances, waste matter, contents of privies and cesspools, sewage, and other noxious, corrupt, and impure substances, so as to render the waters of said river at said property filthy, noxious, and unclean," and that it intends to "greatly and wrongfully increase the pollution and defilement of the waters of said river above the said property of plaintiff, by building new sewers, and connecting and using them, and also old sewers or conduits, with divers drains, cesspools, sinks, and privies, and discharging their contents into said river, and thereby cause to be deposited much greater quantities of filth, poisonous and offensive matter, than there otherwise would be in said waters of said river, to the great and irreparable injury of plaintiff's said property, and the increase of the poison and

unwholesomeness of the air in that neighborhood." These acts, he alleges, have already endangered his health and that of others, by the noxious and unhealthy odors arising from the impure condition of the waters of the river, and have caused his millpond to be partly filled up with filth, and will, if continued as the city intends, cause the pond to be entirely filled up with filth and sewage. This use, in closing the enumeration of certain kinds of substances discharged into the river, of the words "sewage, and other noxious, corrupt, and impure substances," indicates that the sewage of which he complained was itself something noxious, corrupt, and impure; and the solid matter which thus came to be deposited upon his property he describes as "filth." The supplemental answer, setting up the establishment of the Woolf disinfecting plant, avers that the discharges from the sewer have thereby been rendered "entirely harmless, and free from any offensive qualities, and no solid matter is permitted to empty from said sewer into said stream, but the same is liquefied and clarified, and the plaintiff is relieved thereby of all danger in the future from the said sewer; and the condition of the said Still river below the said outfall sewer is rendered more pure and free from offensive matter than it would be if no outfall sewer was permitted, inasmuch as the electrized salt water used to purify and disinfect the said outfall sewer has also a disinfecting and purifying effect on the whole stream into which said outfall sewer enters." These allegations were denied, and the issues upon them have been found for the plaintiff. The decree must be read in the light of the issues joined. Its use of the term "sewage" was that which the parties had made of it in their pleadings. Under the first of its prohibitory clauses, the discharge of no sewage is enjoined which is not either, if fluid, foul and noxious, or, if solid, either foul or noxious, or such as may be a source of the deposit of filth in the plaintiff's pond. It is not impossible that fluids discharged from the sewer, although colorless, sterilized, and apparently innocuous, may yet be such as, by combination with other substances found in the river, to become the occasion of decomposition and consequent pollution; and the second prohibition of the decree makes proper provision for such a contingency.

The defendant urges that it should not be made responsible for the acts of others, and that if its sewage is thoroughly disinfected, sterilized, and purified before its discharge into the river, nothing further should be required, even though, as it flows down the stream, it may be brought into contact with other substances in such a way as to work a nuisance. But the right to deposit a thing in any place must always be dependent, not only on its own nature, but on the nature of the place in question, and the uses to which that has been already put. A lighted match

may be safely thrown into a brook, under ordinary circumstances, but not, should it happen to be covered with oil from a leaky tank. If different parties by several acts foul the same stream, each may be enjoined against the commission of the wrong with which he is individually chargeable. *Chipman v. Palmer*, 77 N. Y. 51. It is not for the defendant to dictate the order in which the plaintiff shall sue those by whom the Still river has been polluted. Nor would it be in any better position if the noxious substances placed in these waters by others were so deposited by prescriptive right. If the stream is, from whatever cause, in such a condition that to discharge its sewage there works a nuisance, the city has no right to use its waters for that purpose.

It is insisted finally that the first clause of the order of injunction, which forbids the discharge of any solid matter from the sewers that, though not foul and noxious, might be a source of the deposit of filth in the plaintiff's pond, is too harsh a remedy, since for any diminution in the storage capacity of his pond he could be adequately compensated in money, while, on the other hand, this part of the decree may result in throwing a very heavy pecuniary burden upon the city. It is a sufficient answer to this objection that the superior court has found that the plaintiff's injuries are and will be such as cannot be redressed by an action for damages. That such well might be the case is quite obvious. The city had, and still has, power, by the exercise of the right of eminent domain which the legislature has confided to it for such purposes, to acquire a title, as against the plaintiff, to use the stream as it pleases. The injunction was not to take effect until nearly two years from its date. We find nothing in the record to indicate that the superior court did not exercise a wise judicial discretion in passing the decree. There is no error in the judgment complained of. The other judges concurred.

(67 Conn. 497)

JACOBS, Treasurer, v. CURTISS.

(Supreme Court of Errors of Connecticut.
April 15, 1896.)

PLEADING—SPECIAL ANSWERS—BOND—DELIVERY
—FORGERY OF PRINCIPAL'S NAME—
NEGLECT OF SURETY.

1. In an action on a bond, the allegation that "defendants bound themselves by a writing under seal" is a sufficient averment of its delivery.

2. In an action on a bond against H. as principal and C. as surety, C. admitted the delivery of the bond, regular on its face, as alleged, but set up by a special answer that H.'s signature to the bond was a forgery. He did not allege that he had no knowledge of the forgery at the time he executed and delivered the bond, or that he did not intend to bind himself notwithstanding. *Held*, that want of knowledge could not be assumed in his favor, and hence the answer was demurrable.

3. By another special answer C. alleged that B. requested him to sign a bond as surety; that at the time of the execution and delivery of the

bond in controversy B. signed the name of H. instead of his own; and that, without looking to see what name B. had written, he signed the bond, believing B. to be the principal. The obligee (plaintiff) had no knowledge that C. did not intend to become H.'s surety. *Held*, that C., so far as plaintiff's rights were concerned, must be taken to have known that B. signed H.'s name to the bond.

Appeal from court of common pleas, New Haven county; Hotchkiss, Judge.

Action by Hiram Jacobs, treasurer, against John W. Curtiss and another. From a judgment in favor of plaintiff, defendant Curtiss appeals. *Affirmed*.

E. P. Arvine and Charles C. Ford, for appellant. Frederick W. Holden and Carlos H. Storrs, for appellee.

TORRANCE, J. This is a suit upon a joint and several bond given under the laws relating to the sale of intoxicating liquors, upon the issue of a license to Hammersley, the principal named in the bond. The action was brought against Hammersley and his surety, Curtiss, but no service was made upon Hammersley, because he could not be found, and Curtiss alone defends. The complaint sets out the bond, and a breach of it, in the usual form. The pleadings, as they now stand, consist of three special defenses; but one of these,—the last one,—alleging, in substance, that Hammersley had not been convicted of violating his license, may be laid out of the case; for it is clearly untenable, and was very properly abandoned upon the argument. The plaintiff demurred to the other two special defenses. The court below sustained the demurrer, and whether it erred in so doing is the question upon this appeal.

The first of these two special defenses is this: "The bond described in said complaint was never signed or executed by said William Hammersley as principal, or by any one having authority to sign for him." To this the plaintiff demurred, "because said bond described in said complaint is a joint and several bond, and, if the same was not signed by the said Hammersley, or by his authority or consent, it is no defense for the defendant" Curtiss. The claim and argument of the defendant on this part of the case is this: The defendant, Curtiss, must be presumed to have signed this bond upon condition that Hammersley, the principal named therein, should sign it also, and the obligee to have received it with knowledge that unless so signed it would not take effect. It is of no consequence, then, whether the bond be joint or joint and several, for the question is whether any obligation at all was created, inasmuch as the condition on which Curtiss' liability depends was never performed. This reasoning is inapplicable to this case as it now stands. The complaint alleges "that on the 20th day of March, 1894, the defendants bound themselves by a writing under seal to pay to the plaintiff the sum of three hundred dollars," and then sets out the writing as an exhibit. From this exhibit it appears that

the bond, upon its face, was complete, and was apparently executed by all the persons named in the body of it. Furthermore, the above allegation of the complaint is equivalent to an express allegation that Curtiss delivered the bond in its present condition, as and for his bond. The delivery of a bond, though essential to its validity, need not be expressly stated in the complaint. The allegation that the "defendants bound themselves by a writing under seal" is a sufficient averment of delivery, as that imports and implies delivery. "An allegation that J. S., on the 20th of November, by his writing of that date, acknowledged himself bound to J. N., is equivalent to a direct averment that the bond was delivered on that day." 1 Swift, Dig. p. 179. "The allegation in the complaint that the undertaking was executed by the defendants is a sufficient allegation, and, there being no denial in the answer, sufficient proof of the complete execution, including the delivery, of the instrument, and no proof of its execution and delivery was necessary." Robert v. Good, 36 N. Y. 408, 410; Martin v. Davis, 2 Colo. 313; Insurance Co. v. Rogers, 30 Barb. 491; State v. Rush, 77 Mo. 586.

In legal effect, then, the complaint alleges that Hammersley and Curtiss delivered this bond; and it further expressly alleges that a license was thereupon issued to Hammersley, and that he committed a breach of the bond. The allegations of the complaint are not denied by Curtiss, and must, therefore, be taken as admitted. Prac. Book, rule 4, § 4, p. 16; Lamphear v. Buckingham, 33 Conn. 237. Curtiss, thus admitting that both he and Hammersley delivered the bond as it is, now says, in effect, that Hammersley's signature to the bond is a forgery. But, if Curtiss knew this when he himself delivered the bond, the fact that Hammersley did not sign is of no consequence. The bond is none the less Curtiss' several obligation. If he knew that Hammersley had not signed it as principal, but, intending nevertheless to be himself bound as surety, executed the bond, and delivered it as and for his bond, he may be held liable upon it. Vulcanite Co. v. Bacon, 148 Mass. 542, 20 N. E. 175. If he had no such knowledge at the time, it was a matter peculiarly within his own cognizance, and he ought to have averred it in his special answer, for it is material. We cannot assume in his favor that he had no such knowledge. No fact can be assumed in favor of the party pleading, except it be directly averred, or arises by necessary inference; but, on the contrary, the construction shall be taken most strongly against him. Griswold v. Mather, 5 Conn. 435, 438; Gaylord v. Payne, 4 Conn. 190, 194. So far, then, as the special answer now under consideration is concerned, the record, even taking the view most favorable to the defendant, shows that with knowledge that the principal had not signed, Curtiss delivered the bond as his own, intending thereby to bind himself. The demurrer

to the special answer now in question was properly sustained.

The other special answer states, in substance, that one Barrows requested Curtiss to become surety upon a liquor-license bond in which Barrows was to be principal; that he met Barrows at the office of the county commissioners for the purpose of executing such bond; that while there the bond in suit was made out by one of the commissioners, and handed to Barrows; that Barrows, instead of signing his own name as principal, signed that of Hammersley, in whose name as principal the bond was made out; that Curtiss did not know Hammersley, nor that he had applied for a license to sell liquor, nor had Curtiss agreed, nor did he intend, to become surety upon Hammersley's bond; that the representations made by Barrows were false and untrue, were made to deceive Curtiss, and did deceive and induce him to sign said bond; and that after seeing "Barrows writing upon said bond as aforesaid, said Curtiss signed his name to the same as surety, without taking any notice as to who the principal named in said bond was, or as to what name the said Barrows had written upon said bond as principal, believing that the representations made by Barrows aforesaid were true, and that the bond upon which he was putting his name as surety was none other than that of said Sam. Barrows."

The plaintiff demurred to this answer on the ground, in substance, that it was not therein alleged that the plaintiff, at the time when said bond was executed and delivered, had any notice or knowledge of any of the matters of fact set forth in the answer; and because it therein appeared that Curtiss, before he executed and delivered said bond, had full opportunity to know, and ought to have known, that the principal named in the bond was Hammersley, and that the bond purported to be executed by Hammersley as principal.

The answer contains no allegation that Curtiss is an illiterate man, unable to read the bond, nor that it was misread to him, nor that he was in any way prevented from ascertaining the exact and entire truth about the instrument he signed; and it must be taken as admitted, from his own statement, that he had the ability and a full opportunity to ascertain the truth. His failure to learn the truth was the result of his own culpable negligence, so far as the plaintiff is concerned; and quoad the plaintiff he must be taken to have known that Barrows signed Hammersley's name to the bond. The record thus shows that Curtiss and Barrows delivered to the county commissioners a bond (upon which a license was at once issued) perfect upon its face, apparently duly executed by all whose names appear therein, and which purported to be signed and delivered by the several obligors, and which was then and there delivered without stipulation, reservation, or condition of any kind;

and this bond they delivered to an obligee, who had no notice, from the face of the bond or otherwise, of any infirmity of any kind affecting the legal validity of the instrument. Under these circumstances we are of opinion that the facts set up in the answer constituted no defense to the action. There is no error. The other judges concurred.

(97 Conn. 533)

HAVENS et al. v. TOWN OF WETHERSFIELD.

(Supreme Court of Errors of Connecticut.
April 15, 1896.)

APPEAL—REVIEW—QUESTIONS OF FACT—HARMLESS ERROR—HIGHWAYS—REPAIR—EVIDENCE.

1. A party who introduces irrelevant evidence without objection is not harmed by the admission of evidence to rebut it.

2. Gen. St. § 2674, provides that, when a town neglects to keep any public road within it in good repair, the county commissioners, on proper statutory proceedings, finding such neglect, shall order the selectmen of the town to cause the road to be repaired. *Held*, that in such proceedings it is not error to admit evidence that the part of the highway complained of is in a worse condition than any of the other highways of the town.

3. Gen. St. § 2674, provides that, when a town neglects to keep any public road within it in good repair, the county commissioners, on proper statutory proceedings, finding such neglect, shall order the selectmen of the town to cause such road to be repaired. *Held*, that a conclusion by the court in such proceedings that the highway is in good repair is not a conclusion of law, but is one of fact, which cannot be reviewed by the supreme court, in the absence of any error of law in reaching such conclusion, with reference to the duty cast on the town.

Appeal from superior court, Hartford county; Ralph Wheeler, Judge.

Petition by Owen R. Havens and others to the county commissioners of Hartford county for an order to the selectmen of the town of Wethersfield to repair a highway. Plaintiffs appealed to the superior court from a judgment against them, and from a judgment there rendered affirming the decision of the county commissioners they appeal. Affirmed.

William J. McConville and Hugh O'Flaherty, for appellants. - George P. McLean, for appellee.

TORRANCE, J. Under section 2674 of the General Statutes, the plaintiffs brought a petition to the county commissioners of Hartford county, asking for an order to the selectmen of Wethersfield to repair a certain highway in that town. After due hearing, the county commissioners found and adjudged that the town had not neglected to keep the highway in repair, and dismissed the complaint. The plaintiffs then appealed the matter to the superior court under the statute, and that court, upon a review of the doings of the county commissioners, and after a full hearing of all the parties, also found that the town had not neglected its duty in

the premises, and ratified and affirmed the decision of the county commissioners; and, from this decision of the court below, the present appeal is taken.

The reasons of appeal are four in number, but the first two, concerning the admission of testimony, relate to one and the same matter, and really constitute but one reason of appeal. On the trial in the superior court, the plaintiffs, without objection, introduced evidence to show that the part of the highway of which they complained was in a worse condition than any of the other highways of the town. To contradict or rebut this evidence, the town was permitted, against the objection of the plaintiffs, to introduce testimony relative to the condition of those other highways. The plaintiffs now claim that the evidence which they thus offered of the condition of other highways was irrelevant, and therefore the evidence in rebuttal was irrelevant, and should have been excluded on objection. If this claim is conceded, the record does not show how the plaintiffs could have been legally harmed by the ruling of which they now complain, because, from the record as it stands, the evidence objected to must be held to have simply neutralized the effect of the irrelevant evidence which the plaintiffs ought, if their claim is correct, to have withdrawn. *Barnes v. State*, 20 Conn. 254. But, upon this record as it stands, we are unable to say that the testimony offered by the plaintiffs relating to the condition of other roads was irrelevant. In a proceeding of this kind the question whether a road is in good and sufficient repair, and whether a town has been guilty of neglect in allowing it to remain in a certain condition, is a relative one, the solution of which may be assisted by comparing the condition of the road in question with that of others similarly situated. At least, we cannot lay it down as a general rule that testimony of this kind can never be relevant and admissible. The record fails to show that the testimony offered by the plaintiffs upon this point was irrelevant, and thus fails to show that the ruling complained of was erroneous.

In the third reason of appeal, the claim is made that the conclusion reached by the court that the highway was in good and sufficient repair was a conclusion of law, which can be reviewed by this court. Upon the present record, we think this claim cannot be sustained. Section 2674 of the General Statutes, under which the petition was brought, provides, in substance, that, when a town "shall neglect to keep any public road within such town in good and sufficient repair," the county commissioners, upon the proper statutory proceedings, finding such neglect, shall order the selectmen of the town to cause such road to be repaired. The principal question, therefore, to be determined upon a proceeding of this kind before the commissioners or the superior

court, is whether the highway described in the petition is or is not in good and sufficient repair; and that question, from the nature of things, must ordinarily be a question of fact, and not of law. *Congdon v. Norwich*, 37 Conn. 414, 418; *Howe v. Ridgefield*, 50 Conn. 592-596. In the case at bar the superior court found that the highway in question was "in good and sufficient repair." That conclusion seems to be reached from a great variety of subordinate facts and circumstances which are detailed in the finding. In reaching it, the record shows that the court sustained all the claims of law expressly made by the plaintiffs relative to the nature and extent of the duty imposed by law upon the town to make repairs upon the highway; and it nowhere appears that in reaching such conclusion the court committed any error of law with reference to the duty cast upon the town. Under these circumstances, and upon this record, we are of opinion that the conclusion in question is one which cannot be reviewed by this court.

In its finding, the court, in substance, says that the muddy condition of this road in the springtime, of which the plaintiffs complain, can be completely remedied only by a system of underdraining and macadamizing; and, further, that "the macadamizing of a highway may seem to be rather in the nature of an improvement than of repair simply." In the fourth and last reason of appeal, the plaintiffs complain of the above remarks. Their claim seems to be that these remarks indicate that the court below held that it was not the duty of the town under any circumstances to macadamize the road; and they say this was an erroneous view of the law which materially affected the decision of the case. Whether, under the section upon which this proceeding was brought, a town can be compelled to macadamize a road, is a question not now before this court, and upon it no opinion is expressed. The court below, however, did not hold the opinion thus attributed to it, for in the record the court says: "When, however, macadamizing is the only practicable method of accomplishing the object sought, it would seem that there can be no good reason why, in a proper case, an order for it should not be made by the county commissioners." This view of the law is certainly one of which the plaintiffs have no reason to complain. There is no error. The other judges concurred.

(97 Conn. 538)

ROBINSON v. CLAPP.

(Supreme Court of Errors of Connecticut.
May 14, 1896.)

ADJOINING LANDOWNERS—INTERFERENCE WITH
LIGHT—INJUNCTION—REMEDY AT LAW.

1. Where a well and a tree stand on the line between two lots, one owner cannot enjoin the other from building to the line, and thus inter-

fering with the well and the tree, and the free access of light and air to the windows of plaintiff's house, because he has offered to buy the land in controversy, where such offer was merely to pay such sum therefor as it should be appraised at by persons to be selected by plaintiff and defendant.

2. Where the restraining of defendant from removing that portion of the trunk of the tree upon his own land, thereby depriving him of the opportunity to build upon it as desired, would produce a greater irreparable injury to defendant than such removal and the consequent destruction of the life of the tree would cause to plaintiff, an injunction will be refused, and the contestants left to settle such rights in an action at law.

Appeal from court of common pleas, New Haven county; Hotchkiss, Judge.

Suit by John A. Robinson against John W. Clapp to enjoin defendant from erecting a certain house. Judgment for defendant, and plaintiff appeals. Affirmed.

E. P. Arvine, for appellant. Henry G. Newton, for appellee.

FENN, J. This is the case of Robinson *v.* Clapp, 65 Conn. 365, 32 Atl. 939. A new trial was then granted, and the case now comes before us again upon another finding, by plaintiff's appeal. So far as such appeal appears to be only an effort for retrial of questions already decided by this court, it is unnecessary to consider it, for we see no occasion to alter the former opinion. Nor need we repeat, but only refer to such former decision for, the facts, and the law as this court held it to be upon such facts. The present finding does not differ very essentially from the previous one, but there are two variations which should be noticed. The plaintiff claims that he was entitled to the injunction prayed for, to restrain the defendant from interfering with the tree and well in question, and the free access of light and air to the windows of the plaintiff's house, because he had offered to buy the land in controversy. The finding, however, states that the defendant has repeatedly offered to sell to the plaintiff; that he claimed the price asked was in excess of the true value,—and adds: "I do not find that the price so asked was in excess of its true value; and I find that the plaintiff has never offered or been willing to pay the defendant the true value of said land, in any manner other than by his offer to pay a sum for which it should be appraised by parties to be selected by the plaintiff and defendant." It seems needless to say that the defendant is under no obligation, legal or equitable, to submit to any such ordeal, and that the plaintiff has shown nothing to entitle him to consideration on this ground, even if,—as we in no way mean to intimate,—in case the plaintiff has proved all he claimed, it would have had any relevancy or weight.

Concerning the tree, the finding is that the defendant intends to remove so much of said tree as is necessary to build his house up to the boundary line. In Robinson *v.* Clapp,

page 380, 65 Conn., and page 942, 32 Atl., we said in reference to this matter: "The injunction should not extend further than to restrain the defendant from cutting any portion of the trunk, and any further cutting of the branches or of the roots than he might lawfully have done had the trunk stood wholly upon the plaintiff's land, but reaching to the defendant's line." The defendant in fact intends to cut away half the trunk, and to clear away branches and roots to the dividing line, and the court below refused to enjoin such proposed action. As bearing upon this matter, the court made the following finding: "If the trunk of said tree was not touched by the defendant, but the roots and branches were cut off up to the boundary line, the tree would probably die; but, if it did not die, it would, after such branches were cut, be unsightly, and of no practical value to the plaintiff. If the branches and roots of said tree were so cut off upon the defendant's side of said line, and said house was so constructed by the defendant, the entire removal of said tree would be a benefit to the plaintiff and to his property." This finding was made upon evidence, the admission of which was objected to, and exception taken. We think such evidence proper to be received, and that upon the facts found the action of the court was induced from, and warranted by, what we before suggested (Robinson *v.* Clapp, page 380, 65 Conn., and page 942, 32 Atl.): "It might, perhaps, fairly be urged that to prevent the defendant from removing that portion of the trunk of the tree upon his own land, thereby depriving him of the opportunity to build upon it as desired, would be likely to produce a greater irreparable injury to the defendant than such removal, and the consequent destruction of the life of the tree, would cause the plaintiff, and that, therefore, the equitable remedy of injunction, which is not adapted finally to adjust the rights of the parties, should have been refused, and the contestants left to settle such rights in methods pertaining to the legal, and not the chancery, jurisdiction. We are inclined to think such elements of discretion enter into the matter that we ought not to disturb the conclusion of the trial court upon it." There is nothing in the additional facts found, regarding the well and concerning light, to differentiate the present appeal in those respects from the former one. There is no error in the judgment complained of. The other judges concurred.

(97 Conn. 528)

TOWN OF NEW BRITAIN *et al.* *v.*
MARINERS' SAV. BANK.

(Supreme Court of Errors of Connecticut.
April 15, 1896.)

TAXATION—LIEN—CERTIFICATE FOR CONTINUANCE.
Under the requirement of statutes authorizing the continuance of a tax lien and the fore-

closure thereof, that the certificate recorded in the town records shall describe "the real estate, the amount of the tax, and the time when it became due," a certificate not giving the amount of the tax, but stating the time when the tax became payable, and a sum purporting to be the amount of the tax, with interest thereon from that time to the date of the certificate (the time between the dates being a year), is insufficient; at least where at no rate of interest prescribed for unpaid taxes can the correct amount of the taxes be ascertained from the sum specified.

Case reserved from court of common pleas, Hartford county; Calhoun, Judge.

Suit by the town of New Britain and another against the Mariners' Savings Bank. Defendant demurred to the complaint, and the case was reserved. Trial court advised to sustain demurrer.

John Walsh, for plaintiffs. Joseph L. Barbour, for defendant.

ANDREWS, C. J. This is a complaint brought by the town and city of New Britain, to foreclose two tax liens laid on a piece of land in said town and city. The complaint is a joint one, as is permitted by section 3891 of the General Statutes. The controlling facts as set out in the complaint are these: On the 1st day of October, 1886, Waldo C. Camp owned six pieces of land in said town and city. Thereafter such proceedings were had by the taxing officers of said municipalities that a tax was lawfully laid on all the said pieces against the said Camp; the town tax being \$96.60, and the city tax \$64.40. These became payable on the 1st day of July, 1887. On the 30th day of June, 1888, two certificates continuing the tax liens on said pieces of land, one in behalf of the town and one in behalf of the city, were entered and recorded on the land records of said town. These certificates described each of said pieces of land, and named the amount of the whole tax on them all. The town certificate described the town tax as \$106.38, and the city certificate the city tax as \$71.28. The certificates stated that these sums were the amount of the tax with interest thereon to the date of filing, and they also named the time when the taxes became due. The defendant was the mortgagee of one of the pieces of land described in the said certificates, whose title became absolute by foreclosure on the 2d day of February, 1892. The complaint avers that the proportional part of the whole tax laid on all said pieces, which was assessed on the one piece belonging to the defendant, was \$39.24 town tax, and \$26.10 city tax; and claimed a foreclosure. The defendant demurred to the complaint because (among other reasons) "the amount of the tax" was not given in the certificate, as is required by law.

All the statutes which have authorized the continuance of a tax lien and the foreclosure of such a lien have required that the certificate recorded in the town records should describe "the real estate, the amount of the tax, and the time when it became payable." It appears in this case that the certificates did not,

in terms, conform to this requirement; and there are no data given in the certificates by which the correct amount of the tax can be ascertained. The certificates state the time when the tax became payable, and purport to give, as one entire sum, the amount of the tax, with the interest thereon from that time to the date of the certificates. The time between those two dates is one year. It may be true that where the amount—i. e. principal and interest added together—is given, as well as the time and the rate per cent., it is a very simple arithmetical proceeding to ascertain the principal. But there is no rate of interest mentioned in any statute as applicable to an unpaid tax, either 12 per cent., or 9 per cent., or 7 per cent., at which for one year the principal sum of \$96.60 can be ascertained from the amount of \$106.38 given in the town certificate, or \$64.40 from the amount of \$71.28 in the city certificate. Municipalities have no powers of taxation other than those specifically given by the statutes. A valid tax can be collected only by complying with the provisions of these statutes. This rule must be applied with some rigor when a special method for the collection of the tax is resorted to. A lien upon real estate for a tax does not exist where the statutory steps have not been strictly followed. *Oooley, Tax'n*, 305; *Dill. Mun. Corp.* (4th Ed.) § 820; *Louisville v. Bank of Kentucky*, 3 Metc. (Ky.) 148; *Manufacturing Co. v. Lathrop*, 7 Conn. 550; *Hellman v. Burritt*, 62 Conn. 438, 26 Atl. 473; *Meyer v. Burritt*, 60 Conn. 117, 22 Atl. 501; *New London v. Miller*, 60 Conn. 112, 22 Atl. 499. The defendant has the right to insist that the plaintiffs shall not take its land to pay to themselves the tax debt of another, unless the steps required by the statute have been exactly taken. *Morey v. Hoyt*, 65 Conn. 516, 33 Atl. 496. The court of common pleas is advised to sustain the demurrer. The other judges concurred.

(67 Conn. 541)

STATE v. SMITH.

(Supreme Court of Errors of Connecticut.
May 14, 1896.)

MUNICIPAL CORPORATIONS—HEALTH REGULATIONS
—LICENSING MILKMEN.

Sp. Acts 1895, p. 532, § 41, authorizing the city of Bridgeport to make ordinances to license "petty grocers, hucksters, and common victualers," and for all other subjects that shall be deemed necessary for the preservation of the health of the citizens, does not authorize the city to require regular milkmen to be licensed.

Appeal from court of common pleas, Fairfield county; Walsh, Judge.

Isaac D. Smith was convicted of violating a city ordinance relating to the sale of milk, and appeals. Error.

Stiles Judson, Jr., for appellant. John H. Light and V. R. C. Giddings, for the State.

BALDWIN, J. The charter of the city of Bridgeport, which went into effect July 1, 1896, authorized the common council to

make ordinances, not inconsistent with law, relative to commerce; to the inspection of produce brought into the city for sale, and the election of inspectors for that purpose; to the sale, or offering for sale, of unwholesome produce of all kinds; to "licensing cartmen, truckmen, hackmen, butchers, bakers, petty grocers, or hucksters, and common victualers, under such restrictions and limitations as said common council may deem necessary and proper"; to the health of the city; and to "any and all other subjects that shall be deemed necessary and proper for the protection and preservation of the health, property, and lives of the citizens." Sp. Acts 1895, p. 532, § 41. In the General Statutes, sections 2658 to 2664 are grouped under the heading of "Adulteration of Milk." A public act went into effect August 1, 1895, to regulate the manufacture and sale of food products, which classes as food, under that description, "every article used for food and drink by man, horses, or cattle." Pub. Acts 1895, p. 578, c. 235, § 2. Gen. St. § 2661, prohibits the sale or offer for sale of impure or adulterated milk. Section 2660 forbids the sale of any milk from which any cream has been removed, except out of a can, vessel, or package, to which is affixed, not more than six inches from the top, a metallic tag stamped "Skimmed Milk," in letters not less than an inch in height. For any violation of these provisions, the offender may be fined not more than seven dollars, or imprisoned not more than 30 days, or both. The act of 1895 (section 3) declares that any article of food shall be deemed adulterated if, among other things, any substance be mixed with it so as to lower or injuriously affect its quality or strength, or if any valuable constituent has been wholly or in part abstracted, or if it is in any part the product of a diseased animal; and that the Connecticut Agricultural Experiment Station shall make analyses of food products on sale which it is suspected may be adulterated, and "may adopt or fix standards of purity, quality, or strength, when such standards are not specified or fixed by statute," and, when it finds by analysis that adulterated food products have been on sale within the state, shall notify the grand juror or prosecuting attorney of the town in which they were found. The sale or offer for sale of adulterated food, by one who knows it to be adulterated, and does not disclose this to the purchaser, is made punishable by a fine of not more than \$500, or imprisonment for not more than one year. At the same session of the general assembly, two days later, another statute was enacted, but repealed the following week (Pub. Acts 1895, pp. 588, 664), which declared the term "adulterated milk," as used in the statute laws of the state, to have the following meaning: "(1) Milk containing more than eighty-eight per centum of water or fluids; (2) milk containing less than twelve per centum of milk solids; (3) milk contain-

ing less than three per centum of fats; (4) milk drawn from cows within fifteen days before or five days after parturition; (5) milk drawn from animals fed on distillery waste or on any substance in a state of fermentation or putrefaction or on any unhealthy food; (6) milk drawn from cows kept in a crowded or unhealthy condition; (7) milk from which any part of the cream has been removed; (8) milk which has been diluted with water or any other fluid, or to which has been added or into which has been introduced any foreign substance whatever; (9) all adulterated milk shall be deemed unclean, unhealthy, impure, and unwholesome."

It is impossible to compare the ordinance of the city of Bridgeport with these statutory provisions without seeing that in many respects they cover the same ground, and cover it in a different way. The ordinance (section 6) defines precisely adulterated milk, and gives conclusive effect to an analysis made by the chemist employed by the local board of health. The general assembly, in 1895, first adopting and then repealing a somewhat similar definition, finally left the matter largely in the hands of the Connecticut Agricultural Experiment Station. The sale of skimmed milk, by the city ordinance, is to be from cans bearing the words "Skimmed Milk" conspicuously stamped upon the side. By section 2660 of the General Statutes, it is to be from cans bearing a metallic tag on which the same words are stamped. The pecuniary penalties imposed by the ordinance cannot be less than \$50, nor more than \$100. Under the general laws, they may be considerably less, and for some offenses more, besides an additional liability to imprisonment. The public statutes leave the business of a milkman open to all, on equal terms, throughout the state; only imposing certain regulations upon those who may undertake it, and enforcing them, when necessary, by proceedings of a criminal nature, resulting in a sentence proportioned to the gravity of the offense. The ordinance excludes every one who has not received a license from the local health officer from participating in it, within the city of Bridgeport, under pain of a fixed pecuniary forfeiture, which in case of a second offense is to be doubled, and to entail a loss of the license previously granted. Of these differences between the provisions of the by-laws in question and the general statutes, that last mentioned, unless found to be warranted by the terms of the city charter, is decisive of the present case.

Under the constitution of this state, even the general assembly has not unrestricted power to provide for the grant or refusal of licenses, without which a citizen cannot engage in what is one of the common occupations of life. *State v. Conlon*, 65 Conn. 478, 33 Atl. 519. It has confided to the common council of Bridgeport the right to make ordinances relative to licensing cartmen, truckmen, hackmen, butchers, bakers, petty gro-

cers or hucksters, and common victualers. Petty grocers or hucksters and common victualers may, as part of their business, sell milk; but the ordinance in question relates to licenses for all who sell milk, without regard to whether they are petty grocers, hucksters, or common victualers, or not. It therefore goes beyond the power specifically conferred, and the "general welfare" clause, with which section 41 of the charter concludes, must be read with strict reference to what precedes it. The right to license the pursuit of a lawful business, which, as usually carried on, does not endanger the public health or safety, and thus to limit the number of those who may engage in it, is one of the highest powers of sovereignty. When conferred upon a municipal corporation, the grant cannot be extended by any doubtful implication. After giving full force to all the provisions of section 41, we are brought to the conclusion that it is, at least, doubtful whether the charter authorized the licensing of milkmen. It therefore did not authorize it, and that part of the ordinance was void upon which the complaint in the case before us was based. *Crofut v. City of Danbury*, 65 Conn. 294, 32 Atl. 365. There is error in the judgment appealed from. The other judges concurred.

(67 Conn. 551)

WHITTEN v. SPIEGEL, Sheriff.(Supreme Court of Errors of Connecticut.
April 23, 1896.)**HABEAS CORPUS—VERITY OF COURT RECORDS—
COLLATERAL ATTACK.**

The verity of the records of a criminal court, showing the return of an indictment, cannot be collaterally questioned, or the record varied by parol evidence, in a habeas corpus proceeding in another court.

Appeal from superior court, New Haven county; Shumway, Judge.

Petition by George E. Whitten against Charles R. Spiegel, sheriff, for a writ of habeas corpus. Writ denied, and petitioner appeals. Affirmed.

William H. Baker and Albert D. Penney, for appellant. William H. Williams, State's Atty., for appellee.

PER CURIAM. The appellant was a prisoner in the custody of the superior court for New Haven county under an order, made at a term held for the transaction or criminal business, committing him, for want of bail, upon an indictment for murder in the second degree, to which he had pleaded not guilty. Such a term of the court is held quarterly, and one is now in progress. He has sought release from confinement by habeas corpus proceedings, brought to a term of the same court held for the transaction of civil business; and the ground on which he relies, as set up in his pleadings, is that the foreman of the grand jury, by a clerical mistake, indorsed the indictment against him as a true bill, although in

fact it had been found not to be a true bill. This is an attempt to vary the records of a court of general jurisdiction by parol evidence, produced before another tribunal in a collateral proceeding. If such a mistake as is set up was made, and if the prisoner has a right to ask for its correction, it is obvious that he should resort, first, at least, to the court the verity of whose records is called in question. It is urged that he has been put to plead and held to trial for murder upon an indictment to which none of the grand jurors ever agreed, and therefore that the superior court had no jurisdiction to make the order of commitment. Gen. St. § 1599; Const. Conn. art. 1, § 9; Const. U. S. Amend. 14, § 1. The records of that court, however, show that an indictment was duly agreed to and presented, and are, in this proceeding, conclusive evidence that the cause against him was fully within its jurisdiction. There is no error in the judgment appealed from.

(67 Conn. 581)

STATE v. HOGAN.(Supreme Court of Errors of Connecticut.
June 5, 1896.)**JURY—CHALLENGE TO ARRAY—STATUTE—CRIMINAL
LAW—EVIDENCE.**

1. A challenge to the array of jurors is an objection to the whole panel at once; hence, to be available, it must be for a cause that affects all the jurors alike.

2. Pub. Acts 1895, c. 189, being a special act authorizing the court of common pleas in New Haven county to retain a jury from one term of court to another, was not repealed by the general jury act subsequently passed (chapter 219), providing for the drawing of jurors before each jury term of the several courts.

3. In a prosecution for keeping open a saloon on Sunday, testimony as to the conduct and statements of defendant's wife, who was in the saloon when entered by the officers on Sunday, tending to show that it was being kept open, is admissible.

4. It is proper for a prosecuting attorney to show that a material witness, whom it would otherwise be his duty to produce, has departed from the state, and that a subpoena for him was issued, which could not be served.

Appeal from criminal court of common pleas, New Haven county; Hotchkiss, Judge.

Patrick Hogan was convicted of keeping open his saloon on Sunday, and appeals. Affirmed.

Defendant challenged the array of jurors on the ground that only four of the number were drawn for that particular term of court, the remainder having been retained from a former term under the provisions of chapter 189, Pub. Acts 1895, while by chapter 219 of said acts the drawing of a jury for each jury term of the superior, district, and common pleas courts is provided for. The challenge was overruled. On the trial the state was permitted to show that one Baker, who was a bartender, and in defendant's saloon when the officers entered it on Sunday, had departed the state, and that a subpoena had been issued for him, which could not be served.

James P. Pigott and Denis T. Walsh, for appellant. George M. Gunn, Pros. Atty., for the State.

ANDREWS, C. J. A challenge to the array of jurors is an objection to the whole panel of jurors at once, and, in order to be available, it must be for a cause that affects all the jurors alike. 3 Bl. Comm. 359; 2 Tidd, Prac. 779. The challenge here was bad on its face, in that it was for a reason which, by its own terms, did not attach to four of the jurors whom it prayed to have rejected. It was necessarily overruled.

But, passing this, the challenge was properly denied for the other reason given. The argument by the defendant is that the act (chapter 189 of the Public Acts of 1895) was repealed by the fifth section of the general jury law passed the same year. That act (chapter 189) was a special act, having reference only to the court of common pleas in New Haven county. The general jury act (chapter 219 of the Public Acts of 1895) was a general act. The rule is that a special statute is not ordinarily repealed by a later general one. *City of Hartford v. Hartford Theological Seminary*, 66 Conn. 475, 84 Atl. 483.

The testimony as to the conduct of the defendant's wife, and what she said to the officers, was admissible, and very significant, as tending to show that the saloon was being kept open at that time.

The state's attorney was in a sense bound to produce the barkeeper, Baker, as a witness, or to explain his absence; otherwise, he would have been open to the charge of a neglect of duty by the holding back of the very witness who was in the best position to relate the true circumstances of the case. The holding back of evidence may be used as a presumption of fact against the party who holds back such evidence, in all cases when it could be produced. 2 Whart. Ev. § 1266; *Throckmorton v. Chapman*, 65 Conn. 441, 454, 32 Atl. 930; *Kirby v. Tallmadge*, 160 U. S. 379, 16 Sup. Ct. 349.

The comments made by the judge to the jury upon the evidence were within the discretion of the court. There is no error. The other judges concurred.

(67 Conn. 570)

CORBETT v. COCHRANE.

(Supreme Court of Errors of Connecticut.
May 14, 1896.)

LAND LEASE—TENANCY AT WILL—PLEADING— ISSUE.

1. In an action for rent, a special answer alleged that "defendant, under a special agreement between her and plaintiff, occupied plaintiff's store and a living apartment over said store as his tenant"; and in subsequent paragraphs alleged that plaintiff represented the building as in good tenable condition, that it was in an imperfect condition, and that defendant had been damaged by reason thereof. Plaintiff admitted the first paragraph of the answer,

and denied the others. There was no dispute concerning the occupancy, the amount of rent agreed on, or that such rent had all been paid until the last month. *Held*, that the only issue was whether the special agreement embraced the representations alleged by defendant. Hence, instructions making the case turn on the want of binding effect of the representations, if made, were erroneous.

2. Where parties orally agree that a lease shall be for three years, with the privilege of five, reserving a monthly rent, and, after entry by the lessee, fail to execute a written lease, the tenancy is not from month to month, within Gen. St. § 2967 (which provides that a tenancy shall be such where the lease is by parol, a monthly rent reserved, and time of termination not agreed on), but is a tenancy at will.

Appeal from court of common pleas, New Haven county; Hotchkiss, Judge.

Action by Thomas W. Corbett against Agnes Cochrane. From a judgment for plaintiff, defendant appeals. Error.

Arthur C. Graves, for appellant. Charles H. Fowler and Grove J. Tuttle, for appellee.

FENN, J. This action came to the court of common pleas, in New Haven county, by appeal from a justice of the peace. The complaint contains only the common counts. The bill of particulars embraces four items, which, with interest claimed, amount to \$59.08. The first and principal charge is "1 mo. rent \$50.00." Two defenses were filed: First, a general denial; second, a special answer, as follows: "Paragraph 1. On and for a long time prior to November 15, 1893, the defendant, under a special agreement between her and the plaintiff, occupied the plaintiff's store and a living apartment over said store, as his tenant. Par. 2. Said store was occupied and used by the defendant as a millinery and ladies' furnishing store. Par. 3. At the time of leasing said premises by the plaintiff to the defendant, the plaintiff represented and maintained to the defendant that the said premises were in a good, tenable, and habitable condition, and agreed to keep them tenable and habitable during their occupancy by the defendant. Par. 4. Said premises were not in good, tenable, and habitable condition at any time during the defendant's tenancy, in that the windows in said store were not properly and suitably built and kept in repair, so as to prevent the rain from entering within said windows; nor was the roof properly built and maintained in repair, so as to prevent the rain and water from entering thereunder; nor was the furnace of said building so properly built, constructed, and kept in repair as to prevent great quantities of smoke from issuing therefrom and filling the entire store and premises with smoke and dust. Par. 5. On divers days between the 15th day of April, 1892, the date of the first occupancy of said premises by the defendant, and the 15th day of October, 1893, the defendant suffered great and extensive damage to her goods, wares, and merchandise, to wit, her household furniture and carpets in the apartments above the store of said premises, and likewise to the goods, stock, and mer-

chandise contained in the store of said premises, and all in consequence of the untenable and uninhabitable condition of said premises,—that is to say, by the leaking of the roof of said house, and the leakage of the windows in said store of said premises, and likewise by the issuance of great volumes of smoke from the furnace of said building, all of which was to the damage of the defendant in the sum of \$500. The defendant claims \$500 damage." The reply admitted paragraphs 1 and 2 of said special defense, and denied every other allegation thereof. Upon the issues thus raised the case was tried to the jury, which returned a verdict, accepted by the court, for substantially the full amount of the plaintiff's demand.

The defendant has assigned 17 reasons for her appeal to this court,—11 in reference to the admission or exclusion of evidence, and 6 in regard to the charge of the court to the jury. Most of these assignments appear to us clearly groundless. Some, however, have weight. But these latter, with a single exception, present questions so peculiar, not alone to the present case, but to the unusual character of the trial had of such case,—questions, therefore, neither of general interest, nor likely to arise again upon another trial of this action,—that we deem it unnecessary to enter into a discussion of them, since upon the one ground, to which we have referred, and for the reason which we will proceed to indicate, a new trial should be granted. The plaintiff claimed the item of \$50, above referred to, was due him for one month's rent from October 15 to November 15, 1893, of a certain store and a tenement over it, each having been rented to the defendant for \$25 per month, and occupied by her,—the tenement from March 15, 1892, and the store from April 15, 1892. There was no dispute concerning such occupancy, the amount of rent agreed upon, or that it had all been paid until the last month, or that the rent for the last month had not been paid. The court, in its charge to the jury, said: "The most important question in the case is the question set up in the defendant's answer, claiming damages by reason of the plaintiff's failure to keep his agreement, made at the time when the lease was a matter of conversation between the defendant and the plaintiff. Upon that question the defendant assumes the affirmative, to prove her allegations." The court then added that she claimed to have proved them, and reviewed the evidence tending to that effect. The court then proceeded to say that it was stated, and the parties did not disagree, that the agreement as to the lease in this case was that it was to be for three or five years, or three years with the privilege of five, but that, though a written lease was prepared by the plaintiff and presented to the defendant on one or more occasions after the defendant had entered into possession, the same was not signed, and, as a monthly rent was reserved or agreed to be paid, it became a lease from month to month, liable to be terminated at the end of any month by either party; that,

under the law, in the absence of an express agreement, the landlord is not bound to make repairs, and no subsequent agreement will make him liable. The court added: "As I have already said, if the fact is so that she [the defendant] went in there under an agreement for a lease for three or five years, or three years with the privilege of five, that agreement could not be enforced, and it becomes a simple occupancy from month to month, liable to be terminated by either at their pleasure at the end of any month; and under those circumstances any agreement made by Mr. Corbett in regard to repairs would only last as long as there is a valid lease between them, or a valid occupation, which would be for the term of one month. And if he made a subsequent agreement on condition that she would remain, that would be merely binding for the length of the legal lease, which would be for one month." Finally, upon this point, the court further charged the jury in the language of the plaintiff's request: "Upon the evidence, first, if the contract for a lease and occupation of the premises was in parol, reserving a monthly rent, and the time of its termination was not agreed upon, all the provisions, conditions, and limitations of this parol lease expired with this parol lease at the end of the first month."

We think the court erred in thus charging the jury, for two reasons: First. It presented to them—and as substantially decisive of the case in the plaintiff's favor—an issue which could not properly arise under the pleadings, and, in effect, required the jury to find for the plaintiff, because the defendant had failed to prove what the reply to the special answer admitted. By referring to that answer, herein recited, it appears that the two admitted paragraphs expressly state the defendant's occupancy of the premises "on and for a long time previous to November 15, 1893," was under "a special agreement between her and the plaintiff." In subsequent paragraphs of the answer, referring to the time of leasing the premises, the alleged promises and representations of the plaintiff are averred as having then been made. The injury resulting to the defendant, for which she claims damage, is then stated as having taken place "between the 15th day of April, 1892, the date of the first occupancy of said premises by the defendant, and the 15th day of October, 1893." Every allegation in these paragraphs, subsequent to the first two, is denied. But it is evident that such denial could not reasonably be understood as contesting that concerning which the court itself declared to the jury: "These facts, as I understand it, are not disputed by either party. They agree as to the dates when she took possession of both the tenement and the store, and when she vacated." This being so, the distinct question presented by the allegations and denial was this: There being an admitted, valid, special agreement, under

which the defendant entered into possession of the premises, and under which she occupied them throughout, by reason of which the plaintiff claimed and was admitted to be entitled to the agreed rent of \$50 per month, concerning which the court also said: "To the claim of the plaintiff for one month's rent, or that on the 15th day of November, 1893, one month's rent, amounting to \$50, was due from the defendant, there doesn't seem to be any dispute,"—this, we repeat, being so, the question was, did the special agreement embrace the representation and promise stated? This the defendant clearly alleged, and sought by her evidence to prove. This the plaintiff as clearly denied in his reply, and contested by his evidence. To make the case, therefore, turn upon the want of binding effect of such promise upon the plaintiff, if in fact made; to tell the jury, as the court did, that the defendant was bound to prove by a fair preponderance of evidence that the plaintiff did make this agreement prior to her taking possession; and then tell them that if, as admitted, the agreement was by parol, it only lasted "as long as there is a valid lease between them, or a valid occupation, which would be for the term of one month,"—to do this is to compel the jury to try the case upon an issue not embraced in the pleadings, to sustain a claim of the plaintiff inconsistent with his own admission. And if the law be as was stated, the charge, for this reason, was erroneous.

But it was, as we think, also erroneous for another reason. The finding shows, and the court said to the jury, that the parties agreed that the lease was to be for three years with the privilege of five. After the defendant entered into possession, a written lease was presented to her by the plaintiff, but was not signed. Then the only lease, in fact, was by parol, and a monthly rent was reserved or agreed to be paid. The court, stating this, concluded, as we have seen, that by virtue of Gen. St. § 2967, it became a lease from month to month. But such is not the statute. To be a lease for a month only, three things must concur (the court refers to but two): The lease must be by parol, a monthly rent reserved, and the time of termination must not be agreed upon. The court made no reference to this last essential, except in the most incidental way, in repeating one of plaintiff's requests. It seems to us that a lease running for a fixed time could not well be considered one which had no agreed time of termination, within the fair intent and meaning of the statute. Such a lease as the present, where the lessee has taken possession under it, creates a tenancy at will, which by implication is held to be a tenancy from year to year; and it is sufficient for the purposes of this case to say, where such a tenancy exists, a contract made between the landlord and tenant, at the time of the letting, may con-

stitute, throughout the continuance of possession by the tenant, what the reply to the defendant's answer admitted to exist in this case, a valid special agreement under which such occupancy was held. *Larkin v. Avery*, 23 Conn. 304. There is error, and a new trial is granted. The other judges concurred.

(67 Conn. 590)

HOYT v. GUARNIERI.

(Supreme Court of Errors of Connecticut.
June 5, 1896.)JUSTICES OF THE PEACE—EXPIRATION OF TERM—
PENDING CASES—SUBSEQUENT JURISDICTION.

1. Under Gen. St. § 671, which provides that, "when any justice of the peace shall not be re-elected, all processes, actions, and matters, which have been begun by, or brought before him, before the expiration of his term of office, may be proceeded with by him in the same manner as if he were still in office," where a writ was issued and dated February 28, 1895, before a justice of the peace whose term of office expired on March 4, 1895, and was duly served and returned to the justice before his term of office expired, the justice had jurisdiction to render judgment in the suit, and to issue execution after his term of office had expired.

2. Pub. Acts 1889, c. 37, which provides that a justice shall not issue execution "after he has ceased to hold office," did not apply to such case, because, as to it, the justice had not ceased to hold office.

Appeal from court of common pleas, Fairfield county; Curtis, Judge.

Action of *scire facias* by Charles R. Hoyt against Rosa Guarnieri. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Joseph A. Gray, for appellant. H. Whitmore Gregory, for appellee.

TORRANCE, J. This is an action of *scire facias* against the defendant as garnishee. It was brought originally before a justice of the peace in Fairfield county, and came thence by appeal to the court of common pleas of that county, where the judgment from which the present appeal is taken was rendered in favor of the defendant.

The principal question upon this appeal relates to the construction of section 671 of the General Statutes, and the facts out of which the question arises are the following: The original writ, in which the present defendant was made garnishee, was issued and dated on the 28th of February, 1895, and was made returnable on the 16th of March, 1895, before a justice of the peace whose term of office (he not having been re-elected) expired on the 4th of March, 1895. The writ was duly served, and returned to the justice before his term of office expired. Upon the return day, neither the defendant in that suit nor the present defendant as garnishee appeared, and thereupon judgment was rendered in favor of the plaintiff, execution was at once issued, and all necessary steps taken to fix the liability of the garnishee. She, however, refused to pay, and thereupon the present proceeding was brought.

Upon the trial below, the principal question was whether the justice before whom the original suit was brought had jurisdiction, under section 671 of the General Statutes, to render judgment therein and to issue execution after his term of office had expired. The court held that he had not, and for this reason alone rendered judgment for the defendant; and in this we think the court erred. As originally passed in 1851, that section reads as follows: "That whenever any justice of the peace shall not be re-elected, all processes, suits and matters whatsoever, which shall have been begun by such justice of the peace, or which shall have been made returnable to him before the expiration of his office, may be proceeded with by said justice of the peace, to final judgment and execution, in the same manner as if the said justice had been re-elected and continued in office." Pub. Acts 1851, c. 14. This enactment remained in this form down to 1875, when it was changed by the revisers substantially to its present form. Revision 1875, p. 36, § 10. It now reads as follows: "When any justice of the peace shall not be re-elected, all processes, actions, and matters, which have been begun by, or brought before him, before the expiration of his term of office, may be proceeded with by him in the same manner as if he were still in office." We are of opinion that this change of phraseology does not import any change of meaning, and therefore that the present act must be construed as if no change in phraseology had been made. *Association v. Danielson*, 62 Conn. 319, 26 Atl. 345. In effect, then, this statute provides that all actions which shall have been brought before a justice of the peace—that is, which shall have been made returnable to him—"before the expiration of his term of office" may be proceeded with by him "to final judgment and execution" in the same manner as if he had been re-elected and continued in office. The court below seems to have held that an action was not "brought before" or "made returnable to" a justice for any purpose until the return day; but this, we think, is not so. For certain purposes an action may be said to be "pending before," "brought before," or "made returnable to" a justice prior to the return day. For instance, section 674 of the General Statutes speaks of a case as "pending" before a justice for the purpose of trial by agreement of parties, before the designated day of trial; section 679 speaks of such an action as "pending" before the return day, for the purpose of making a motion to have a jury summoned; while in section 669 a process is spoken of prior to the return day as one "made returnable" before a justice; and the same thing is done in section 686, where "all civil process returnable to a justice of the peace" is directed to be served at least six days, inclusive, before the sitting of the court. The statute in question is a remedial one, and, to be an effectual remedy for the evils and inconveniences it was designed to meet, it should receive a liberal construction. We think the original action, upon

which this *scire facias* proceeding is based, was, within the meaning of this statute, an action brought before the justice "before the expiration of his term of office," and therefore that he had jurisdiction to render judgment and to issue execution as he did. The construction contended for by the defendant is too narrow, and would almost inevitably work harm and inconvenience; while it is very difficult to see how any evil effects to any person can flow from the construction here put upon the statute.

Counsel for the defendant, in their brief, claim that, even if the justice had jurisdiction to render the judgment in question, he had none to issue execution, because of the provisions of chapter 37 of the Public Acts of 1889. That act applies, we think, only to judgments rendered by a justice before he "ceased to hold office." It has no application to the present case, because the justice here, quoad the case in which he rendered judgment, had not "ceased to hold office." The tenth amendment to the constitution of this state relating to the appointment of justices of the peace provides that "the period for which they shall hold their offices shall be prescribed by law." In effect, the section in question extends the term of justices of the peace with reference to cases falling within its provisions; it in effect prescribes by law the period for which they shall hold office, within the meaning of the constitution. There is error in the judgment complained of, and it is reversed. The other judges concurred.

(67 Conn. 594)

HEENAN v. BRIDGEPORT TRACTION CO.

(Supreme Court of Errors of Connecticut.
Feb. 21, 1896.)

REVIEW—NEGLIGENCE.

The decision of the trial court, in an action for personal injuries, on the question of negligence and contributory negligence, is conclusive on appeal.

Appeal from court of common pleas, Fairfield county; Curtis, Judge.

Action by Patrick Heenan against the Bridgeport Traction Company for personal injuries. There was a judgment for plaintiff, and defendant appeals. No error.

Stiles Judson, Jr., for appellant. James T. Lynch, for appellee.

PER CURIAM. The questions presented by the record are whether the motorman was guilty of negligence in the matter of stopping the car, and whether the plaintiff was chargeable with contributory negligence. These questions were for the determination of the trial court, and its decision is conclusive. There is nothing in the finding or memorandum of decision to indicate that the trial court imposed on the motorman a higher degree of duty than the law requires. No error. All concur.

(88 Vt. 556)

LINDSAY v. CANADIAN PAC. RY. CO.
(Supreme Court of Vermont. Orleans. Aug.
21, 1896.)

**RAILROADS—INJURY TO TRESPASSER ON TRACK—
MEASURE OF CARE REQUIRED—NEGLIGENCE—
CONTRIBUTORY NEGLIGENCE—EVIDENCE.**

1. A railroad company owes the duty of exercising reasonable care to prevent injury to trespassers on its tracks, and a greater measure of care is required in a populous part of a town or city, where houses in which children reside stand close beside the tracks, than in an unfrequented locality.

2. Whether a woman living in a house, the rear of which is but a few feet from a railroad track, with no fence between, is guilty of contributory negligence in leaving her two year old child in temporary charge of a girl ten years of age, after placing the child in a perambulator on the walk in front of the house, is a question for the jury.

3. Whether a railroad company which ran a switch engine backward at the rate of four miles an hour through the yards, where it collided with a child that had strayed from one of several houses standing within a few feet of the track, was guilty of negligence in omitting to watch for obstructions, is a question for the jury, though the track at that point was clear when the engine passed in the other direction, three or four minutes before the accident.

4. In an action against a railroad company for killing a child that had strayed from a house standing within a few feet of a yard track, with no fence between, evidence that people frequently crossed the track at that point, and that children were in the habit of playing on the track there, is admissible.

Exceptions from Orleans county court; Start, Judge.

Action by H. D. Lindsay, as administrator of the Pelkey estate, against the Canadian Pacific Railway Company, to recover for the negligent killing of plaintiff's intestate. Verdict directed for defendant, and plaintiff excepts. Reversed.

Cook & Redmond, for plaintiff. W. D. Crane and Bates & May, for defendant.

TYLER, J. The following are the material facts which the plaintiff's evidence tended to show: That it was the duty and practice of the defendant's shunting crew to go with a shunting engine into the yard of the Boston & Maine Railroad Company in the village of Newport, and pass along down the track to granite sheds after cars. This was done sometimes once a day, sometimes not oftener than once or twice a week, and some weeks not at all. The Pelkey house, in which the intestate lived with her father and mother and three other small children, was situated between Coventry street and said track, the rear of the house being from six to ten feet from the track. The family had lived there about four years. The house next north of the Pelkey house was known as the "Mizo House," the rear of which was also within a few feet from the track. Between these houses there was an unobstructed space of ten or twelve feet, extending from the street to the track. North of

the Mizo house were other houses, fronting the street, their rear ends facing the yard of the Boston & Maine. The portion of the street in the vicinity of said houses was thickly settled, and had been for three or four years prior to the accident, and there were quite a number of children in that vicinity. The plaintiff's mother left her house just before 7 on the evening of the accident, July 2, 1894, to go to a store on an errand, but directly returned to the house for some money, and left again soon after 7. Before leaving, she noticed that her children were on the veranda, from which she took the intestate, who was about two years old, and put her in a baby carriage on the walk in front of the house, where there were three or four other children playing, and left her there in charge of her cousin Rose, a girl ten years of age. After Mrs. Pelkey went away, Rose wheeled the intestate in the carriage in front of the house until she heard a six year old sister of the intestate cry from behind the house, when she took the intestate from the carriage, carried her up a flight of four steps, and placed her in a chair on a platform directly in front of the door of the Pelkey house, near the sidewalk. Rose then ran round the house to the crying child, whom she got, and returned immediately to the place where she had left the intestate, but the intestate was gone. Rose then ran between the Pelkey house and the Mizo house in search of her, saw her standing on the track, and the engine approaching her. Rose hurried towards her, but fell just before reaching her, and the engine struck the intestate, and killed her.

Shortly before the accident, the engineer and two brakemen, pursuant to orders, took a Mogul engine, which was much larger than the one generally in use there, and ran down the track of the Boston & Maine, past the Pelkey house, to couple to and pull up a car standing near the granite sheds. When the car was attached, they ran the engine backward past the Pelkey house, where it ran over and killed the child. The engine moved at the rate of about four miles an hour. The engine and tender were sixty feet long, and it was fifty-five feet from the rear end of the tender to the point where the child was struck. It was not more than two or three minutes from the time the engine passed that point till its return. The engineer knew that there was no fence between the track and the house. At the time of the accident the father was away at his usual night employment. The plaintiff's counsel offered to show that children were in the habit of playing upon these tracks, and that the space between the Pelkey house and the Mizo house was a common passageway for people going to and from the street across the tracks, and claimed that the shunting crew, by reason of the frequency of their trips, must have

known, or ought to have known, these facts. The evidence was excluded, to which the plaintiff excepted.

There was no evidence tending to show that any one of the shunting crew saw the intestate on the track. The plaintiff's evidence tended to show that they were so situated in respect to the engine, cars, and tracks that they could not see her. When the evidence was closed, the court, on motion, directed a verdict for the defendant, to which the plaintiff excepted.

The rule of law adopted by the court below, and which the defendant's counsel contend for, is that, the plaintiff being a trespasser upon the railroad track, the defendant owed her no duty beyond that of exercising reasonable care not to injure her after her presence on the track was discovered; that, though she was of such tender age that negligence was not imputable to her, her parents were guilty of negligence in not preventing her from running onto the track, and that the plaintiff was constructively chargeable with their negligence. There are two lines of authorities upon this subject, in which opposite views are maintained. We quote briefly from a few of them. *Chrystal v. Railroad Co.*, 105 N. Y. 164, 11 N. E. 380, was an action to recover for damages to an infant 17 months old. The accident occurred in a sparsely settled village, the infant having escaped from its mother. The court said: "The sole negligence charged, as we understand it, is that the engineer ought sooner to have discovered the plaintiff upon the track, and stopped the train before it reached him. * * * An engineer is not bound to stop his train the moment he sees some living object on the track. * * * He is not, bound to expect helpless infants on the track, without sufficient knowledge or ability to escape when warned of danger. * * * He could not know, when he first saw plaintiff, that he was too young to be conscious of the danger to which he was exposed, and without the imputation of negligence he could run on until he discovered that he was heedless of the danger. Reasonable care in the management of trains, which must make their time between stations, and have the right of way, does not require more. * * * All the engineer was bound to do after the discovery of the peril was to use reasonable diligence and care to avert it." In *Cauley v. Railroad Co.* (Pa. Sup.) 40 Am. Rep. 664, the accident occurred in a populous suburb of Philadelphia. The court said: "But if the use of a railroad is exclusively for its owners, or those acting under them, if others have no right to be upon it, they are wrongdoers whenever they intrude. The parties lawfully using it are under no obligation to take precautions against possible injury to intruders upon it. Ordinary care they must be held to; but they have a right to presume, and act upon the presumption, that those in the vicinity will not violate the laws, will not trespass on the

right to a clear track; that even children of tender age will not be there, for though they are personally irresponsible they cannot be upon the railroad without a culpable violation of duty by their parents or guardian. Precaution is a duty only so far as there is reason for the apprehension. No one can complain of want of care in another where care is only rendered necessary by his own wrongful act. * * * If the rule against trespassers on railway tracks is made to depend upon the intelligence and age of the trespassers, it is easy to see that the law upon this subject will very soon become involved in inextricable confusion." The same court said in *Railroad Co. v. Hummell*, 44 Pa. St. 375: "It is time it should be understood in this state that the use of a railroad track, cutting, or embankment is exclusive of the public everywhere, except where a way crosses it. This has more than once been said, and it must be so held, not only for the protection of property, but, what is far more important, for the preservation of personal security, and even of life. In some other countries it is a penal offense to go upon a railroad. With us, if not that, it is a civil wrong of an aggravated nature, for it endangers not only the trespasser; but all who are passing or transporting along the line." In *Morrissey v. Railroad Co.*, 126 Mass. 377, a child four years old was run over in a cut through a ledge at a point on defendant's track opposite an opening by the side of the track, where there was no fence, through which was a path, open to every one to use, but not as a public way, highway, or traveled place where the defendant was required by statute to maintain warning boards, or where the plaintiff or his mother had any private rights, but at a point where the rail was visible from the station to the place where the plaintiff was hurt. The court said, in discussing the case: "The plaintiff, at the time of the injury, was a mere intruder and trespasser on the railroad track, * * * but was there merely for his own amusement, and was using the track as a playground. The defendant corporation owed him no duty except the negative one not maliciously or with gross and reckless carelessness to run over him." If the train had been running through a village, where dwelling houses were situated near the track, upon which children were likely to, and often did, wander, and this was known, or ought to have been known, to the engineer, the decision in the above case might have been different, for in *Lovett v. Railroad Co.*, 9 Allen, 557, that court adopted the rule laid down in *Hilliard on Torts*, that: "The fact that a plaintiff is a trespasser or violator of the law does not of itself discharge another from the observance of due and proper care towards him, or the duty of so exercising his own rights as not to injure the plaintiff unnecessarily." Page 160. The better rule is stated in *Conley v. Railroad Co.* (Ky.) 12 S. W. 764: "We recognize and

repeat the rule that the operators of a train are ordinarily under no obligation to look out for trespassers; that, as a rule, they have the exclusive right to their track, and have the right to presume that persons will not trespass upon it, and are, therefore, under no obligations to look out for them. But this rule as to looking out for such persons has its exceptions, one of which is that, when the train is coming through a city or town, and the people thereof may cross the track at any and all hours, at such points as may be convenient, whether public or not, and the operators have reason to know that such is the habit, it is their duty to look out for such persons and take reasonable care not to run over them." In *Gunn v. Railroad Co.* (W. Va.) 14 S. E. 465, which was an action to recover for the death of two young children, the court, after an exhaustive discussion of the principles involved, said: "In conclusion, summing up our views of this case, we are of opinion, from principles already announced by this court, that a railroad company owes to a child on its track, apparently insensible of its danger, the duty of ordinary care in keeping before its running train an outlook, reasonable according to the circumstances, in order to discover the child. * * * In *Isbell v. Railroad Co.*, 27 Conn. 393, the court reviews a large number of cases, and gives many interesting illustrations in elucidating the rule of law that, though a man do a lawful thing, yet, if any damage thereby be done to another which he could reasonably have avoided, he will be held liable, according to the maxim, "*Sic utere tuo ut alienum non lædas.*" The opinion of Carpenter, J., in the recent case of *Mitchell v. Railroad Co.* (N. H.) 34 Atl. 674, is directly in point. We quote: "The conduct of a person of average prudence in doing his lawful business is the legal standard of the defendant's duty. Such a person running a locomotive engine would, as the law requires, manage it with greater or less caution, according as he is passing through a mob, over the crowded streets of a city, the less traveled highways of a village, the comparatively unfrequented country, or a territory where there is no crossing, and no reason to expect any one to be upon the track. The measure of his care would be proportionate to the danger of injury from the want of it." If they knew, or ought to have known, that the deceased was in a place where she was likely to be injured by the locomotive in passing along the track, it was their duty to exercise ordinary care to prevent such injury, whether she had a right to be there or was a mere trespasser. In the case of *Pickett v. Railroad Co.* (N. C.) 23 S. E. 264, it is said that: "He who has the last clear chance, notwithstanding the negligence of the adverse party, is considered solely responsible for injuries resulting from his failure to exercise reasonable care. The failure of an engineer to perform his duty to maintain a reasonably

vigilant lookout along the track in front of the train renders the railroad company liable for killing a human being lying on the track, apparently helpless from any cause, when the engineer could have seen him by the exercise of ordinary care." (By this remark we do not understand the court to relax the rule of law in respect to contributory negligence.) This case also lays down the rule that the failure of an engineer to perform his duty to maintain a reasonably vigilant lookout along the track in front of the train renders the railroad company liable for killing a human being lying on the track, apparently helpless from any cause, when the engineer could have seen him by the exercise of ordinary care.

The decisions are thus at variance, which is partly by reason of the varying facts upon which they are made. But the most humane and reasonable rule applicable to this case, and the one most in accord with the decisions of this court, is that the defendant did owe to the intestate the duty of reasonable care; and whether, in the circumstances detailed in the exceptions, such care was exercised by the defendant's employés, was a question of fact. *Robinson v. Cone*, 22 Vt. 213; *Magoon v. Railroad Co.*, 67 Vt. 177, 31 Atl. 156. The shunting crew had run the engine down past the Pelkey house, without obstruction, two or three minutes before the accident; but whether they had a right to assume that, even in that short space of time, a child would not escape from one of the houses situated near, and get upon the track, and therefore omit to watch the track as the engine moved backward, was a question of fact. Whether, in view of the known danger of the situation, it was prudent for the parents of the intestate to leave her in the manner shown by the evidence, so that she could in an unguarded moment escape upon the track, or whether they were guilty of contributory negligence, was a question of fact for the jury. The evidence offered in respect to children and others being frequently upon the tracks in that locality should have been admitted. Judgment reversed, and cause remanded.

(68 Vt. 622)

STATE v. HARRINGTON.

(Supreme Court of Vermont. Orange. Aug. 4, 1896.)

ACT REQUIRING ITINERANT VENDORS TO PROCURE LICENSES—CONSTITUTIONALITY.

1. Acts 1894, No. 59, provides that every person desiring to do business in the state as an itinerant vendor shall deposit \$500 with the state treasurer, after which, on application, and payment of \$25 as a fee, he is entitled to a state license for one year; that he may then apply to the city or town clerk where the goods are kept for sale, and shall file a sworn statement of the average value of his stock, and if, in the judgment of the board of aldermen or selectmen, a local license should be granted, on payment of a sum based on such value he is entitled to a local license. The \$500 deposit is returned at the end of the year less fines and

penalties. *Held*, that the act is not in violation of Const. c. 1, art. 7, which declares that "government is, or ought to be, for the common benefit, * * * and not for the emolument or advantage of any single man, family, or set of men who are a part" of a people, nation, or community.

2. It is not in violation of the inhibition of the federal constitution (article 1, § 10), that "no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

3. The requirement of a deposit of \$500 is not in violation of the constitutional provision that private property shall not be taken without due process of law.

4. It is not in violation of the federal constitution (amendment 14), which provides that "no state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States."

5. That the provisions of the act are oppressive on the class of persons known as "itinerant vendors" is not a ground for declaring the act unconstitutional.

Taft, J., dissenting.

Exceptions from Orange county court; John W. Rowell, Judge.

A. E. Harrington was prosecuted on an information for violation of Acts 1894, No. 59, requiring itinerant vendors to take out state and local licenses. Heard on a general demurrer at the June term, 1895. To a judgment overruling the demurrer, respondent excepts. Affirmed.

D. C. Hyde, State's Atty., and John H. Watson, for the State. Darling & Darling, for respondent.

TYLER, J. This information is based upon Act No. 59, Laws 1894, in which the words "itinerant vendors" are construed to mean and include all persons who engage in a temporary or transient business, either in one locality, or in traveling from place to place selling goods, wares, and merchandise, and who, for the purposes of carrying on such business, hire, lease, or occupy any building or structure for the exhibition and sale of such goods, etc. The law excludes from its provisions sales made to dealers by commercial travelers and selling agents in the usual course of business, and bona fide sales of goods, etc., by sample, for future delivery; hawkers on the streets; and peddlers from vehicles. It requires that every itinerant vendor who proposes to do business in this state shall deposit \$500 with the state treasurer, after which deposit, upon application in prescribed form, and the payment of \$25 as a state license fee, he is entitled to an itinerant vendor's license from the state treasurer, authorizing him to do business in this state for one year. He may then apply to the clerk of the city or town where the goods are kept for sale for a local license. With his application to such clerk he must file a true statement, under oath, of the average quantity and value of his stock. The clerk submits the statement to the listers for their valuation. Their certificate of valuation is then submitted to the board of aldermen or selectmen, "who must

forthwith act upon such application, and if, in the judgment of such board, such application should be granted, such city or town clerk may be authorized to issue a license to such applicant," who shall pay therefor a sum ascertained by the clerk by a computation based upon the valuation of the listers, in the ratio and at the rate of the last preceding assessment of taxes. It is provided that every itinerant vendor who sells, exposes or advertises for sale, goods, wares, and merchandise, without a state and local license, shall be liable to fine or imprisonment, or both. The local license, in any event, expires on the last day of the next March. The deposit of \$500 is subject to the payment of all fines and penalties that may be incurred by the licensee through violations of the law. Upon the expiration of the state license the state treasurer returns to the licensee the remainder of the deposit, after deducting all fines and penalties. The case comes here upon the sole question of the constitutionality of the law.

The respondent's counsel contend that the law is in violation of both the state and federal constitution; that it is an encroachment upon the natural, inherent, and inalienable right of citizens to acquire and possess property through the agency of labor; that it discriminates between itinerant vendors and resident vendors, and between classes of itinerant vendors, and thus violates that portion of chapter 1, art. 7, of the constitution which declares that "government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community, and not for the particular emolument or advantage of any single man, family or set of men, who are a part of that community"; that it is in conflict with the inhibition of the federal constitution that "no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws"; that the requirement of a deposit of \$500 deprives an itinerant vendor of his property without due process of law; that it violates the fourteenth amendment of the federal constitution, which commands that "no state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States"; that the requirements of the law are unjust and oppressive, and violate the natural as well as the constitutional rights of the citizen.

The legislature had in view the class of persons who go from place to place, and temporarily occupy rooms for the exhibition and sale of goods, and enacted the law in the apprehension that there was fraud in such sales. Its title is, "An act to prevent and punish fraud in the sales of goods, wares and merchandise at public or private sale by itinerant vendors, and to regulate such sales." It seems to have been passed as a police regulation, though the local license fee is equivalent to taxation upon the grand list in each

town in which such license is taken. The police power of a state extends beyond the protection of health, peace, morals, education, and good order. It is the power to govern men and things within the limits of its dominion. It comprehends all those general laws of internal regulation necessary to secure peace, good order, the health and comfort of society, and the regulation and protection of all property in the state. Its power in these respects is supreme. *Desty, Tax'n, 1377*, and cases cited; *Cooley, Const. Lim. 704*. "Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in it by the constitution, may think necessary and expedient."

* * * The power we allude to is the police power,—the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as it shall judge to be for the welfare of the commonwealth and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise." Chief Justice Shaw in *Com. v. Alger, 7 Cush. 53*. The law is clearly stated by Redfield, C. J., in *Thorpe v. Railroad Co., 27 Vt. 140*: "This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property, within the state. According to the maxim, 'Sic utere tuo ut alienum non lædas,' which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others." "The powers of the state to impose restraints and burdens upon persons and property, in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States, and essentially exclusive." *Wilkerson v. Rahrer, 140 U. S. 545, 11 Sup. Ct. 885*.

The question is whether this law is within the scope either of the police or taxing power of the state. If it is beyond such scope, and unconstitutional, it is in respect to the licenses, or the special deposit with the state treasurer, or the authority conferred upon the board of aldermen or selectmen to grant or refuse local licenses according to their judgment. Citizens have not an inherent and inalienable right to acquire and possess property, without the legislative restraint of taxation. It is also true that the property alone is not

liable to taxation. A tax may be assessed on the privilege of carrying on a particular business, and, when it takes this form, convenience in collecting will commonly require payment of a license fee, as a condition to the right to carry on the business. *Cooley, Tax'n, 384 et seq.; License Tax Cases, 5 Wall. 472*. "The mode of levying, as well as the right of imposing, taxes, is completely and exclusively within the legislative power, which, it is to be presumed, will always be exercised with an equal regard to the security of the public, and individual rights and convenience." *Cowles v. Brittain, 2 Hawks (N. C.) 204*. Judge Cooley remarked in *Youngblood v. Sexton, 32 Mich. 406*, that, while a statute might have revenue for one object, the exercise of the police power of the state might be another. So, if this law were to be considered as a mere revenue law, it must be in the light of the settled rule, as laid down by all writers upon taxation, that everything to which the legislative power extends may be the subject of taxation, whether it be person, property, franchise, privilege, occupation, or right; that not only is the power unlimited in its reach as to subjects, but, in its very nature, it acknowledges no limits, and may be carried to any extent which the government may find expedient. It may therefore be employed again and again upon the same subjects, even to the extent of exhaustion and destruction, and thus become, in its exercise, a power to destroy. *Cooley, Tax'n, 384*, and cases cited in notes; *Nathan v. Louisiana, 8 How. 73*; *License Tax Cases, supra*; *Railroad Co. v. Peniston, 18 Wall. 5*; *New Orleans v. Telephone Co. (La.) 3 South. 533*.

No employment is exempt from taxation. The state has an undoubted right to determine what employments shall be permitted, and to forbid those which are deemed prejudicial to the public good. Rules for the conduct of the most necessary and common occupations are prescribed, when from their nature they afford peculiar opportunities for imposition and fraud. The state has authority to make extensive and varied regulations as to the time, mode, and circumstances in and under which parties shall assert, enjoy, or exercise their rights, without coming in conflict with any of those constitutional principles which are established for the protection of private rights or private property. *Cooley, Const. Lim. 742 et seq.* That all occupations may be taxed, when no restraints are imposed by the constitution, is settled beyond controversy. It is no valid objection to a tax on business that its operation will not be uniform, but it must operate uniformly upon each class taxed. *Cooley, Const. Lim. 609*, note. A license tax cannot be deemed unequal because reaching one occupation only, if it reaches all who follow that occupation. * * * It would be only when individuals of the class were singled out for exemption that the inequality would be manifest. *Cooley, Tax'n, 128*. It was said by Judge

Cooley in *Youngblood v. Sexton*, *supra*, that occupation taxes are no violation of the rule of uniformity. *Worth v. Railroad Co.*, 89 N. C. 301. *Desty, Tax'n*, 1333, says: "Municipal corporations may tax a business or occupation of one class, and omit to tax that of another class, and may classify merchants, and tax each class in its discretion; but a tax on any occupation must reach all who follow it,—all of a class of persons or things." The court said in *Ficklen v. Taxing Dist.*, 145 U. S. 1, 12 Sup. Ct. 812: "No doubt can be entertained of the right of a state legislature to tax trades, professions, and occupations, in the absence of inhibition in the state constitution in that regard. * * *" Quoting again from *Youngblood v. Sexton*: "A particular business may be taxed, while others are spared, not only because for any reason it can best bear the burden, but also because such surroundings attach themselves to the business taxed as to render the discouragement and discipline of heavy taxation wise and politic." He instanced the taxing of state banks out of existence, which was sanctioned in *Bank v. Fenno*, 8 Wall. 533. It is laid down in 2 Dill. Mun. Corp. § 793, that the usual provisions in the constitutions of the different states concerning taxation do not prohibit the legislatures from imposing, or authorizing municipal corporations to impose, taxes upon trades, special professions, and occupations, and that authority to tax all persons exercising any profession may be executed, to the extent of taxing each member of a firm separately. The right of the legislature to impose a license tax upon peddlers was recognized in *State v. Hodgdon*, 41 Vt. 139, and *State v. Pratt*, 59 Vt. 590, 9 Atl. 556. In the latter case that part of section 3951, R. L., which required a license of a person peddling tea of foreign growth, was held in conflict with the federal constitution, as attempting to regulate commerce between the states. "The legislature, if it does not make discriminations in violation of the state constitution, may authorize municipal corporations to tax transient traders or itinerant dealers and peddlers; and such tax is not in violation of the constitution of the United States, although the property be brought from another state, provided, it must be added, it does not unlawfully discriminate in favor of the resident, and against the non-resident, citizen." Dill. Mun. Corp. 744; *Ward v. Maryland*, 12 Wall. 418; *Welton v. Missouri*, 91 U. S. 275; *Webber v. Virginia*, 103 U. S. 344; and numerous other cases cited in note. It was held in *Commissioners v. Roby*, 8 Ired. 250, that a license may be imposed on all transient persons keeping "stores" in the town, imposing it as a police regulation, though called a tax in the statute. *State v. French* (Mont.) 30 Lawy. Rep. Ann. 415 (41 Pac. 1078), and *State v. Wheelock* (Iowa) 30 Lawy. Rep. Ann. 429 (64 N. W. 620), have exhaustive and valuable notes upon this subject. In the former case the question was whether imposing the payment of license fees upon laundrymen violated the uniformity clause in the state con-

stitution in respect to taxation. It was held that a license fee was not a tax, within the constitutional restrictions. In the latter case a license fee of \$100 per annum, charged itinerant vendors of drugs who professed to cure or treat all diseases, was held reasonable, and not an unconstitutional interference with interstate commerce, though the drugs were in original packages, brought from other states. The annotations to these cases are exhaustive and valuable. The general rules deduced are: That "the power of a sovereign state to fix license fees at such figures as it may see fit would appear to be unlimited, except in cases in which its exercise would conflict with some constitutional provision. * * *" That "statutory and charter restrictions upon the power to tax, like constitutional ones, do not apply to license fees required for the purpose of regulation." Among the notes of cited cases are the following: The legislature of a state may impose such license taxes upon privileges as it may choose. *City of Columbia v. Beasley*, 1 Humph. 232. And it may, in regulating any matter which is a proper subject for the police power, impose such sums for licenses as will operate as a partial restraint on the business, or on the keeping of a particular kind of property. *Tenney v. Lenz*, 18 Wis. 566. And a requirement of a license fee from peddlers, classifying them as foot peddlers, peddlers with one-horse cart or wagon, and peddlers with two-horse cart or wagon, charging a different rate for each, is a police requirement, and a valid exercise of a power to regulate, and not in conflict with a constitutional requirement of uniformity of taxation upon all of a class. *Kneeland v. City of Pittsburgh* (Pa. Sup.) 11 Atl. 657. The constitutional requirement as to uniformity of taxation does not prevent a municipality from discriminating in fixing rates for licenses for the transaction of different classes of business, and imposing a higher rate upon one class than upon another. *Ex parte Hurl*, 49 Cal. 557. A license tax upon different industries, varying in amount upon each, but being the same upon the subjects of the same class, is not unconstitutional for want of uniformity. *Hadtner v. City of Williamsport*, 15 Wkly. Notes Cas. 138. And a license tax imposed by a municipality endowed with discretion on the subject will not be declared unreasonable by the courts merely because they deem it unwisely large. *Cooper v. District of Columbia*, 4 MacArthur, 250. And when the legislature confers upon a municipal corporation the power to pass ordinances of a special and defined character, if the power thus delegated be not in conflict with the constitution, an ordinance passed in pursuance thereof cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental powers of the corporation, or under a grant of power general in its nature. *Ex parte Chin Yan*, 60 Cal. 78. So, a license fee of \$200, imposed upon the business of vending butcher's meats, is not unauthorized, oppressive, or in restraint of trade, when required un-

der a statute empowering municipalities to fix the fee for licenses at from \$5 to \$500. *City of St. Paul v. Colter*, 12 Minn. 41 (Gil. 16). Cases are cited in these notes where municipal ordinances have been held unconstitutional and void on account of the excessive amount of license fees imposed, but few, if any, cases are cited where statutes have been declared unconstitutional for this reason. The imposition of license taxes is, upon abundant authority, within the constitutional authority of the legislature, though it may interfere, as the payment of all taxes directly does, with the acquisition of property. The law is not a "class" law, for all persons of the class of itinerant vendors, whether resident or nonresident, are subject alike to its requirements. Peddlers, hawkers, and drummers are not of this class. The occupation of itinerant vendors, from the manner in which it is conducted, is as distinct from that of resident vendors as is that of peddlers and auctioneers. It imposes no burden upon interstate commerce, as the occupation licensed is not directly concerned therein. It makes no discrimination between our own citizens and citizens of other states, and therefore does not violate the command of the federal constitution that "no state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States." The law could not be deemed oppressive in respect to licenses if only the state and one local license fee were required for the year, but it must be remembered that each local license fee is for the privilege of doing business in the town in which it is payable.

The money deposited with the state treasurer is returnable to the licensee, upon his surrender of the license, less the amount of fines that may have been imposed and costs, so it cannot be held that he is deprived of property without the process of law. The requirement of this deposit is not more oppressive than a requirement of a statute of Illinois that operators of butter and cheese factories on the co-operative plan shall file with the circuit clerk a bond in the sum of \$6,000, with two sureties, conditioned that the company shall make monthly statements of the amount of the product and sales, prices received, and dividends earned. This was held to be a proper exercise of police power; that the fact that law regulates trade, or in some degree operates as a restraint upon trade, does not render it obnoxious to any constitutional provision; that a statute is not subject to the objection that it is not general, because it applies to a class of persons, if it applies to all persons similarly engaged. An ordinance of the city of Chicago which requires auctioneers to pay an annual license fee of \$200, and to give a bond in the penal sum of \$1,000, with two sureties, to be approved by the mayor, conditioned for the due observance of the ordinance, was held reasonable and valid as a police regulation. *Wiggins v. City of Chicago*, 68 Ill. 372. The

statute of a state relating to oleomargarine, its manufacture and sale, was held to belong to the police power of the state for the prevention of fraud, in *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1237. See notes to *State v. Goodwill* (W. Va.) 25 Am. St. Rep. 870 (10 S. E. 285).

Our statute is nearly an exact transcript of the Massachusetts act of 1890. The only material difference is that under the latter the city or town clerk, on application, after ascertaining the value of the stock of goods, and the amount to be paid for the license according to the rate of the last preceding tax levy in his city or town, "shall issue" a license upon payment to him of the amount so ascertained. The supreme court, in *Com. v. Crowell*, 156 Mass. 215, 30 N. E. 1015, upheld the law as a proper police regulation. Connecticut has a statute providing that city and town authorities may issue licenses to such persons as they find proper to engage in a temporary or transient business, for the sale of goods, wares, and merchandise, for a term not exceeding a year, on the applicant paying a fee not less than \$1, nor more than \$100, as the authorities may direct, and, except in the sale of farm and sea products, making it a misdemeanor to engage in such business without a license. The supreme court, in *State v. Conlon*, 33 Atl. 519, declared the act void because, as it said, "it permits the local authority to grant a license to one, and to refuse it to another, in pursuance of a discretion unguided and unrestrained by law," and " * * * the absolute power to fix the license fee at \$1 for one year, or \$100 for one day, * * *" thus making it nominal or prohibitive at pleasure. *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 1071, is authority for this holding, though it is not cited in the opinion. In that case an ordinance conferred upon supervisors arbitrary power, at their own will, and without the exercise of discretion, in the legal sense of the term, to give or withhold consent to the carrying on of laundry business within the limits of the city and county of San Francisco, and made it unlawful to carry on such business without such consent. This was held unconstitutional. The court said that "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails. * * *" The Connecticut court states the general rule that "the legislature has power to require a license for the transaction of any business, either for the purpose of raising a revenue, or for the purpose of regulating the conduct of such business as public interests may demand." It admits the power in the legislature—"First, to regulate the conduct of all business, or of any particular business, harmless in its nature,

and which every citizen has the right to carry on; and, second, to regulate, even to the extent of prohibition, any business in its nature injurious to the public." But the court says that " * * * the exercise of that power in the two cases is governed by different principles. In the latter case the controlling object is giving to the public that protection from danger which the state is bound to give, and ordinarily the legislature must be the judge of the degree of danger, and of the required protection. It may restrict the business by requiring large fees, or by other protective regulations." The court makes the point that the act draws no line of distinction, except between a business that is temporary, and a business that is not temporary, without defining the former or showing that it is more dangerous to the public than the latter. The information was for the sale of boots and shoes without license, and the court construed the act to deal with temporary or transient business, for the purpose of regulating an ordinary and lawful business, in which all citizens have a right to engage, and held the act to be in violation of Bill of Rights, § 1, declaring all men equal in rights, and that no man or set of men is entitled to exclusive privileges, which is substantially like the constitutional provision of Massachusetts and of this state. The court conceded the full legislative power to license and regulate a lawful business, as well as a business which in its nature is dangerous to the public, though its regulations must be governed by different principles in the two cases. Therefore, had the Connecticut statute, like ours, defined "temporary or transient business," granted no exclusive privileges to any persons of the class of transient dealers, and referred the granting of licenses to the legal discretion, instead of the mere caprice, of the local authorities, possibly it might have been held constitutional. At all events, that statute differs from ours in important particulars. Section 6 provides that upon such vendor's filing his sworn application, depositing \$500, and paying \$25, the state treasurer shall issue a license to him; and section 9 provides that the city or town clerk, when authorized by said board, and upon payment of the license fee, shall issue a license. But it provides that, though such vendor has complied with every requirement of the law down to the time the aldermen or selectmen "act upon such application," they may then refuse the license, if in their judgment it should not be granted. The act does not confer upon this board authority to grant or refuse licenses at their mere option, as in *Yick Wo v. Hopkins*, and in *State v. Conlon*, supra. Here the board are required to act forthwith upon the application, and to exercise their judgment whether a license should or should not be granted. If they should re-

fuse to act in any case, they could doubtless be moved by mandamus. When they have acted, and passed their judgment upon the application, resort to mandamus cannot be had, because they are invested with quasi judicial power, and the legal presumption is that they have acted judiciously. No point is made in the respondent's brief that it is not competent to leave the granting of licenses to the judgment of the board of aldermen or selectmen. Discretion should be reposed in some person, otherwise books, pictures, and other merchandise of an immoral character might be offered for sale. Whether there is reason to apprehend that vendors who go about from place to place, disposing of goods by auction and private sale, will deceive and defraud the public as to the quality of the goods sold, the legislature, as was said by the court in *State v. Conlon*, must be the judge.

It must be conceded that the requirements of this law are oppressive upon the class of persons known as "itinerant vendors," in respect to the deposit of \$500, and in the payment of a license fee in each town where business is transacted. But the question is not whether the law is oppressive or unjust, but whether it contravenes any provision of the state or federal constitution. If it does not, the court has no right to declare the act void, for the constitution alone is the boundary of the power of the legislature. *Cooley*, Const. Lim. 10, says: "The government of the United States is one of enumerated powers; the national constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess. In this respect it differs from the constitutions of the several states, which are not grants of powers to the states, but which apportion and impose restrictions upon the powers which the states inherently possess." It is not sufficient to say that the law violates the spirit of the constitution. "Courts are not at liberty to declare a statute unconstitutional because, in their opinion, it is opposed to a spirit supposed to pervade the constitution, but which is not expressed in words, nor because it is opposed to the fundamental principles of republican government, unless those principles are placed by the constitution beyond legislative encroachment." *State v. Corbett* (Minn.) 59 N. W. 318. It was said in *Youngblood v. Sexton* that courts cannot annul tax laws because of their operating unequally and unjustly; that, if they could, they might defeat all taxation. See *Cooley*, Const. Lim. 200, 587, 706, and notes.

We are unable to find that the law in question, as a police regulation, is in contravention of any constitutional provision. We have incidentally considered the authority of the legislature in respect to taxation,

out it will be borne in mind that this law imposes a license fee, and not a tax. The distinction will also be observed between the cases where license fees have been imposed by municipal ordinances without charter or other legislative authority, and those where such fees are imposed by the state through legislative enactment. In the latter case the reasonableness of the fees, in respect to their amount, must be left with the sovereign state. The judgment overruling the demurrer, and adjudging the information sufficient, is affirmed. The judgment that the respondent is guilty is pro forma reversed, and cause remanded.

TAFT, J., dissents.

(67 Conn. 473)

JORDAN et al. v. PATTERSON et al.

(Supreme Court of Errors of Connecticut.
April 15, 1896.)

CONTRACT FOR MANUFACTURED GOODS—INTERPRETATION—BREACH—MEASURE OF DAMAGES—SUBSALES—PROFITS—EVIDENCE—ADMISSIBILITY.

1. In an action for breach of contract for the manufacture and delivery by defendants to plaintiffs of a certain quantity of goods, it appeared that between February 10, 1892, and March 16, 1892, plaintiffs sent to defendants 14 separate orders for goods of their manufacture, each one duly numbered and signed, specifying the number, quality, and price of the goods ordered, and the date when they were to be delivered, as well as the date of payment; that on March 16, 1892, defendants sent a letter to plaintiffs as follows (omitting caption): "We are in receipt of the following contracts, for which we thank you" (describing the 14 orders by their numbers and amounts). The orders and the letter were offered as proof of a contract between the parties. There was no ambiguity as to the terms of the orders or of the letter, and there was no suggestion of fraud. *Held*, that the contract, if any, was a written one, and hence its interpretation was a question of law, for the judge.

2. The letter of March 16, 1892, was an acceptance by defendants of all the orders named in it, and hence there was but one contract.

3. In such case the measure of damages is the difference at the time and place of delivery between the price plaintiffs had agreed to pay, and the market price, if greater than the agreed price.

4. For the breach of a contract to deliver certain manufactured goods, if there be no market from which plaintiff can supply himself with the goods contracted for he may recover the actual damages which he has suffered.

5. In an action for the breach of a contract to deliver certain manufactured goods, the fact that there was no market in which plaintiff could procure such goods as defendant was to deliver to him may be proved by the testimony of any person who has knowledge on the subject.

6. Where one has contracted for goods for the purpose of reselling them, and at the time of the contract has bargained to sell a portion of them to other persons at a profit, and the vendor has knowledge of these subcontracts, profits on the subsales, in an action for the vendor's breach of the contract, may be recovered as a part of the damages.

7. After a contract for the purchase of goods, where the vendee, relying thereon, resells the goods to other persons at a profit, the vendor, in an action for his breach of the contract, can-

not be charged with the special profits to be derived from the subsales, since they were not in the contemplation of the parties at the time they made the contract.

8. In an action for the breach of a contract for the delivery of goods, proof of the terms of subsales made by the vendee in reliance on the contract is admissible for the purpose of showing what the market price of such goods was at the time they were to have been delivered.

9. In an action for the breach of a contract to deliver goods, whether the circumstance from which the loss results, or the gain is prevented, is or is not one which may reasonably be considered to have been in the contemplation of the parties, is, from the necessities of the case, an introductory one, upon which the judge must, in the first instance, decide before evidence either of losses suffered, or gains prevented, can be shown to the jury.

10. In an action for the breach of a contract to manufacture and deliver certain goods, for the purpose of proving subsales in reliance on the contract plaintiff (vendee) offered the deposition of one of his traveling salesmen, who had been sent out to make sales by sample of some of the goods which defendants were to deliver. He was asked if he knew by whom these goods were to be manufactured. He answered that he did, through C., plaintiff's buyer. *Held*, that the evidence was admissible to show what the witness was to represent to his customers as to the manufacture of the goods he was trying to sell them.

11. One who has knowledge of the market price at which goods would have been sold is competent, in an action for the nondelivery of goods under contract, to answer the question, "At what price would these have been retailed?"

Appeal from superior court, Fairfield county; Robinson, Judge.

Action by Jordan, Marsh & Co. against James T. Patterson and others, doing business as the Patterson Bros. Knitting Company. Judgment for plaintiffs, and they appeal. Reversed.

John H. Perry and George E. Hill, for appellants. Morris W. Seymour, John C. Chamberlain, and Howard H. Knapp, for appellees.

ANDREWS, C. J. This action was brought to recover damages for the nonperformance of a contract. The plaintiffs are large dealers in dry goods at wholesale and by retail. The defendants are manufacturers of knit underwear. The complaint alleged generally that on the 16th day of March, 1892, the defendants agreed to manufacture for the plaintiffs a large number of knit undergarments, of various styles and at agreed prices, amounting in the whole to nearly 12,000 dozen, and to deliver the same at various times, but all before the 1st day of December, 1892, for which the plaintiffs were to pay; that the plaintiffs contracted for these goods with the intent, as the defendants knew, to resell the same to other parties; that at the date of said contract they had bargained to sell a part of said garments to other persons at a profit; that afterwards, and before the time when said goods were to be delivered, they bargained to sell the balance of the same to certain other persons at a profit; that the defendants delivered to the plaintiffs, in pursuance of the said agreement, 160 dozen of

the said goods, but neglected and refused to deliver the remaining part,—and claimed damages to the amount of \$10,000. The defendants' answer denied the making of the said contract alleged by the plaintiffs, and set up a different one,—a conditional one; and they said, that in performance of the contract so alleged by them, they furnished the said 160 dozen of said garments, but that the plaintiffs neglected to perform the conditions of said last-mentioned contract on their part to be performed, and therefore they (the defendants) did not furnish any more of said goods. The answer also demanded pay for the goods the defendants had so furnished, and damages for the nonperformance by the plaintiffs.

The finding of the court shows that there was evidence that the parties had had dealings with each other prior to the 10th day of February, 1892; that the plaintiffs had purchased of the defendants garments of their manufacture, some of which were then manufactured, and some of which were to be thereafter manufactured and delivered, and which were in fact so manufactured and delivered, but that on said day there was no contract subsisting between them; that between the said 10th day of February, 1892, and the 16th day of March, following, the plaintiffs sent to the defendants 14 separate orders for goods of their manufacture, each one duly numbered and signed, specifying the number, quality, style, and price of the goods ordered, and the date when they were to be delivered, as well as the date of payment; that on said 16th day of March, 1892, the defendants sent a letter to the plaintiffs as follows: "Office of the Patterson Brothers Knitting Co. Ladies', Gents', and Children's Fine Knit Underwear. Bridgeport, Conn., March 16, 1892. Messrs. Jordan, Marsh & Co., Boston, Mass.—Gentlemen: We are in receipt of the following contracts, for which we thank you. [Then followed a description of the 14 orders above referred to, by their numbers and amounts.] Yours, truly [Signed] H. B. Odell, Manager." It is also found that the defendants delivered to the plaintiffs 160 dozen of the goods mentioned in said orders. There was no claim made that Odell was not the duly-authorized agent of the defendants, or, at any rate, no claim that the question of his agency was not submitted to the jury with proper instructions. The case was tried on an issue closed to the jury, and the plaintiffs had a verdict for an amount in damages which, they assert, is very much less than they are entitled to have; and they have appealed to this court, alleging various errors in the trial court.

The plaintiffs claimed that the said orders, and the letter of March 16, 1892, constituted one contract, as to all the goods named in all the orders, and that it was the contract on which this action was brought; that the letter was afterwards ratified and confirmed by the defendants themselves as an accept-

ance of all the orders, and was so treated by them, because they delivered a portion of the goods under the orders generally. The defendants, on their part, claimed that the letter of March 16, 1892, was not an acceptance; that, if an acceptance at all, it was an acceptance of only some one of the orders; that each of the orders stated a separate contract, and must be separately declared on, and, as the complaint declared on one contract only, in no event could there be a recovery in this case on more than one of such orders. Upon this part of the case the judge instructed the jury as follows: "It is for you to say what language the paper [i. e. the letter of March 16, 1892] speaks, and what the intention was in the use of the language it contains. It is for you to say whether a person who sends such a paper as this to another under the circumstances here claimed, and then goes forward and begins to fill, and does fill, some of these very orders named in the paper so sent (if such be the facts), could fairly be said to have had no intention to speak the language of acceptance and promise in that paper, or had no intention, by the language used, to accept, and promise to fill, the orders he named. These are matters for you to determine after a careful and serious examination of the evidence and claims on both sides." The substance of this instruction was repeated by the judge twice or three times in the course of his charge, and at one time with language which apparently implied that the jury might select one of the separate orders, and, if that was broken, render a verdict for damages only as to such particular contract. This was error. There was no ambiguity or doubt as to the terms of the orders, or of the letter of March 16th, and there was no suggestion of any fraud. Under such circumstances, it was for the judge, and not for the jury, to say what these writings meant. It was a question of law, and not of fact. *Gibbs v. Society*, 38 Conn. 153, 167; *Hotchkiss v. Higgins*, 52 Conn. 205, 213; 1 Starkie, Ev. 429; 1 Greenl. Ev. § 277. The orders and the letter were offered as proof of a contract between the parties. If a contract at all, it was a contract in writing. As such, its interpretation—its legal effect—was a question of law, for the judge. Nor was such interpretation the less a question of law because the construction might have been aided by the use of extrinsic evidence, such as the business of the parties, their knowledge each of the business of the other, and their previous dealings, including as well what may be called the practical construction put upon the contract by the conduct and acts of the parties. The judge, by the aid of all the undisputed facts in the case, could put himself into the situation of the parties, and look at the contract from their standpoint. But, from whatever source light was thrown upon the contract, what its meaning was,

what promises it made, what duties or obligations it imposed, was a question of law, for the judge. It was, after all, the legal reading and interpretation of what was written. See *Smith v. Faulkner*, 12 Gray, 251, 254; *Brady v. Cassidy*, 104 N. Y. 147, 155, 10 N. E. 131; *Neillson v. Harford*, 8 Mees. & W. 805, 823. In the light of the undisputed facts in this case, the trial judge should have instructed the jury that the letter of March 16, 1892, was an acceptance of all the orders named in it. And, as there was but one contract claimed to exist between these parties, such instruction would, in effect, have directed them to exclude from their consideration the conditional contract claimed by the defendants.

The general intention of the law giving damages in an action for the breach of a contract like the one here in question is to put the injured party, so far as it can be done by money, in the same position that he would have been in if the contract had been performed. In carrying out this general intention in any given case, it must be remembered that the altered position to be redressed must be one directly resulting from the breach. Any act or omission of the complaining party subsequent to the breach of the contract, and not directly attributable to it, although it is an act or an omission which, except for the breach, would not have taken place, is not a ground for damages. In an action like the present one, to recover damages against the vendor of goods for their nondelivery to the vendee, the general rule is that the plaintiff is entitled to recover in damages the difference at the time and place of delivery between the price he had agreed to pay, and the market price, if greater than the agreed price. Such difference is the normal damage which a vendee suffers in such a case. And, if there are no special circumstances in the case, a plaintiff would, by the recovery of such difference, be put in the same position that he would have been in if the contract had been performed. This, of course, implies that there is a market for such goods, where the plaintiff could have supplied himself. If there is no such market, then the plaintiff should recover the actual damages which he has suffered. There may be, and often there are, special circumstances, other than the want of a market, surrounding a contract for the sale and purchase of goods, by reason of which, in case of a breach, the loss to a vendee for their nondelivery is increased. In such a case the damages to the vendee which he may recover must, speaking generally, be confined to such as result from those circumstances which may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract. It must be remembered, also, in attempting to carry out this general intention of the law in any given case, that any damages which the plaintiff by reasonable diligence on his

part might have avoided are not to be regarded as the proximate result of the defendant's acts. In the present case the plaintiffs claimed that at the time of delivery there was no market in which they could procure such goods as the defendants were to deliver to them. This was a fact which might be proved by the testimony of any person who had knowledge on the subject. And if it was true the plaintiffs could not, by any diligence on their part, have relieved themselves by such purchase from any portion of the damages which they suffered.

There were various special circumstances by reason of which the plaintiffs claimed to recover damages. One was that they contracted for the said goods for the purpose of reselling them. It is averred in the complaint—and there appears to have been evidence on the trial tending to prove such averments—that at the time the goods were contracted for the plaintiffs had bargained to sell a portion of the said garments to other parties at a profit, and that the defendants had knowledge of the subcontracts. As to the profits on these subsales, the judge charged the jury that the plaintiffs were entitled to recover these as a part of their damages, because, as the judge correctly said, the existence of these subsales was known to the defendants at the time they contracted to furnish the goods, and the profits that were to be made must be considered as having been contemplated by them at that time.

It is also averred in the complaint that, soon after the time the contract was made, the plaintiffs, relying on the same, began to sell the balance of said garments to other parties at a profit, of which subcontracts they gave notice to the defendants a reasonable time before the date at which the goods were to be delivered. The judge charged the jury that these profits should not be allowed, because, as he said, these sales cannot be considered to have been in the contemplation of the parties at the time they made their contract. As the judge stated it, this ruling was correct. Notice to the defendants after their contract was entered into would not increase their liability. If these subsales could not reasonably be considered to have been in the contemplation of the parties at the time they made the contract, then the defendants could not be made liable for the special profits to be derived therefrom.

But there is an aspect of the question of the profits on these latter subsales—which seems not to have been very clearly presented—upon which the evidence of their terms might have been admissible. The defendants had knowledge that the plaintiffs contracted for these garments in order to resell them to others. They were chargeable with knowledge that the plaintiffs would make such profits as the market price of such goods would give them. If proof of the terms of these last-mentioned subsales was offered for the purpose of showing what the market price of

such goods was at the time they were to be delivered, then the evidence should have been received. The market value of any goods may be shown by actual sales in the way of ordinary business.

It was alleged in the complaint that by reason of the default of the defendants the plaintiffs had been obliged to pay large damages to their vendees for their failure to deliver to them the goods so bargained to them, and they offered evidence to prove such a payment to one of their vendees, which evidence was, on objection by the defendants, excluded. In respect to this item of damage, the rule above stated furnished the proper test. In restoring an injured party to the same position he would have been in if the contract had not been broken, it is necessary to take into the account losses suffered, as much as profits prevented. And whenever the loss suffered, or the gain prevented, results directly from a circumstance which may reasonably be considered to have been in the contemplation of the parties when entering into the contract, the plaintiff should be allowed to prove such loss. Whether the circumstance from which the loss results, or the gain is prevented, is or is not one which may be reasonably considered to have been in the contemplation of the parties, is, from the necessities of the case, an introductory one, upon which the judge must, in the first instance, decide, before evidence either of losses suffered, or gains prevented, can be shown to the jury. When the admissibility of evidence depends upon a collateral fact, the judge must pass upon that fact in the first place, and then, if he admits the evidence, instruct the jury to lay it out of their consideration if they should be of a different opinion as to the preliminary matter. The particular evidence excluded in this case was that of Edward J. Mitton, one of the plaintiffs, to the effect that the plaintiffs had paid to William Taylor & Sons, one of their vendees, the sum of \$641 as damages. Both the objection to this evidence, and the ruling upon it, seem to admit that this subcontract was one of which the defendants had notice. The objection to it was that it was not admissible under any allegation in the complaint. But precisely this sort of loss was alleged in the complaint and denied in the answer, and, unless other reasons existed for the exclusion of this testimony than the one claimed, it should have been received. If the sale to Taylor & Sons was one of those sales of which the defendants had notice at the time they made their contract with the plaintiffs, then the evidence was clearly admissible for the reason given by the trial judge when instructing the jury that the profits from these sales should be allowed.

For the purpose of proving the subsales, the plaintiffs offered the deposition of F. R. Chase, one of their traveling salesmen. In the early part of 1892 he was sent out by the plaintiffs to make sales by sample of some of

the goods which the defendants were to manufacture. He was asked if he knew by whom these goods were to be manufactured. He said he did, through Mr. Campbell, the plaintiffs' buyer. This question and answer were objected to by the defendants, and ruled out. This objection seems to have been made on a total misapprehension of the object of the evidence. The witness was stating what he was to represent to his customers as to the manufacture of the goods he was trying to sell them. Both question and answer should have been admitted. Whether or not the goods, when they should be delivered, corresponded with the sample and with this statement, would have been quite another question.

One Deland, a buyer for the plaintiffs, testified. He was asked, respecting certain of the goods which the defendants had contracted to deliver to the plaintiffs, "At what price would these have been retailed?" On objection, he was not permitted to answer. Assuming that Deland had knowledge of the market price at which such goods would have been sold, it is very obvious that his answer would have been relevant, and should have been received.

The other questions made in the case, so far as they are material, would not be likely to arise on another trial. There is error, and a new trial is granted. The other judges concurred.

(67 Conn. 585)

HALL v. APPEL.

(Supreme Court of Errors of Connecticut.
June 5, 1896.)

CONTRACTS—CONSTRUCTION—TENDER—WAIVER.

1. The mortgagee gave the mortgagor permission to cut timber from the mortgaged premises for sale, provided the "avails" of the timber were turned over to be applied on the mortgage note. *Held*, that the mortgagee, where the timber cut was sold to a solvent corporation, was not bound to accept, in payment on the note, an order drawn by the mortgagor on the corporation for the price of the timber and accepted by the corporation.

2. The fact that the refusal of a creditor to accept a tender by the debtor of money and an order on a third person was not based on any objection to the character of the amount tendered, did not constitute a waiver of his right to a tender in money alone.

Appeal from court of common pleas, New Haven county; Hotchkiss, Judge.

Action by Henry F. Hall against Eugene S. Appel. There was a judgment for defendant on his cross complaint, and complainant appeals. Error.

Henry G. Newton, for appellant. Joseph Sheldon, for appellee.

TORRANCE, J. This is a complaint to foreclose a mortgage, and for a temporary injunction. In his defense, among other things, the defendant alleged, in substance, that, prior to the bringing of this suit, the

plaintiff had agreed with the defendant to surrender to him the note secured by said mortgage, on the payment of \$400 within two months from the date of said agreement; that he had duly tendered said \$400 to the plaintiff within the time agreed upon; that the plaintiff had refused to accept said tender, and to surrender said note as agreed; that he was still ready and willing to pay said money to the plaintiff, or into court for the plaintiff's use; and, upon the facts so set up in his cross complaint, the defendant claimed a surrender of the note, and a release of the mortgage described in the complaint. The motion to amend the record, made in this court by the defendant, was not granted. The matters sought to be added to the record occurred long after this appeal was completed, and formed no part of the record proper to come here by way of appeal.

One of the important questions in the court below was whether or not, upon the facts found with reference to the tender aforesaid, said tender fulfilled the terms of the agreement under which it was made, and thus entitled the defendant to the surrender of the note as agreed. The controlling facts upon this part of the case may be stated as follows: On the 1st of April, 1895, the plaintiff held the note and mortgage described in the complaint. The note, made by the defendant, dated April 21, 1892, for the sum of \$500, was payable, on demand, to the order of the plaintiff, with interest and taxes. The court finds that, at the time of the execution of said note, or within a few days thereafter, the defendant called the attention of the plaintiff to the fact of said note being payable on demand, and of his inability to meet the same, and his liability to have the same enforced at any time, and thereupon the plaintiff indorsed on the back of said note the following: "It is understood and agreed that this note and interest shall be due and payable five dollars per month, with interest. H. F. Hall." The only payments made upon said note up to and including April 1, 1895, were the following, which appear as indorsements thereon: "Received on the within note \$23, August 6, 1892. Received on within, April 1, 1895, \$50." On the 1st of April, 1895, the plaintiff signed and delivered to the defendant a writing of the following tenor: "Wallingford, April 1, 1895. I hereby agree to release and surrender a note I hold of Eugene S. Appel, bearing date April 21, 1892, for the sum of four hundred dollars (\$400), provided the same is paid two months from date; otherwise, the balance of the note shall be due, without any deduction of the same, if not paid in sixty days as agreed. Said note secured by mortgage." Afterwards, upon the same day, the parties orally agreed as follows: That the defendant might cut the wood upon the mortgaged land, "provided he would turn the avails over to the plaintiff, which avails the plaintiff agreed to accept in part satisfaction of said sum of \$400, so to be

paid in satisfaction of said note." Thereafter the defendant cut a portion of said wood and sold it to a corporation for the price of \$150. On the 6th of May, 1895, the defendant drew his order on said corporation for the price of said wood in favor of the plaintiff, in the following form: "Pay to Henry F. Hall or order, one hundred and fifty dollars (\$150), and charge to my account." Said corporation duly accepted said order in writing upon its face. The court finds that said corporation was solvent, that the acceptance was a valid and binding one, and that the order would have been paid on presentation by the plaintiff. Within the two months' time agreed upon, the defendant tendered to the plaintiff, in performance of the written and oral agreements of April 1, 1895, said accepted order and the sum of \$250 in cash, and requested the surrender of the note and a release of the mortgage, but the plaintiff refused to accept the tender, and refused to do as requested. The court finds that such refusal was "based on matters arising from another controversy, to which the defendant was a party, and which the plaintiff desired the defendant to adjust, and that the said refusal was not based upon any objection to the character of the money or of the order." The court also finds that the "defendant undertook in good faith to carry out, and has as aforesaid carried out, his said agreement with the plaintiff, and that in equity and good conscience the plaintiff ought to have accepted the said money and order, and to have delivered up said mortgage note and released said mortgage."

Upon the facts found, the court below held the tender of the money and the order to be a good tender of the \$400 under the written and oral agreements of April 1, 1895; and in this we think the court erred. In reaching this conclusion we assume, for the purposes of the argument merely, that the agreements of April 1, 1895, were made upon a legally sufficient consideration, as claimed by the defendant. As they are stated upon the record, these agreements of April 1, 1895, are agreements on the part of the plaintiff alone. The defendant does not agree or promise to do anything. In the written one, the plaintiff agrees to give up the note on condition that the defendant pays \$400 in cash within the time agreed upon; while in the oral one, made after the written one, but on the same day, the plaintiff agrees to accept the "avails" of the sales of wood to be made by defendant from the mortgaged land, "in part satisfaction of said sum of four hundred dollars, so to be paid in satisfaction of said note." This subsequent oral agreement, in effect merely gave the defendant permission to lessen the value of the mortgage security by cutting and selling wood therefrom, on condition that he would turn over the "avails" of such sales—that is, the money obtained therefrom—to the plaintiff. It was made merely to enable the defendant to raise part of the \$400 in cash

in this way; and the plaintiff agreed to accept the "avails"—that is, the money—realized from such sales as a part of the \$400 in cash to be paid under the written agreement. The oral agreement, then, does not change nor qualify the written agreement in any respect. It, in effect, merely provides how part of the money to be paid under the written agreement, may be obtained. The payment of \$400 in cash was thus a condition precedent to the surrender of the note. The plaintiff did not agree to accept an order of any kind whatever, in whole or in part payment. He agreed to accept cash, and cash only. It may be conceded, for the sake of argument, as claimed by the defendant, that in the present case a tender duly made in accordance with the terms of the written agreement would be as effectual for the defendant as an actual payment; but this concession cannot avail the defendant unless his tender was so made, and clearly it was not. The \$400 was neither paid nor tendered in cash at all, and so one of the essential conditions precedent to the surrender of the note was not performed, nor was there any effectual tender of performance. Unless, then, the court below has found, expressly or by necessary implication, that the plaintiff waived performance of this condition, it erred in holding that the tender was sufficient. It is not found, as a fact, that the plaintiff expressly waived performance of this condition; nor does it necessarily follow, as a conclusion of law from the facts found, that he did so. He gave certain reasons for his refusal, "which were not based upon any objection to the character of the money or the order"; but he was under no obligation to give any reasons for his refusal, and the mere fact that he mentioned certain grounds of objection to the tender is not of itself a waiver of other grounds not mentioned. If there was a waiver in point of fact, the court should have found it expressly or impliedly; and, not having done so, this court cannot say, as matter of law, from the facts found upon this point, that there was any such waiver.

The conclusion reached upon this point in the case renders it unnecessary to discuss or to decide the other errors assigned upon the appeal. There is error in the judgment of the court below, and it is set aside. The other judges concurred.

(19 R. I. 437)

SMITH et al. v. TOWN OF WESTERLY
et al.

ARNOLD et ux. v. PRICE et al.
(Supreme Court of Rhode Island. Feb. 26, 1896.)

WATER COMPANIES—EXCLUSIVE GRANTS—RATIFICATION—ESTOPPEL—CONSTRUCTION OF STATUTES—WARRANT CALLING TOWN MEETING.

1. Under the power given the council of any town by Pub. Laws 1884, c. 425, § 1, to grant the right to lay pipes in the highways of the town for supplying the inhabitants with water, and to consent to erection and maintenance

of a reservoir in the town, for such time as on such terms as they may deem proper, a town council cannot grant an exclusive right to lay water pipes in the highways.

2. An unauthorized grant by a town council of an exclusive right to lay water pipes in the highways is not validated by a ratification thereof by the town, where the town itself has no power to make such grant.

3. A town is not estopped to take advantage of the incapacity of its council to make a contract granting the exclusive right to lay water pipes in the highways, because the grantee acted in good faith, and fulfilled all its obligations.

4. It being free from doubt that Pub. Laws 1882, c. 285 (Gen. Laws, c. 123), gives all towns general power to construct waterworks of their own, construction of the act cannot be affected by the subsequent passage of an act giving a particular town power to construct waterworks, even assuming from the fact of such special legislation that the legislature considered chapter 285 insufficient for such purpose.

5. Under Pub. St. c. 35 (Gen. Laws, c. 37), requiring the warrant calling a special town meeting to contain a notice of the business to be transacted, and providing that no vote shall be passed in any town meeting concerning the making of a tax, unless special mention thereof be made in the warrant, a warrant calling a town meeting, reciting that it is "to consider the question of advisability of constructing * * * new waterworks by the town," is sufficient to authorize the meeting to direct the town council to contract for and construct waterworks for the town at a cost not to exceed a certain amount.

Separate actions by Orlando R. Smith and others against the town of Westerly and others, and by Louis W. Arnold and wife against Walter Price and others. Heard on demurrers to bills. Sustained.

Walter H. Barney, A. B. Crafts, and Francis Colwell, for town of Westerly. Walter B. Vincent, for Seaman's Friend Soc. Jos. C. Ely, Walter B. Vincent, and Jas. M. Ripley, for Westerly Waterworks.

TILLINGHAST, J. These cases have been tried together, and we will consider them in the same way. The Smith case is brought by certain taxpayers of the town of Westerly, in behalf of themselves and all others similarly situated, against the town of Westerly, the members of the town council, members of the committee on waterworks, and the town treasurer, and seeks to enjoin them from proceeding further with the erection of waterworks, or the purchase of land therefor, and from expending any money or incurring any obligations whatever in respect thereof, and for other relief. The Arnold case is brought by taxpayers and owners of land abutting on one of the public streets of Westerly, in behalf of themselves and others similarly situated, against the members of the town council, and seeks to enjoin the respondents and their successors in office, together with their agents and servants, from constructing waterworks or opening streets of the town, and in particular the street on which the complainants' lands abut, for the purpose of laying water pipes therein, without the consent of the Westerly Waterworks, prior to the expiration of the term of years under which it is claimed said corporation has exclusive rights

in the streets of said town. The complainants in the Smith case substantially set up in their bill: (1) That at a town meeting holden in Westerly, on the 11th day of April, 1895, it was voted to build waterworks for said town; (2) that the town council of Westerly, in pursuance of said vote, has authorized its committee on waterworks to expend the sum of \$1,749 in purchasing certain lands to be used in the construction of waterworks; (3) that the action of the town and town council in the premises was without legislative authority; (4) that, notwithstanding such want of authority, the said town council is proceeding to purchase lands without the state, and threatens to spend large sums of money in building waterworks, by reason of which a burden will be placed upon the complainants and other taxpayers; (5) that the Westerly Waterworks, a private corporation, is, and for a long time has been, furnishing to the citizens of Westerly an abundant supply of pure water at a reasonable cost, and from which the necessary supply for public use can at all times be procured; (6) that the building of new waterworks is unnecessary, and would impose an unjust burden upon the complainants and other taxpayers; (7) that the Westerly Waterworks has the exclusive right, under a contract with said town, to use the public highways for the purpose of laying water pipes, and continuing the same therein, during a specified period, not yet expired, with the terms of which contract said Westerly Waterworks has complied; (8) that, whenever said town shall proceed to construct new waterworks, the said Westerly Waterworks will have the right to enjoin it from so doing; (9) that the complainants believe that said Westerly Waterworks intends so to enjoin the town; (10) that, in case said town should be so enjoined, all sums of money expended by it as aforesaid would be wholly lost; (11) that the Westerly Waterworks obtains its supply from a certain brook in North Stonington, Conn., through contracts made with and privileges obtained from parties having the right to and controlling the stream; (12) that the land which the town is proceeding to purchase is only available in obtaining a supply from the same brook or stream from which the Westerly Waterworks obtains its supply; (13) that no contract or arrangement has been made by said town with the parties controlling said stream to take water therefrom; (14) that the complainants are informed and believe that no such contract or arrangement can be made, and that any expenditure of money for land in such locality would be wholly lost; and (15) that the notice to the taxpayers calling the town meeting of April 11, 1895, did not state that any proposition to expend money was to be voted upon at said meeting, but that, notwithstanding this fact, the expenditure of \$150,000 was authorized. The complainants in the Arnold bill set up substantially the same facts, together with the charter of the Westerly Waterworks, and

seek the same general relief. To the Smith bill the respondents the town of Westerly and William Hoxsey have demurred, and the other respondents have answered; and to the Arnold bill the respondents have demurred. Several grounds of demurrer are alleged, but principally to the effect that it does not appear from said bills, or either of them, that the Westerly Waterworks has the exclusive right to use the public highways of said town for the purpose of laying and maintaining water pipes, etc.; that, so far as appears from the allegations set up, the town of Westerly has the right to erect waterworks and purchase land therefor; and, also, that it appears by said allegations that the vote of the town passed April 11, 1895, was authorized and legal.

The principal questions raised by the pleadings are: (1) Does the contract entered into between the town council of Westerly and the Westerly Waterworks Company confer upon the Westerly Waterworks the exclusive right to use the public highways and grounds of said town for the laying and maintaining of water pipes for the purposes aforesaid? (2) Has the town of Westerly the right to construct waterworks of its own? And (3) if it has such right, does the vote of the town passed April 11, 1895, authorize the construction of such waterworks?

Before proceeding to answer the first of these questions, it is proper to state that it appearing to the court that the questions involved could not be determined without passing on the rights of the Westerly Waterworks, and it also appearing that said Westerly Waterworks was interested in said questions, but was not a party to said bills or either of them, said corporation was, by order of the court, notified to intervene in said suits if it desired to be heard. Said corporation, however, has not seen fit to become a party to either of said bills, and has informed us through its counsel that it does not desire to do so.

As to said first question, then: The contract which was made with James M. Pendleton and others, who styled themselves the Westerly Waterworks Company, and who subsequently obtained a charter, and organized thereunder as the Westerly Waterworks, we will treat, for the purposes of this decision, as having been made with said corporation. The only authority to make said contract on the part of the town council is conferred by Pub. Laws R. I. 1884, c. 425, § 1, which provides as follows: "The town council of any town, or the city council of any city, may grant to any person or corporation the right to lay water pipes in any of the public highways of such town or city for the supplying the inhabitants of such town or city with water, and may consent to the erection, construction and the right to maintain a reservoir or reservoirs within said town or city, for such time and upon such terms and conditions as they may deem prop-

er, including therein the power and authority to exempt such pipes and reservoirs, and the land and works connected therewith, from taxation." It will be seen at once that, in attempting to grant to said company the exclusive right to lay water pipes in the public highways of the said town, the town council exceeded the authority conferred by said statute, and hence that the town is not bound by said contract; for, however it may be as respects the power of the legislature to make such a grant exclusive, it is clear that no such power can be exercised by a town council unless it is conferred by express words or by necessary implication. In other words, when a franchise like the one here set up in favor of a corporation is drawn in question, and is claimed to have been obtained by virtue of a contract of this sort, the power of the town council to enter into such a contract must be free from doubt; or, as said by the court in *State v. Cincinnati Gaslight & Coke Co.*, 18 Ohio St. 293, "it must be found on the statute book in express terms, or arise from the terms of the statute by implication so direct and necessary as to render it equally clear." See 2 Dill. Mun. Corp. (4th Ed.) § 695, and cases cited; *Citizens' Gas & Min. Co. v. Town of Elwood*, 114 Ind. 332, 16 N. E. 624; *Syracuse Water Co. v. City of Syracuse* (N. Y.) 22 N. E. 381; *Norwich Gaslight Co. v. Norwich City Gas Co.*, 25 Conn. 19, 31; *Saginaw Gaslight Co. v. City of Saginaw*, 28 Fed. 529, 534, 538; *Grand Rapids Electric Light & Power Co. v. Grand Rapids Edison Electric Light & Fuel Gas Co.*, 33 Fed. 659 et seq.; *Birmingham & Pratt Mines St. Ry. Co. v. Birmingham St. Ry. Co.*, 79 Ala. 465, 473; *Paine v. Spratley*, 5 Kan. 525; *Sedg. St. & Const. Law* (2d Ed.) 291-296, and cases cited; *Farnsworth v. Town Council of Pawtucket*, 13 R. I. 82; *Mathewson v. Hawkins*, Index QQ, 18, 19, 31 Atl. 430. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public. *Suth. St. Const.* § 380, and cases cited. The statute above quoted simply authorized the respondent town council to grant the right to lay water pipes in the public highways of said town for the purposes and under the limitations and exemptions specified, but did not authorize them to go beyond its terms, and grant the exclusive right so to do. This would be to enlarge and very materially alter said statute, instead of construing it as the law requires in regard to acts like this, which tend to establish monopolies or confer exceptional exemptions and privileges, correlatively trenching on general rights. *End. Interp. St.* § 349, and cases cited. Thus, in case of *Wright v. Nagle*, 101 U. S. 791, it was held that legislative power given to an inferior body to establish ferries and bridges did not authorize such body to grant the exclusive right therefor to one person; that every statute which takes away from the legislature its power will always be construed

most strongly in favor of the state. In *State v. Cincinnati Gaslight & Coke Co.*, supra, in which the question now before us was very exhaustively and learnedly considered, the charter conferred on said company power "to manufacture and sell gas, to lay pipes," etc., provided the consent of the city council be obtained for that purpose. Under the power given to the city council of Cincinnati "to cause said city or any part thereof to be lighted with oil or gas," and to levy a tax for that purpose, it contracted to invest the defendant with the full and exclusive privilege of using the streets, etc., for the purpose of lighting the city for the term of 25 years, and thereafter until the city should purchase the works. It was held that while there was no doubt that the city might, by contract, provide for the lighting thereof by gas, yet it had no authority to grant the exclusive right so to do to the respondents. In *Jackson Co. Horse R. Co. v. Interstate Rapid Transit Ry. Co.*, 24 Fed. 306, it was held by Judge Brewer that, in the absence of express authority in its charter, the city of Kansas had no power to grant to a street-railway company the sole right for the space of 21 years to construct, maintain, and operate their railway over and along the streets of said city. In *Minturn v. Larue*, 23 How. 435, it was held that a charter authorizing the city of Oakland to establish and regulate ferries, or to authorize the construction of the same, gave no power to the city to grant an exclusive privilege. In the case of *Lehigh Water Co.'s Appeal*, 102 Pa. St. 515, the act went so far as to provide, among other things, that "the right to have and enjoy the franchises and privileges of such incorporation within the district or locality covered by its charter shall be an exclusive one, and no other company shall be incorporated for that purpose until the said corporation shall have from its earnings realized and divided among its stockholders during five years a dividend equal to eight per centum per annum upon its capital stock." *Laws 1874*, p. 94. It was held by the court that, notwithstanding such a provision, the right of the water company was exclusive only as against other private water companies, but not as against the borough. Without multiplying citations in support of the construction which we have put upon said statute, it is sufficient to say that the authorities are singularly uniform in sustaining the conclusion to which we have arrived. We have examined the authorities relied on by complainants' counsel in support of the construction of said statute contended for by them, but fail to find that they materially conflict with the doctrine above stated. The case of *Atlantic City Waterworks Co. v. Atlantic City*, 39 N. J. Eq. 367, which is specially relied on, is clearly distinguishable from the cases at bar, in that the act of the legislature (*Pub. Laws 1890*, p. 318) by virtue of which the ordinance there in question was passed authorized the city

council to pass such ordinances as they should judge proper for providing a supply of water for the city. They passed an ordinance granting the exclusive right to the complainant to furnish water to the city and its inhabitants; and the court held that, whether or not the city's grant of the exclusive privilege granted was *ultra vires* and void as creating a monopoly, the city had exhausted its power as to providing a water supply, and, moreover, that the complainants' franchise, which was granted by the legislature, was exclusive, and that, consequently, the court would, by injunction, protect the complainants in their rights,—the chancellor saying that "equity will protect a corporation entitled to the enjoyment of an exclusive franchise against unlawful competition." We see no occasion to question the soundness of this decision. *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manufg Co.*, 115 U. S. 650, 6 Sup. Ct. 252, is not in point, for the reason that in that case the charter of the complainant corporation expressly granted to said company the exclusive privilege of making and selling gas in New Orleans; and the court held that a legislative grant of an exclusive right to supply gas to a municipality and its inhabitants, through pipes laid in the public streets, and upon the condition of the performance of the service by the grantee, is a grant of a franchise vested in the state, in consideration of the performance of a public service, and, after performance by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it. *State v. Columbus Gaslight & Coke Co.*, 34 Ohio St. 572, was also a case where the charter of the complainant contained an express provision giving to the corporation the exclusive privilege of supplying the city of Columbus and its inhabitants with gas for the term of 20 years; and hence it has no bearing on the question now under consideration.

But it is urged by the complainants that the town of Westerly has recognized the existence and validity of said contract by a certain vote which it passed relative thereto on April 11, 1895. Said vote is as follows: "That the town council of the town of Westerly be, and it is hereby, requested to agree, if possible, with the Westerly Waterworks of said town, upon a third referee, under the agreement between said town and said Westerly Waterworks." Doubtless, this vote may properly be said to have amounted to a recognition of the existence of the contract in question, in so far, at any rate, as it confers upon the town the right to purchase the waterworks which had been constructed by virtue thereof. But, even assuming that it was a recognition of the contract in its entirety, still it does not amount to an adoption or ratification thereof by the town. And, indeed, even assuming still further that it did thus operate, it could not have the effect to vali-

date said contract, for the very conclusive reason that the town itself, in its corporate capacity, had no authority to make said contract; and it hardly needs to be argued that the town could not ratify a contract which it had no power to make originally. The power to make such a contract as the statute contemplates is expressly conferred upon councils, and hence the maxim, "*Expressio unius est exclusio alterius*," is clearly applicable. Nor is the town estopped from taking advantage of the incapacity of said town council to make said contract because the other party thereto acted in good faith in making the same, and has on its part fulfilled all the obligations which it assumed thereunder, as contended by complainants' counsel. *McTwiggan v. Hunter*, Index RR., —, 83 Atl. 5. It was bound at its own peril to know the extent of the authority of the town council and also of the town in the premises. *Austin v. Coggeshall*, 12 R. I. 329.

To what we have said above regarding the proper construction to be put upon said statute, it may be added that under Pub. Laws R. I. c. 566, passed June 1, 1876, town councils were given power to grant to any person or corporation the exclusive right to lay water pipes in the public highways of the town, for the purpose of supplying the inhabitants thereof with water, but that subsequently, in the Revision of 1882, said power to grant the exclusive right to use the highways for such purpose was cut down to the power to grant simply the right so to do, and said chapter 566 was repealed. See Pub. St. R. I. c. 38, § 32, together with chapter 260, § 12.

But the complainants further contend that not only was the granting of said franchise by the town council acquiesced in and approved by the town, but that it was subsequently sanctioned by the legislature in the charter of the Westerly Waterworks. An examination of said charter, however, fails to show any ratification or adoption of said contract, or any reference thereto; and while the act in some respects closely follows the terms of the attempted grant from the town council, and was evidently drafted with said contract in the mind, and probably in the presence, of the scrivener, yet it materially differs therefrom in other respects; and, while granting rights in the streets for an indefinite period, yet neither itself grants nor recognizes any authority in the town council to grant an exclusive right therein. In this connection we will briefly refer to the case of *Citizens' Water Co. v. Bridgeport Hydraulic Co.*, 55 Conn. 1, 10 Atl. 170, which it is claimed by complainants' counsel is a strong authority in its favor. While that case comes nearer to sustaining the construction contended for than any of the others, yet it is clearly distinguishable from the cases at bar. The main point of similarity between that case and those now before us is that there the common council of Bridgeport, in 1853, accepted a proposition made by

G. to supply the city with water, and granted him (with a right of assignment) the exclusive right to lay pipes in the streets so long as a full supply of pure water should be furnished. In 1857 the Bridgeport Hydraulic Company was incorporated, with power to acquire, and which did acquire, all the right of G. under the vote of the city, and became charged with all his duties; and this company soon after expended a large sum of money in acquiring property and establishing its waterworks. In granting said charter, the general assembly expressly recognized and confirmed the grant made by said city; and the court held that said grant thereby became as effective as if the city had had the power to make it, and as if the legislature had made it in the most direct and explicit words. But it is clearly evident from the opinion of the court that without said act the grant of the exclusive use of the streets in said city would not have been sustained. The court say: "Inasmuch as Nathaniel Greene had power to bind himself to furnish water for a specified consideration, if the city had possessed power to bind itself in the manner proposed, there would have been no reason for the interference of the legislature in the matter; the contract between an individual and the city would, of necessity, have been left to the parties, or to judicial arbitrament if they had disagreed. In the want of power upon the part of the city to give to Nathaniel Greene a binding obligation to do what it desired to do is found the only reason for the existence of the seventeenth section, to give the needed legislative sanction to the city's desire to grant, and to its act granting, the exclusive use of the streets in return for the supply of water." "The legislature, having, in effect, authorized the city to make a contract which it desired to make, will not—cannot—now relieve it." If the charter of the Westerly Waterworks had expressly, or perhaps by necessary implication, recognized and adopted the contract now in question, a very different state of facts would be presented, and the case might, and probably would, be decided in accordance with the one just referred to. But no reference whatever being made in the charter of the Westerly Waterworks to said contract, and nothing appearing to show that the legislature had any knowledge even of its existence, we clearly should not be warranted in holding that, simply because there is quite a striking similarity between the tenth section thereof and one clause of said contract, therefore said act amounts to an adoption or ratification thereof. We therefore decide that the contract entered into between the town council of Westerly and the Westerly Waterworks Company did not confer upon said company, or upon their successor, the Westerly Waterworks, the exclusive right to use the public highways and grounds of said town for the laying and maintaining of water pipes for the purposes aforesaid.

The second question is whether the town of Westerly has the right to construct waterworks of its own. We think it has. Pub. Laws R. I. c. 285, passed March 30, 1882, entitled "An act in relation to supplying towns with water" (now Gen. Laws R. I. c. 123), provides that "whenever the electors of any town, qualified to vote upon questions of taxation or involving the expenditure of money, shall have voted at a town meeting called for that purpose, to provide a water supply for the inhabitants of such town, or for some part thereof; or whenever any town shall enter or shall have entered into any contract with any person or corporation to furnish such town with such a water supply (a contract which towns are hereby authorized to make), then such town, or the person or corporation bound to fulfill such contract, as the case may be, may take, condemn, hold, use and permanently appropriate any land, water, rights of water and of way necessary and proper to be used in furnishing or enlarging any such water supply, including sites and materials for dams, reservoirs, pumping stations, and for coal houses, with right of way thereto, and right of way for water pipes along and across public highways and through private lands, and including also lands covered or to be flowed by water, or to be in any other way used in furnishing, enlarging or maintaining any such water supply. And if any change in any highway shall be required for the accommodation of such water supply, then such town, person or corporation may alter the grade of such highway or construct a bridge therein, under the direction of the town council of the town where such change is made, and as far as may be needful, first giving bond with surety satisfactory to a justice of the supreme court, if requested, conditioned to reimburse such town for every expense and damage occasioned by such change of grade or other change in such highway." Said act also provides for the payment of any property taken for said purposes, for the manner by which property may be condemned, how the damages to the owner thereof shall be ascertained, the manner of determining whether the taking of property for said purpose is necessary, the appointment of commissioners to appraise the damages sustained by reason of the taking of property, the right of trial by jury in favor of any party aggrieved by any award of damages which may be made on account of such taking, and generally for all the usual and necessary proceedings common to the exercise of the right of eminent domain. Indeed, we fail to see that there can be any doubt as to the sufficiency of the authority of any town under said act to construct and maintain waterworks of its own. This is its evident scope and purpose, and we think it is ample and sufficient for the accomplishment thereof.

But complainants' counsel urge the insufficiency of said act, in that it nowhere expressly says that towns are authorized, after a vote of the taxpayers so to do, to build waterworks.

It is true that the act does not use this particular language, but it does use language equally as effectual and pertinent; and it makes no difference what particular form of language the general assembly has seen fit to adopt, so long as it is clearly sufficient to accomplish the object sought to be obtained.

But counsel for the complainants further argue that the legislature itself, by the passage of other acts since the passage of said chapter 285, specially authorizing towns to build and construct waterworks, has placed its own construction upon the extent of the powers conferred by that chapter; and he instances the passage of the "Act for supplying the town of Cumberland with pure water," passed May 25, 1893, the same being Pub. Laws R. I. c. 1254. The contention is that the general assembly, in passing the last-named act, impliedly decided that, notwithstanding the provisions of said chapter 285, still towns have no authority to build waterworks without further legislation. We fail to see the force of this argument. It is very common for a particular town to desire something different in the way of legislation from that which is provided for towns in general, not only as to the mode of constructing and maintaining waterworks, but also as to very many other things in connection with the management of the local affairs thereof. An examination of the legislation of the state shows that quite a large proportion of our laws have been passed to meet the wants, or wishes at least, of some individual town or district, and hence, of course, have only a local application. Indeed, special legislation of this sort is, and long has been, a marked feature of the lawmaking branch of our state government. But this fact in no wise detracts from the force and authority of general laws in those towns where matters of this sort are not regulated by special acts. Although an examination of said chapter 1254 shows that in minor particulars it is somewhat different from chapter 285, yet we fail to see that its general scope or authority is any greater, or that the passage thereof tends in the least to show that the legislature considered that said town of Cumberland was not invested with full general powers in the premises before the passage thereof. But even assuming that the legislature did consider that the passage of said chapter 1254 was necessary in order to authorize the town of Cumberland to construct waterworks, or, to state it differently, that said chapter 285 was insufficient for said purpose, still such legislative construction, while entitled to great respect, should not control the action of the court on a question so free from doubt as the one now under consideration. See *State v. District of Narragansett*, 16 R. I. 440, 16 Atl. 901; *Sedg. St. & Const. Law* (2d Ed.) p. 214; *Suth. St. Const.* § 311, and cases cited.

As to the third and last question aforesaid, viz.: Does the vote of the town passed April 11, 1895, authorize the construction of waterworks? Said vote is as follows: "Resolved,

that the town council of the town of Westerly be, and it is hereby, requested to agree, if possible, with the Westerly Waterworks of said town, upon a third referee, under the agreement between said town and said Westerly Waterworks; and, in case no such agreement can be arrived at within thirty days from the date of this meeting, the said town council is hereby directed to contract for and construct waterworks for said town, not to exceed in cost the sum of \$150,000." In order to more fully understand this vote, it is necessary to refer to a former vote of the town, passed June 2, 1891, and also a vote of the town council subsequently passed, on the same day, in pursuance thereof. Said votes are as follows: Vote of the town: "Resolved, that the town council be, and they are hereby, instructed to notify the Westerly Waterworks Company, in writing, that the town desires to purchase the property of the Westerly Waterworks Company; and they are further instructed to take all necessary action, in accordance with the provisions of the franchise of the said Westerly Waterworks Company, to ascertain at what price the Westerly Waterworks can be purchased." Vote of the town council: "Whereas, the town of Westerly, in town meeting duly assembled, did on the 2d day of June, A. D. 1891, adopt the following resolution: [The following follows the above.] Now, therefore, it is voted by the town council of said Westerly that the clerk of the council be, and he is hereby, authorized and instructed to notify the Westerly Waterworks, a corporation duly incorporated, and located in said town of Westerly, that said town of Westerly desires to purchase the property of the said Westerly Waterworks, together with all the rights, privileges, and appurtenances to the same in any wise appertaining and belonging, in accordance with said resolution adopted by said town as aforesaid." While not particularly questioning the sufficiency of said vote of April 11, 1895, as such, to confer the necessary authority upon the town council to construct waterworks, yet complainants' counsel contend that the town had no authority to pass said vote, because the notice contained in the warrant, pursuant to which said town meeting was held, did not justify the action taken. The article or notice contained in the warrant calling said town meeting was as follows: "To hear and consider the report of the arbitrator selected on behalf of the town as to progress in matter of determining value of the Westerly Waterworks, and to take such further action as the town shall see fit with reference to the purchase of said waterworks, and also to consider the question of advisability of constructing, maintaining, and operating new waterworks, by the town." The statute requires that the warrant calling a special town meeting shall contain a notice of the business to be transacted therein, and also that no vote shall be passed in any town meeting concerning the making of a tax unless special mention thereof be made in the warrant. See Pub. St. R. I. c. 85, now Gen

Laws R. I. c. 37. We think the notice above quoted clearly answers the statutory requirement, and hence that it was sufficient to authorize the passage of the vote or resolution in question. All that is necessary in such a notice is that it be sufficiently explicit to call the attention of the voters to the subject to be considered and acted on (*Marden v. Champlin*, 17 R. I. 427, 22 Atl. 938; *School Dist. v. Blakeslee*, 13 Conn. 234); and, if this is done substantially, it is sufficient (*Torrey v. Inhabitants of Millbury*, 21 Pick. 64). "The articles inserted in warrants for calling town meetings," says Mr. Justice Hubbard in *Haven v. City of Lowell*, 5 Metc. (Mass.) 35, "presenting the various subjects for the consideration of the inhabitants, are, from the very nature of the case, general in their description, and are oftentimes inartificial in their construction. They are the mere abstracts or heads of the propositions which are to be laid before the inhabitants for their actions, and matters incidental to and connected with such propositions are alike proper for their consideration and action." See, also, *Fuller v. Inhabitants of Groton*, 11 Gray, 340; *Com. v. Wentworth*, 145 Mass. 50, 12 N. E. 845. We think that no one who read the notice of said meeting could fail to understand that a proposition to construct waterworks by the town was liable, at any rate, to be taken up and acted on; and, of course, every voter must have known that the construction of such works would necessarily involve the expenditure of a large sum of money. Nor does the fact alleged in complainants' bill—viz. that there were only 123 out of a total of about 600 voters present at said meeting—conclusively show, as contended by counsel, that the tax-paying voters did not suppose that any such action could be taken. It is matter of common knowledge that special town meetings, in particular, are frequently, if not usually, attended by less than a majority of the voters. They are too busy about their own affairs, or too indifferent regarding the particular matters to be acted on, to devote their time or attention thereto, and hence the business must necessarily be transacted by a minority of the total number of voters in the town; and while it were well if this were otherwise, and the people took a more general and active interest in public affairs, yet we must take things as we find them, and judge accordingly.

For the reasons above given, the demurrers must be sustained.

(54 N. J. E. 570)

TALCOTT v. ARNOLD et ux.

(Court of Chancery of New Jersey. Oct. 2, 1896.)

EMPLOYMENT OF HUSBAND BY WIFE—RIGHTS OF CREDITORS OF HUSBAND.

1. A debtor cannot be compelled to work for his creditors; but, if he puts his latent property-earning ability into action, equity will apply any property created to the payment of his debts.

2. If the debtor is a husband, his first duty is to support his family, and he can devote enough of the proceeds of his labor to effect that purpose.

3. Such a debtor can give to his wife, in her separate business, or in respect to her separate property, those incidental services which a husband, as head of a family, would naturally render, without subjecting the business or property of the wife to any liability for his debts.

4. A wife can employ her husband as a servant in the management of her separate business; but a court of equity will closely scrutinize such relation, to see whether the employment is bona fide, and whether the business is clearly that of the wife.

5. After the failure of a firm in which a husband was a partner, his wife advanced to him \$10,000, with which he supported his family, and paid the expenses of a shop wherein he carried on a series of experiments as an inventor. He caused to be issued in his wife's name a number of patents, from which large sums of money were realized, and a portion of the proceeds was put in property in the wife's name. All the contracts in the business were made in her name, and the property in which the business was conducted and the bank accounts were also in her name. No contract of employment was proved, and the entire course of conduct showed that the husband was master of the business, over whom the wife exercised no control, and from whom she expected no account. *Held*, that the business was the husband's, and its proceeds would be applied to the payment of one of the firm debts, subject, however, to a prior lien of the wife for the repayment of the money which she had advanced to him.

(Syllabus by the Court.)

Bill by James Talcott against Satterlee Arnold and Anna M. Arnold, his wife. Decree for complainant.

John B. Vreeland and Theo. Little, for complainant. E. C. Harris, for defendants.

REED, V. O. This bill is filed by a judgment creditor of Satterlee Arnold, for the purpose of reaching certain equitable assets of the said Satterlee Arnold, and to have them applied to the payment of his judgment. Previous to 1879, Satterlee Arnold was in business in the state of New York, together with one Sarah T. Harden. Their business was the manufacture of knit goods. The complainant was a commission merchant, who received and sold the goods of Arnold & Harden. He was accustomed to advance money upon the goods in his hands for sale. In 1878 the firm of Arnold & Harden failed in business, and made a general assignment for the benefit of its creditors. At that time the complainant had a large amount of the goods of the late firm in his hands, upon which goods he had made large advances of money. He subsequently sold these goods, as the opportunity for sale offered, and found that the receipts from the sale of all the goods in his possession were insufficient to repay the advances of money which he had made, together with interest. He brought an action to recover the balance in his favor, in the courts of the state of New York, and on November 21, 1885, recovered a judgment. Upon that judgment an action was brought in this state, and a new judgment recovered in the supreme court for the sum of

\$6,200.53, on September 28, 1891. Execution was issued, and returned unsatisfied. The bill is filed upon the notion that there are equitable assets of the husband, the legal title to which is now in the name of the wife.

It appears that Satterlee Arnold is an inventor, and his skill has been directed to the invention of improvements upon the sewing machine, for which inventions he has caused a number of patents to be issued. Previous to the time of the failure of his firm, in 1879, he had procured patents to be issued to himself, namely: No. 104,532, issued June 21, 1870; No. 119,958, issued October 17, 1871; and No. 204,938, issued June 18, 1878. The title to these patents seems to have been passed over to Mrs. Arnold before the failure of the firm. Since the failure the husband has had issued to himself, and has then assigned to his wife, the following patents: No. 241,116, issued on May 10, 1881; Nos. 378,822 and 378,823, issued February 28, 1888. He has caused to be issued to his wife the following patents: No. 392,581, on November 13, 1880; No. 242,038, on May 24, 1881; No. 249,734, on November 22, 1881; Nos. 278,484, 278,485, and 278,486, on May 29, 1883; No. 311,558, on February 3, 1885; Nos. 331,106 and 331,108, on February 24, 1885; No. 313,909, on March 17, 1885; No. 324,351, on August 18, 1885; No. 331,107, on November 24, 1885; Nos. 378,644 and 378,645, on February 28, 1888. So far as appears, nothing substantial was realized from these patents until 1882. On April 1, 1882, an agreement was entered into between Anna M. Arnold, the wife, and the Norfolk & New Brunswick Hosiery Company, by the terms of which agreement she granted to the company the exclusive right to make, use, and sell in the United States the patents granted on June 21, 1870 (No. 104,532), on May 10, 1881, (No. 241,116), and November 22, 1881 (No. 249,734); as well as any patent which might thereafter be granted to Satterlee Arnold or to Anna Arnold, for any improvement or invention appertaining to the "Anchor stitch seam" or "Anchor sewing-machine trimming and holding devices," or any invention to make knit underwear with the Anchor stitch seam and Anchor stitch sewing-machine trimming. The company agreed to pay royalties, which after January 1, 1883, would together amount to not less than \$1,000 a month. These royalties have been, since the date of the agreement all paid. On April 2, 1886, another agreement was made between Anna M. Arnold, of the first part, and Satterlee Arnold, of the second part, and A. G. Jennings & Sons, of the third part. By this contract, Anna M. Arnold granted to A. G. Jennings & Sons the exclusive right in the United States to manufacture and sell gloves and other hand covering made of fabric other than leather, and also the right to license others to do so under patents numbered 104,532, 241,116, 249,734, 278,484, 278,485, 278,486, 311,558, 313,909, 324,351, 331,106, 331,107, 331,108, and under any patent which might be thereafter issued to Anna M. Arnold in aid of the im-

provements patented as aforesaid. The parties to the third part agreed to pay the sum of \$25,000 in money. They also agreed to pay one-half of all the royalties which they should receive from others whom they should license, and they guaranteed for five years that these royalties should not be less than \$3,000 a year. Out of the royalties received under the first of these agreements, the wife has bought and now owns an unincumbered lot of ground in Verona, worth \$5,000, and also 10 government bonds, of \$1,000 each. She also owns a \$1,000 railroad bond. She is also the owner of stock in the Arnold Sewing-Machine Company, which stock is of the nominal value of \$75,000, but probably of little real value. Besides the amounts received from the Norfolk & New Brunswick Hosiery Company, Mr. Satterlee Arnold states that \$50,000 or \$60,000 has been received under the Jennings contract. Indeed, he says that they had spent in their business \$110,000. The proceeds received under the two contracts, left after paying the expenses of the business and maintaining the defendant's household, seem to have been invested in the property already mentioned.

The question presented for solution is whether all these patents assigned to or issued to Mrs. Arnold, and the contracts made in her name, from which she received a consideration in cash, and from which she has received and is entitled to receive royalties, the stock held by her in the Arnold Sewing-Machine Company, and the property which has been purchased by the use of the moneys received from the said contract, belong to the wife, free from any liability to answer for this debt against her husband. She, of course, insists that the property is hers, and she puts her rights to it upon the ground—First, That the assignments made previous to the failure of her husband's firm, in 1879, although the assignments were voluntary, were, nevertheless, valid, inasmuch as they were not made when he was insolvent, or when he supposed himself upon the verge of insolvency, and that, at any rate, they were then, and are still, valueless. In respect to the patents issued to her since 1879, it is, secondly, insisted that they belong to her by virtue of an agreement made between herself and her husband, by which, in consideration of the sum of \$10,000 advanced by her, or to be advanced by her, she purchased the future products of the inventive ability of her husband, and established a separate business of experimentation, and of machine building, and of selling and leasing the said machines.

In respect to the three patents assigned before 1879, it is impossible to conclude from the testimony that they had in themselves any value; nor is there anything in the testimony to show when the insolvency of the firm of Arnold & Harden was first known to the defendant. The subsequent inventions seem to have been the source from which the profits derived from the contracts and from the business have been mainly received. In regard to

the patents issued to Mrs. Arnold subsequent to 1879, the point upon which the present inquiry must turn is whether the transaction of which those assignments were a part was a separate business of the wife. The language of section 4 of the married woman's act (Revision, p. 637) is "that the wages and earnings of any married woman, acquired or gained by her after the passing of this act, in any employment, occupation, or trade in which she is employed, and which she carries on separately from her husband, and all investments of such wages, earnings, money or property, shall be her sole and separate property, as though she were a single woman." If the business carried on by the husband in the name of the wife after 1879 can be regarded as her separate business, then, by force of this statute, all the property invested in it, and all the accretions resulting from its conduct, belong to her; and if the husband, in conducting this business, was a servant of the wife under a bona fide employment, then his services in the business will not subject any portion of such property to the claims of the husband's creditors.

The account given by Mrs. Arnold of the circumstances under which these patents were assigned to her, and the future inventions issued to her, and the property where the business was carried on put in her name, is this: She says that about the time of the failure of her husband, in 1879, she received the sum of \$10,000 from the estate of her uncle, Dr. Vedder, of Schenectady. She and her husband were then living at Troy. She says that they entered into an agreement by which he assigned to her the patents issued and to be issued, in consideration that she should pay him \$1,200 a year, and should pay all the shop expenses for the development of these patents, and for all experimenting. She says: "I was to take all the risks from my private fortune for that purpose, and, in consideration of his salary and the amount of this money which I paid out, all these inventions, as they became developed through due experimenting, and became patented, were to be assigned to me." She says that she thinks that this agreement was put in writing, but she cannot find it. The husband's account of this arrangement with his wife is substantially the same as hers. He also thinks, but is not sure, that the agreement was put in writing. I do not think that there was ever any such agreement written and signed by these parties. If it had been executed, that fact would indicate that they were of the opinion that such an agreement was of importance. It is improbable that in such case there would be a doubt in their minds whether it had ever been executed. Nor do I believe that any single verbal agreement, embodying the point which is now said to have been covered by a written agreement, was entered into. I have no doubt that the wife received the money mentioned as coming from her deceased uncle's estate. I have no doubt that, with her consent, the money was paid to him as received by her, or as needed by

him, from time to time, and that it went to support the family, including the husband, for two or three years after his insolvency, as well as to pay the shop expenses; but that there was a distinct agreement that he was to receive a certain sum as salary I do not think is proven. Nor do I find any foundation in the testimony to support the theory that the business, which was carried on from 1879 to the present time ostensibly in the name of the wife, was in fact the business of the wife. The theory of the defendants is that he was the servant, she was the master; that all the business was transacted by him as her servant. Now, the entire history of the business from the year 1879 down is convincing that she let him have her money whenever he wished it, without a question, and that he put all the patents in her name, for the purpose of securing his property to his family in case of business trouble, while in fact he retained as complete control over it as if he was its absolute owner. Every step taken in the business was the offspring of his thought and will alone. In all the transactions it is perfectly obvious that everything was left to him. His wife naturally had but the faintest knowledge of the work in which he was engaged, and exercised no oversight over the conduct of the business. The bank accounts, it is true, were in her name. It is true, also, that he drew checks under a power of attorney from her; that the contracts with the Norfolk & New Brunswick Hosiery Company, and with Jennings & Sons, were made in her name; that the property purchased was put in her name; that the property in which the machines were manufactured was in her name. But it seems to me transparent that all this was merely colorable. It was the husband who suggested the agency, who settled the terms of the contracts, who received and deposited the money arising from them, and who spent it, with no expectation on his part or on her part that he would ever be called upon to account to her for its receipt or expenditure. He kept no books of account, except of the most meager and partial kind, of the receipts and the expenses of the business. The wife never asked for an accounting, and never expected any, and he knew that she never expected any. The organization of the Arnold Sewing-Machine Company, and its operation, are illustrations of his absolute control of affairs. The company was organized in this way: The property in which the husband had conducted his experimentation was in her name. The Arnold Sewing-Machine Company was organized, and \$75,000 worth of its stock was given to the wife, ostensibly for this property, which she turned over to the corporation. The rest of the stock seems to have been held by friends of the Arnolds, the husband holding one share. The husband was made president and manager, and is still such. His control of the business of the corporation has been absolute. No meetings of directors seem to have been held. In fact, he cannot tell who the present directors are. He has been the presi-

dent, the manager, the board of directors, and the whole corporation.

The facts of the case, as I have found them, are very much in line with those in *Glidden v. Taylor*, 16 Ohio St. 509. In that case the husband manufactured in the name of his wife for years. There was no formal agreement between the husband and wife concerning his services, or as to the disposition of the property of the business. As her agent and trustee, he received the proceeds, and supported himself and his family therewith, and spent what money he desired, and, with the surplus, purchased, in the name of his wife, a dwelling house and lot. In the prosecution of the business he had entire control. The property thus accumulated was held to be subject to the claims of his creditors.

But it is strongly insisted that all the property which is now alleged to be equitable assets of the husband is the outcome of his inventive ability, and that he had the right to give his talent to his wife, without impressing upon the property produced by it any liability for his own debts. It is said that a man is not the slave of his creditors, and that he is not bound to devote his personal labor or mental ability to the payment of his debts. This statement is undoubtedly true. While there is a moral duty to pay debts, yet there is no method of physical coercion by which the debtor can be compelled, by any judicial proceeding, to do so. But the question here is, not whether the debtor can be compelled to work for his creditors, but whether if he does put into action his latent ability to earn money, and it produces property, the property can be reached and applied to the payment of his debts. In *Abbey v. Deyo*, 44 N. Y. 344, Mr. Commissioner Ward Hunt, in his opinion, took the ground that the debtor could give his time and his talents to whomsoever he pleased. Therefore it followed that, however great his talents were, if he chose to exercise them for the benefit of his wife, the product was hers. In *Voorhees v. Bonesteel*, 16 Wall. 31, the supreme court of the United States, on appeal from the circuit court of the Eastern district of New York, followed the cases in the state courts in holding that a wife could employ her husband to manage her business, and that the application of a portion of the income of the wife's separate property to the support of the husband would not impair the title of the wife. In *Aldridge v. Muirhead*, 101 U. S. 397, on appeal from the circuit court for the district of New Jersey, Chief Justice Waite held that the fact that the husband had rendered services in employing the wife's capital in the purchase of lands would not invalidate her title thereto, if his services were devoted to her separate property. These cases were cited with approval by Vice Chancellor Van Fleet, in his opinion in *Tresch v. Wirtz*, 34 N. J. Eq. 124. The right of a wife to employ her husband in her grocery business, in consideration of his clothes and board, was upheld by Vice Chan-

cellor Bird in *Kutcher v. Williams*, 40 N. J. Eq. 436, 3 Atl. 257. I do not understand, however, that in any case decided in the courts of this state it has been held that the right of a husband to give away the proceeds of his labor or his talents as he pleases, free from the demands of his creditors, has been asserted in the unrestricted language used in the opinion in *Abbey v. Deyo*, supra. It is to be observed that, in all the cases so far mentioned, the services of the husband were rendered in a separate business, or upon the separate property, of the wife. There is no instance within my knowledge where a husband has said to his wife, "I am going to work, and I give to you my labor and its fruits," that a court has held that the gift of the property-creating potentiality of the husband carries to the donee a title to the property created, free from all liability to pay the husband's debts.

As has already been remarked, it is, of course, true that a court cannot exert any authority over a debtor to make him work with his hands or his intellect for his creditors; and, even when a debtor has turned his ability into value by the exertion of his talent or the exercise of his hands, it is in a degree free from liability, if the debtor is a husband. Such a debtor undoubtedly possesses the right to labor for the support of his family and the maintenance of his children. This is a duty, and, so long as the result of his labor does not exceed an amount sufficient to properly maintain and educate his family in their walk in life, it cannot be reached. *Phillips v. Hall*, 160 Pa. 60, 28 Atl. 502; *Seay v. Hesse*, 123 Mo. 450, 24 S. W. 1017, and 27 S. W. 633; *Bump, Fraud. Conv. par. 25*. A husband can render those incidental services which the head of the family generally performs, and can give his wife the benefit of his experience and skill in the transaction of her separate business, and in the management of her separate property. *Tresch v. Wirtz*, supra. But there is no case in our courts which has upheld the right of the husband to give to his wife, unrestrictedly, all the profits of his labor or his talent. Instead of upholding the right of the husband to this extent, the courts have asserted a different rule. In *Bank v. Sprague*, 20 N. J. Eq. 18, Chancellor Runyon held that while a husband had the right to give to his wife her earnings when she carried on her separate business with his assistance, with her own means and on her own account, yet, when the labor and skill of the husband had united with those of the wife, the business would be considered as the husband's, and the proceeds would not be protected from his creditors. So, in *Quildort v. Pergeaux*, 18 N. J. Eq. 472, it was held that the husband could not give to his wife his earnings. It is true that at the date of these decisions section 3 of the present married woman's act (Revision, p. 637) had not been enacted. That section became operative in 1874. The statute shields all the earnings of the wife derived from her

separate business from her husband's creditors. Under this statute the relation of the husband and his wife is exactly the same as it was before its enactment whenever the husband had abandoned, in favor of his wife, all claim to her earnings. In both the cases cited, the husband had done this so far as he was able. The ability of the husband to confer all the benefit resulting from his labor and skill was not affected at all by the act, nor does the act modify or annul the force of the previous decisions touching that point. Those cases represent the true doctrine. No debtor can obtain a clearance from all the claims of his creditors except by virtue of a bankrupt law; nor can he voluntarily turn over all the proceeds of his labors or his ability by a gift which precedes or follows the accretion of such property, so long as he has creditors.

My conclusions are that the business carried on in the name of Mrs. Arnold was not her separate business, but was, in fact, the business of her husband. The profits derived from it, and the property into which the profits have been put, are liable, as equitable assets of the husband, to be applied to the payment of the complainant's judgment. I am of the opinion, however, that Mrs. Arnold has a superior equitable lien upon all this property, as security for the repayment to her of all the money advanced to the husband, together with interest upon it. One object which Mr. Arnold had in mind when he caused the patents to be assigned to, or issued in the name of, the wife, was security to her. This much of the transaction she must have known, although she knew little beyond this. The case is one where the legal titles held by her should be set aside, upon equitable terms, and the wife's equity in the property, to the degree already stated, should be protected. I will frame the details of the decree on application of the counsel of complainant, upon notice to the counsel of the defendants.

(64 N. J. R. 559)

MOLINEAUX v. RAYNOLDS et al.

(Court of Chancery of New Jersey. Sept. 14, 1896.)

PARTNERSHIP REAL ESTATE—PARTITION—DISSOLUTION—DISTRIBUTION OF ASSETS.

1. Partnership real estate is regarded as personalty, so far as it is required to pay firm debts.

2. As a general rule, there can be no partition of firm realty so long as there are firm debts outstanding. This rule is to secure the right of each partner to have firm property applied to the payment of firm debts, in order that he may be discharged from personal liability for them. Therefore, if it appears that the realty will not be called upon to pay firm debts, a partition of the same may be decreed.

3. Upon the dissolution of a partnership, the assets are applicable to the payment—First, of firm debts due to nonpartners; second, of advances made to the firm by partners; third, of capital contributed by each partner. The residue is divisible, as profits, equally between the partners, unless a different method of division is stipulated for.

4. When by agreement each partner had the privilege of leaving in the business of the firm, as contributions of capital, all or a part of his share of the profits set apart to him at the end of each year, then, upon dissolution, such portions of profits undrawn will be payable as capital.

5. When upon dissolution the partners agree upon a valuation of the firm assets at a sum not in excess of the entire amount of the capital which has been contributed, and the personal property is turned over to a new firm upon the basis of such valuation, and the real estate is retained by the members of the old firm, their respective interests in the real estate will be in proportion to their contributions of capital.

(Syllabus by the Court.)

Bill by Edward Molineaux against Charles T. Raynolds and others for partition. Decree for complainant.

A. Q. Keasby & Sons and Hugo Hirsch, for complainant. Copeland & Luce and George S. Hamlin, for defendants.

REED, V. C. This bill is filed for a partition of a tract of land, upon which is a factory, at Bergen Point, N. J. It is admitted that the present owners of the property are Charles T. Raynolds, Thomas B. Hidden, the two defendants, and Gen. Molineaux, the complainant. It is also admitted that they own it as partners. It is admitted by counsel that, if the property is subject to a partition suit, it should be sold, and not divided. Two questions are presented for solution: The first is whether the suit for partition is well brought. If it is properly brought, then the second question is, what are the proportionate interests of the owners in the property? It is essential to a clear understanding of the second of these questions—and, in a degree, of the first—that the manner in which the property in question was created, and how it is now owned, should be set out in detail. It appears that previous to the year 1867 there existed a firm under the name of Raynolds, Pratt & Co., of which firm the parties to this bill were members. In 1867 a new partnership was formed, consisting of four persons, namely Raynolds, Hidden, Richardson, and Molineaux. By the terms of the partnership agreement, each was to put into the new firm, as capital, the amount of interest which each had had in the old firm of Raynolds, Pratt & Co., and Molineaux was to put \$20,000 in addition. This agreement continued until 1875. Between 1867 and 1870 one Aquilla Rich became a member of the firm, and in 1870 a deed for the property now in question was made to the five partners. In 1875 a new agreement was made between these partners. In this agreement the capital stock contributed by each was set forth. It was stated that Charles T. Raynolds' share of contributed capital was \$450,000; Hidden's share, \$250,000; Richardson's share, \$138,000; Molineaux's share, \$100,000; Rich's share, \$33,000. By the terms of the agreement the net profits were to be divided as follows: To Raynolds, 38 per cent.; to Hidden, 22½ per cent.; to Richardson, 15 per cent.; to Molineaux, 15

per cent.; and to Rich, 12½ per cent. The several partners were to receive interest on their capital up to certain amounts, and were to share net profits according to the agreement above stated. This agreement continued until 1882, when another agreement was entered into. In this agreement, also, the amount of capital contributed by each was stated, namely: Raynolds, \$450,000; Hidden, \$250,000; Richardson, \$138,000; Molineaux, \$138,000; Rich, \$33,000. The net profits were to be divided as in the last-mentioned agreement, and interest was to be paid on capital in the same way. In 1884 still another agreement was made. In this agreement the amount of capital stock contributed by each was stated as follows: Raynolds, \$500,000; Hidden, \$250,000; Richardson, \$27,000; Molineaux, \$180,000; Rich, \$27,000. The net profits were to be divided as follows: To Raynolds, 33 per cent.; to Hidden, 24 per cent.; to Richardson, 12½ per cent.; to Molineaux, 18 per cent.; and to Rich, 12½ per cent. Interest on capital was to be paid as before. This agreement was to last for five years. Shortly before the termination of this agreement three of the partners (the parties to this suit) purchased the interest of two of the parties, namely, Richardson and Rich, paying therefor the sum of \$40,000. Each of the three purchasing partners contributed, to pay the consideration, the same proportions that they had contributed capital. Shortly after the purchase of these interests, Charles T. Raynolds having become insane, a new agreement was executed, by which the interests of Charles T. Raynolds in the personal property, machinery, and fixtures of the firm was purchased by the other two partners, together with one Edward H. Raynolds. By this arrangement all the property of the firm, except the real estate, was transferred to a new firm, consisting of Thomas B. Hidden, Edward L. Molineaux, and Edward H. Raynolds. By this agreement all the liabilities of the old firm were assumed by the new firm, with the exception of one liability, in the shape of a suit then pending against the firm, brought by one De Floras. This transaction wound up the business existence of the old firm, leaving as undivided assets the property in question, and one other piece of real estate, situate in Brooklyn, N. Y. These properties therefore belong to the members of the old firm, the three parties to this suit.

The first question mooted springs out of the existence of the De Floras suit. The counsel for the defendants insist that, so long as any claim against the old firm remains unsatisfied, so long each partner has a right to have the firm assets held as such to be applied in liquidation of the claim; that until all such claims are satisfied no partner has a right to demand a division of the firm property. The equitable rule thus invoked is entirely settled. The property of a firm, whether personal or real, is a fund to be primarily applied to the payment of its

debts; and each partner has a right to have it so appropriated, to the end that he himself may be relieved from any personal liability to answer for the firm debts. In England, land as well as personalty belonging to a firm is regarded as personal assets. *Lindl. Partn.* par. 343. In this country the land is held to be personal assets so far only as it may be needed to pay firm creditors. *Bank v. Sprague*, 20 N. J. Eq. 13; *Freem. Co-Ten.* par. 118. Out of this equity of each partner to have the firm property applied to the payment of firm debts, in order that he may be discharged from personal liability, has emerged the rule that the partition of the real property of a firm will not be decreed, so long as debts of the partnership remain unliquidated. *Pennybacker v. Leary*, 65 Iowa, 220, 21 N. W. 575; *Kruschke v. Stefen (Wis.)* 53 N. W. 683; *Mendenhall v. Benbow*, 84 N. C. 648; *Freem. Co-Ten.* par. 443. By the rule laid down in these cases, the only method by which a partner, under such conditions, can compel a division of the firm property, is by a bill to administer and settle the partnership affairs. It is apparent, however, that, inasmuch as the ground for refusing partition is that partners may be protected from future calls to pay firm debts, therefore, if it should be made to appear that the property involved in the application for partition will not be needed to meet such obligations, the objection to the distribution of the property disappears. Now, it appears in this case that there is other real estate in Brooklyn, belonging to this firm, of the value of \$150,000. It also appears that the De Floras suit is pending in the courts of New York. The property and the pending suit are therefore both in the state of the firm's domicile. It is beyond the realms of probability that the final judgment in the De Floras suit, which suit has been dragging along for 20 years, can reach an amount which will begin to exhaust the Brooklyn property. Although it appears that a proceeding for partition of that property also had been commenced in the courts of New York, that proceeding has not gone to a decree, and it is in that suit that the defense set up here can be more appropriately interposed. Under these conditions, I do not see any substantial ground for thinking that the interest of any member of the firm will be menaced by the severance of the title to this property as is proposed by this suit.

The second question is therefore presented, what are the proportionate interests of these parties in this real estate? The contention of the complainants is that this real estate represents accumulated profits, and therefore should be divided in the proportions to which the several partners were entitled to share in profits. The contention of the defendants is that this real estate represents capital, and it should be divided in proportion to each partner's contribution of capital. Inas-

much as the partners under the different partnership agreements were entitled to share in profits in proportions differing from their proportionate contributions of capital, it follows that by the adoption of the one or the other of these theories the interest of the complainant in the firm property is differently affected. As has been already displayed, these partners had transacted partnership business under successive agreements from 1867. Each agreement set out the amount of capital which each partner had contributed, and prescribed the proportion of profits to which each partner was to be entitled during the term of the partnership. He was also to have the right to draw interest upon his capital. Now, some partners drew out all of their interest and all of their profits. Others let a portion of their profits or a portion of their interest remain in the business. By the apparent acquiescence of all the partners, the balance of those profits or interest remaining at the end of each year undrawn were added to the amount of the capital of those of the partners who saw fit to permit them to remain in the business. By reason of the unequal additions to the capital from year to year, the proportions of capital respectively contributed constantly shifted, and the total amount of capital contributed by all increased. Now, the theory of the complainant is that the original amount of firm property was increased by the employment of the profits which were permitted to remain in the business in improving and purchasing property. It is insisted that, by the sale of the personal property by the old firm to the new firm in 1889, the members of the old firm were paid for all the property which represented the product of the original capital, and that what remained is to be regarded as the product of the profits, and should therefore be divided as such. Now, it seems to be entirely clear that at the end of each year the net profits of the business were divided between the respective partners in the proportions in which profits were to be divided by the terms of the agreement. It is clear that when these profits were calculated and divided according to the terms of the agreement, and the share of each partner was put to his credit, then, as between the partners, these profits ceased to be assets of the firm, and became debts due from the firm to each member of the firm. The sum set apart to each partner at the end of each year was at the disposal of the partner as so much cash put to his credit. He could draw it out and use it as he chose. If he chose to invest it in the business, it was to be regarded as any other money which he saw fit to so invest. It became a part of the capital, or it became a loan, just as he and the partners agreed. That they agreed to regard these sums as additions to the capital appears beyond all question. Up to 1884 there was not merely a division of calculated profits, but such calculation included all profits, so that apparently nothing existed in the shape of undivided earnings.

This appears from a fact I think proven, 1. e. that in the calculation of profits all moneys spent in betterments were eliminated from the debit side of the account. Mr. Mather, the bookkeeper, swears positively that no expense for permanent improvement, but only expenses for repairs to the real estate and machinery, were deducted from the gross earnings of the business, in arriving at the net profits. Each partner therefore received as a credit for his share of the profits the same amount that he would have received had no permanent improvements upon the firm property been made. The expense of the permanent improvement was a debt against the firm assets, and, when paid, was necessarily paid out of the new capital which the partners contributed, by leaving a portion of their credit for profits and interest in the business of the firm. This portion, as already observed, after being calculated and credited was equivalent to cash; and, if left in the firm business, is to be regarded as capital. Again, each of the parties has acquiesced in the view that his interest in the property was in proportion to his contributions of capital. In March, 1889, as already stated, the interest of two of the partners, Richardson and Rich, was purchased by the three remaining partners. The interest of these two partners, whether something or nothing, was paid for by the three partners in proportion to their capital. The purchase eliminated any claims which the selling partners might have had to share in the assets of the firm, and transferred such claim to the three remaining partners. The manner by which this purchase was made and paid for indicates that the view of the parties was that the right of each in all the assets was in proportion to his capital. Again, in May a new firm was formed, composed of the two old members, Hidden and Molineaux, and a new member. By reason of Raynolds' insanity, it became essential to ascertain the amount of Raynolds' interest in the firm. The ascertainment of this necessarily involved the ascertainment of the proportionate interests of Hidden and Molineaux. In accordance with the result of this adjustment of values, the personal assets of the old firm were to be turned over to the new firm. An expert was put upon the books to discover any error in bookkeeping which might have crept in during the number of years covered by the partnership transactions, so that a final accurate account might be stated. With the consent of all the parties connected with the old and the new firms, such an account was stated; and upon the basis of such statement the personal property of Raynolds was purchased, and the personal property of Hidden and Molineaux in the old firm was transferred to the new firm. In making up the valuation of the property of the old firm, the real estate was valued at \$289,200. The real estate did not pass to the new firm, but was retained by the three old members. In fixing the value of all the property, the value of the real estate

was deducted. In fixing the value of the interest of each partner in all the property, his proportionate interest in the real estate was deducted from his proportionate interest in all the property. Now, the deduction on account of Raynolds' interest in the real estate was calculated in accordance with the relative amount of capital which he had contributed to the firm. In other words, his share in the personality was sold upon the theory that his proportionate interest in the real estate, as well as in the personality, was $\frac{50}{101}$, and the real estate was retained upon that theory. It will be perceived that the adoption of this theory in respect to Raynolds' interest involved as a sequence the adoption of the same theory with respect to the interest of Hidden and Molineaux. It is also perceived that if Molineaux's proportionate interest in the real estate, as is now claimed, is not in proportion to his capital contributed, which is $\frac{18}{101}$, but is 2 per cent. more, then it follows that the deduction from the amount received by Raynolds on account of his interest in the real estate retained was excessive, and therefore what he received for the personality was inadequate. This follows from the fact that, if Molineaux's share was larger, Raynolds' must be smaller, else the proportions could not be preserved. In fact, to accord to Molineaux what he now claims, the entire settlement must be overturned, and a new one adopted. In view of these facts, namely, that from 1867 to 1889 the profits have been divided; that they have been, if the partners pleased, added to the capital; that the purchase of the two partners' shares was made upon the basis of the proportion of capital contributed; that the calculation and settlement of the Raynolds interest in all the property were made upon the same basis; that the books of the firm were open to each member of the firm; and that at the end of each year, as Mr. Mather says, the balance sheets of the firm's business and division of profits were given to each partner, and invoked no complaint,—I say that in view of all this no court would be justified in unsettling this deliberate adjustment of the partnership affairs, unless in case of fraud or gross mistake. No such fraud or mistake is apparent.

But the complainant insists that, by the sale made by the old firm to the new firm in 1889, all the capital contributed by the parties to this suit to the firm business was paid, and therefore the real estate left remaining must be divided as profits. The legal ground upon which it is sought to raise this insistence is well established. Upon the dissolution of a partnership, after the payment of firm liabilities, the amounts contributed as capital by each partner are to be paid. If there is a surplus it must be divided as profits, and if there is a deficit the loss must be borne in the same ratio. Mr. Justice Lindley, in his work on Partnership (marginal page 402), lays down the following rules for the adjustment of partnership accounts upon dissolution. The assets are to be applied (1)

in paying the debts and liabilities of the firm to nonpartners; (2) in paying to each partner ratably what is due from the firm to him for advances, as distinguished from capital; (3) in paying to each partner ratably what is due from the firm in respect of capital; (4) the ultimate residue, if any, will then be divisible as profits between the partners, in equal shares, unless the contrary can be shown. It follows, of course, that if the contrary is shown the residue must be divided in accordance with such showing. There can therefore be no doubt that, upon the assumption that there was a surplus, the parties to this suit, as partners, were entitled to be paid, before the division of such surplus, only the amount of capital which each had contributed. Nor can there be a doubt that whether by the enhancement of the value of the real estate, or from any other cause, such surplus existed after the payment of the capital, such surplus would be divisible as profits. *Robinson v. Ashton*, L. R. 20 Eq. 25. Now, as already shown, all the earnings, so far as they could be calculated, had either been drawn out by each partner, or had by him been transmuted into capital. Whether there would remain any additional surplus in excess of the amount of contributed capital could only be ascertained by a sale of all the firm property, or by a sale of a part and an estimate of the value of the remainder, or by an appraisal of the value of all, and a division of the same according to the estimated value of the several portions. Now, in 1889 the old firm, as already observed, was dissolved by the insanity of O. T. Raynolds, and a new firm was formed by Hidden, Molineaux, and another Raynolds. The committee of O. T. Raynolds sold his interest to the new firm, and Hidden and Molineaux transferred their interest in the old to an interest in the new. The property of the old firm was not exhibited for sale, but by an agreement between the committee of Raynolds and Hidden, Molineaux, and Edward Raynolds, a price was fixed for all the property of the firm in excess of its liabilities, excepting the *De Floras* suit. The price or value of all this property was fixed at \$1,316,725. At the close of the firm's business the amounts due the partners were: To Raynolds, \$583,994.97; to Hidden, \$587,568.28; and to Molineaux, \$145,162.37. The total was the same as the amount of the estimated value of the firm assets. The amount of such assets was in fact diminished by a deduction made for depreciation in value of the machinery, and on account of the irrecoverable overdrafts of Richardson and Rich. What was actually paid to the committee of Raynolds was his share in the amount of the assets remaining after such deduction, namely, \$539,346.76. Hidden's share was estimated and turned over upon the valuation of \$356,314.52, and Molineaux's at the valuation of \$130,874.94. From these amounts was deducted the estimated value of each partner's share in the retained real estate, and the balance was paid for in cash, or credits of different kinds upon the books of the new firm. Now, in the agreement

of 1884 it was stated that the amount of capital contributed by each was: Raynolds, \$500,000; Hidden, \$350,000; and Mollneaux, \$150,000. If the subsequent profits, which had been divided, and credited to Raynolds and Hidden, and left undrawn, together with the undrawn interest, are to be regarded as additional capital, then it is perceived that all the property of the firm was needed to pay capital. If it should be conceded that the amounts to the credit of Raynolds and Hidden in excess of the \$500,000 and \$350,000, respectively, represented profits and interest, then such shares of undrawn profits so divided and credited, together with the interest, were debts of the firm to the partner, as for advances. Therefore, in pursuance of the rule already announced, they were payable before the capital. After such payment the remainder of the firm property, as valued, was insufficient to pay the amounts of capital stated to have been contributed in 1884. In this balance Mollneaux would have the right to share in the ratio of $\frac{1}{10}$, assuming that his capital has not been depleted. If, as in fact, it has been depleted, then his share would be less. The real estate representing a portion of such balance of the firm assets is divisible in the same ratio. I am unable to perceive how the complainant's interest in the real estate can exceed $\frac{1}{10}$, upon any hypothesis which has been or can be propounded. I will advise a decree in conformity with these views.

(54 N. J. E. 447)

CRESSE v. SECURITY LAND-INVESTMENT CO. et al.

(Court of Chancery of New Jersey. Sept. 22, 1896.)

DECREE PRO CONFESSO — RIGHT TO APPEAR AND ANSWER.

Appearance and answer by a nonresident defendant, pursuant to the provisions of the twenty-first section of the chancery act (Revision, p. 107), is not a matter of right, but rests in the discretion of the chancellor, to be exercised in view of all the circumstances of the case. The party applying for it must show merits, and, where the circumstances demand, also surprise.

(Syllabus by the Court.)

Action by Ruhamah W. Cresse, administratrix of the estate of Humphrey S. Cresse, against the Security Land-Investment Company and others, to foreclose a mortgage. Petition of a nonresident defendant for leave to appear and plead. Denied.

On petition of the Bethlehem Iron Company, a nonresident defendant, for leave to appear and plead, answer, or demur to the complainant's bill, and for a stay of proceedings under the execution issued upon final decree heretofore made herein, until further order. The suit is for the foreclosure of a mortgage on land, part of which was claimed by one Ryon, who mortgaged a portion of that part, with other land owned by him, to the Bethlehem Iron Company. Ryon and the Bethlehem Iron Company were both made defendants, in or-

der, among other things, that their claims upon part of the lands mortgaged to the complainant's intestate might be adjudged to be without validity. The bill was filed in April, 1893, and promptly thereafter process of subpoena was issued against the defendants. The Bethlehem Iron Company was a corporation of Pennsylvania, having its principal office in Bethlehem, in that state, and, not being found within this state, an order of publication was made against it, pursuant to the provisions of the eighteenth section of the chancery act, as amended in 1893, a notice of which, in the form prescribed by the fifty-eighth rule of this court, was published and mailed as required by law. Revision, p. 106, § 18; P. L. 1893, p. 199. That notice was addressed to the Bethlehem Iron Company, and contained this paragraph: "And you, Bethlehem Iron Company, are made defendant because you claim to have an incumbrance upon said lands, or some part thereof, given to you by John T. Ryon; and in the said bill it is alleged that said John T. Ryon claims to own said lands through misapprehension and by mistake of facts, whereas in fact he never had any title to said lands, or any part thereof; and it is alleged in said bill that the mortgage to said Bethlehem Iron Company is not, and never has been, an incumbrance on said land, or any part thereof." The Bethlehem Iron Company failed to appear or answer, and a decree pro confesso was in due course, in July, 1893, taken against it. Ryon answered, asserting his title, and thereupon issue was joined, which, after having been litigated at considerable length and expense, was in June, 1895, decided adversely to Ryon; and thereupon a final decree, dated in June, 1895, was entered against both Ryon and the Bethlehem Iron Company. From that decree Ryon appealed, but his appeal was dismissed for want of prosecution in June, 1896. Upon the record being remitted from the court of errors and appeals to the court of chancery, execution for the sale of the mortgaged premises was issued, and pending advertisement of sale under it, on the 11th of August, 1896, the Bethlehem Iron Company presented its present petition, upon the filing of which the sale advertised was ordered to be adjourned from week to week, and the complainant was called upon to show cause why the prayer of the petition should not be granted.

S. H. Grey, for Bethlehem Iron Co. C. H. Sinnickson, for complainant.

McGILL, Ch. (after stating the facts). The petition admits that the Bethlehem Iron Company was duly proceeded against as a nonresident defendant. It does not deny that it had timely knowledge of the notice published and mailed, which made known to it the character of the suit, and its concern in the result thereof. It is true, in an affidavit annexed to the petition the counsel of the defendant company says that he knew of an-

other litigation between the complainant and Ryon, to which the Bethlehem Iron Company was not a party, which he supposed was the only suit between those parties; but this lack of knowledge of the present suit upon the part of such counsel does not show that the notice referred to was not received, or that the managing officers of the said company did not know of this litigation, and for some reason determine or fail to employ the affiant therein. Besides, there is a contradiction of the affidavit of such counsel in the affidavit of a former solicitor of the complainant, which is to the effect that he was told by the counsel of the Bethlehem Iron Company that that company would not answer in this cause, or take any steps to protect its mortgage. It is not perceived that such a remark could have been directed to the other litigation between the complainant and Ryon, for to that litigation the Bethlehem Iron Company was not a party, and therefore no question as to its answering or defending its mortgage therein could arise. If the notice to the Bethlehem Iron Company ever reached its counsel, it appears to be impossible, in view of its specific language quoted, that he should attribute it to litigation to which the Bethlehem Iron Company was not a party. The contradiction is, of course, due to some failure of memory or misapprehension which does not now appear. It is enough for present purposes that I cannot reconcile the statements of both affidavits, and that for that reason, if for no other, I should not base any judicial action upon the contradicted fact alleged in the affidavit of defendant's counsel. But this contradiction arises upon matter contained only in the affidavits, outside of the petition. The petition does not aver that the Bethlehem Iron Company did not have notice and know of this suit, and at the argument it was expressly disclaimed that its present application is intended to at all rest upon that ground. Nor does the petition aver that the Bethlehem Iron Company has a meritorious defense against the complainant's claim, which the final decree supports. The application is put upon the facts that the Bethlehem Iron Company has an important interest in the suit, that it is a nonresident defendant, that it was not served with process within this state, and did not appear in the suit, and that it was never served with notice of the decrees against it; and its argument is that, even though it knew of the pendency of the suit, and stood by inactively for two years, until Ryon's defense was overruled, and a decree was made against him and it, now, in virtue of the chancery act (Revision, p. 107, § 21), it being yet within three years from the date of the final decree, it has the right to appear and answer the complainant's bill.

The section of the chancery act referred to, stripped of verbiage and matter not pertinent to this inquiry, provides that where a decree shall be made against an absent defendant the chancellor "may," before issuing process to compel performance of the decree,

"if he deems it equitable so to do," require the complainant to give a bond, with such security and in such sum as he may direct, conditioned for restitution of property which may be unjustly taken from the absent defendant, and that, if such security shall not be given, execution for the performance of the decree shall not issue, but the estate and effects of the absent defendant may be sequestered, and remain under control of the chancellor, and if the absent defendant shall, within six months after notice in writing of the decree is given to him, or within three years after the decree, if no such notice be given, "petition the chancellor touching the matter of such decree and pay or secure to be paid, such costs as the chancellor shall think reasonable to order and direct," he "may be permitted to appear and answer the complainant's bill, and thereupon such proceeding shall be had as if such absent defendant had appeared in due season and no decree had been made," or he may within the times aforesaid file his bill to recover back the excess over the complainant's rightful recovery; but, if he shall not present his petition or file his bill within the times aforesaid, the decree shall be deemed and adjudged to be confirmed as of the time of making it. The scheme of this section of the statute obviously is to declare, and, to some extent, regulate and limit, the power of the chancellor, not only to withhold execution in the enforcement of the decree against an absent defendant, but also to let the absent defendant answer, leaving the exercise of the power, subject to the limitations, within the discretion of the chancellor. The section treats of precaution that may be taken against injury from possible error in an ex parte decree. It has nothing to do with the process by which jurisdiction of the absent defendant is had. It is to be read in the light of the remainder of the enactment, of which it is a part, and the objects and purposes thereof, and particularly in the light of the nineteenth section (amended in 1893; P. L. 199) which first provides that an absent defendant, who shall be served with notice of the suit as in the eighteenth section of the statute directed, shall be bound by the decree as if served with process within the state, and then, if such defendant shall make oath that he did not receive the notice or have knowledge of it within 10 days after the time within which it was directed to be served, or, in cases where actual service of the notice is affirmed by the complainant, shall show that it was not made, "the chancellor may, in his discretion, before executing the decree," proceed to take security in the manner provided in the twenty-first section. In this section the legislature indicates its intention to be that the twenty-first section is not designed to relieve an absent defendant who has received notice of the suit given as the eighteenth section of the statute prescribes, but that the power described and declared in

the twenty-first section to require security against error in the decree, or, in default of its being given, to withhold execution for a limited time, is to be available to the chancellor in case notice shall not have been received. But it does not require the chancellor to use that power. Its provision is that he "may" do so, and to emphasize that there is no mandatory requirement the words "in his discretion" are added. So in the twenty-first section the power to require security is submitted for use by the chancellor whenever he deems it equitable to use it; the language being, "may if he deems it equitable so to do." And later, when it contemplates that there may be appearance and answer by the absent defendant, it does not give an absolute right to the defendant to appear and answer, but authorizes his application to the chancellor, who may permit appearance and answer, very properly leaving the affirmative or negative action upon the application to rest in a proper exercise of judicial discretion. The seventy-third section of the chancery act is of the same general character as the twenty-first section. It has for its object the protection of absent defendants from error in mortgage foreclosure cases. Its provision is that after decree, and before sale of the mortgaged premises under execution, an absent defendant may enter his appearance, and apply to the court for a writ of supersedeas to stay proceedings on the execution. In *Horne v. Corning*, 28 N. J. Eq. 254, the court of errors and appeals held that this section of the statute is not mandatory as to the issuance of the writ of supersedeas, but is declaratory of a power which was inherent in the court when the section was enacted. "The act," said Mr. Justice Dalrimple in writing the opinion of the court, "simply declares it lawful for the court, under the circumstances named, to issue the supersedeas. Whether it shall or not issue depends, not on the will of the party, but on the discretion of the court, to be exercised in view of all the circumstances of the case. I think a party who invokes the aid of the court under this statute should show at least surprise and merits." If authority be needed to assure us that the proper interpretation of the twenty-first section is, as its language plainly indicates, that all indulgence to the absent defendant is left within the discretion of the chancellor, the case cited furnishes it.

I think that in this case it was incumbent upon the Bethlehem Iron Company to unequivocally allege and establish that it was never served with notice of the suit in the manner prescribed by the eighteenth section of the chancery act, so that it actually received the notice of the suit, or to allege surprise in some other form which will justly call for this court's interference in its behalf, and also that the defense it proposes to interpose is possessed of merit. The propriety of requiring the defendant to show sur-

prise in this case is emphasized by the fact that for months the complainant and Ryon were engaged in trying the very issues upon which the claim of the Bethlehem Iron Company rests. It should have clearly appeared that during such litigation the defendant did not willfully stand by, watching the proceeding in the hope that in the success of Ryon its mortgage would be protected, and did not negligently fail to defend. The application, in substance, asks the repetition of an expensive litigation, which should not be permitted except upon the presentation of a clear and strong case of surprise and merits. In the case of *Consolidated Electric Storage Co. v. Atlantic Trust Co.*, 50 N. J. Eq. 93, 24 Atl. 229, the question as to the right of a nonresident defendant under the twenty-first section of the chancery act to appear and answer, regardless of whether he has or has not a ground of defense, was presented to Vice Chancellor Van Fleet, but was not decided, because there so strong a meritorious defense was shown against the holding of a decree made upon ex parte proofs, and at trifling expense to the complainant, that the vice chancellor felt constrained to permit it to be set up, even though it appeared that the defendant had notice of the suit, and opportunity to defend it. I apprehend, however, that he would have attached some importance to the failure to defend after notice, if, during the delay, the complainant had been put to a long and costly litigation with other parties upon the very issues the proposed defense must raise.

A general expression of the vice chancellor at the end of his opinion indicates that he was at least inclined to the opinion that importance was to be attached to the words of the twenty-first section, that the absent defendant could petition the chancellor "touching the matter of such decree," as restricting that which was to be considered by the chancellor upon the application, to the substance adjudicated by the decree, excluding question as to surprise. I take a broader view of this language. I think that by use of the words "matter of such decree" the legislative intent was to comprehend everything that might justly be considered to sustain or defeat the decree. I think that the case presented by the petition is insufficient to justify my granting the prayer of the petition, and therefore, no desire to amend having been expressed, I will deny the application, and discharge the restraint upon the sale.

(54 N. J. E. 454)

McTAGUE v. FINNEGAN et al.

(Court of Chancery of New Jersey. Sept. 26, 1896.)

SPECIFIC PERFORMANCE—CONTRACT TO MAKE DE-
VISE—PAROL EVIDENCE.

1. Where the object of a suit in equity is to secure the specific performance of an alleged parol contract to leave the estate of a foster parent to the child, the rule is that the agreement

must be clearly established by satisfactory proofs. Such proofs do not exist in uncertain and unnecessary inferences.

2. Where parties to a contract have put it in writing, and that writing, upon its face, purports to contain the whole agreement between them, it will be the only evidence of the contract as concluded; and no parol proof of what was said and done during the negotiations which led to it will be admitted to alter or contradict it, or to supply additional terms.

3. In such case, proof will not be received to show a collateral promise, between the parties, at the negotiations, unless that promise relates to a subject distinct from that to which the written contract applies.

(Syllabus by the Court.)

Bill by Mary A. McTague against Austin Finnegan and others for specific performance. Bill dismissed.

John H. Fort, for complainant. Alfred Mills, James R. English, and T. F. McCormick, for defendants.

McGILL, Ch. The complainant's bill alleges the existence of two contracts, whereby, at the death of Patrick Rehill and Elizabeth, his wife, the complainant was to have their respective estates; and its object is to secure the specific performance of those contracts so far as the estate of Patrick Rehill is concerned. The allegations of the bill are that soon after the complainant's birth, in December, 1839, her mother died, and her father committed her to the care of his sister, Elizabeth Rehill, and Patrick Rehill, her husband, who were about to visit Ireland, to conduct her to the home of her grandparents in that land; that the Rehills, having no children, became attached to her, and, instead of delivering her to her grandparents, kept her, and treated her as their own child, and, after six or seven years, returned with her to America; that, upon their return to America, her father sought her surrender to him, and then the Rehills bargained and agreed with him that, if he would make complete surrender of her to them, they would adopt her as their child, and maintain and educate her, and "make" her the "beneficiary" of their joint and separate estates at their demise; that the surrender thus stipulated for was duly made, and the complainant thereafter remained with the Rehills as their adopted daughter, known by their surname, and rendered them service and obedience as their daughter, until November, 1861, when, with their consent, she married one Peter S. McTague; that McTague thereafter became the partner of Patrick Rehill in business, as general contractors in the construction of railroads and work of kindred character, and remained such partner for many years; that, in process of time, McTague sued Rehill to secure an accounting of the partnership dealings, which suit resulted in a judgment for \$17,000 in McTague's favor; that thereupon Rehill conveyed his real estate to a nephew, and converted a large portion of his personalty into cash, and fled to Ireland, to escape the payment of the judgment; that Elizabeth

Rehill, suffering from a cancer, was unable to follow her husband, and therefore sent for the complainant, and induced her to influence McTague to compromise the judgment; that the judgment was compromised for \$5,000 in cash (which was subsequently paid), and an agreement that the family affection which had existed before the suit should be restored, and the complainant should be recognized as the adopted daughter of the Rehills, "with [using the language of the bill] all the rights and privileges of inheritance of a child, and with the understanding that your oratrix was to be the beneficiary to their estates at their demise, as fully and freely as if no estrangement had ever taken place, * * * and upon this express understanding and agreement: that the matter of inheritance should not be disputed, and that your oratrix should in no wise be affected by any misunderstanding existing between said Peter S. McTague and Patrick and Elizabeth Rehill, but that every provision, condition, and understanding that existed before the suit should, by the terms of the agreement, and in consideration of a reduction of \$12,000 on said judgment of \$17,000, be removed, and the rights and privileges of your oratrix remain unaffected, and the question of her adoption and the question of her inheriting as the beneficiary of their estates should be undisputed"; that, after the compromise had been effected, Mr. Rehill returned to the United States, presented his wife with \$40,000 of his moneys, made a will by which he bequeathed and devised the remainder of his estate to others than the complainant, and a few days thereafter died; and that, a few months later, Mrs. Rehill made her will, by which she bequeathed all her estate, including therein the \$40,000 received from her husband, except \$1,000, to others than the complainant, and shortly thereafter died; and that before the suit by McTague against Patrick Rehill was brought, and while the complainant continued to be recognized by the Rehills as their daughter, her own father, John Lee, died, possessed and seised of a considerable estate, of which he bequeathed and devised to her a much smaller portion than he would have given her if he had not believed that she would take the estates of the Rehills.

The complainant's object in this suit is to recover the estate of Patrick Rehill, including, as part thereof, the \$40,000 which was given to Mrs. Rehill upon the return of Patrick from Ireland, and which constituted practically the whole property disposed of by Mrs. Rehill's will. The defendants are the executors, devisees, and legatees under the two wills. The decree sought by the complainant, if made, will require the surrender of both estates, and defeat the provisions of both wills. It thus appears that the complainant relies upon two agreements,—the first made about the year 1845, when she insists her father surrendered her, and

she became the adopted child of the Rehills; and the second when, in 1888, the proofs show, the \$17,000 judgment was satisfied.

The facts alleged concerning the first agreement, it is insisted, bring it within the principles decided in *Van Dyne v. Vreeland*, 11 N. J. Eq. 370, 12 N. J. Eq. 142. It is urged that it was a parol contract, made by a father for the benefit of his child, in good faith, fully performed upon her part by her surrender to the Rehills, and her dutiful obedience to and service of them as their child, until, with their consent, she married; and her irretrievable detriment in the loss of a portion of the bounty of her father, which, but for his reliance upon the agreement, she would have had, which contract will be enforced in equity, upon the ground that the nonperformance will operate as a fraud upon the complainant. The first difficulty I have with this alleged agreement—and it is an insurmountable one—is that it is not proved to have ever been entered into. There is no direct proof that it was made. The facts that the complainant's father suffered the Rehills to keep his daughter; that she was called by their name, and known as their daughter; that they said she was their adopted daughter, and taught her and suffered her to call them, respectively, "father" and "mother"; and that they frequently declared to her husband and strangers that she would have their properties when they should die,—are clearly established; but I do not perceive how they warrant the inference, contended for, that the Rehills had absolutely bound themselves to John Lee to give the complainant their estates at their death. Lee had lost his wife. He desired to make some disposition of his infant daughter. Mrs. Rehill was his sister. She and her husband were about to go to Ireland, and, taking advantage of the opportunity their proposed visit offered, he besought them to take the child to its grandparents. Mrs. Rehill was childless, and, upon the voyage, she and her husband became attached to the child committed to their care, and kept it. That the father afterwards demanded it is not proved. That he acquiesced in their retention of it, and treatment of it as their own child, is clear. He married again, and had five children by his second wife, and, upon the death of his second wife, married a third time, and had two more children. As his family increased, he witnessed the affection that his sister and her husband lavished upon the daughter of his first wife, and her return of it, and knew of the increasing wealth of Patrick Rehill, and his declared purpose to leave that wealth to his child. If he should take the child, he must take it from this opportunity and a happy home, and to the care of a stepmother, who had children of her own. Under such circumstances, his acquiescence is not necessarily attributable to a surrender of his child under contract. It may as well

be attributed to his resolution that it was best for her interests, in view of the probability of her ultimately having the estates of the Rehills, that he should leave her with them. He witnessed her marry a man in good circumstances, who, before Mr. Lee's will was made, became probably as rich as Lee himself. In view of that circumstance, and of his daughter's prospect of bounty from the Rehills, it does not appear to have been unreasonable for him, in the disposition of his estate, in absence of any contract with the Rehills, to put her, as he did, on a par with her half-brother, who was able to maintain himself. The disposition of Mr. Lee's will was this: He allowed a married daughter the use of a dwelling house until the final distribution of his estate. He gave the income of the residue of his estate to his wife for her life, requiring her to pay therefrom three annuities during her life to three of his children, no one of which annuities exceeded \$400, and also enough from that income to educate two other children; and he provided that upon the death of his wife, and the completion of the education of those two children, the whole of the principal of his estate should be distributed equally among his seven living children, among whom the complainant was included. I am inclined to think that the more natural inference from this testamentary provision for the complainant is that Mr. Lee did not have an agreement with the Rehills that his daughter should have their estates, but considered her taking them as an uncertainty; for otherwise he would probably have thought that, with Rehill's estate and her husband's wealth, she would have enough without sharing his estate with the six other children. The first contract is not proven.

It is claimed that the second contract was made at the settlement of the judgment which McTague recovered against Rehill. The agreement for that settlement was effected on the 20th of October, 1888, between McTague and Mrs. Rehill. It was brought about in this way: Rehill sent for his wife to join him in Ireland. She was then suffering with a cancer, and feared she could not survive the ocean voyage. The only escape from that peril apparently possible to her was to secure the satisfaction of the judgment, so that her husband might return to America. To this end, she directed her attention to enlisting the services of friends to induce McTague to enter into a compromise. On the 19th of October, the son of McTague, a young man some 24 years of age, at the instance of his mother, called upon her at her residence, in Philadelphia. She told the young man of her condition and wishes, and sent him to bring his mother to her. Mrs. McTague came on the 20th of October, and, joining in the effort to settle the judgment, sought her husband, who, on the same day, had an interview with Mrs. Rehill, at which he says he said to her: "There is only one way that matter can be

settled without paying the full amount to the court, and that is that Mr. Rehill and you recognize Mrs. McTague as your adopted daughter, as she always was, and heir, and I will settle with you;" and that thereupon she assented to the terms he thus proposed. On the same day, immediately after this conversation, it appears that McTague and Mrs. Rehill went to the office of a Mr. Boyer, who had been the counsel of Mr. Rehill in the suit in which the judgment was recovered, to have their agreement reduced to writing, and stated to him its terms. Mr. Boyer drew the agreement in the shape of a unilateral contract, signed and sealed by McTague alone, in which he agreed, in consideration of one dollar to him paid by Mr. Boyer, as the attorney of Mr. Rehill, "and for the further consideration [quoting the language of the instrument] of the relation of myself and family to P. Rehill and Elizabeth Rehill, his wife," upon the payment to him of \$5,000 within 60 days by Mr. Rehill or his representatives, he would satisfy the judgment. The \$5,000 was paid to him nine days later, on the 29th of October, by a Mr. Bines, who had formerly been employed as a civil engineer by Mr. Rehill, and who interested himself in Mrs. Rehill's efforts to secure a settlement of the judgment; and thereupon, advised by his own counsel, McTague duly satisfied the judgment of record. It was not stipulated in the writing that Mrs. McTague was to receive the estates of Mr. Rehill and his wife when they should die. Mr. Boyer is positive that he embodied in the agreement all the terms that were stated to him, and also that nothing was said to him about Mrs. McTague having Mr. Rehill's property at his death, and that, before the agreement was signed, he read it aloud to Mr. McTague and Mrs. Rehill. He is contradicted in these particulars by Mr. McTague, who insists that he instructed Mr. Boyer that his wife was to be recognized as the adopted daughter of the Rehills, and have their estates at their demise, and that the paper signed was not read to him or in his presence. It further appears that, after the execution of the paper, Mr. McTague was advised by his counsel, who called on Mr. Boyer, and saw the agreement; and that, after he had been so advised, he executed the agreement as drawn, by taking the \$5,000, and actually satisfying the judgment of record.

It is an established rule of evidence that where parties have put their contract in writing, and that writing, upon its face, purports to contain the whole agreement between them, it shall be the only evidence of the contract as finally concluded, and no oral evidence of what was said and done during negotiations leading up to it will be admitted to alter or contradict it, or to supply additional terms; also, that no proof will be received to show a collateral promise between the parties at the negotiation, unless that promise relates to a subject distinct from

that to which the written contract applies. *Naumberg v. Young*, 44 N. J. Law, 331. I think that the writing in this case, upon its face, purports to contain the whole agreement between Mr. McTague and Mrs. Rehill. It treats of the compromise and settlement of the judgment, and provides that Mr. McTague, for one dollar, and because of the relation of himself and family to the Rehills, agrees to take \$5,000 in satisfaction of the judgment. To add to it, by parol evidence, the additional term that the Rehills were to leave their estates to Mrs. McTague, would violate the rule above stated. Such a term cannot be considered a collateral promise. It relates to the subject of the written agreement,—the satisfaction of the judgment. It is true, the testimony of Mr. McTague, that the writing was not read, and that he insisted upon the insertion of the alleged missing term in it, is evidence tending to show that the instrument is the product of a fraud practiced upon him; but that evidence is clearly not strong enough to defeat the instrument, which is supported by Mr. Boyer's oath, and is vouched as valid by Mr. McTague's signature, and was carried into execution by him, under the advice of his counsel.

But it is also remembered that this suit is for the recovery of the estate of Patrick Rehill, not for the recovery of the estate of Elizabeth Rehill. How was Patrick bound by the parol promise of his wife, if such promise was in fact made? There is no proof that either she or Mr. Boyer acted under his authority. It is true, he paid the \$5,000, which Mr. Bines advanced, when he returned to America. If his payment may be said to ratify anything, he may possibly be bound to the written agreement which was carried into execution, by Bines' payment of the \$5,000. Beyond that, the proofs do not show that he is bound by anything that Mrs. Rehill or Mr. Boyer did.

I do not find that either of the contracts alleged in the bill has been established, and, upon consideration of the whole evidence, I do not believe that any such contracts were ever made. It was the duty of the complainant to establish them by clear and convincing proofs, for parol agreements of the kind, because of the situation and relation of the parties to them, and the consequent opportunity for misunderstanding and the perpetration of fraud, are naturally regarded with suspicion, and, when their enforcement is sought, are properly the subjects of close scrutiny. *Vreeland v. Vreeland*, 53 N. J. Eq. 387, 32 Atl. 3.

Having reached the conclusion stated, it is not necessary for me to consider whether the terms of the second contract as asserted are sufficiently definite and certain to be enforced, nor whether the consideration relied upon to support the first contract is sufficient.

I think that Mr. Rehill's frequent declaration of his intention to leave his estate to Mrs. McTague may, to some extent, have in

fluenced her conduct towards him, and secured from her, through her desire to please him, and thus retain his intention in her behalf, possibly more assiduous devotion to her foster parents and their interests than she would otherwise have accorded them. But those declarations do not appear to have been made for the purpose of inducing such devotion. They were rather the voluntary exhibition of his love and admiration for her, and, though Mrs. McTague may have had faith in them, they did not bind him to any legal liability. *Drake v. Lanning*, 49 N. J. Eq. 452, 24 Atl. 378. There can be no doubt that, when he made them, it was his honest purpose to fulfill them; and there can be little doubt that he would have done so had it not been for Mr. McTague's unfortunate exaction of his legal rights, by resort to a litigation which embittered Mr. Rehill against him, and also against his wife, who sympathized with him, and resulted in Rehill's becoming a fugitive from his home and country, and in the wreck of his hopes and happiness, and, probably, in expediting his death. The bill will be dismissed, with costs.

(68 Vt. 639)

In re **PIERCE'S ESTATE.**

(Supreme Court of Vermont. Windsor. June 22, 1896.)

GUARDIAN AND WARD—COMPENSATION—ACCOUNTS—SETTLEMENT—EVIDENCE—FINDINGS OF COMMISSIONER—LIABILITY FOR RENT—OBJECTIONS—WAIVER.

1. A testator devised to his wife, H., all his estate, except certain money legacies to his children, S., A., and F. The realty consisted of a farm and pasture. In 1851, after the testator's death, H. was appointed guardian of S., but it did not appear that she ever settled her accounts. In 1860, S. left the state, but in 1869 returned, and lived on the farm with his mother, but in a separate house. After his return, S. assisted part of the time in carrying on the farm. His wife died in 1878, and A., who attended to household duties for her mother, did the housework for S. also, but without any expectation of compensation from her mother, and without any contract with S. In 1881, H. became insane, and S., who since 1877 had gradually assumed the management of the farm, and acted as owner thereof, was appointed her guardian. Through the negligence of S., the house occupied by him and certain barns were destroyed by fire, and thereafter S. resided with his mother and sister. A new barn was afterwards built, and the house where all resided was unnecessarily moved to another location. H. held a note against S., dated in 1866, for \$1,300, and a receipt dated in 1869. He held her receipt for \$500, dated in 1869. S. never kept an account of his receipts and disbursements, and never settled his accounts as guardian. In 1887, S., under license from the probate court to sell the land and invest the proceeds in stock and bonds, conveyed the farm and pasture to A., who immediately after reconveyed the same by deed to him; and on the same day S. conveyed the farm to D., who gave a bond to reconvey on payment of S.'s personal note to D. This transaction was intended as a mortgage. From 1869 to 1887, S. had all the products of the farm except those used by his mother until her death in 1892, and thereafter all, until his death, in 1894. In 1895, H.'s administrator having been cited before the pro-

bate court upon petition of S.'s administrator to settle H.'s account as guardian, it was decreed that her estate was indebted to S.'s estate in a certain sum. *Held*, in a proceeding against S.'s administrator for an accounting of S.'s guardianship of H., that, as it did not appear of record that H. had settled with her ward, it was competent for her administrator to show that she had in fact paid over to him all the money she received, and, to show this, evidence was admissible as to the ward's financial condition about the time he became of age.

2. As the administrator of S. introduced the decree of the probate court as evidence of the indebtedness of H.'s estate, it was competent to show that the decree had been appealed from.

3. Though, on a second hearing before the commissioner, there was evidence that S. was once heard to say, in A.'s presence, that he had hired her to take care of her mother, and that A. said she had always taken care of her, a finding that A. was not hired by S. would not be disturbed.

4. S. having in his accounts claimed a credit of \$4,000, resulting from the sale of the farm, it was proper for H.'s administrator to show the entire transaction with D., and S.'s continued occupancy, and offer the several deeds, as bearing on the question whether the transaction was a deed absolute or a mortgage.

5. S.'s declarations to D., at the time of the transaction, as to the purpose for which he wanted the money, made in the absence of any adversely interested party, were not admissible in his favor.

6. As S. claimed to be allowed for his labor and expense in building said barn, it was competent for H.'s administrator to show that the neighbors contributed their assistance in building the same.

7. The conveyance to D. having been, in effect, a mortgage to secure the payment of the personal note of S., it was not a conveyance, from which S. realized \$4,000, for which he claimed credit.

8. S.'s administrator having drawn the accounts of S. relative to the care of the farm, on one side, and rent of it, on the other, after the death of H., into examination and adjudication by the commissioner on appeal from the probate to the county court, he could not be heard to contend that the item for rent, based on the value of the farm products, should not have been charged to the estate of S., because it was not presented to commissioners on the estate of S., and the jurisdiction of the probate court obtained in that way, instead of the way adopted by him.

9. S.'s administrator having failed to except to the commissioner's disallowance of the note given by S. to H., he was not harmed by the ruling.

10. As the commissioner found that in 1887, when S. was appointed guardian of H., nothing was due from either party to the other, the admission of the receipt given by S. to H., in 1869, and the receipt given by H. to S., in 1866, thereby became immaterial.

11. The administrator of H., after the latter's death, was entitled to the possession and care of the farm, and therefore the claim of the administrator of S. for compensation for the care of the farm was properly disallowed, in the absence of any contract with H.'s administrator.

12. From the manner in which S. managed his ward's estate, he was entitled to no compensation as guardian.

13. The commissioner's finding that nothing was due from either party to the other when S. was appointed guardian is conclusive.

14. The value of the rent, and what was a reasonable compensation for the support of the ward, were questions of fact.

Exceptions from Windsor county court; R. S. Taft, Judge.

In the matter of Hannah B. Pierce's estate. Proceeding between Don C. Pollard, administrator of said Hannah B. Pierce, and Burton B. Pierce, administrator of Samuel B. Pierce, for an accounting. An appeal was taken from an order of the probate court for the district of Windsor to the county court, and the matter was heard upon the report of a commissioner and exceptions of the appellee thereto at the May term, 1895. From a judgment overruling his exceptions, and in accordance with the account as stated by the commissioner, Burton B. Pierce excepts. Judgment affirmed.

This was an accounting of Burton B. Pierce, as administrator of Samuel B. Pierce, settling the account of said Samuel B., as the guardian of Hannah B., Pierce. The following are the material facts, as reported by the commissioner: Alanson Pierce died in 1851, and left, by will, his estate, both real and personal, to his wife, the said Hannah B. Pierce. The real estate thus left was a homestead farm, the "Preston Lot," so called, and about 140 acres of wood and pasture land in Cavendish. Alanson and Hannah B. had three children,—Augusta, born about 1829; Samuel B., born about 1839; and Fernando, whose age did not appear, but who had married and deceased before 1869, leaving several minor children. Augusta Pierce never married, and died, intestate, December 28, 1893. Samuel B. died, intestate, January 5, 1894. Hannah B. Pierce died June 23, 1892, also intestate. After the death of her husband, in 1851, Hannah B. Pierce continued to live upon the homestead farm, and carried on and managed the same with so much success that in 1869 she had accumulated some property in addition to what was left her by her husband. Augusta Pierce lived with her, and she also took care of the minor children of Fernando. About the time Samuel B. became of age, he married, and removed to Claremont, N. H., where he lived until the fall of 1869, when he came back to Vermont, and moved into what was known as the "red house," upon the homestead farm. There was also upon said farm another house, built after the red house, which was known as the "white house," and in which Hannah Pierce with her family lived. Samuel B. continued to live in the red house until it was destroyed by fire, in 1881. At first he did team work for various parties, and also worked to some extent about the farm, receiving some portion of the products of the farm. He gradually assumed more and more the management of the farm, until in the year 1881 he had come to be the virtual manager of the property. His mother had gradually lost the use of her intellectual faculties, and was at all times after 1881 incapable of contracting for herself. By that time, Samuel B. had come to be treated as the owner of the

stock and personal property upon the farm, which he bought and sold at his pleasure, although it did not appear that the same had ever been transferred to him by his mother. In 1881 the red house and the barns upon the farm were destroyed by fire. This fire was occasioned by an attempt upon the part of Samuel B. to burn up a wasp's nest, and the commissioner found that it was due to gross carelessness upon his part. After the destruction of the red house, Samuel B. moved into the white house, where he continued to live with his mother until her death. Augusta also lived with her mother. She had gradually come to take care of the household affairs in the same way that Samuel B. had of matters out of doors. About 1882, Samuel B. began the erection of a new barn, to take the place of the one destroyed by fire, and also moved the white house from where it stood to another location. The commissioner found that the barn was constructed on a much larger scale, and in a much more expensive manner, than it ought to have been, and that the moving of the house was unnecessary. He further found, in a subsequent report, that the barn was built and the house moved by Samuel B. without any arrangement with his mother, and without any intention upon his part of charging his mother anything for so doing. May 4, 1887, Samuel B. was appointed guardian of his mother, Hannah B., who was then adjudged an insane person. July 11, 1887, he obtained a license from the probate court to sell the real estate of his ward, for the purpose of putting the proceeds thereof at interest, or investing the same in stocks and bonds. Neither before nor after his appointment as guardian did Samuel B. Pierce keep any account between himself and his mother showing his receipts and expenditures in respect to her property. In October, 1893, he was notified to appear before the probate court to settle his guardian account. He did appear at that time, and said he thought the accounts ought to be called even. Owing to the fact that the judge could not be present, the matter was not disposed of at that time; and, although he made several attempts previous to his death to obtain a hearing, no such hearing was ever had. At the hearing before the commissioner, the administrator of Samuel B. presented an account of which the credit side consisted of two items. Item No. 2 was for the sale of bank stock sold by Samuel B., as the commissioner at first supposed, subsequent to his appointment as guardian. This item was credited in the account at its face value. Item No. 1 was a credit of \$4,000 received from sale of real estate. It appeared that July 18, 1887, after having obtained license from the probate court as hereinbefore stated, Samuel B. Pierce conveyed to Augusta Pierce, by guardian's deed, the homestead farm and the Cavendish pas-

ture, and that on the same day she conveyed it back to Samuel B., who thereafter, upon the same day, conveyed to Gilbert A. Davis the homestead farm. As a part of that transaction, Samuel B. gave Davis his note for \$1,000, and Davis gave Samuel B. a bond to reconvey said homestead farm upon the payment of the note. The master found that the transaction was not a sale, but simply a mortgage, to secure the payment of Samuel B.'s personal note for \$1,000 to Davis; that the title to the meadow farm was still in the estate of Hannah B., and he therefore disallowed the item of \$4,000. The debit side of the guardian account, as presented, consisted of several items, most of which were allowed by the commissioner. Those that were not so allowed were the following: No. 1. This item was for building the barns and moving the white house, as hereinbefore stated, and it was disallowed by the commissioner upon the grounds previously stated. No. 2. This item was a charge of \$10 per week for the support of Hannah B. Pierce from the time Samuel B. was appointed her guardian until the day of her death. The commissioner found that her support furnished during that time was reasonably worth \$7 per week; that the part of it furnished by Samuel B. was worth \$3 per week, and the part furnished by Augusta \$4 per week; and he allowed the estate of Samuel B. at the rate of \$3 per week. The commissioner also found in his first and a subsequent report that Augusta never made any contract with Samuel B. to care for their mother, but rendered this service upon her own account. No. 9. This item was for services as guardian. It was disallowed by the master, upon the ground that, having taken all the property of his ward, and kept no account of the same, he was not entitled to compensation. No. 12. It appeared that Burton B. Pierce, as administrator of Samuel B. Pierce, took possession of the estate of Hannah B. upon an order of the probate court; and this item was for services rendered in the care of such real estate in pursuance of that order. Pollard, the administrator of Hannah B. Pierce, claimed that after his appointment he was entitled to the possession of her real estate, and that, therefore, Burton B. had no right to the possession of said real estate, and could receive no compensation for taking charge of the same. The commissioner disallowed the item upon that ground. It appeared that Samuel B. sold the Preston lot, in pursuance of the license obtained as hereinbefore stated, for the sum of \$325. The appellant insisted that the estate should stand charged with this amount, and the commissioner so held. The appellant, being the administrator of Hannah B. Pierce, presented a receipt for \$1,363, signed by Samuel B. Pierce, dated December 12, 1869, which the commissioner disallowed. Burton B. presented a receipt dated April

14, 1866, signed by Hannah B. Pierce, for the sum of \$500, which was also disallowed. The appellant offered in evidence a note for \$1,300, executed by Samuel B. Pierce to Hannah B. Pierce, dated April 14, 1866, payable on demand. The commissioner disallowed this also. From the time he was appointed guardian, in 1887, until his death, in 1894, Samuel B. Pierce had the entire use of the homestead farm and the Cavendish pasture. As before stated, he kept no account whatever of his receipts from the same. The commissioner charged him with a rental of \$150 per year. As the account was stated by the commissioner, therefore, the estate of Samuel B. stood charged with the cash received from the sale of the bank stock, with that received from the sale of the Preston land, with the rent of the farm after May, 1877, and with the balance of interest, and stood credited with the support of his ward, at the rate of three dollars per week, from May, 1877, and with certain other items connected with his administration as guardian. When this report was filed, the appellee excepted and moved to recommit; and thereupon the court ordered it re-committed, for the sole purpose of stating what, if anything, was due from Samuel B. to Hannah B., or vice versa, at the time said Samuel was appointed guardian of Hannah B. After hearing, the master reported in that respect the following facts: Upon the death of his father, Alanson, Hannah B. was appointed guardian of Samuel B., and continued to act as said guardian until he became of age. In 1852, that being the first year after she became his guardian, she returned an inventory to the probate court, from which it appeared that she had in her hands \$520.11. It did not appear from the records of the probate court that she had ever settled her account as guardian, or that she had ever paid over this or any other sum to the said Samuel B. August 8, 1895, Pollard, the administrator of Hannah B. Pierce, was cited before the probate court of Windsor district, on the application of Burton B. Pierce, administrator of Samuel B. Pierce, to settle the guardian account of the said Hannah, as guardian of the said Samuel; and such proceedings were had therein that it was adjudged that Hannah B. Pierce's estate was indebted to the estate of Samuel B. Pierce in the sum of \$1,875.69. An appeal was taken from the judgment, and that appeal was still pending. The commissioner found that in 1860, after becoming of age, Samuel B. bought over 100 sheep, for the sum of \$1,400; that upon his return from Claremont, in 1869, he had very little, if any, means; that the notes and receipts referred to in the commissioner's report were given as therein stated. It did not appear that Samuel B. in his lifetime had ever made any demand upon his mother for the payment of what might be due from her to him. The commissioner found that Sam-

uel B. never expected to pay his mother the note or the receipt, and never expected to receive anything from her for his services and expenses in building the barn and moving the white house. From all these facts, he found that nothing was due from the one to the other when Samuel B. was appointed guardian, in 1887, and he accordingly disallowed all items, both of debt and credit, up to that time. Upon the hearing under this order of recomittal, the commissioner received some testimony tending to show that Samuel B. had hired Augusta to care for their mother; but the commissioner still found that, notwithstanding said testimony, there was no such contract between Augusta and Samuel B. The report being the third time recommitted to the commissioner, it was made to appear to him that the bank stock with which he had charged the estate of Samuel B. was sold by him, and the money received previous to the time he had been appointed guardian of his mother, viz. March, 1886; that said Samuel B. then represented that said Hannah B. was of unsound mind, and that he had the entire charge of all her affairs; that he did not expect at that time to account for the proceeds of this stock. The commissioner submitted the question whether, upon this finding, the amount previously allowed by him should be disallowed. The appellee, Burton B. Pierce, took various exceptions to the report of the commissioner, which sufficiently appear from the opinion.

Gilbert A. Davis and W. B. C. Stickney, for Samuel B. Pierce's estate. Stickney & Sargent and W. E. Johnson, for Hannah B. Pierce's estate.

TYLER, J. Alanson Pierce died in the year 1851, leaving, by will, all his real and personal estate, of considerable value, to his wife, Hannah B. Pierce, excepting a legacy of \$600 to each of his three children. The home farm consisted of a valuable meadow in Weathersfield, which produced from 60 to 70 tons of hay annually. The farm was well stocked, and there was other personal estate. In the year 1851, Hannah B. was appointed guardian of her son Samuel B., who was then 12 years old; and in March, 1852, she filed in the probate court an inventory showing that she then had in her hands \$520.11 belonging to her ward. The records do not show that she ever settled her account as guardian. She continued to live on her farm, which she managed successfully, and prior to 1869 increased her estate, besides supporting herself and family. She built a new house on the meadow farm, a few rods distant from the one that had been occupied by the family. In 1860, Samuel married, and moved to Claremont, N. H., where he remained till the fall of 1869, when he returned to his mother's farm, and moved into the old house. He had accumulated but little, if any, property. His mother, then 70 years old, was living in

the new house, her family consisting of her daughter, Augusta, who was then 40 years old, and four children of her deceased son, Fernando. After Samuel's return, he worked for himself part of the time, and also assisted in carrying on the home farm. His wife died in 1873, after which Augusta did the work in his house, with the assistance of his children, going there daily from the new house, where she lived with and cared for her mother. In 1881 the mother became partially insane, and Samuel gradually assumed the management of the farm, while his sister took charge of the household affairs. Samuel bought and sold stock for the farm, and was the ostensible owner of the stock, and the manager of the farm; but this was a position which he assumed; it was not by virtue of any contract with his mother. In that year, Samuel unintentionally, but through gross carelessness, set fire to the barns, and they were destroyed, with all their contents, after which he moved into the new house, where he afterwards resided with his mother and sister. After the burning of the barns, he built a new one, at large expense, but it was poorly adapted to the use of the farm. The timber for it was partly cut upon the farm, and partly purchased, and the neighbors contributed their assistance in its construction. Samuel also moved the new house onto the site of the old one, which work was wholly unnecessary. He superintended the building and moving, which were completed in 1885. His mother was mentally incapable of assenting to or dissenting from this work. Under his management, her estate finally became reduced to her farm and household furniture. She held a note against him, dated April 14, 1860, for \$1,800, and a receipt dated December 12, 1869, for \$1,362. He held a receipt against her for \$500, dated April 14, 1868. Samuel never kept any account of his receipts and disbursements in the management of his mother's affairs, either before or after his appointment as guardian. Augusta was unmarried, and lived with her mother, without any contract for or expectation of compensation. There never was any contract between her and Samuel in respect to her labor. She was no more a member of his family than he was of hers. Samuel was appointed guardian of his mother May 4, 1887. He never settled his guardianship account. July 18, 1887, as guardian and under license from the probate court, he conveyed, by deed, the farm and Cavendish pasture to Augusta, who, on the same day, reconveyed the same, by deed, to him, as guardian. Nothing was paid as a consideration for either conveyance. On the same day, Samuel conveyed the meadow farm, by deed, to Gilbert A. Davis, who gave him a bond to reconvey the same to him on payment of his promissory note to Davis for \$1,000, which was Samuel's personal debt. All the parties knew about the deeds, bond, and note. The transaction was intended by

them all as a mortgage. The license from the probate court recited that the guardian had applied for license to sell, for the purpose of "putting the proceeds at interest, or investing the same in stocks and bonds." Samuel had all the products of the farm after his return, in the fall of 1869, to May, 1887, except to the amount of \$75 a year, used by his mother; and thereafter, until the time of his death, January 5, 1894, he had the entire use. The value of the rent from April 1, 1870, to April 1, 1887, was \$200 a year, and thereafter, until January 5, 1894, \$150 a year, he paying the taxes and making the ordinary repairs. In the year 1893, Samuel appeared, by request, before the probate court, to settle his guardianship account. He then stated that he had kept no account, and thought the accounts ought to be jumped and called even. Hannah died January 23, 1892, and the appellant, Pollard, was appointed administrator of her estate February 5, 1894. Her heirs were Samuel, Augusta, and the children of the deceased son. The appellee, Burton B. Pierce, was appointed administrator of Samuel's estate, January 13, 1894; and January 23, 1894, he was appointed administrator of the estate of Augusta, who died in December, 1893, intestate, leaving no property other than her share in the estate of her mother. On August 8, 1895, Hannah's administrator having been cited before the probate court, upon the petition of Samuel's administrator, to settle Hannah's account as guardian, it was adjudged and decreed that her estate was indebted to her ward's estate in the sum of \$1,875.69. Hannah's administrator appealed.

At the hearing before the commissioner, Samuel's administrator presented an account as he claimed it of Samuel's guardianship of his mother. The exceptions relate to the items of this account, which are as follows:

1887.	
June. By avails of sale of real estate of Hannah B. Pierce..	\$4,000 00
By cash from bank stock....	272 00
	<u>\$4,272 00</u>
Dr.	
For payment of various sums [giving items] for material purchased, not produced on the farm, and for labor in erecting buildings on farm.	\$2,135 00
For expense of support of ward from May 4, 1887, to her death, June 23, 1892, 266 and 5/7 weeks, at \$10 a week [Then follow 10 items for burial expenses, probate fees, advertising, taxes, and guardian's expense in rendering account, about which there was no contest, and which amounted to].....	2,667 00
For guardian's services and expenses from May 4, 1887, to June 23, 1892, 5 years 1 month 19 days.....	192 72
For care of farm after death of Samuel B. Pierce, 9	325 00

months, under direction of probate court, to September, 1894, at \$25 per month, in addition to products.....	228 00
For care of farm after September 12, 1894, under direction of probate court.....	* * *

1. It did not appear of record that Hannah had settled with her ward. It was competent for the appellant to show that she had in fact paid over to him all the money she received, and, as tending to show this, evidence was admissible as to the ward's financial condition and his occasion to use money about the time he became of age. As the appellee introduced the decree of the probate court as evidence of the indebtedness of Hannah's estate to that of her ward, it was certainly competent for the appellant to offer evidence tending to show that the demands upon which the decree was based had been paid; also that the decree had been appealed from.

2. From what has already been stated in respect to Samuel's occupancy of the farm from the time of his return to it, in 1869, until April, 1871, it is wholly immaterial what he furnished his mother, between those dates, for her support, besides the farm products.

3. The finding that there was no occasion to move the new house, that the cellar could have been drained, and that the expense incurred in moving the house was needless, covers this point in the case.

4. It is distinctly found in the first report that there was no contract between Samuel and Augusta; that there was no evidence that she intended to charge him or her mother for her services. The report was not recommended for further finding on this point, but, at the second hearing, the appellee was permitted to introduce some newly-discovered evidence to the effect that Samuel was once heard to say in his sister's presence that he had hired her to take care of his mother, and that Augusta said she always had taken care of her. Upon considering this evidence and the other evidence in the case, the commissioner repeated his former finding that Samuel did not hire his sister. So there is no force to the exception.

5. This exception relates to several rulings admitting and excluding evidence. The appellee sought to justify the sale of the real estate, and gave credit for \$4,000 as the proceeds. It was competent for the appellant to show the entire transaction,—the giving of the deeds, note, and bond, the purpose for which they were given, and Samuel's continued occupancy of the premises,—as bearing upon the question whether the transaction was in fact a conveyance, or was in effect a mortgage. The several instruments were admissible in this view.

What Samuel said to Mr. Davis when he gave him the \$1,000 note—what he wanted the money for—was a declaration in the party's own favor, the other party not being present, and was not admissible. The conversation between Samuel and Burton B. Pierce,

and between the latter and Watkins, was properly excluded, for the same reason.

The appellee claimed to be allowed for Samuel's labor and expense in building the barns. It was competent for the appellant to show by the witness Amsden that the neighbors contributed their assistance in building the barns and moving the house.

9. The finding of the commissioner in respect to Samuel's management of his mother's farm and affairs sufficiently covers the ground to which this exception relates. To have reported more in detail about supplying the table and clothing for his mother and sister would not have changed the case in its legal aspects.

10. This exception is to the disallowance of the \$4,000 item of credit. The facts reported show that the conveyance made by Samuel was, in effect, a mortgage to secure the payment of his \$1,000 note, instead of a conveyance to raise money for investment, which was the purpose stated in his application for a license. Whether the conveyance was valid as a mortgage we are not called upon to decide, but it was not a conveyance from which Samuel realized \$4,000 or any other sum with which to credit his mother's estate. In this view, the return upon the license, showing that the real estate had been conveyed for a different purpose from that represented in the application, was immaterial, though it is one of the exhibits.

11. The appellee excepts to the allowance for rent of the farm and pasture after the termination of Samuel's guardianship of Hannah by her death, and insists that, in any event, too large a sum was allowed. The appellee presented Samuel's guardian account to the probate court, which passed upon it, and made a decree. An appeal was taken, and the case went to the county court (which is a higher court of probate), and was sent out to a commissioner. The appellee there presented the account, containing items of debt and credit, "as he claimed it should be." It contained a charge for taxes paid in the year 1894, a charge for the appellee's services in the care of the farm from the time of Samuel's death to September 1, 1894, and a charge for like services from that date until the time of the trial. The appellant contested the last two items and others, and claimed that Hannah's estate should be credited with additional items, among them the item for rent. The accounts were fully litigated before the commissioner, but, upon the filing of the report, the appellee excepted to the allowance of so much of the charge for rent as accrued after Hannah's death and the consequent termination of the guardianship. The ground of exception is not stated in the brief, but it was argued that it should have been presented to the commissioners on Samuel's estate. The appellee, by his own action, drew these accounts, relative to the care of the farm, on one side, and to the rent of it, on the other, after the ward's death, into examination and

adjudication by the commissioner; and he cannot now be heard to contend that a part of a certain item should have been presented to commissioners on Samuel's estate, and the jurisdiction of the probate court, obtained in that way, instead of the way adopted by him. It is evident that the commissioner made Samuel's estate chargeable with rent in accordance with what appeared to have been the value of the farm products, especially of the hay crop. Samuel had the products of the farm seven seasons, which, at \$150 a year, made the item of \$1,050.

14. The commissioner disallowed the \$1,300 note given by Samuel to Hannah, April 14, 1866, after receiving it in evidence, and the appellant took no exception; so the appellee was not harmed by the ruling.

15. This was to the admission of a receipt for \$1,363, given by Samuel to his mother, December 12, 1869. The appellee, under the appellant's exception, introduced a receipt for \$500, given by Hannah to Samuel, April 14, 1866. The commissioner subsequently found upon competent evidence that on May 4, 1887, when Samuel was appointed guardian of his mother, there was nothing due from either party to the other; so the exceptions to the admission of the receipts became immaterial.

16. The appellant, Pollard, was appointed administrator upon Hannah Pierce's estate, February 5, 1894; whereupon the law committed the possession and care of the farm and other property of the estate to him. The services of Burton B. Pierce for care of the farm, as charged in items 12 and 13, were not claimed to have been rendered under any contract with Pollard, administrator, and were properly disallowed.

17. From the manner in which Samuel managed his ward's estate, as shown by the report, he was entitled to no compensation as guardian. In *re Hodges' Estate*, 66 Vt. 70, 28 Atl. 663, and cases cited in the opinion.

18. Upon the findings of the commissioner, it is immaterial whether the heirs of Fernando Pierce were of full age July 18, 1887, or not. There is no finding and no request to find that these heirs had any participation in or knowledge of Samuel's transactions in the settlement of his ward's estate, and no question of acquiescence can be raised as to them.

The other exceptions taken by the appellee at the trial were not insisted upon in this court.

The appellee filed four exceptions to the acceptance of the report. As to the first and second: We have discovered no error in the commissioner's rulings admitting and excluding evidence, and his decision that there was nothing due from one party to the other at the time Samuel was appointed guardian is conclusive as a finding of fact. Interest was properly allowed. The other exceptions we have already considered.

At the second hearing, the commissioner learned that the bank stock was sold by Samuel prior to May 4, 1887, and after his mother

became insane, and he therefore charged Samuel's estate with the avails. He states the account as allowed by him as follows:

The Estate of Hannah B. Pierce, in Account with S. B. Pierce, Late Guardian.
Cr.

1887.		
Jan. 30.	By cash from sale of bank stock	\$ 272 00
July 31.	By cash rec'd from sale of Preston land	325 00
1894.		
Jan. 8.	By rents of real estate since May 4, 1887, at \$150....	1,050 00
	By bal. interest due January 23, 1892.....	147 43
	By bal. interest due May 28, 1895	115 15
		<hr/>
		\$1,909 58

The Same.

Dr.

To support ward from May 4, 1887, to her death, June 23, 1892—268 $\frac{1}{2}$ weeks, at \$3.....	\$800 00
[Add ten items, amounting to]	192 73

Balance due Hannah B. Pierce's estate May 28, 1895..... \$ 916 85

Upon the facts reported, the note and receipts were properly disallowed.

Nearly all the findings allowing and disallowing items were questions of fact for the decision of the commissioner. As Samuel carried on the farm and took the products, he was properly chargeable with rent, as upon an implied promise. The value of the rent, and what was a reasonable compensation per week for the support of his ward, in the circumstances, were questions of fact. It is found that the old barns were burned through Samuel's fault. Whether, for this reason, he considered it his duty to replace them, and furnish what materials and labor were required in addition to what the farm furnished and the neighbors contributed in labor and money, is not stated; but it is found that he did not intend to charge his mother for building the barns, nor for moving the house. In the same connection, it is found that he did not expect to pay his mother his \$1,300 note, nor his receipt of \$1,360. As before stated, whether Hannah had paid her ward the amount which she at one time held for him was a question of fact. Judgment for the appellant, to recover \$930.76 and costs, affirmed.

(87 Conn. 554)

PARISH OF CHRIST CHURCH v. TRUSTEES OF DONATIONS AND BEQUESTS FOR CHURCH PURPOSES.

TRUSTEES OF DONATIONS AND BEQUESTS FOR CHURCH PURPOSES v. PARISH OF CHRIST CHURCH.

(Supreme Court of Errors of Connecticut. May 14, 1896.)

RELIGIOUS SOCIETIES—CHARITABLE TRUSTS—VALIDITY—TERMINATION.

1. Where property is conveyed in trust for a certain church parish, a limitation that, on such

beneficiary ceasing to exist in union with the diocese, the property shall be held in trust for another parish, is valid.

2. The "Trustees of Donations and Bequests for Church Purposes" was chartered by 5 Priv. Acts, p. 562, section 2 of which, as amended in 1873, authorizes it to hold property for the support of parishes of the Protestant Episcopal Church in the diocese of Connecticut, and, with the consent of the convention of the diocese, to sell the same, subject to the conditions of the trust. The Christ Church Parish conveyed to the trustees its church property, to hold, free from liability for debt, in trust for the sole use of the Christ Church Parish, to be occupied in accordance with the canons of the Episcopal Church of the United States, so long as the parish should exist in union with the convention of said diocese and in communion with the Episcopal Church of the United States, and, on its ceasing to be in union with said convention and in communion with the Episcopal Church of the United States, then to be used by the Trinity Church Parish, so long as it shall exist, etc., then to hold the property for such uses as will most nearly accomplish the object desired in the building of said Christ Church, and promoting the interest of the Protestant Episcopal Church generally. *Held*, that the trustees could not, after release by the Trinity Parish of its interest in the trust, and with the consent of the convention of the diocese, make an unconditional reconveyance of the property to the Christ Church Parish.

3. The last use specified in the trust,—1. a. "such as will most nearly accomplish," etc,—is not void for uncertainty.

Appeal from superior court, New Haven county; Hall, Judge.

Suit by the Parish of Christ Church against Trustees of Donations and Bequests for Church Purposes, to compel the execution of a deed; and by the latter against the former, for advice as to the execution of a trust. From a judgment in the first case for defendant, complainant appeals. No error.

The second case was reserved for the consideration of the court.

The charter of the Trustees of Donations and Bequests for Church Purposes (5 Priv. Acts, p. 562, § 2, as amended in 1893) declares: "The object of this act is to enable said trustees to take, hold, manage and use such funds as they may acquire under the provisions of this act, for the support of the institutions, parishes and missionary work of the Protestant Episcopal Church in the diocese of Connecticut and for the promotion of any of its general interests, according to the doctrines, discipline, rites and usages of said church;" and further provides that, "to this end, said trustees are hereby empowered to take and hold any and all transfers, gifts, devises and bequests of real and personal estate which may be made to them on trust, condition or otherwise, and to execute and perform any and all conditions, uses, and trusts which may be imposed thereon or connected therewith, and to manage, invest, reinvest, and (with the consent of the convention of the diocese) sell, demise, convey, or otherwise dispose of, said estate, and to appropriate and apply the net income thereof to any and all of the purposes and objects above declared; subject, however, in each and every case,

to the specific trusts, directions, limitations or conditions contained in such transfer, gift, devise or bequest." Pub. Acts 1877, p. 250 (Gen. St. §§ 2075, 2076), for the organization of parishes of the Protestant Episcopal Church, provide: "All ecclesiastical societies which have been heretofore organized, and which may be hereafter organized in this state, in communion with the Protestant Episcopal Church in the United States of America, shall be known in the law as parishes as well as ecclesiastical societies, and shall have power to receive and hold by gift, grant, or purchase, all property, real or personal, that has been or may be conveyed thereto for maintaining religious worship according to the doctrine, discipline and worship of said church, and for the support of the educational and charitable institutions of the same, and shall have and exercise all the ordinary powers of bodies corporate." "The manner of conducting such parishes, the qualifications of membership of the parish, and the manner of acquiring and terminating such membership, the number of the officers of the parish, their powers and duties and the manner of their appointment, the time of holding the annual meeting of the parish, and the manner of notification thereof, and the manner of calling special meetings of the parish, shall be such as are provided and prescribed by the constitution, canons, and regulations of said Protestant Episcopal Church in this state."

The trial court found that the Parish of Christ Church was an ecclesiastical corporation, in communion with the Protestant Episcopal Church of the United States; that, in 1885, Christ Church was the owner of certain land, and indebted to the extent of \$5,000; that the parish applied to the Society of Trinity Church Parish for certain money to be used to pay off the debt; that the money was furnished by the Trinity Church on the condition that Christ Church should execute to it the deed of trust in suit; that the money was not regarded by either parish as a loan nor was it intended that it should be repaid. Christ Church Parish, on December 10, 1885, passed the following vote: "At a special meeting of the Society of Christ Church Parish of New Haven, legally warned and held at said church, on Thursday, the tenth day of December, A. D. 1885, it was voted, that the Society of Christ Church Parish of New Haven convey to the Trustees of Donations and Bequests for Church Purposes, of the diocese of Connecticut, a corporation legally incorporated by the general assembly of the state of Connecticut, all that certain piece of land, with the church edifices and rectory building thereon standing, situated in the city of New Haven. * * * To have and to hold the said premises, with all the privileges and appurtenances thereof, to the said Trustees of Donations and Bequests, their successors and assigns, forever, in trust, however, for the sole use and benefit of the Society of

Christ Church Parish, aforesaid, to be used, occupied, and improved by said Society of Christ Church Parish in accordance with the constitution and canons of the Protestant Episcopal Church of the United States, under the control and management of the warden and vestry of said parish, without being subject to debts, liability, or incumbrance of any kind, so long as said Society of Christ Church Parish shall exist in union with the convention of said diocese and in communion with the Protestant Episcopal Church of the United States; and, on its ceasing to be in union with said convention and in communion with said Protestant Episcopal Church, then to be used, occupied, enjoyed, and improved by the Society of Trinity Church Parish of said New Haven so long as it shall exist in union with said convention and in communion with said Protestant Episcopal Church; and, on said Society of Trinity Church Parish ceasing to exist in union with said convention and in communion with said Protestant Episcopal Church, then to have and to hold said premises for its, said corporation's (the Trustees of Donations and Bequests for Church Purposes), sole use, benefit, and behoof, to hold and dispose of said property for such uses as will most nearly accomplish the object desired in the building of said Christ Church, and in the creation of this trust, and promote the interests of the Protestant Episcopal Church generally." The deed of trust was executed in pursuance of the vote, and, after delivery of said deed, the Trustees of Donations and Bequests for Church Purposes passed the following vote: "Voted, that we accept, in trust from Christ Church, New Haven, land, with rectory building thereon, as described in their vote of December 10th, 1885." The Parish of Trinity Church, on April 16, 1895, quitclaimed to the Christ Church Parish its interest under the deed of trust. On July 11, 1895, the diocesan convention passed the following resolution: "Resolved, that upon the petition of the Parish of Trinity Church and the Parish of Christ Church, both of New Haven, the consent of the convention of the diocese is hereby given that the title to the property of the Parish of Christ Church, New Haven, now held by the Trustees of Donations and Bequests for Church Purposes, be reconveyed to said Parish of Christ Church by said Trustees." The Trustees of Donations and Bequests for Church Purposes refused to reconvey the land to Christ Church Parish.

Charles H. Fowler and Joseph B. Morse, for appellant. Henry C. White and Leonard M. Daggett, for appellee.

HAMERSLEY, J. The important question presented by these cases is contained in the prayer for relief in the action brought by the Trustees of Donations and Bequests for Church Purposes, namely: Can the Trustees, etc., in view of the terms of its charter, the

trust deed, and the other facts found, make an unconditional reconveyance to the Parish of Christ Church, without a violation of its duty as trustee? The answer involves the consideration of three questions:

1. Is the deed valid? It is claimed that an absolute deed was given upon an understanding between the parties to the deed that it was in fact in the nature of a mortgage to secure the payment of a loan of \$1,000. There are no facts to support this claim. It is distinctly found by the trial court that no such understanding existed; and the conclusion of the court that the deed was not given as a mortgage, nor as security for a loan, is the legal conclusion from the facts found. Counsel for Christ Church intimated in argument that the parish vote authorizing the deed was passed at a meeting not legally warned for that purpose; but such intimation was not admitted by the counsel for the Trustees, etc., to be true, and is a matter entirely outside the record. For the purposes of this decision, the finding of the trial court that the vote, appearing by the parish records to have been passed at a meeting legally warned, was duly passed, must be held conclusive.

2. Is the trust created by the deed a valid trust? It is the settled policy of this state to so frame its legislation that each denomination of Christians may have an equal right to exercise "religious profession and worship," and to support and maintain its ministers, teachers, and institutions, in accordance with its own practice, rules, and discipline; and this policy is conformable to the provisions of our constitution. The law authorized the Parish of Christ Church to acquire all property appropriated to the support of public worship and of the educational and charitable institutions of the Protestant Episcopal Church in the United States, and, by voluntary agreement, to establish funds for the same object. The charter of the Trustees, etc., authorized that corporation to acquire, by transfer, gift, or will, funds for the support of the institutions, parishes, and missionary work of said church, and for the promotion of any of its general interests. The Parish of Christ Church had the power to transfer the land on which its church edifice and rectory stood to the Trustees, etc. The fact that such transfer was made in order to obtain a sum of money given on that condition supplies an additional and valuable consideration for the transfer. The estate so transferred was for objects which are plainly charitable, and, upon the acceptance of the deed of trust, became, by force of the statute of charitable uses (section 2951), a trust fund forever appropriated to the uses for which it had been granted.

It is claimed that because the grantor has directed that the benefit of the fund shall be received first by Christ Church Parish, then in a certain contingency by Trinity Parish, and then by other beneficiaries, the trust is invalid. The trust deed contemplates but one trustee, but one charitable use. Two bene-

ficiaries are named by the grantor, the subsequent beneficiaries, if any, are to be selected by the trustee. The limitation of one trust upon another in such case is not unlawful. *School v. Whitney*, 54 Conn. 342, 8 Atl. 141. It is difficult to see how the release of Trinity Parish to Christ Church Parish can have any effect upon the trust. It certainly cannot invalidate it. The interest is the right to use and occupy the land for public worship in accordance with the constitution and canons of the church,—an interest, in the absence of authority in the trust deed, insusceptible of conveyance to another. This interest does not vest in possession until Christ Church Parish has ceased to exist in connection with the diocesan convention and in union with the church; and, by the terms of the deed and the law of the state, Christ Church Parish cannot in that event be the recipient of any interest. The release of Trinity Parish is ineffectual to increase or alter the interest of Christ Church Parish, nor can it be treated as a renunciation of the contingent interest of Trinity Parish. If the occasion shall arise, Trinity Parish may claim and enjoy the beneficial use of the land, notwithstanding the release.

It is further claimed that the last use specified in the trust deed—i. e. "such uses as will most nearly accomplish the object desired in the building of said Christ Church, and in the creation of this trust, and promote the interests of said Protestant Episcopal Church generally"—is too indefinite to be administered. We cannot now determine the particular construction which must be given to this language in case the trustee should ever be called upon to administer the trust. The facts in these cases do not call for such construction, and perhaps the parties before us are not sufficient to make it binding. The only question we can now consider is whether the language may fairly be so construed that the use is not void for uncertainty. On this question we entertain no doubt. By the terms of the deed and the law, the charitable use for which this estate is appropriated is the maintenance of the religious worship, and the support of the charitable and educational institutions, of the Protestant Episcopal Church in the United States. The successive beneficiaries named by the grantor are Christ Church Parish and Trinity Parish. We think that the language may fairly be construed as authorizing the trustee, in case the beneficiaries named become incapable of receiving the benefit, to select, in accordance with its judgment, such beneficiaries, from a well-defined class of church corporations, as are lawfully capable of receiving the benefit. *Coit v. Comstock*, 51 Conn. 352, 377. Recent legislation has recognized to a limited extent the doctrine of cy pres in the administration of trusts created by deed (*Woodruff v. Marsh*, 63 Conn. 125, 136, 26 Atl. 846); but it is unnecessary, if it were competent, to invoke any aid from that doctrine in the present case.

3. Is the trust created by the deed terminated, and, if not, can the trust be lawfully terminated by the agreement of the parties before the court? The charter of the Trustees, etc., authorizes it to sell or otherwise dispose of the estate held by it in trust, with the consent of the diocesan convention. This power is limited by the specific directions that may be contained in the deed of trust, and relates to a change in the form of the trust fund. It does not authorize a violation or termination of the specific trust contained in the transfer of the estate. The vote of the diocesan convention of June 11, 1895, did not direct and could not lawfully authorize the Trustees, etc., to violate the specific trusts created by the trust deed. It is not competent for the parties now before the court to terminate the trust. When a fund has once been devoted by unqualified deed or gift to a public charitable use, it comes under the protection of the law, which says it shall forever remain to such use according to the true intent and meaning of the grantor, which intent and meaning must be settled by the law. The donor cannot withdraw the gift. The trustee cannot release the trust. *Langdon v. Society*, 12 Conn. 113; *School v. Whitney*, supra. The Parish of Christ Church, considered merely as a corporation, is not the sole beneficiary of the trust. The beneficiaries include "each individual member of the society and their posterity, so far as they shall remain within the influence of the gospel as there dispensed." *Langdon v. Society*, supra.

Nor is there any ground for disposing of the estate as if the purpose of the trust had been accomplished. That purpose includes the preservation of the estate by the legal ownership of the Trustees, etc., "without being subject to debts, liability, or incumbrance of any kind, so long as said Society of Christ Church Parish shall exist and be in union with the convention of said diocese and in communion with the Protestant Episcopal Church in the United States." Such a purpose is in support of the doctrine and usages of that church, which forbids the consecration of any house of worship until the building and ground on which it stands are fully paid for and free from any incumbrance, and requires the property to be secured from danger of alienation from those who are in communion with that church, and makes it unlawful for any corporate body authorized by law to hold such property to incumber or alienate any consecrated church without the previous consent of the bishop and standing committee of the diocese. Dig. Can. tit. 1, Can. 26. The church in this state, as a constituent part of the church in the United States, acknowledges the authority of this canon, and it bears upon every parish in union with the diocesan convention. *Goodrich's Appeal*, 57 Conn. 275, 283, 18 Atl. 49. The Trustees, etc., was chartered for the express purpose (among others) of holding property for the support of parishes according to the doctrine and usages of the church, subject

to the specific direction and conditions contained in the transfer of such property. Plainly, this purpose of the trust, which the state, in pursuance of its policy to authorize each denomination of Christians to hold and use property appropriated to such charitable use in accordance with its own doctrines and usages, has authorized Christ Church Parish to create, and the Trustees, etc., to accept, has not been accomplished, and therefore the trust must continue under the protection of the law. The state has provided various agencies, and given ample authority to the Protestant Episcopal Church, for acquiring and holding property for the support of its institutions according to its doctrine and usages; but when, in pursuance of such authority, an estate has been appropriated to a public and charitable use under specific trusts, the state does not authorize the church, nor any of its agencies, to violate a settled public policy, and destroy such trust. The limitations and conditions of a trust are within the control of the agencies of the church by which it may be created, but the created trust is under the protection of the state. It follows that the Trustees, etc., cannot, upon the facts found by the court in these cases, make an unconditional reconveyance of the land described in the trust deed to the Parish of Christ Church, without a violation of its duty as trustee.

The second prayer of relief in the action brought by the Trustees, etc.,—i. e. "to advise the plaintiff, in view of the premises, in what manner it shall discharge its duty so that it may properly and safely execute the trust aforesaid,"—asks relief to which the plaintiff is not entitled upon the facts found.

The views we have expressed dispose of all the questions raised by the appeal in the case of *Parish of Christ Church v. Trustees, etc.*, except an error claimed in the exclusion of evidence. The finding states: "Upon the trial of said cause, for the purpose of proving that said deed [the trust deed] was given by plaintiff to defendant upon the understanding that the same was a mortgage to secure the payment to said Parish of Trinity Church of said \$1,000, and that a release deed would be executed by the defendant to the plaintiff upon payment of said sum of \$1,000 to said parish, the plaintiff offered to prove the statements and representations to that effect made by members of the plaintiff parish at the meeting of the 10th of December, 1885, and before the passage of the vote" authorizing the execution of the trust deed. Such evidence was properly excluded by the court. It had no relevancy whatever to any fact in issue, and it does not appear that any evidence was given or offered in connection with which it might become relevant.

In *Parish of Christ Church v. Trustees of Donations and Bequests for Church Purposes*, there is no error in the judgment of the superior court. In *Trustees, etc., v. Parish, etc.*, the superior court is advised to render judgment that the plaintiff cannot, upon the facts

found, make an unconditional reconveyance to the defendant of the property described in the deed of trust, without a violation of its duty as trustee. The other judges concurred.

(178 Pa. St. 6)

IMBRIE v. MANHATTAN LIFE INS. CO.
(Supreme Court of Pennsylvania. Oct. 5, 1896.)

INSURANCE—CONDITIONS—PAYMENT OF PREMIUM.

A life insurance policy required the premium to be paid in cash, before the policy should become binding, and provided that the provisions of the policy could only be waived by written agreement signed by the president or secretary of the company. The note of insured was taken by insurer's agent in payment of the premium, and insurer, with knowledge of such fact, in settlement with the agent, took the note, and sent it to insured's town, indorsed for collection. Part of the note was paid, and the balance charged to the agent, who received from insured a renewal note for such balance. Before the expiration of the year for which the premium was so paid, insurer notified insured that, unless the premium for the succeeding year was paid by a certain time, the policy would be forfeited. Insured died before the second premium was due. *Held*, that insurer ratified the action of the agent in accepting the note in payment of the premium, and therefore could not defeat a recovery on the policy on the ground that the premium was not paid in cash.

Appeal from court of common pleas, Allegheny county.

Action by A. M. Imbrie, executor of John D. McCune, deceased, against the Manhattan Life Insurance Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

James Otis Hoyt and Marcus A. Woodward, for appellant. James R. Macfarlane, for appellee.

DEAN, J. The defendant company on the 23d of January, 1893, issued to John McCune, of Wilksburg, in Allegheny county, four policies of insurance on his life, each in the sum of \$5,000; the policies were known as "life policies." For two years the insured was to pay in advance an annual premium of \$211.50 on each policy, and thereafter on each an annual premium in advance of \$369, for 18 years, or the remainder of his life. This suit is upon only one of these policies. They were all solicited by James C. McKown, who at their date, and for 10 years previous, was the agent and general manager of the company for the Pittsburgh district. It was agreed between McKown and McCune, when the policies were taken, that the premiums on all four, for the first and second years, should be paid in two notes, of \$846 each, to the order of McKown, —one at five months, and the other at six months. These notes were delivered by McCune to McKown, who delivered to him the policies, and receipts for the premiums. The notes, not being paid in full when due, were renewed for the balance by McCune, and the old notes returned to him. Two renewal notes were indorsed by McKown to third parties.

A part of the amount was paid to the holders in his lifetime, and renewals had for the part unpaid. On the 4th of January, 1895, before the expiration of the two years for which the premiums had been paid in notes, McCune died. Due proofs of his death were made to the company, and claim made for payment of the policies, which was refused by the company on the ground that the premiums had not been actually paid as required by the policies. McCune's executor then brought suits, of which this is one, on the four policies. On the trial of the cause the facts as heretofore stated appeared, and there was other evidence as to the authority of McKown as agent, and his course of dealing with policy holders, and the knowledge of, as well as ratification of, his acts by the company. The court submitted the evidence to the jury, to find: (1) Whether the agent of the company had taken these notes as absolute payment of the premiums. (2) If not at the time taken in payment, or if taken by the agent without authority, did the company, after full knowledge of the transaction, treat them as payment, and ratify the act of its agent?

The verdict was for plaintiff, and we have this appeal by defendant, assigning four errors. The first is to the refusal of the court to peremptorily direct a verdict for defendant. As our ruling on the second, third, and fourth assignments disposes of the first, we need give it no further attention. The last three raise the question as to the authority of the agent to accept notes when the policy is issued, as actual payments of the premium, and whether, if he had no precedent authority, there was subsequent ratification, and the effect of the evidence tending to prove ratification.

The plaintiff having offered the policies, premium receipts, and preliminary proofs of death, the burden was on defendant to show that the receipts were for notes, instead of cash; for there can be no doubt that the proper construction of the contract is that the insured shall pay the premiums in cash to the agent. And the acceptance of notes and delivery of the policy do not bind the company, unless the agent had authority to waive a cash payment, or his act was subsequently ratified by his principal. The written stipulation is, "No provision of this contract can be changed or waived except by a written agreement signed by the president or secretary of the company." While the evidence plainly showed that the notes were given, there was much evidence, even on side of defendant, tending to show that, whatever may have been McKown's authority, his acts in reference to this transaction were known to the company, and it, by unequivocal conduct, approved and ratified them. McKown was called by defendant, and testified, in substance, that he accepted the notes from McCune in payment of his premiums, and had delivered to him the policies. If the evidence had stopped here, there would have been just one question for determination: Had the agent authority to waive

a cash payment? The contract or policy to which McCune was a party, and by which he was bound, answered, "No." Then it would have been incumbent on plaintiff to show that, outside the policy, the company had conferred on him such authority, or, if not authorized, the company had ratified the act. No precedent authority was shown. Although requested to do so, the company did not produce in evidence the written appointment of the agent, showing his authority. But McKown goes further, and states: That he sent the notes on to the company, with many others. That afterwards differences arose between him and the company, and Mr. Wemple, vice president, came from New York to Pittsburgh to adjust his accounts, and brought these notes, with others, along. After a settlement, and a large balance struck against him as agent, Wemple took these notes, with others, in part payment of the balance. Wemple scrutinized all the notes, and selected such as were premium notes. When the notes were about to mature, they were sent on to Pittsburgh by the company for collection, and when presented bore the indorsement, "For collection on account of Manhattan Life Insurance Co. Wm. C. Frazee, Sec'y." Part of the aggregate amount of the notes was not paid, and the company returned them to McKown, charging him back with the amount unpaid. He then took new notes from McCune for so much as remained unpaid. The testimony of the vice president and secretary does not contradict these facts. They state, however, that the taking of the notes was an individual arrangement between McKown and McCune, not authorized by the company; that they accepted the notes from McKown only as collateral security for the balance due the company from him; that such entries on the company's books as this, "Due Co. Note J. D. McCune," preceded by the number of his policy, were only a method of bookkeeping, to accurately keep the account of the company with its agent. While this may be so, the question was still for the jury: Did the company, with full knowledge that the notes were given for premiums, instead of cash, accept them as payment, and adopt precisely such course for their collection as if they were the owners of the notes? The credibility of the witnesses, and the reasonable inferences to be drawn from the acts of the parties, were for the jury. McKown testifies that, as between him and McCune, he accepted them as payment. Assume he had no authority to do so. If the company had knowledge of this violation of authority, took the notes from McKown in settlement of his balance, and looked alone to him for payment, —gave no notice to the policy holder that they disclaimed the agent's authority,—the jury might infer that the company ratified his act in accepting the notes as payment. That part of the notes was not paid at the time of McCune's death is not important. Were they accepted as cash, and the policies delivered in pursuance of that form of payment? is the

question. He might have paid in greenbacks, and afterwards the government might have refused to redeem its obligations. The company might have accepted iron, at so much per ton, as cash, and afterwards have failed to sell for one-half the value at which they had taken it. There is a form of contract, with reference to notes accepted as premiums, which in some of the cases the courts have enforced; that is, where the notes on their face stipulate that if not paid when due the policy shall be void. But that is not this case. Another significant fact tending to show that the company ratified the act of the agent in accepting these notes as absolute payment is the notice as to the third annual premium. That was due the 23d of January, 1895. McCune died the 4th of January, 19 days before it was due; but in December, 1894, about 30 days before it was due, the company sent him formal notice to pay this premium on that day, or his policies would be void. At that date, with full knowledge that notes had been received for the first two years' premium, had been in the company's possession, part of them paid and part not paid, the insured is notified to pay the premium for the third year, or his policy will be avoided. If McCune had lived until the 23d of January, and had paid the premium, that fact alone, under the authorities, would have effectually estopped the company from denying the actual payment of the first premiums. But what is the reasonable inference to be drawn from the notice? Is it not that the policies are now valid, the first two years' premiums having been paid, but they will not continue to be so if the third premium be not paid? He not having lived to pay the third year's premium, is not the present defense an afterthought suggested by an otherwise immediate liability for the face of the policies?

We do not see how the learned judge of the court below, on all the evidence, could have withheld this case from the jury, as urged by counsel for appellant. There were one or two inadvertent misstatements of fact as to dates, and one in treating the testimony of one witness as that of another, but these trifling errors could have had no possible influence on the verdict. As to the complaint that the charge was partial, and an argument to the jury in favor of plaintiff, it is not well founded. A bare statement of the undisputed facts in this case is itself an argument against defendant's position, that McKown's conduct was not recognized or approved by it; and, if defendant failed to rebut the inferences warranted by the facts, that was not the fault of the judge, who seems to have fairly submitted the case. It is unfortunate for this defendant that its policy holder died when he had only paid two years' premium on \$20,000 insurance, but it is generally supposed that is a risk life insurance companies take. If policy holders all lived until the annual premiums equaled the amount of the policies, there would be no risk assumed. We see

nothing in any of the assignments of error warranting a reversal of the judgment. Therefore it is affirmed.

(177 Pa. St. 218)

GARDNER et al. v. GARDNER et al.
(Supreme Court of Pennsylvania. Oct. 5, 1896.)

WILLS—REVOCATION—PRESUMPTION.

1. Where one makes a will, and retains custody of it, the presumption is, if it cannot be found after his death, that he destroyed it, with intention of revoking it; hence it is incumbent on one claiming the contrary to overcome the presumption.

2. On the issue, evidence may be given of testator's character, condition, acts, and declarations, as well as of the conduct and interest of those around him after the making of the will.

Appeal from court of common pleas, Clarion county; E. Heath Clarke, Judge.

Action by Boston Gardner and another against James W. Gardner and others to determine whether a will was revoked, plaintiffs claiming that it was not. Verdict and judgment for plaintiffs. Defendants appeal. Affirmed.

The charge of the court was as follows:

"This case has been a very tedious one, and undoubtedly you are very tired; but, when we give you our instructions as to the law in the case, it will be for you to pass upon it, and render a verdict either in favor of the plaintiffs or the defendants. You should be as clear and free of prejudice in this matter as the court. We have no interest further than that right and justice shall succeed. We know none of the parties, either the plaintiffs or the defendants, so far as any favors are concerned. It is a cool question of fact, to be decided on the evidence; and it is your duty to follow the pathway of the evidence, and be guided by it.

"The parties to this suit are Boston Gardner and Elmer Gardner, plaintiffs, and James W. Gardner, F. E. Gardner, Nancy Fulton, Sarah Cooper, Isabella Crow, Lavina Myers, Anna L. Latshaw, F. Alson Latshaw, and David G. Latshaw, defendants. The issue is: 'That the plaintiffs aver that the last will and testament of Lot Gardner, deceased, executed by him on the 6th day of November, 1889, was not canceled or destroyed by him *animo revocandi*, which shall stand as a declaration; and the defendants aver that the said will was canceled or destroyed by the said Lot Gardner *animo revocandi*, which shall stand as a plea.' This issue was formed by the agreement of the counsel for the parties, and, further, 'that this case shall be tried on such declaration and plea.' Hence we have to begin with the fact that the last will and testament of the testator was made and duly executed by him on the 6th day of November, 1889; that Lot Gardner died on the morning of the 20th day of November, 1889, about fourteen days after the making of the will; that the said will

cannot be found; and that it has been lost, concealed, canceled, or destroyed. The making and execution of the will have been adjudicated by the orphans' court. The loss, concealment, cancellation, or destruction of the will is an admitted fact, by the declaration and plea. Therefore the principal facts in dispute are whether the will was canceled or destroyed by the testator *animo revocandi*,—that is, that Lot Gardner canceled or destroyed the will with the intent to revoke it,—or whether the will was concealed or destroyed by some person or persons other than the testator, Lot Gardner.

"It is a well-settled principle of law that where a will is made, and the testator retains the custody of it, or had ready access to it, the presumption arises, if the will cannot be found after his death, that he destroyed it with the intention of revoking it. In such a case the presumption is a natural one, or, in other words, it is a presumption of law. Where a will is retained in the possession of the testator, and after his death it cannot be found, the law presumes, in the absence of proof to the contrary, that it was done by the testator himself, and with intent to revoke it. Foster's Appeal, 87 Pa. St. 67, fully sustains our view of the law under the latter state of facts. To the same effect is Stewart's Estate, 149 Pa. St. 111, 24 Atl. 174. But all presumptions of this kind may be rebutted by proof of the actual facts. The burden is on the plaintiffs in this case to overcome the presumption of revocation which arises out of the fact that the will of the testator could not be found at or after his death; and, in order to rebut and overcome such presumption of revocation, it is incumbent upon them to produce sufficient evidence to satisfy you that the will of the testator was not canceled or destroyed by him *animo revocandi*,—that is, that term means, gentlemen, with intent to revoke it,—or that the will was destroyed or concealed by some other one than the testator. This makes not only the testator's character, condition, acts, and declarations, but the conduct and interest of those who were around him from and after the date of the making of his will, legitimate subjects of inquiry. Each of these lines of proof are important, in strengthening the other, and both together seem necessary to constitute full proof. Youndt v. Youndt, 3 Grant, Cas. 140.

"The contention of plaintiffs is that the concealment or destruction of this will was done or procured by the fraud of some third person. Fraud must be affirmatively shown. It will not be presumed. It is one thing to charge a fraud, and another thing to prove it to the satisfaction of a jury. Though fraud is not to be presumed, it may be inferred from facts clearly proved, leading to that conclusion, but it is rarely capable of proof in a direct way. It is the chain of less direct circumstances, all pointing the same way, until there seems no other reasonable

mode of reconciling them, that must usually be depended on in reaching a conclusion. *Eichenlaub v. Hall*, 163 Pa. St. 201, 29 Atl. 919. As bearing upon the issue of revocation or no revocation, evidence is admissible as to the firm and positive character and tenacity of purpose of the testator; the deliberation with which the will was made; the short period of time between the making of the will and the time when the key of the trunk passed out of his possession; his physical weakness in that short interval; his expressions of purpose, after the will was made, consistent with its provisions, and inconsistent with an intention to die intestate; his repeatedly expressed wish that Summerville, who had drawn his will, would come and make changes in it, or complete it, or make changes in his business, or complete his unfinished business,—you will recollect, there is some difference between the witnesses as to what those words were,—together with the fact that he had a large sum undisposed of by the will; the absence of any evidence of any change in the circumstances of any of his relatives after the will was made, making it probable that he would so radically change his mind as to destroy his will, together with the acts or suspicious conduct of those who surrounded him, and whose interests would be subserved by intestacy. And, as to such evidence, it is your duty to carefully examine it, and give it a fair and reasonable construction or inference in rebutting the presumption of revocation arising from nonproduction of the will. But the defendants contend that they have offered sufficient evidence to overcome all of the evidence of plaintiffs going to rebut the presumption of revocation of the will, and further allege they have offered direct and positive evidence of those who surrounded the testator from the time the will was made, on up to his death, and who remained there after his death, who all deny having seen the will, or that they destroyed it. So that it will be necessary for you to consider the evidence on both sides of this case. Understand, gentlemen of the jury, that from the very pleadings in this case the presumption of law is that this will was destroyed with the intent to revoke it. As we said to you before, this presumption is a natural one, and it remains until it is dispelled by proof to the contrary; and when we say 'by proof to the contrary,' we mean that you shall take into consideration all of the evidence, not only that offered on part of the plaintiffs, but that offered on part of the defendants, bearing upon the same subject-matter.

"We have referred to the circumstantial evidence. Circumstances to which we referred, and of which evidence has been offered, may be sufficient for you to infer that the testator did not destroy this will. If anybody other than Lot Gardner destroyed this will, gentlemen, unless they destroyed it by his directions (and we do not know of any

evidence of that character), why of course it would not revoke it. The last will and testament of a man is a sacred instrument. Every man has a right to make his will to suit himself, and, if he executes it in a legal form and manner, it has a right to stand. No court, no jury, has a right to make a new will for him. But you will understand, gentlemen, that you are not to make a new will in this case. The will has been adjudicated, but you are to decide whether this will shall stand or fall, because if it was destroyed *animo revocandi* that ends the will; that is, if it was destroyed, we say, by the testator. If it was destroyed by some other person, through trick or fraud, the will should stand, and it would not be a revocation of it. It would not be a destruction by the testator. Now, how is this, gentlemen? You have heard the evidence upon the part of the plaintiffs. It is too voluminous for us to go over. You have heard the evidence of Squire Summerville as to the making of this will. The counsel for defendants called your attention to the purpose of the cross-examination of the squire to affect his credibility. You will recollect his testimony, and that of the other witnesses, bearing upon the character of the testator. Some of them say he was a firm, resolute man; that it was not easy to change his mind. You will also recollect the reasons given by Lot Gardner, as testified to by Summerville, as to why he was making his will in the manner he did,—why he cut off certain of his relatives,—the number of schedules that had been made, and increasing the amount to some of them, and others not increasing the amount as stated in the first schedule. Then the testimony in relation to how much he would dispose of, \$18,000, by the will, and that the remainder of his money or bank accounts, notes, etc., whatever it might be, being the difference between \$18,000 and \$27,400, as they had counted up at that time, he would dispose of personally himself. You will recollect as to what Summerville testifies,—that Mr. Gardner would get to talking about some of those poor relatives, and then he would say: 'Well, it will not do. I can't give them all. It will not do.' After making out several schedules,—we do not remember whether four or five, or perhaps it was six, Summerville testified to, we believe that was the way,—why, they got a schedule made out; and you will remember how that schedule, upwards of a month after the death of Lot Gardner, was discovered, what was communicated, and when it was communicated to a party by the name of Craig.

"Now, gentlemen, you have the theory of the plaintiffs in this case, and the theory of the defendants. You have heard the counsel sum up on both sides, and they have gone over the evidence pretty fully. You are the judges of this evidence. It is for you. But undoubtedly there are contradictory statements, and it is for you to reconcile those statements. No witness

has been directly impeached, that we recollect of. The credibility of the witnesses is entirely for you, and you will consider the interest or want of interest of the different parties in this case; their manner of testifying on the witness stand; their candor, or want of it. As we stated to you before, you will have to reconcile these contradictions, and you must be reasonable in coming to a conclusion as to whether a witness is testifying to the truth or not. You must take the whole of his testimony. It is not fair to single out a part of a sentence or a clause, and to say that he has been successfully contradicted, when if you would take the whole of his testimony it would really tell a very different story. Gentlemen, you take this case, consider all of the evidence carefully, and, if you are satisfied that there is a preponderance of the evidence in favor of the plaintiffs, your verdict should be, 'We find for the plaintiffs.' If you are satisfied that the preponderance of the evidence is for the defendants, your verdict should be, 'We find for the defendants.'

'The plaintiffs have submitted the following points: '(1) The orphans' court of Clarion county, having full jurisdiction for that purpose, has adjudged and determined that the copy of the will (Exhibit F) offered in evidence is a correct copy of the last will and testament of Lot Gardner, deceased, duly executed by him on the 6th day of November, 1889.' We will affirm this point, gentlemen, as an abstract proposition of law, but we do not see that it has much to do with the case. We have already instructed you that the will has been adjudicated. '(2) That fact, being already established by competent authority, is binding and conclusive in this court; and the jury have therefore nothing to do on this trial with the question of whether the copy of the will in evidence is or is not a correct copy of the will of Lot Gardner, deceased.' We affirm that point. '(3) The only question for this jury to determine is whether Lot Gardner's will, made by him on the 6th of November, 1889, was afterwards canceled or destroyed by himself, with the mental capacity and intention of revoking it.' We affirm this point, with this qualification: We do not recollect from the evidence, unless it comes by way of what the counsel for plaintiffs claim,—that Dr. James Gardner has contradicted himself by stating that, from a certain time up to a certain time, Lot Gardner was not competent to make a will. But we think, gentlemen, all of the evidence in this case (we are only giving our opinion in this matter)—all of the evidence that has been offered bearing on the mental capacity of Lot Gardner, at least up until as late as Sunday or Monday before his death—is that he had mental capacity; but as to whether he was physically able to get out of his bed, say, from the Saturday before that, or even on Friday, that is for you to consider from the evidence. '(4) It requires as much mental capacity to revoke a will validly as to make one. And that is the kind of capacity and intention which is meant by the legal phrase, "animo revocandi," contained in the issue formed in this case.'

We answer that in the affirmative. If a man has not mental capacity, he can neither make a will nor revoke it. If a man, when he executes a will, is in his right mind, and after the making of it becomes mentally incapacitated, so that he is not able to know what he is doing, and would destroy that will, it would not be a destruction of the will *animo revocandi*. We think there is very little evidence here going to show that Lot Gardner did not have mental capacity. It is true that he was under the influence of medicine at times, and it would be pretty hard to waken him. '(5) The jury should determine the question stated in the third point according to the preponderance of the evidence. It is not necessary that anything should be found proven beyond a reasonable doubt.' Affirmed. '(6) If the jury should find from all the facts and circumstances in evidence that it is more probable that Lot Gardner did not, than that he did, cancel or destroy his will *animo revocandi*, your verdict should be for the plaintiffs.' We answer that point in the affirmative. By the word 'probable' is meant that which is most consonant with reason; that which has the appearance of reality and truth. '(7) In order to find for the plaintiffs, it is not necessary that the jury should determine who did destroy or suppress the will, or what became of it. It is sufficient if the facts and circumstances satisfy you that it is more probable that the testator did not himself destroy his will than that he did.' We affirm this point. '(8) No civil right of the citizen is more valued or more sacred than the right to dispose of his property by will, according to his own choice, whether judiciously exercised or not; and it is not the business of courts and juries to set aside a testator's last will, and substitute in lieu thereof their own notions of what he should have done with his property.' We affirm this point, as an abstract proposition of law. We have before instructed you that this will has been adjudicated. The only question is for you to determine from the evidence whether it was destroyed by the testator with intent to revoke it, or was destroyed by some other person.

'The defendants have submitted the following points, and request the court to charge the jury: '(1) Where a testator makes a will, and retains it in his possession, and after his death it cannot be found, the presumption of law is that he destroyed it himself, *animo revocandi*; i. e. with the intention of revoking it.' Affirmed. '(2) To overcome this presumption in the case on trial, the plaintiffs must prove to the satisfaction of the jury that Lot Gardner, the testator, did not destroy his will with the intention of revoking it, and died believing it in existence; and, if they have failed to so prove, the verdict of the jury should be for the defendants.' Affirmed. '(3) There being evidence that Lot Gardner made a will and retained it in his possession, and since his death it cannot be found, the jury, at every stage of their deliberations, must keep in the balance in favor of defendants the presumption of law that the testator destroyed said will himself, with the

intention of revoking it, to which is to be added the evidence offered by defendants to strengthen such presumption; and, if the whole be not overcome by the evidence offered by plaintiffs, the verdict of the jury should be in favor of the defendants.' We affirm this point, and we have practically instructed you to this effect in our general charge."

J. E. Wood, Harry R. Wilson, Frank R. Hindman, J. A. F. Hoy, C. Z. Gordon, and D. F. Patterson, for appellants. W. A. Hindman, W. H. Hockman, F. J. Maffett, and B. J. Reid, for appellees.

PER CURIAM. We find nothing in this record that would justify us in sustaining either of the assignments of error, nor do we think that any of the questions therein presented require special notice. The case was carefully tried, and fairly submitted to the jury, and their verdict in favor of the plaintiffs should not be disturbed. Judgment affirmed.

(177 Pa. St. 33)

NEAL v. BLACK et al.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

TRUSTS—REVOCATION.

Plaintiff, an orphan of weak understanding, but competent to make a deed, and capable of understanding the general purpose of a trust, on arriving at majority, at the suggestion of his uncle, who was acting on the advice of his mother and other members of the family, and the physician who had attended plaintiff from infancy, after having the matter carefully explained to him by a reputable and competent attorney, who had acted for plaintiff in having his guardian appointed, and who was not attorney for the uncle, conveyed all his property, valued at \$150,000, to his uncle, with absolute power to take charge of the same, sell, invest, and reinvest, and appoint a trustee in his place, with provision that such part of the income as the trustee deemed proper should be paid plaintiff from time to time, and that the trustee should convey the principal and accumulation to whomsoever plaintiff should designate by will. Compensation of \$500 a year for the trustee was provided. At plaintiff's suggestion the deed was declared irrevocable, and the provision giving the trustee discretion as to the amount to be paid plaintiff was inserted in place of one that all the income be paid him. According to plaintiff's wish, and the understanding before execution of the deed, plaintiff's guardian was substituted as trustee as soon as his account as guardian was confirmed. Plaintiff was satisfied with the arrangement till urged by an uncle of one he had married secretly to revoke it. *Held*, that the court would not ratify his revocation, it not appearing that his best interests required it.

Appeal from court of common pleas, Allegheny county.

Suit by George B. Neal against William H. Black and another. Bill dismissed, and plaintiff appeals. Affirmed.

The opinion of the court below (Slagle, J.) was as follows:

"The bill in this case was filed for the purpose of enforcing a revocation of a voluntary deed of trust made by plaintiff to William H. Black, who, under authority contained in the deed, subsequently appointed Thomas H.

Lane as trustee in his stead, who is still acting as trustee. The bill sets forth that plaintiff is the son of James Lawrence Neal and Margaret Neal, both of whom died when he was a child of tender years; that his mother was a daughter of George Black, from whom he inherited a large estate; that Thomas H. Lane was appointed his guardian, and acted as such until plaintiff came of age, on the 26th day of September, 1889; that on the 19th day of October, 1889, plaintiff executed a paper by which he conveyed to William H. Black all his estate in trust, and subsequently, on December 20, 1889, the said Black appointed Thomas H. Lane as trustee in his stead. The deed is an absolute conveyance of all plaintiff's property to William H. Black, his heirs and assigns, and gives to him the absolute and unqualified power to take charge of the same, to sell at public or private sale, to invest and reinvest, etc., at the will of the trustee, and to appoint a trustee in his stead. It is further provided that: 'Out of the net income of said trust estate, which shall not be subject to my control or engagements, to pay from time to time such sums as he (said trustee) shall deem proper for the liberal and comfortable support and maintenance of myself and any family and establishment I may acquire or have, or should support, for which sums my receipts shall be vouchers. To reinvest and accumulate the remainder, if any, of such net income during my life, and at my death to convey and assign the whole of said estate, with all its accumulations, as I by my last will, or writing in the nature of such last will, may direct and appoint, and, in default of such will or testamentary writing, to such persons as would inherit my estate under the intestate laws of the state of Pennsylvania, in such shares and interests as by such law directed.' The trustee is authorized to retain \$500 annually out of the income as compensation. The conveyance is made irrevocable. The bill further alleges as follows: 'Fifth. Your orator further avers: That at the time of executing said paper, Exhibit A, and for a long time prior thereto, he lived at the house of his grandmother, Mrs. Jane Black, and said paper was prepared at the instance of William H. Black, who is his uncle, and who lived at the same home of said Mrs. Jane B. Black until a few months before the preparation of said paper, and continued to visit at said home frequently. Your orator had no knowledge in relation to said paper, or the contents thereof, until the same was presented to him by said William H. Black for signature, on October 19, 1889. That he executed said paper solely at the solicitation and upon the advice of said William H. Black, and at the time he was entirely inexperienced in business, unacquainted with the extent and value of his estate, or its conditions, the information in relation thereto being in possession of said Lane and Black, and they having concealed the same from him;

and in executing said paper he acted on the suggestion and advice of said Black, without any independent advice, and under an entire misapprehension as to the terms and legal effect thereof. Sixth. That said William H. Black and Thomas H. Lane, although requested, have neglected and refused to render an account of said trust. Seventh. That on February 22, 1894, he executed a revocation of said trust,' etc. The defendants, in their answer, admit all the allegations of the bill, except those contained in the fifth paragraph, which they deny, and set forth at length the circumstances under which the deed of October 19, 1889, was made, and allege that it was made with full information as to his estate, and knowledge of its purposes, and that he was satisfied with it until after he was secretly married, in September, 1893; that they refused to give a statement of his property, because they believed that persons other than plaintiff were endeavoring to obtain control of his property. They deny that the revocation was of any effect, because the deed is in terms irrevocable, and to revoke the same would work great injury to the plaintiff.

"It will be observed that it is not disputed that George B. Neal, at the time of the execution of the deed in question, was competent to make a contract. The plaintiffs do not allege that he was incompetent, and in fact claim that he is now fully capable of managing his own affairs, and do not show such marked improvement in his condition as to justify an allegation that he was not then legally competent. Of course, the defendants' case depends upon his capacity at that time to make a valid contract. There is no evidence in the case to show want of legal capacity at that time. Plaintiff's bill is based upon circumstances attending the execution of the paper, and the character of the instrument itself. Though no request was made by plaintiff for specific findings of fact or of law, the grounds of the application are very clearly set out in the exhaustive and able argument presented by counsel, in propositions as follows: 'First. There being no power of revocation in this deed, and it having been prepared, and the signature thereto procured, by persons who stood in a confidential relation to Neal, the burden of proof rests on defendants. Second. This burden can only be met by clear and decisive proof. Third. This burden is upon defendants to show, by such clear and decisive proof, these things: (a) That Neal had a true and full knowledge of his estate, its extent and value, and of the income therefrom; (b) that he had independent advice in regard to the act which he was performing; (c) that the terms and provisions of the deed were proper and reasonable; (d) that he had a full, clear, and intelligent understanding of the act he was engaged in, and of the effect and consequences of the deed which he was executing.' The defense is that Neal was informed of the

amount and character of his estate; that the control of his estate was put into the hands of a trustee at his own request, and he was fully informed as to the contents and purposes of the deed, and it was made irrevocable at his request; and further that, though then and now competent to make a valid contract, he is of weak intellect, without qualifications for the transaction of business, and incapable of acquiring such qualifications as would make it safe to intrust him with control of his estate.

"The main question in dispute is as to the mental capacity and business ability of George B. Neal, and should be first considered, as it has a bearing upon the other questions of fact and law. The testimony of George B. Neal, and his manner upon the stand, would indicate that he is not a man of full mental vigor or average intelligence, though his testimony was to some extent affected by his defective hearing. He could not tell when his father, mother, and grandfather died. These events happened before he knew anything; but an ordinary person would have inquired, and remembered such important matters. He says he did not know he had a guardian, or had any property, until about two weeks before he came of age. There are not many young men of that age, with a fortune of \$100,000, who would have been ignorant of that fact, or who would not have inquired as to the matter. When he undertook to give the amount of moneys paid to him by Mr. Lane in 1893, he became thoroughly confused, and could give no intelligible answer. Dr. Willard was his attending physician from infancy until he was 16 or 17 years old. He testified that, in infancy, George was affected by marasmus, and his development was very slow. He advised his grandmother that he did not think it was proper for him to arrive at the age of 21, unless some disposition was made of his affairs, or some one was appointed to look after him. He also was of the opinion that the best thing that could have been done to develop his mental condition was to keep him at home, under a tutor or governess; that there was no use sending him to school, because he could not take an education. Dr. Fleming had attended him at times for four or five years. He says: 'He had no capacity for understanding what I was talking about. In mental condition he was a child, simply. His mental development was incomplete. He could read, and had a personal identity. He was neat and cleanly in his person. That showed that his moral condition was good. But the intelligence was defective, and his judgment faulty.' He gave it as his opinion that Neal did not have mental capacity for dealing with a considerable estate. Miss Benson was employed as teacher for eleven years, and remained with him until his marriage, in 1893. She traveled with him extensively, —to Chicago, Denver, and a long trip in

Europe. She says: 'His mental development was weak. His memory was very good, but he hadn't any reasoning power whatever, and is of a dependent nature,—is easily persuaded or influenced by others, especially by any one to whom he may take a fancy. He was not capable of taking care of his property, or of himself either.' M. L. Durst was employed as teacher about 1883. He says: 'Well, George couldn't learn a rule so that he could use it three or four days later. He could go through the examples or exercises under the rules. He could learn to go through those exercises, and to me it seemed very well, and I thought he was learning those rules so he could retain them, and for two months I supposed he was making very good progress; but at that time I began to make some reviews with him, and had occasion to use the rules that he had been drilled in, and found that he couldn't use them. At end of year, do not think any progress was made. He was very well in history. Seemed rather broad and well informed in many things, was fairly good in geography, was fairly good in spelling, and was fairly good in writing.' Samuel Rea, an uncle by marriage, knew George from childhood. Saw him frequently at Mrs. Black's and at his own home. Took George to Europe in 1892. He says of him: 'He was very backward as a boy, and seemed incapable of taking an education such as the average boy is able to take. He has a good disposition, exceedingly kind-hearted, very easily influenced by those whom he cares for, but is totally unable to do any business. In my judgment, he is totally unfit to take care of his estate. If a thing is explained to him, he seems to understand it thoroughly, but it is liable to get away from him.' These witnesses have no connection with this case. William H. Black, Thomas H. Lane, and W. A. Lewis express similar opinions.

"On part of plaintiff, a number of witnesses were called to testify to the capacity and ability of George Neal. Rev. Dr. Fulton had known him for some time. During last summer and the previous summer had correspondence with him, and in January of 1894 taught him for 20 or 25 days. He details the course of study, and says that he made a very marked improvement, and adds: 'With the right kind of education, I am satisfied that he would continue to improve; and, while I make that statement, there are several things to be taken into consideration.' He was asked this question: 'Assuming that this young man's estate, as it exists at present, to be invested in securities,—Pennsylvania Railroad stock, and the remainder in school, city, and county bonds, etc.,—I wish you would state what your judgment is as to his ability to take care of that property, invested in that way.' to which he answered, 'I think he could do it.' On cross-examination he said that he had not tested George as to his studies after the lessons ceased; that

he did not think George had an ordinarily developed mind; and explained: 'In the first place, George is one of those men in whom the sutures of the brain become hardened early. In the second place, I think his education has not been sufficient, or of the kind, to develop the mind of any boy.' He further said, 'I think he could transact ordinary business.' He was asked the question, 'Suppose he was given his estate to-day, of \$200,000, invested in stocks and bonds; do you think he could be trusted to convey that property, and reinvest it safely?' to which he answered: 'No, I don't. I think he can manage that as at present invested. * * * He could take care of it with such advice from counsel or business men that he could secure, but I don't think, without that, he could manage any business complications.' R. G. Gamble, an uncle of Neal's wife. He knew George about eight years. In answer to the same question put to Dr. Fulton, says: 'Well, I believe George could take care of money, and I believe he knows when he sees a good investment. I think, in time, George could be educated, with a little assistance, to manage it himself. Of course, it is very hard for a man that has never had any experience in business of any kind to manage or transact business,—buy or sell safely.' He was asked: 'Do you think George could be safely trusted to invest \$15,000 to \$20,000?' A. I don't know about that. That would be hard to tell. Q. You don't think he could at present? A. Not without assistance, and I don't think any person could.' He advised George to revoke the deed of trust, and gives a statement of the circumstances: 'I told him it would have to be fixed in some shape. Either he would have to take care of it himself, or have it fixed so he couldn't lose it, and nobody could beat him out of it.' William B. Neal, an uncle, says: 'I consider that George is very careful and cautious in any undertaking, but, owing to his bad education, he would not be able to take care of his affairs without further education and advice. Had him in office from the time he was 17 or 18 years old until after he came of age.' W. B. Moyle knew him about eight years. Says, 'He is very cautious in money matters.' In answer to question put to Dr. Fulton, says: 'Well, invested in first-class securities, I suppose, I think, I know he would be capable of taking care of it.' And again: 'Well, I don't think George would be able, perhaps, to increase it to any great extent; but, as invested now, he would be able to take care of it.' Reese Neal, an uncle, says: 'He visited our house a great deal, and went with us to Michigan once for two weeks. Bought his own ticket, and looked after his own finances. Always considered him very careful.' In answer to the question: 'If his estate, consisting, as it now does, of Pennsylvania Railroad stock and municipal and state bonds, was put into his

possession, do you think he would be able to manage that property? A. Yes, sir; I think he could.' In cross-examination he said: 'By "managing" I mean that if he had that estate left to him, and if he struck some matter that he didn't understand, he would have sense enough to go and see where it was wrong, if he thought it was wrong.' 'I think he is fully developed mentally. I think he is a little slow in some things, but I think that is partly on account of his hearing. He is a little slow in learning. Q. You think it would be safe to give him \$200,000, and let him go out and take care of himself? A. Yes; because he would take advice where he didn't understand.' Dr. Samuel Ayers, an expert physician, made an examination of Neal for the purpose of testifying in this case. He had ten or twelve interviews with him. Says that 'he is possessed of a very fair degree of mental capacity,—a little under the average in some respects, and average in others. In the mathematical faculty he is defective. In some of his faculties—his observation, for instance—he was very good. * * * His judgment was apparently good in various matters, perhaps defective in some directions. His attention was close and acute. His speech was clear and coherent in all matters. Special senses all normal, except hearing. Handwriting particularly good, and composition good. Expression of face natural and normal. Caution and care normal.' 'As to mathematics, he is decidedly under the average, in almost every direction you take him. His reasoning powers are quite good.' 'Has difficulty in making change.' 'I think there has been some defect in his development. This marasmus probably stopped the organic growth in the brain. It was an interruption in the early years, undoubtedly; but he seems to have overcome it in later years largely, particularly during his married life. I have no doubt that he has developed in many of his faculties much more readily than before.' Being asked: 'Take George in the condition in which you found him, and give him the possession and control of, say \$50,000; do you think that would be a safe thing to do?' He answered: 'Well, yes. I will answer you by yes; that it would be comparatively safe. Q. Do you think, for George's own sake, supposing he was some relation of yours,—say he was the only son of some lost sister of yours,—would you put him in possession of \$200,000 worth of property to handle and dispose of? A. No, I don't believe I would. Q. Why wouldn't you do it, doctor? A. Well, I would not do it for this reason: I think probably he could not manage safely such a large sum without he had some experience, and without some assistance too. He might get along with it, probably, with some losses; but I believe he is capable of profiting by experience of that kind, because he is capable of development.

Q. If invested as it is said to be invested now, in Pennsylvania Railroad stock and municipal and county bonds, would he be able to take care of it? A. I think he would, from what I have seen of him.' Mrs. Neal finds nothing wrong. 'It is just the way they kept him.'

"A fair conclusion from all this testimony is that though George B. Neal, the plaintiff, is able to understand an ordinary proposition, when presented, and competent to make a contract, his intellectual powers are by nature weak, and have not been fully developed. None of the witnesses for plaintiff state unqualifiedly his ability to take charge of, and safely manage, his estate. They differ from the witnesses on part of the defendants as to the amount of his mental power, and the chances for improvement. They all agree at present that he would require assistance. George himself says that he thinks he is able to take care of his estate, but is not capable of doing business. Thinks he has improved a little in the last year or two, and says: 'I attribute that to—since my marriage—that I have learned a little more; have got out among people; by getting out more with people, business men especially. But I will learn a great deal more.' The criticism made by plaintiff's witnesses as to the education of Neal does not seem to be well founded. There is no evidence that his grandmother and uncles, with whom he lived, were not anxious to do everything best calculated to develop his powers. Those with whom he passed his daily life would be better able to judge as to what was best than those who met him casually. He was sent to school, provided with teachers, given very considerable opportunity for travel; and his uncle William B. Neal says that for several years he was taken into his office, with a view of his learning something of business. Dr. Willard, who attended him from infancy, and Dr. Fleming, who attended him when grown, would be able to form a more reliable judgment as to his capacity than a physician called in to make an examination.

"The next question of dispute is as to the making of the deed of trust, and the circumstances attending it. Defendants claim that, as the allegations of the bill are denied, they should have been supported by the testimony of two witnesses, and, standing on the testimony of Neal alone, all questions thus raised should be resolved against the plaintiff. The plaintiff contends that the relation of the parties casts the burden upon defendants. The testimony having been produced, we think it should be considered and determined upon its weight. This question may be considered under plaintiff's third proposition, to wit, that it must appear (a) that Neal had a true and full knowledge of his estate, its extent and value, and of the income therefrom; (b) that he had a full, clear, and intelligent understanding of the act he was engaged in, and of the effect

and consequences of the deed he was executing; (c) that he had independent advice in regard to the act which he was performing. These propositions may be more strongly stated than the law of the case justifies, but they suggest the questions of fact in dispute. George Neal's account of the transaction is that the deed was signed in his grandmother's house. He says: 'I was sitting in the back parlor, reading a book, and William Black and grandmother came to the door. I first noticed them standing in the door, and I just glanced up, and didn't pay no more attention to them; and my grandmother came into the room and spoke to me, and said that Will would like to see me. So I laid down my book, and went out, and followed him across the hall into the sitting room; and he asked me, he would like me to sign this paper. So he held the paper out,—the deed of trust,—and he read it over to me, but didn't explain any of the parts of it. Then he said: "Do you want to manage this estate yourself, or do you want somebody appointed to manage it for you?" Well, I thought over it a minute or two, and mentioned Mr. Lane. He said, "You would rather have Mr. Lane appointed?" I said, "Yes, sir"; and he said, "Well, sign this." I signed the paper, and he didn't say anything for a while; and I said, "Will, can I look at the papers?" and he said, "Certainly," and I looked over it. Just glanced down each page, and turned it over, but I couldn't understand anything about it. I never saw such a paper as that before. Then I folded it up again, and handed it over to him. He says, "Do you understand it?" I says, "Yes," but I meant that I had appointed Mr. Lane, and that was all there was of it. Then he asked, "There is some other part of it I can't quite remember," but he showed me a paper of some kind that he called a statement. He held it in his hand, but I could not tell you what was on it. I only heard only a short time before that Mr. Lane was my guardian. Only after I signed this deed of trust, I asked Will, "How much am I worth, Will?" And he said, "Something over \$150,000." On cross-examination he said that before this he knew that he had some property, but did not know how much, or who had charge of it; that a couple of weeks before he heard an aunt say that Mr. Lane was his guardian. 'I didn't think any more of it.' He had no recollection of signing any paper in connection with Mr. Lane's account. The only paper he recollected was the deed of trust. Says he acknowledged the deed of trust at the office of W. A. Lewis, but says, 'He didn't tell me anything about the deed of trust,' and denies that he had any talk with Mr. Lewis as to the terms of the deed, or the account of Mr. Lane. 'He read it over to me, but that's all. William H. Black read over something, but I don't know what was on it.' William H. Black says that Dr. Willard had advised that some arrangement should be made for the care of Neal's estate when he came of age; that, when

George was about to come of age, he obtained a statement showing accurately the condition of George's property up to that time; that he gave the statement to him, and asked him whether he thought that he was capable of managing his property. He replied, in a very pathetic way, that he didn't feel himself competent to take charge. He then expressed a desire that Mr. Lane should continue the management of his property. He professed that he understood the situation, and at his suggestion I undertook to become trustee in the interim, until Mr. Lane had filed his account as guardian and been discharged. I showed it (the statement) to him, particularly the part showing the aggregate of his property. This was the result of a family consultation. Afterwards saw W. A. Lewis, Esq., and after a number of consultations with him the deed of trust was prepared. Mr. Lewis was not Black's attorney, but had represented George Neal's estate. The deed was signed at Lewis' office. Mr. Lewis went over it with Neal, and discussed it with him. The clause making it irrevocable was inserted at Neal's request. As to his understanding of the statement and deed of trust, he says: 'He had mind enough to understand the total amount, and different items composing his estate, but would not know the difference between a bond and a promissory note. He understood the terms of the deed of trust. Whether he understood the full import, I do not know.' W. A. Lewis says he was attorney for Neal's estate, and for his guardian. He did not see Neal in reference to this matter until the time of executing the deed, but states at length his conference with William H. Black, and his instructions to him, and states the interview when the deed was signed as follows: 'I asked Neal whether he understood what his estate consisted of, and whether or not he wanted me to go over the account of Mr. Lane with him, and explain it to him. He said, "No;" that his uncle William H. Black had gone over it with him, and he understood it pretty well, or as well as he hoped to; that he didn't understand figures or money matters very well, and he didn't want to have anything to do with it,—he would only get twisted up,—and he wanted me to have his uncle appointed trustee first, so that Mr. Lane could file his account, then when Mr. Lane would get through with his account, and it would be passed by the court, then Mr. Black would appoint Mr. Lane trustee in his stead. I then asked him whether or not he wanted this deed of trust to be revocable at any time, and advised him that he ought to state in the deed of trust whether he wanted it revocable or irrevocable; that it might be drawn to be revocable after ten years, or after he would become fifty, if he thought he would improve; but he said he didn't expect to, that he had been training with teachers and traveling, and the only thing he could learn was a little history, and for me to put in a clause so that it couldn't be coaxed away at any time. That

is the word he used. Then I added the clause in his presence, in the office. I wrote these words: "And I hereby make this conveyance irrevocable." This deed of trust was not out of my office after it was signed, until Mr. Neal had been there and talked it over with me and executed it. I read it over and explained it to him. I think we were pretty near all the afternoon over it,—an hour or an hour and a half any way. There was nothing in this paper he did not understand. He was brought to my office for that purpose. Otherwise I could have sent this paper to be signed by him at his grandmother's. It was explained in all its details, and I thought he well understood it. He afterwards joined with his uncles in having Mr. Lane discharged. That is the paper they sent to Grandmother Black's home.' He says the clause in relation to income was inserted after the paper had been drawn, and after discussion with Neal, which he details. 'As the paper was originally drawn, I think he was to draw all the income if he wanted it. And he thought that was giving him too much range, and it might not be best to have it in that shape.' Samuel Rea says: 'I remember one occasion, we were at the Savoy Hotel, I think, in London. He detailed to me the transfer of his estate, and how well satisfied he was that Mr. Lane or his uncles should have charge of it; that he didn't feel that he could take care of it or understand it.' Miss Benson says: 'About the time he was 21, he came to me and told me that they had told him all about his affairs, and asked him if he wanted to take charge of his money, or have some one else do it, and he said, "Oh, no," he wanted somebody else to do it, and they asked him who, and he said Mr. Lane and his uncle Will. Then it seems that he had some papers at home that he wanted to bring up to me to read. He read them over, he said, and could tell me where his money was, and how it was arranged, what railroad stock he had, and different things about it. He tried to explain to me, but I can't tell you anything he said, because I didn't care. I remember he spoke about railroad stocks. I think he told me the amount of the whole. It was something over \$150,000.'

"In view of this testimony, there is no room to doubt that the plaintiff was fully and fairly informed of the condition of his estate, and the terms and conditions of the deed of trust. Whether he fully comprehended them in all the details is not so certain. He was able to understand in a general way the condition of his estate, the purpose to be accomplished, and the mode of effecting it. This is all that should be required. If it were necessary that a person creating such a trust should fully appreciate all the technical intricacies of the transaction, he should not need a trustee, and one who did would not be able to protect himself against his own weakness and incapacity. It is sufficient that he be not deceived, or misled by

fear or favor. In this case there is no allegation of any attempt to deceive Neal or mislead him in any way, except such as may be implied from the statement that he was ignorant of the condition of his estate; 'the information in relation thereto being in the possession of said Lane and said Black, and they having concealed the same from him.' This statement is not fully sustained even by Neal's own testimony. He admits that Black told him that his estate amounted to over \$150,000, and showed him a statement of it, which he read to him. He is not sustained by any other witness. Black says he obtained a statement from Mr. Lane which he showed to Neal, and explained to him. Lewis says he offered to go over the accounts of Lane with Neal, and explain them to him; but he said that it was not necessary, as his uncle William had done so. And he told Miss Benson that he understood all about his estate, and offered to show of what it consisted. We are therefore of the opinion that there is no reason for setting aside this deed because of ignorance or concealment.

"But it is claimed that Neal did not have proper counsel and advice, and that the deed should be revoked, if for no other reason, because Neal acted 'without any independent advice.' Some of the cases say that this of itself is sufficient ground for setting aside a voluntary deed. What is independent advice? We think an examination of the cases will show that the word is used as a synonym of 'impartial.' One of the definitions of the word is, 'Not subject to bias or influence.' It certainly does not mean that, when a person has the advice of one or more impartial friends, he must seek, or the friend must suggest, application to another. Nor do we think, when the friend is a near relative, who is familiar with the condition of the party as to mental capacity and estate, that it is necessary to call in a stranger to make his advice valid. Neal says he acted solely on the advice of William H. Black. If so, why was he not an independent and competent adviser? It is true that he was made trustee, with an annual salary of \$500. But this was a temporary arrangement, to continue until Mr. Lane, the selected trustee, could be properly appointed. Otherwise Black had no personal interest in the deed. All the estate was left to the absolute, final control of Neal. The only interest he could have in the estate would be in case of intestacy. But this he had under the law, and not through the deed. He did not act solely upon his own judgment, but upon the advice of Dr. Willard, and after consultation with other members of the family. In seeking legal advice he did not go to his own attorney, but to Mr. Lewis, who had acted for Neal in appointment of his guardian, and says that he represented Neal's estate, though he acted as attorney for his guardian. Mr. Lane says he knew nothing of the deed until after it was executed. When a young man, soon

after coming of age, makes a voluntary deed giving away his estate, or relinquishing a right in favor of another, and especially if he be of weak mind and inexperienced, the transaction should be carefully considered in view of all the circumstances. But in this case we find no evidence that Black and Lewis did not act fairly and honestly for what they regarded the best interest of Neal, and we do not think there was anything in their relations to him or his estate to make them incompetent advisers.

"But it is further claimed that the deed is improvident, and the revocation should therefore be sustained. When a deed is voluntarily executed by a person, it is doubtful whether he can revoke it merely because it is improvident. But as in this case the deed confers no vested right in any third person, but is solely for the protection of the grantor, a court should inquire whether the provisions are inconsistent with such purpose. Under the circumstances of this case, we regard the general purpose of the deed as eminently wise and proper. Neal was a young man possessed of a large estate. He was of weak intellect, but with sufficient ability to recognize his incapacity. He was inexperienced in business, and whether it was because of improper education, as alleged by his witness, or inability to take a proper education, as said by those more intimately associated with him, the fact remained, and even he himself did not expect improvement. It was certainly wise in him to put it into the hands of some one able and willing to take care of it, and upon terms which would prevent waste by mismanagement, and so that it might not be coaxed from him. The trustee selected was a well-known business man of unquestioned integrity, a friend of his grandfather, who had shown his ability by increasing his estate, while guardian from about \$97,000 to about \$165,000. Unless something in the special provisions is found to be unreasonable, the deed could not be held to be improvident. We will therefore examine the matters suggested by counsel in their order as stated:

"First. It strips Neal of all his property, without any valid reason therefor.' This is not in accordance with the fact. The deed does not give away any part of his estate, except \$500 a year as compensation to the trustee for management. It does give to the trustee the power to control it, for the very good reason that he did not feel able to safely manage it himself.

"Second. It contains no power of revocation.' This is a fact, but it does not of itself render the deed improvident. It was inserted upon full consideration, and at his request, as stated by Mr. Lewis. To have made the deed revocable would have defeated the purpose for which it was made.

"Third. Because it leaves him at the discretion of the trustee as to what portion of the income he shall receive from his own property.'

This provision was made after full discussion, and practically at Neal's suggestion. The income was large, and he felt that it might be wasted, and preferred that it, like the rest of his estate, should be protected by the judgment of his trustee. No difficulty has so far arisen. Neal has had all he asked, and presumably all he needed. If the trustee should unreasonably withhold the income, he is under control of the court, and may be compelled to do his duty.

"Fourth. Because it makes no provision for future contingencies or emergencies.' The income of the estate was probably deemed sufficient to provide for all contingencies. It is ample for the liberal support of a family, and the accumulations would probably be sufficient to meet any unusual demands. If not, the entire estate is within the control of the court.

"Fifth. Because it gives unsafe and unwise power to the trustee.' If a man retains control of his property, he has unlimited power over it. If he deems it wise to commit it to another a proper management of it requires that he should confer extensive powers. The specifications under this head are: '(a) That the trustee is not required to give security.' We think an examination of the case will show that it is an exceptional case where a trustee created by a voluntary deed is required to give security. There is no reason why he should be, when he is selected by the grantor, and he alone is interested in the estate. Presumably, he is selected because of his ability and integrity, and for the convenience of the grantor, and it would be unreasonable for the grantor to ask a third person to stand good for the default of his own agent. See *Rigler v. Cloud*, 14 Pa. St. 364. (b) The objection that William H. Black has the power to name a new trustee without security has more force. But this alone ought not to strike down the deed. It may seem unwise to give the power to name a new trustee to Black. Neal doubtless thought that, if the occasion arose, Black would act only for his (Neal's) good, and that his acquaintance with the business world would enable him to make a better selection. He would not be likely to act without consultation with Neal, and if he undertook, improperly, to act contrary to Neal's wishes, could be restrained. (c) The trustee has unlimited power as to conversion of property and investments.' We do not think it an unwise thing to authorize the trustee to make investments outside of those expressly designated by law. So far, the investments of the trustee are largely those made by Mr. Black, from whom the estate came. But, as before remarked, a wide discretion must be confided in a trustee in such a case. (d) The trustee is not required to account to anybody.' Neal can require an account at any time, and, if refused, the trustee can be compelled to make it. It is alleged that an account has been frequently demanded and refused. It was demanded several times within a few days, about the time the

bill was filed in this case. Lane told Neal that he would make it out, but that it would require some time. Lewis offered to go with him, and go over the books. A statement was made, and handed to Mr. Black, who concluded that at that time it ought not to be furnished. The legislature has conferred upon the courts very extensive powers over trustees and trust estates. It is therefore unnecessary to reserve in the deed creating such a trust rights to the cestui que trust which he may exercise under the supervision of the court, and it would be unwise and improvident to do so when the trust is created to protect him against his own weakness.

"The foregoing has been written in consideration of the facts of the case, and though some of the principles of law, as we understand them, have been stated, we have not referred to the case by which we believe they are established. Those will now be considered.

"At the first blush, it would seem that one who was compos mentis and sui juris, who has made a voluntary deed for his own benefit, and by it granted no vested right to another, should have the power to control his own affairs, and revoke the trust whenever he felt disposed to do so. This does not appear to be the law. When such a trust is created the party constitutes himself a ward of the court, and cannot revoke his act, except subject to the approval of a court, having jurisdiction of such subjects. This is apparent from the many cases in which the courts have been asked to ratify such revocations, and the many cases in which they have refused to do so. Among the first cases upon this subject in Pennsylvania is *Reese v. Ruth*, 13 Serg. & R. 434. The deed was substantially in the terms of the deed in this case. It was an action of assumpsit, brought before the extensive equity powers now conferred upon our courts by the act of 1836. The court held that the action would lie, but that the jury should have been instructed 'that the plaintiff had no right to avoid her deed unless fraudulently obtained, and they might at the same time have directed them that she was entitled to what was necessary for present maintenance, under the restriction which I have mentioned.' One of the cases upon the subject (*Reidy v. Small*, 154 Pa. St. 505, 28 Atl. 604), is almost identical with the present case, except as to the age of the parties; Reidy being 73 years old, and Neal 21. Justice Dean, in reversing the decree of the court below, says: 'We think the execution of this deed, under all circumstances, was a wise act on part of the plaintiff. Both he and the trustees have access to the court, who will see to it that the trust is faithfully executed. There is no reason why it should be revoked, while there are many why it should be sustained.' The facts of that case, and the reasoning from them, as stated by Justice Dean, would aptly apply to this case, by substituting 'natural incapacity' for 'drunkenness and fear of insanity.' It meets nearly

every question raised in this case. He very clearly shows that the fact that the deeds contained no clause of revocation did not affect its validity, because such a clause would have defeated the object of the trust. See, to same effect, *Ashurst's Appeal*, 77 Pa. St. 464, and *Ash's Appeal*, 80 Pa. St. 500. The other reported cases differ from this in the fact that the deeds in dispute gave vested or contingent rights to third parties, but they seem to have been disposed of upon the same principles as the cases cited. In *Greenfield's Estate*, 14 Pa. St. 489, the case seems to have been ruled largely upon *Reese v. Ruth*, supra. The court says: 'Settlements like that before us, reserving a present interest in the creator of them, and carrying a future benefit or bounty to other designated parties, are very usual. If fairly made and carried into effect, uninfluenced by fraud or circumvention, they cannot be subsequently impeached, as is shown, among other determinations, by our own case of *Reese v. Ruth*, 13 Serg. & R. 434, page 501.' And Judge Gibson refers to the fact that one of her purposes was to protect herself against the importunities of some of her friends. Page 495. In *Nace v. Boyer*, 30 Pa. St. 99, it was said that: 'Nothing but fraud or palpable mistake is ground for rescinding an executed contract. * * * But the mere fact that a person is of weak understanding, whether produced by old age, accident, or disease, if there be no fraud or surprise, is not an adequate cause of relief. * * * And the mere fact that a contract is improvident is no ground for setting it aside.' Page 110. 'Advice or even persuasion to make a deed or bill in a particular way is not fraudulent. There must be something more,—something which amounts to imposition or circumvention.' Page 113. The opinion of Judge Symser considers all these questions very fully and clearly. In this case the court refused to revoke the deed, though it was subsequently declared to be testamentary, and therefore revocable. *Frederick's Appeal*, 52 Pa. St. 388. In *Ritter's Appeal*, 59 Pa. St. 9, Ritter, being addicted to drink, made a deed of real estate, in trust to pay debts, \$60 per annum to Ritter, and balance to his wife. The court says: 'This deed is neither testamentary nor revocable, and it is clearly the interest of all parties that it should be sustained. It was made by the plaintiff with full knowledge of his own weakness, and we cannot doubt he was the best judge of himself.' Page 13. In *Fellows' Appeal*, 93 Pa. St. 470, it was said, 'The title of a trustee under a deed of trust is complete, and irrevocable by the settlor, although the transaction be purely voluntary.' *Merriman v. Munson*, 134 Pa. St. 114, 19 Atl. 479, and 21 Atl. 171, was a spendthrift trust. The court below said: 'The proof by these witnesses, as against the plaintiff's own testimony alone, shows that the power of revocation was purposely and knowingly surrendered by the plaintiff in order to guard against his own inability to control and administer his property. Page 127, 134 Pa.

St., and page 483, 19 Atl. And the supreme court says, 'To have inserted a clause of revocation in such a trust would have been an act of extreme folly, as it would have rendered it of no value for the protection of his estate.' Page 181, 184 Pa. St., and page 481, 19 Atl. See, also, *Simon v. Simon*, 163 Pa. St. 292, 29 Atl. 657.

"None of the cases in which such deeds have been declared void will be found to be inconsistent with the principles upon which the foregoing cases were decided. They will be found to be ineffective as deeds, because not in accordance with some rule of law, or be voidable because they grant estates, and were procured by undue influence, mistake, or fraud. In *Turner v. Scott*, 51 Pa. St. 126, and *Frederick's Appeal*, 52 Pa. St. 338, the deeds were held to be testamentary, and therefore revocable. In *Russell's Appeal*, 75 Pa. St. 279, a lady in contemplation of marriage executed a deed of settlement, in which she provided for payment of the income of her estate to herself for life, and after her death to her children, if any, and, if not, to her brother and sisters. There was no power of revocation. Her husband died, leaving her childless. She had been advised that she could dispose of her property by will, though there was no such provision in the deed. The deed was made in view of marriage, and no other purpose appeared. The court held that there was a mistake of fact, and not merely one of law, against which equity could grant relief as against mere volunteers. The court says: 'It may be admitted that the mere omission of counsel to advise the insertion of a power to revoke will not alone be ground in equity to set aside a voluntary conveyance. But the absence of such a power, and the failure of counsel to advise upon it, are circumstances of weight, when joined to other circumstances tending to show that the act was not done with a deliberate will.' The court, however, says: 'There may be reasons for continuing the disability intended by the grantor or settlor which would influence the chancellor to maintain it, as where a settlement is made for self-protection against improvidence, or the urgent importunities of others, which the circumstances show it is difficult for the grantor or settlor to resist.' Page 289. *Darlington's Appeal*, 86 Pa. St. 512, was a case in which a married woman made a voluntary conveyance of all her estate to her husband, and the controversy was between her own child and the children of her husband by a former marriage. It was held that the confidential relation between the husband and wife required affirmative and positive proof that it was her voluntary act, and not induced by undue influences. In *Rick's Appeal*, 105 Pa. St. 528, it was held that the evidence 'tends strongly to show that Mrs. Peiffer signed the deed of trust in ignorance of its legal effect, that she had no intention of depriving herself of all control of her property in the future, and that her brother,

in whom she confided, misled and deceived her. If Mrs. Peiffer signed the deed under the representation that it could be revoked, when a fraud was practiced upon her, if under the advice that she could not insert a power of revocation, she was wrongly advised. She acted under a mistake, partly of law and partly of fact. She was misled by those whose duty it was to inform her. * * * Not only was the deed irrevocable in its terms, but it was improvident.' But the court further says: 'It would be unwise in us to hold that a person may not make an irrevocable gift, nor would the authorities sustain it. There may be instances in which it is to the highest interest of a man to place his estate beyond his control irrevocably. He may do so to protect himself against his own infirmities. The intent to make the gift irrevocable should be clear.' The court thus recognizes the principle of *Reese v. Ruth* and *Reidy v. Small*. In *Miskey's Appeal*, 107 Pa. St. 611, it appeared that Jacob A. Miskey had made a deed by which he conveyed his entire estate—about \$70,000—to his father, reserving for himself the income during his life, making no provision for his wife, and but a slight provision for his son; that Miskey was a drunkard, and largely under the influence of his father, and the deed was prepared by his father's attorney. There was no power of revocation, and no testimony in the case showing that this fact was known to him, or was in any manner explained to him; that it did not appear that the deed was read over or explained to him at or before its execution, etc. The court held the principle recognized in all the cases: 'That whenever one person obtains by voluntary donation a large pecuniary benefit from another the burden of proving that the transaction is righteous falls on the person taking the benefit. But this proof is given if it be shown that the donor knew and understood what it was that he was doing. Especially is this the case where the donee stands in a confidential relation to the donor. And that where there is no power of revocation in such a deed, and no reason appears why it should be irrevocable, it is a fact, with other circumstances, tending to show that it was not executed with proper advice and understanding.' Justice Green very fully cites and considers the authorities upon these questions, and concludes that in no case was there so strong a combination against the validity of the instrument in question as found in that case.

"These cases establish the principles upon which this case should be determined, and it therefore appears to be unnecessary to refer to the many cases decided in the courts of England and of other states, especially as most of them are considered in one or more of the cases above cited, and some of them are inconsistent with the cases decided by our own courts.

"Counsel for defendants have requested the

court to find the following facts: 'First. That, when the trust deed was executed, George B. Neal was not, nor is he now, able to manage and control his property; and the purpose of it was to protect his estate, and prevent the same from being squandered or wrested from him by designing persons.' This is found to be true, as stated. 'Second. That it was prepared in pursuance of advice of Neal's physician, and after a family consultation, and with the advice and approval of his grandmother, with whom he had lived, and who had raised him, from infancy.' This is found to be true, except that Dr. Willard, who so advised, was not at that time his physician, but had been from infancy, until he was 16 or 17 years old. 'Third. That all George B. Neal's estate covered by the trust deed came from his grandfather George Black.' This is found to be true. 'Fourth. That George B. Neal, prior to its preparation, realized that he was not able to manage his estate, and requested that the management and control of the same should be put in the hands of his uncle William H. Black, who should appoint Thomas H. Lane the trustee when Lewis' account as guardian should be confirmed, and that this was done as agreed upon.' This is found to be true. 'Fifth. When the trust deed was executed, Neal knew of what his estate consisted, and the amount of the same, and said deed was executed by him after the fullest explanation of it, without any solicitation from any one, and with a full knowledge of its provisions, and after he had changed it in two important particulars.' This is found to be substantially true. We would strike out the word 'fullest,' and insert 'very careful.' 'Full knowledge of its provisions' is perhaps too strong an expression. He appears to have had full information of its provisions, and, we believe, an understanding of its general purpose and effect. The testimony does not show any solicitation, though he acted on the advice of William H. Black and Mr. Lewis. 'Sixth. There was no fraud or deceit or misrepresentation on the part of any one connected with the preparation or execution of said deed, and the deed itself preserved the estate for Neal's own use, and subject to his disposition by will. There was no attempt to control it, except for Neal's own good.' This is found to be true. 'Seventh. Neal's marriage was secret, and unknown to his family. He remained satisfied with the trust deed for over five years, and was induced to begin proceedings for its revocation after his marriage on the advice of one Gamble, an uncle by marriage. The best interests of Neal should be subserved by upholding the deed, and the attempted revocation would put his property in the peril it was the purpose of the trust deed to avoid.' This is found to be true. But the last sentence is a matter of opinion, and not of fact.

"Upon the full consideration of all the evidence in the case, we find as matters of

fact: That the plaintiff, George B. Neal, arrived at the age of twenty-one years on the 20th day of September, 1889. On the 19th day of October, 1889, he executed the deed of trust in dispute. In pursuance of authority contained in said deed, William H. Black appointed Thomas H. Lane as trustee in his stead, and conveyed the property to him, who from that time to the present has performed the duties of the trust. That George B. Neal was satisfied with this arrangement until about the 24th day of February, 1894, when he executed a deed revoking the trust made October 19, 1889. That Thomas H. Lane refused to recognize the validity of this revocation, and this bill was filed to enforce the same. George B. Neal, at the time the deed of trust was executed, October 19, 1889, though of weak understanding, and, by reason thereof, wholly inexperienced in business, and of less than ordinary intelligence, was competent to make a valid deed, and capable of understanding the general purpose of such a transaction, and means by which it was to be effected. That Mr. Lane was selected by him to be the trustee, and he was informed why it was necessary or advisable to appoint Mr. Black in the first instance. Before the deed was executed a statement of his property was made out by his guardian, and submitted to him by William H. Black, who informed him of its contents; at least, to the extent of the estate. Black consulted with W. A. Lewis, a reputable and competent attorney, and, when the deed was prepared, Neal, with Black, visited Mr. Lewis, who carefully explained the matter to Neal; and after discussion with him the clauses in relation to the disposition of the income, and making the trust irrevocable, were inserted, in accordance with Neal's conclusion as to what was best. Lane had no knowledge of the deed until after its execution. Neal had no advice or counsel from any one other than William H. Black and W. A. Lewis. William H. Black is the uncle of George B. Neal, and they lived in the house of Mrs. Black together until a few months before the execution of the deed. Black acted upon the advice of Dr. Willard, and after consultation with his mother and other members of the family as to the object of the transaction, but it does not appear that he consulted any other person than Mr. Lewis as to the mode of effecting it. He, however, took no interest under the deed, and was therefore wholly disinterested. Lewis was not Black's attorney, but had acted for Neal in having Lane appointed guardian. Neither Black nor Lewis had any interest to serve, other than that of Neal's; and, so far as appears from the character of the men, we are satisfied that they acted and advised Neal solely for what they regarded his best interests. They were independent and unprejudiced advisers. Thomas H. Lane, the trustee, was a proper selection. He has shown his faithfulness and ability by the successful management of this

estate as guardian. In view of the control of the courts over the trustee and the estate, the deed is in no respect improvident; and considering the incapacity and inexperience of Neal, the amount of his estate, and the large income derived from it, it seems to have been eminently wise and prudent. There does not appear to have been any marked improvement in his condition, as to mental power or business capacity; in the six years which have elapsed since the execution of the deed. So that the same conditions which made its execution advisable still exist as reasons against its revocation, and that it is not for the interest of plaintiff that it should be revoked. As matter of law, we find that the plaintiff has not the power arbitrarily to revoke a deed voluntarily made; that such revocation is subject to the judgment of the court, and should not be ratified unless it appear that the best interests of the plaintiff so require. Under the facts and law of this case, we are of opinion that the deed of October 19, 1889, should not be revoked, and that plaintiff's bill should be dismissed at his costs. A decree will be drawn accordingly.

"We feel disposed to add, as an apology for this lengthy opinion, the words of Justice Green in *Miskey's Appeal*, 107 Pa. St. 632: 'It has seemed to us appropriate to dwell with rather more than usual fullness upon our view of the case, because of the unusual character of the questions involved and the relief invoked, the very large amount at stake, and the earnestness, zeal, and ability with which the argument was conducted by the learned counsel on both sides.' And, besides, we do not have the benefit of a master's report; and though we are satisfied that the new rules in equity will greatly facilitate business, and be of advantage to parties, counsel, and the courts, it necessitates a fuller reference to testimony and of the cases bearing upon questions of law than was necessary in passing upon exceptions to a master's report."

Plaintiff assigned as error certain findings of fact, and the following finding of law: "As matter of law, we find that the plaintiff has not the power arbitrarily to revoke a deed voluntarily made; that such revocation is subject to the judgment of the court, and should not be ratified unless it appears that the best interests of the plaintiff so require."

W. B. Rodgers, Joseph Stadtfeld, and J. H. Beal, for appellant. Watson & McCleave, for appellees.

PER CURIAM. We find no error in this record that would justify either a reversal or modification. The learned judge's findings of fact and conclusions of law are substantially correct, and fully warranted the decree dismissing the bill at plaintiff's costs. There appears to be nothing in either of the specifications of error that requires discussion. The decree is affirmed and appeal dismissed, with costs to be paid by the appellant.

(176 Pa. St. 309)

In re BRYANT'S ESTATE.

(Supreme Court of Pennsylvania. July 15, 1896.)

CLAIM TO ESTATE—IDENTITY OF DECEDENT—EVIDENCE.

1. A seafaring man died in Philadelphia in 1893, being aged about 70; having made his home there for over 40 years, and having gone by the name of Charles Bryant. A certificate of citizenship found in his trunk after his death, given by the collector of the port of Philadelphia in 1856, described Charles Bryant as an American seaman, aged 33, and born in North Bridgewater, Mass. Affidavits made by him in 1866, as part owner and master of a ship, for purposes of registration, stated that he was an American citizen, born in Massachusetts. *Held*, that there was sufficient proof of his identity with a Charles Bryant born in North Bridgewater July 25, 1822 (the records of that place showing none other by that name born there within 9 or 10 years of that time), who followed the sea from his sixteenth year, and left his home in 1847 as mate of a coasting vessel; the personal description of the two showing a general correspondence, and there being strong resemblance between a portrait of such person given a relative in 1844, and portraits of decedent found in his trunk after his death, though about the time decedent became a resident of Philadelphia a man reported to be Charles Bryant, of Massachusetts, died in New Orleans, who was assumed to be from Bridgewater, whither his chest was sent, and the family of the man who left in 1847 accepted the announcement of death as that of their kinsman; there appearing, however, beyond this, no identification of the man who then died in New Orleans.

2. The person known as Charles Bryant, who died in Philadelphia in 1893, cannot be held identical with an Englishman born in a suburb of London in 1819, who was never heard of after going away as a sailor when sixteen years old, his connection with such person resting on an alleged conversation by Bryant with one L. in which he so identified himself,—this being at variance with all the previous acts and declarations of Bryant, and resting on the unsupported testimony of L., which is discredited by his interest; by his declarations to decedent's stepson and his attorney that there were no heirs; by his failure to make mention of English heirs when the subject of administration was under consideration, and L. was himself an applicant for letters; and by his failure to mention Bryant's alleged birth in London in the advertisement through which he came into communication with the English claimants.

3. Neither can he be held identical with Charles Bryant born in Massachusetts in 1831, who, while being taken to Illinois in his infancy, was lost, and never afterwards heard of.

4. Nor can he be held identical with a Mr. Dean, of about the same age, reared at Islesboro, Me., who sailed as mate of the vessel *Trout* till 1860, who at that time wrote his wife, from New York, that he was about to sail in the ship *Harpwell*, and who was never afterwards heard of by her, though it was rumored and generally believed that the *Harpwell* foundered and Dean was lost,—the wife's claim resting mainly on the testimony of T., who stated that he was informed by the second mate of the *Harpwell* that it did not founder, but that Dean left it in safety; that 10 years later he met Dean in Philadelphia, and he then admitted that he had taken the name of Charles Bryant; and that witness then saw him sitting in front of the store in Philadelphia which Charles Bryant kept, and in front of the hotel at which Bryant lived; though another person testified to seeing Dean at such time with T., and though they and Dean recognized the portraits of Bryant as correct likenesses of Dean, it appearing that T. permitted Mrs. Dean to remarry without inform-

ing her that Dean was alive (his explanation of his silence being that it was no part of his duty to give the information, and that Dean was a Mason, and pledged him to secrecy as a brother Mason), and that, when Dean sailed on the Trout, Bryant was mate of another vessel, though an adopted son of Bryant testified at the age of 47 that when he was a lad Bryant told him that he came from Islesboro.

Appeal from orphans' court, Philadelphia county.

In the matter of the estate of Charles Bryant, deceased. From a decree awarding the estate to Ann Chance and others, English claimants, George E. Bryant and others, Massachusetts claimants, appeal. Reversed.

The opinion of the auditing judge was as follows:

"Charles Bryant died at the age of seventy years, on July 28, 1893, at the Delaware House, an hotel at the corner of Second and Pine streets, where he had lived for nine years. Dating as far back as 1846, his home appears to have been in Philadelphia. He was married here on June 7, 1853, and his place of residence from that time until his death was distinctly shown to have been within the city limits. He had followed the sea from an early age, and had risen from the grade of an ordinary seaman to that of captain and owner of a brig. In 1870 he appears to have abandoned the sea. In that year he opened a grocery store at Third and Carpenter streets, and he retired from business a few years afterwards, with an estate, part of which probably came to him from his wife, which at his death was valued at about \$45,000. He was at all times reticent as to matters relating to his personal history; his brother-in-law declaring that, in an intercourse of forty years, he had never known the decedent to allude to his parents or other kindred. He had no correspondence and no communication with any who claimed to be of his blood, and he left no writing of any kind—except a United States certificate as sailing master, to be noticed hereafter—which could furnish the slightest clue to his origin. He died suddenly of apoplexy. Letters of administration to his estate were issued to James T. Thompson, the proprietor of the hotel, and a creditor, to a small amount, of the decedent, and that gentleman immediately notified the commonwealth's officers that an escheat had occurred. Various inquiries were set on foot, and notices were published, and the details of the case gained considerable notoriety through the newspapers here and elsewhere. The result was that at the audit of the administrator's account, in addition to the commonwealth, five different sets of claimants appeared, each of which set up title to the estate as the sole surviving next of kin of the intestate. These sets or classes of claimants hailed, respectively, from Maine, Massachusetts, New York, and Illinois, and the members of one of them jointly from Nova Scotia and England. Their narratives, dissimilar in everything else, had this feature in common,—that the relative whom they describ-

ed as identical with the decedent had disappeared from their midst more than a generation ago, had sent them no message, oral or written, and, except in two instances, had never again been seen by them or their witnesses. One means of identity, however, was left open. Among the few personal effects of the decedent were a daguerreotype and a photograph, which were evidently of old date, and portrayed him at what seemed to be the age of thirty years or thereabouts. These pictures were recognized in the most positive terms by the representatives of each set of claimants as the undoubted likeness of their individual decedent. It is easy to see that this diversity of belief as to the original of the portrait took away from the individual opinions every vestige of value which they might otherwise possess as a matter of evidence. Admitting what it requires a large gift of credulity to admit,—that five persons of the same age and name, but wholly unrelated to each other, disappeared at the same time from five different places, and were thereafter lost to all former acquaintances, and that these five persons so closely resembled each other that a single portrait would serve for the entire group,—the difficulty would still remain of assigning out of so many originals his own proper personality to this decedent, of adaptable likeness, who is proved to have been an exact copy of them all. The embarrassment is not helped by another circumstance: The Massachusetts claimants produced a photograph of the relative whose identity with the decedent they sought to establish, and they contended that this picture was a counterpart of those which were admittedly portraits of the decedent, but the remaining claimants were unanimous in denying that any similarity whatever existed. It was forcibly said by Paxson, C. J., in a case where testimony of a like character had been submitted: 'Granting the likeness, it may be the result of the merest chance. We all know that striking likenesses often occur between persons who are not of the same blood; so strong that in many instances the one is mistaken for the other.' In *re Sheehan's Estate* (Pa. Sup.) 20 Atl. 1003. To accept it, even if uncontradicted, as conclusive, would be to build the decision upon what is, in the most literal sense, a shadow. Another feature which the several claimants had in common was that each of the absent relatives had disappeared without any assignable cause for his leaving. One of them had vanished in infancy, but in the case of each of the others his home intercourse had been pleasant, and his final departure had been in the course of his ordinary calling, yet he had never thereafter addressed a line to his former associates, and had dropped out of their lives as completely as he would have done if he had removed to one of the fixed stars. If the narratives told by the witnesses are reliable,—and in the main they may be true,—the decedent must be regarded as the type of quite a number of Charles Bryants, each of

whom is possibly living a dual life, and, without having developed any preparatory wickedness, has cast off the ties which were generally held to be sacred.

"The Massachusetts claimants were nephews and nieces and remoter collateral kindred of one Charles Bryant, who was born July 23, 1822, in the town of North Bridgewater, now Brockton, in that state. He was a sailor, and in 1848 left in a coasting vessel on his last known voyage. He never returned, and the rumor was that he died that year in New Orleans. In 1848 a letter was received by one of the family announcing the sailor's death, either on the trip or in a Southern city, and about the same time a box purporting to contain his clothing also arrived. No further tidings ever came to hand, and the death had been universally accepted as a fact for more than forty years, and until intelligence of the death of the present decedent. The latter fact was communicated to the claimants by an agent who was sent by the administrator on an errand of inquiry to Brockton. A certificate had been found in a trunk belonging to the decedent, under the hand and seal of the collector of the port of Philadelphia, dated May 2, 1856, which set out that Charles Bryant, an American seaman, aged 33 years, 5 feet 8½ inches in height, of light complexion, brown hair, and gray eyes, with a scar on the left hand, and born in North Bridgewater, Massachusetts, had produced satisfactory proof that he was an American citizen. The anomaly may just here be noted,—that, although this paper accurately described him in other particulars, it failed in this: that the decedent unquestionably had black hair and eyes, and a dark complexion, and was never known to have had a mark upon either hand. The claimants were able to identify the features of Charles Bryant of Bridgewater in the likenesses which were shown them of the decedent; and their description of the former person corresponded in a general way with that of the decedent himself, except as to the eyes, hair, and complexion, in which their original answered to the recital in the certificate. Their evidence upon this point was either traditional or hearsay, because none who appeared at the hearing had ever seen their kinsman. The coincidences which obtained in this case, striking as they were in respect of name, age, and place of origin, cannot, however, be accepted as decisive. We have already seen that they were not aided by the alleged resemblance of the picture of the missing man to the portraits of the decedent, for the reason that a likeness equally strong was claimed with as great positiveness for three other men who had disappeared. The fact, also, that the certificate named North Bridgewater as the place of decedent's birth must be taken in connection with the decedent's own statement—which will be presently alluded to—that he came from Massachusetts. To preserve the verisimilitude, he would, assuming that the certificate in question was really used by him as his own, be very apt to select for his putative birthplace the town of North Bridgewater, a place which was prolific of Bryants, as the slightest inspection of Kingman's history of the locality will demonstrate. Against these coincidences must be placed the well-founded tradition, which the receipt of the letter and box raised into something more than a rumor, of the death of Charles Bryant of Bridgewater, in 1848, at New Orleans. Here, again, a most important incident comes into play. The claimants, it would seem, had never thought it worth while to verify the truth of the report of their kinsman's death by personal inquiry at the place where it was supposed to have happened. The agent employed by the accountant, however, himself visited New Orleans for that purpose, and as the result of his investigation he produced at the hearing a transcript, duly authenticated, from the records of the board of health of New Orleans, reciting that 'O. Bryant, a seaman, a native of Massachusetts, aged 26 years, died on the first day of May, 1848, at the Franklin Infirmary,' in that city. This proof tailed so nicely with that which was furnished by the memorials of the death which had come at the same time and from the same place that no after coincidences, no matter how plausible, could sweep it aside, and the auditing judge thinks it effectually disposed of the claim.

"The parties from Illinois deduced title from their brother and uncle, Charles Bryant, who was born at North Bridgewater, Massachusetts, but who was taken by his parents, in his infancy, to the West. The date of his birth, as ascertained by the public records of the town, was November 10, 1831. In some way during the progress of the journey westward, which was performed in wagons, the child disappeared, and his history thenceforth was a blank, although his parents survived until 1838. In this instance even the slight clue which was furnished by the daguerreotype was wanting, the child of two or three years being hardly discernible in the man of thirty-five. The claimants rested their case upon what they term 'record evidence,'—the town register and the United States certificate. It was unfortunate for them that these papers were mutually destructive of the theory of identity, because the person described in the certificate must have been at least eight years older than the person named in the register. The claim is dismissed.

"Of the New York claimants, one, an alleged grandniece of the decedent, attended at the audit. This lady knew nothing of the early career of her granduncle, and was unable to say that she had seen him more than once in her lifetime. The event occurred when she was eleven years of age, and the impression he had made upon her was that of a 'big boy or a big man,' the decedent at

the time having reached the age of forty. Her grandfather, she remembered, brought home with him a person who he said was his brother Charles. The guest was treated by the grandmother with such scant courtesy that the visit ended almost as soon as it began, and it was never repeated. The witness was also able to swear that the daguerreotype of the decedent was the likeness of the visitor whom she had thus seen once in her childhood, thirty years ago. She called to mind that in 1880 her grandfather had said to her that he would be glad to find some trace of his missing brother. This was extraordinary, for the reason that if another witness, called by the grandniece herself, spoke the truth, the brother's whereabouts must at that time have been known to the family. The last-named witness detailed a visit which, in company with the claimant's mother, she had made in 1876 or 1877 to Charles Bryant at his store on Third street. The mother, she said, addressed the decedent as her 'uncle by marriage,' and he asked her in reply if 'Isaac was living?' Isaac, the brother, about whom the inquiry was made, lived at the time within a few blocks of the inquirer. One peculiarity of this visit was that the mother of the claimant, apparently with a view to future contingencies, requested the witness, in advance, to notice the resemblance which the uncle bore to another member of the family. The witness unconsciously strengthened the doubt that the uncle's whereabouts could have been unknown by declaring that the mother attended the funeral of the wife of that uncle within a year of that interview. In further support of the claim an alleged niece of the decedent swore that in 1884 a stranger stopped at the door of her house, in Atlantic City, when she happened to be on the steps, and made some inquiries about the Bryant family. She could form no idea of his purpose in stopping, but she was satisfied that he was the lost Bryant, although the possible identity of the visitor with that person does not seem to have suggested itself to her imagination until after the commencement of these proceedings. The claim requires no further comment.

"The story told by the Maine claimant had in it something of dramatic interest. On July 16, 1852, Susan J. Calamer was married to one Levi F. Dean at Lincolnville, Me. The husband was about twenty-nine years of age, and had been reared in the family of Thomas Gilkey, who lived at Islesboro, three or four miles from Lincolnville. At the time of his marriage, Dean was mate of the bark M. E. Trout, which was owned by the bride's father, and he continued to sail in her until 1861. He spent the spring and summer of 1861 at home, and left in November. In that month his wife received a letter from him, dated at New York, and stating that he was about to sail from that port in the ship Harpswell. She never heard from him afterwards, and it was rumored and generally believed that

the vessel was lost at sea, and that Dean had perished. In 1873 Mrs. Dean remarried. She came to the audit, and recognized the portraits found among the decedent's effects as correct likenesses of her first husband. Her claim rested mainly upon the testimony of a Captain Trim, a person who had known Dean as far back as 1843, when both of them lived at Islesboro, and who in 1861 had secured for Dean a berth as mate on the Harpswell. Trim had never credited the current belief that the Harpswell had foundered, for the very excellent reason that the second mate of the ship assured him that the vessel had arrived safely at Liverpool, and that Dean had left her at that place. Ten years afterwards he met the fugitive in Philadelphia, and he then learned that Dean had taken the name of Charles Bryant. This fact came to his knowledge in a peculiar way. A seaman named Warren, who had been a neighbor and intimate with Trim, had shipped in 1865 on a schooner of which a certain Charles Bryant was mate. On the voyage, Bryant, finding that the sailor came from Maine, voluntarily told him that he himself had been brought up, when a boy, at Islesboro, in that state, by Thomas Gilkey. The sailor, on returning home, repeated this conversation to the father of Captain Trim, and was told by the latter that Gilkey had raised a boy named Dean, but had never had charge of one named Bryant; and Warren was thereby convinced that Bryant was the original Dean, under an assumed name. In 1871 he encountered Dean, alias Bryant, in a shipbroker's office in Philadelphia; and he hastened to inform Captain Trim, who was then in the city, of the circumstances. Trim and he repaired to the broker's rooms, and Dean admitted to Trim that he had adopted the name of Charles Bryant. In his testimony Trim went on to say that he frequently saw Dean after that interview, particularly between 1887 and 1893, and he knew that Dean, under the name of Bryant, had a store at Third and Carpenter streets, and lived at the Delaware House. One other witness, named Bullock, was called to corroborate Trim. He was a native of Lincolnville, Me., and he identified the pictures of the decedent as likenesses of Dean, and declared that he had seen the original of the pictures in 1886 or 1887, on board Captain Trim's vessel, at Philadelphia, and had addressed him as Levi. The answer to this salutation was given by the witness on direct and cross-examination in eight different shapes, but its purport was to 'keep still.' The witness had been mate along with Dean in a schooner in 1850, but had only seen him three times after that year,—in 1856 casually in Boston, in 1865 at New Orleans, and in 1886 in Philadelphia. His interview at New Orleans was brief. He hailed Dean on the street, and said: 'I heard you were dead,' and the supposed corpse replied, 'I am not dead yet,' and passed on. This, in a word, was the claimant's case; and, although it comprehended a number of wearisome details, its point was the

identification by Trim of the decedent as the missing husband of Mrs. Dean. The testimony invited scrutiny. It is remarkable that these witnesses, who are eager to prove the continued existence of Dean in the person of Bryant, now that a sum of money is at stake, should have so long and carefully concealed their knowledge of the fact from those to whom information would be of supreme importance. This criticism is especially applicable to the witness Trim. He was the cousin and intimate associate of Dean, and he admitted that his mother and Dean's father had been raised in the same household. He had been told in 1862, and believed the statement, that Dean had landed safely at Liverpool, and he afterwards knew—so he swore—Dean's place of abode in Philadelphia; and yet he never communicated these facts to the wife or relatives of the missing man, who were mourning his death, and he even permitted the woman who believed herself a widow to contract a void marriage on the strength of that belief. When questioned as to the reason for his silence, he answered with the utmost nonchalance that it was no part of his duty to give the information. Subsequently he found it convenient to be more specific, and he said first that Bryant was a Mason, and pledged him, as a brother Mason, to secrecy, and next that Bryant had been in prison, and therefore had adopted an alias. This point is left without attempting to draw from it any inference as to the veracity of the witness. The testimony of Trim and his co-witnesses may be absolutely true in all that related to Dean. It may be true, and no doubt is, that a man of that name disappeared from his home in 1861; that he afterwards turned up elsewhere as Bryant, and admitted his identity with Dean; that he had been in prison, and had sought to hide his disgrace by assuming an alias; and it may also be true that in person and age he resembled the present decedent; and yet it may not be true—and it is certain that these facts combined do not show it—that the fictitious Bryant was one and the same with the Charles Bryant whose estate is being battled for. Any man who happened to know the facts which have been detailed as to Dean's history, and who also knew the fact that this decedent, of unknown antecedents and without any known kindred, had died in Philadelphia, would at once see, no matter how dull might be his intellect, that the one link which was wanting to bring the heirs of Dean into touch with the decedent was to identify the latter with the missing man; and Trim supplied that link when he declared that the husband of the claimant was the man who kept a store on Third street, and who died at the Delaware House. His statement on this point—the all-important one in the case—was as meager as could well be imagined. He said at first that he had never been inside of decedent's store, and afterwards that he had been in it once or twice, but he could not describe it; he was never in the hotel while Dean lived there; he never saw decedent's wife, although

it was proved that she ran the store; he never saw the decedent's daughter; and he was never at the decedent's residence. The two bald facts which he affirmed to, and beyond which he would not venture, were that he saw the decedent sitting at the door of the grocery, and in front of the hotel, and that he knew him to be Dean. Did the rest of his narrative coincide with that of other witnesses whose opportunities for tracing the movements of the decedent must have been greater than his own? In 1852, when Dean was married and served on the schooner Trout, sailing from New York and Eastern ports, Captain Bryant was mate of the bark Isaac R. Davis, which sailed out of Philadelphia. He had served on this boat since 1848, and previously to that service he was, in 1846, at the Sailors' Home in Philadelphia, while in 1845 or 1846, to January, 1848, Trim declared that Dean was in the United States navy. In 1857, when, according to Trim, Dean had his home in Lincolnville, Maine, and was mate or captain of the M. E. Trout, Captain Bryant resided in Christian street, in this city. In 1859, when Dean was still on board the Trout, Bryant was officer, under Captain Roberts, of the Cordella, which was owned by Starr & Co., of Camden, N. J., and he remained in the employ of that firm until 1864. As early as 1856 he had his home on Christian street, in 1861 on Third street, and after his wife's death, in 1878, at the Delaware House. During every year, beginning with 1855, his name and residence appear in the directories of this city. If in that long period it was possible for him to have lived a dual life, it is morally certain, if the claimant's own witnesses can be believed, that Levi Dean was not his double. The auditing judge would suppress nothing in the evidence, however trifling, and he therefore notices the declaration of a stepson of the decedent that the latter once told the witness that he came from Islesboro, Maine. The witness was a lad at the time of this conversation, and he was forty-seven years old when he repeated it. The decedent had told others that he came from other parts of New England, and the other stepson always believed that his stepfather was an Englishman or an Irishman. The claim of Mrs. Dean is rejected.

"The English claimants were brought to light through a clue which had been furnished by the decedent himself. In 1838 a will was prepared for him by the agent who attended to his real-estate interests, by which he left one-third of his property to the children of a deceased stepson, and the balance to charities. A few months before his death he declared that he had destroyed this will, and the agent then sought to impress upon him the duty of providing for his own kindred, and interrogated him very seriously as to his family connections. He parried these inquiries by saying that he had no knowledge that a single relative survived, and that he had no desire to search for those who, if they were found, would care only for his money. He was fin-

ally induced to say he was born in the district of Poplar, in London, of Irish parents; that his father was a ropemaker; that he himself, when a boy, had come over to this country as a sailor; that he left four brothers and four sisters behind him, of whom one sister, he remembered, had been very kind to him. He gave the names of these persons, and he also declared that the child of a brother or sister lived somewhere in Nova Scotia. He admitted that he had always concealed the place of his birth, and had avowed himself a native of Massachusetts. Beyond these meager details, he either could not or would not go. After his death the agent inserted a notice in a newspaper published at Halifax, N. S., calling in general terms for information as to any surviving kin of the decedent. As a result of that notice he received a letter from a person signing himself 'Charles Bryant,' who alleged that he was a son of Cornelius Bryant, a brother, and who gave the address of his sister, in Chatham, England. This lady was visited by the agent in person, and the story which she told corresponded in every detail with that which had come from the lips of the decedent and the nephew in Halifax. These particulars embraced the nativity and names of his parents, the trade of his father, the names of the various members of the family, and the date and manner of the decedent's abrupt departure from home. It was ascertained that the informant, Mary Ann Farless, was the sole survivor of the brothers and sisters, and that most of the children—to the number of twenty-two—of those who had died were still living in London. These were in turn seen by the agent, and they severally corroborated the statements of the sister. The sister and a niece, a daughter of James, a deceased brother, appeared at the audit, and testified, among other matters, that the deceased was born in 1819, and was baptised at King's Chapel, London, in 1819 or 1820, and had run away at sixteen years of age, and shipped on the ship Thames, and that no further tidings of his whereabouts had ever been received. This testimony can afford to stand without comment. It is of the highest class of evidence which is known to the law; it was furnished by different parties, widely separated from each other, and between whom no possibility of collusion could exist; it bore out exactly the statements of the decedent; and it tallied with all the known incidents of his life. To the mind of the auditing judge, it is so entirely convincing that he has contented himself with giving it only in outline, especially as a sense of justice to rival claimants, whose demands were pressed under an honest belief that they were genuine, required that some space should be given to the discussion of their merits. It was urged against the claim that it rested, like its immediate predecessor, upon the testimony of a single witness,—a proposition which the auditing judge concedes. He also admits as conceivable that a person who had secured from a claimant rep-

resenting himself to be the heir of a decedent the names and degrees of relationship of those who would be entitled if the claimant were the rightful heir, might be base enough to pretend that he had received those details from the decedent in his lifetime. In that way he would apparently give to a title which was wholly fictitious the direct sanction of the decedent. But that no such fraud was perpetrated here is self-evident. If the agent who finally brought the English claimants into the case was not told by the decedent that probably a relative was still alive in Nova Scotia, why did he advertise in the Halifax papers? The decedent had certainly told others that he was born in Massachusetts, and the administrator promptly and properly sent a messenger to that state in quest of living kindred. The advertisement in question was inserted almost immediately after the death, before the circumstances of the case had gained publicity, and before any claimant had had time to apply. The auditing judge thinks the claim was effectively proved, and he so decrees accordingly. The names of the next of kin of the decedent, and the degrees of their relationship, are set out in the table which is hereto annexed, and now made part of this adjudication.

"A word remains to be said respecting the United States certificate in the name of Charles Bryant. Beyond the circumstance that it was produced from among the effects of the decedent, nothing was known as to its use by him, or whether he used it at all. In the very material points by which it was meant to identify the bearer—the color of the hair and eyes and complexion—it was certainly at fault. Its description was of a man of brown hair, gray eyes, and a light complexion, while the decedent was almost unanimously accredited with black hair and eyes, and a dark complexion. The witnesses on behalf of the Bridgewater, Mass., claimants picture their decedent as possessing in 1848 the characteristics of color set out in the certificate, and in so doing they described another person than the present decedent. According to the testimony of some of the witnesses for Mrs. Dean, it is a custom among seafaring men to give to customhouse officials false answers to name and nationality, where some temporary or local advantage can be secured by perjury. If the decedent did this, and thereby obtained a certificate that he was an American citizen, born in Massachusetts (the fact being otherwise), it is nevertheless difficult to see how he could have misled the official in a matter so open to the senses as the color of his hair and the tint of his complexion. If we wander into conjecture, we may guess that the official was color-blind. The paper, at best, must play a very subordinate part as evidence. Its chief interest is that it assigns North Bridgewater as the decedent's birthplace. But he named other places as well. He said to one witness that he came from Maine; to another, that he came originally in a man-of-war to Boston;

and two witnesses, one of whom was his stepson, believed him to be an Englishman or an Irishman. The names of the next of kin of the decedent, and the degrees of their relationship, are set out in the table which is hereto annexed, and is now made part of this adjudication.

"A claim on behalf of Henry H. Oolclaser for \$300, and another by George Lodge for \$963, were presented. Both were of the same character, and were based upon services of the claimants in looking up the relatives of the decedent. The services required a high order of intelligence, and they involved considerable travel and a large expenditure of money, and they undoubtedly resulted in securing the evidence upon which a distribution of the estate can be decreed. The claims are allowed."

The affidavits of decedent referred to in the opinion were made in 1866, and stated that he was an American citizen, born in Massachusetts.

Samuel W. Cooper and John G. Johnson, for appellants. William W. Ker, for appellees.

MITCHELL, J. Charles Bryant died intestate in July, 1893, aged about 70. He had been married, but his wife and only child were dead, and he was without known relatives. He was a seafaring man, but had made his home in Philadelphia for 40-odd years, had left the sea for 25 years, and during most of that time had been in the grocery business, but was well known in nautical circles as Capt. Bryant. The parties to the present litigation are claimants of his estate, and their claims depend upon the question of identity. There are few more difficult subjects with which the administration of justice has to deal. The carelessness or superficiality of observers, the rarity of powers of graphic description, and the different force with which peculiarities of form or color or expression strike different persons, make recognition or identification one of the least reliable of facts testified to even by actual witnesses who have seen the parties in question; and, where they have not, there is the added obstacle of the inadequacy of language to describe the minute variations of feature and color which go to make up the individual personality. In the present case we have all these difficulties multiplied a hundredfold by the bias of interest under which even honest people so easily persuade themselves that they are the rightful heirs to a vacant fortune. Five sets of heirs or next of kin appeared before the orphans' court, and, in addition, the commonwealth, who claimed an escheat on the ground that none of the others had proved relationship. The court below awarded the estate to the appellees. One set of claimants dropped out, and the other four, including the commonwealth, are now before us. The appeals are sep-

arate, but it will be more convenient to treat them all in one opinion.

The claims of Daniel Bryant et al., known as the "Illinois Claimants," and of Susan Dean, are effectually disposed of by the opinion of the auditing judge in the court below, and do not need any further discussion. The other claims depend not so much on the findings of fact by the court below as upon the proper inferences from the facts proved, and therefore required a consideration of the evidence.

When Bryant died there were found in his trunk a certificate of citizenship given by the collector of the port of Philadelphia, a daguerreotype and a card photograph of himself, and at the hearing there were produced three affidavits made by him as part owner and master of a vessel. The learned auditing judge was impressed apparently by some testimony that it is customary "among seafaring men to give customhouse officials false answers as to name and nationality, where some temporary or local advantage can be secured by perjury"; and he finds that the certificate, "at best, must play a very subordinate part as evidence." From this view we are obliged to differ totally. The papers, especially the certificate, are the only safe foundation for the whole case. Everything else is more or less dependent on conjecture and inference, but these are the property and the acts of the man whose identity is in issue. He at least knew the truth, and these are his own testimony to his own identity. To attribute falsehood and perjury to him, without evidence, without motive shown, against the legal presumption of innocence, and against the weight of a good character borne for 40 years in the community where he lived, is monstrous injustice; and pretended relatives, who come here basing claims to his property on such charges, violate not only the rules of legal reason, but of common decency. We regard this fundamental proposition as the first step in the investigation, that no claim can be sustained which is inconsistent with these papers, unless it gives a full, adequate, and convincing explanation of the discrepancies. This consideration alone would make an end of the case for the appellees. Their claim rests on the allegation that the deceased was an Englishman, born in a suburb of London in 1819, who ran away and became a sailor at the age of 16, and had not since been heard of. This story charges Capt. Bryant with falsehood and perjury as to both age and nationality, and, instead of being convincing, is full of insuperable difficulties. Without recounting them in detail, it is sufficient to note that it asks us to believe that a British sailor, who had left his native country more than 20 years before, and had had a settled residence in Philadelphia for 10 years, desiring to have a certificate of citizenship, instead of getting naturalized preferred to commit perjury, and in so doing not only selected

as his pretended birthplace an inland town of Massachusetts, but hit upon one in which there had been actually existing a man of the same name, the same age, the same seafaring vocation, and whose personal appearance so closely resembled his own that, whatever weight his photograph might have as affirmative evidence of identity, no one looking at it could say with confidence that it was not the same man. The draft upon credulity is too great. But, even if the story were intrinsically credible, there is a controlling objection to the manner in which it comes into the case. The connection of the English sailor with the decedent rests upon an alleged conversation of the latter with one Lodge, in which Capt. Bryant is said to have declared that he was born in the district of Poplar, in London, and came to this country when a boy, as a sailor, with other particulars as to his brothers and sisters, etc. This account, which is at variance with all the acts and declarations of Capt. Bryant at previous times, including his sworn affidavits in matters of the utmost business importance to him, rests upon the unsupported testimony of Lodge. Of itself, the burden would be heavy enough to carry, but the testimony of Lodge is discredited by its own contradictions; by his interest in the present claim; by his declaration to William Bryant, decedent's stepson, and to Henry J. Scott, Esq., his counsel, that there were no heirs; by his own failure to make any mention of English heirs at the time when the register of wills was considering the subject of administration, and Lodge himself was an applicant for letters; and finally by his entire failure to mention Capt. Bryant's alleged birth in London in the advertisement through which he came into communication with these claimants. The whole claim bears strong marks of having been manufactured after Capt. Bryant's death, when the buzzards began to gather over an estate which seemed about to pass to the commonwealth for want of real heirs. The claim itself, and every item based upon it, must be disallowed.

This reduces the case to what we regard as the only substantial contest in it,—that between the Massachusetts claimants and the commonwealth. The claim of the latter, of course, is merely negative, and based on the failure of the former to make satisfactory proof of their case. The starting point, as already said, must be the articles found in decedent's possession, and the affidavits by him produced from the customhouse records. Among these the certificate of citizenship is of controlling weight. It is the seaman's charter of safety and protection, which, in case of wreck or trouble in any port of the world, entitles him to call upon his country's consul for aid and assistance. No one having the slightest acquaintance with sailor character or sailor life needs to be told how scrupulously such paper is taken out, how carefully preserved. The affidavit of ownership of a vessel, for pur-

poses of registration, is only second in importance to the certificate of citizenship. On it depend the "ship's papers," as they are commonly called, which are the vessel's charter of safety and protection, as the certificate of citizenship is the individual sailor's. On the testimony of these papers, we must start with the assumption that Capt. Bryant, the decedent, was born in North Bridgewater, Mass., and that in May, 1856, he was about 33 years of age. The appellants have proved kinship with a Charles Bryant who was born in North Bridgewater July 25, 1822, followed the sea from his sixteenth year, and left his home in 1847 as mate of a coasting vessel. Further, that, although records were kept in North Bridgewater, no other Charles Bryant appeared to have been born there within 9 or 10 years of this one. The correspondence in birthplace, age, and occupation, with the decedent, as described in the certificate, is certainly close enough to establish a fair *prima facie* case, and the date of his last leaving Bridgewater coincides closely with the time when he practically became a citizen of Philadelphia. But in addition to this the personal description of the two men shows a general correspondence which could hardly be fortuitous. If this correspondence depended solely on the claimants' description of their relative, it would be entitled to comparatively little weight; for, besides the poverty of language to differentiate the peculiarities of feature and color which make up likeness, it behooves us always, in cases of this class, to remember that the idea of succession to the fortune of a hitherto unknown relative exercises over even honest minds a fascination only to be compared to the gambler's desire to throw dice to get something for nothing, and hence it is the duty of courts and juries to scrutinize all such evidence with keen and incredulous eyes. But the appellants have fortified their case in this respect with a piece of evidence of great weight. One of them produced a daguerreotype which her kinsman gave her in 1844, and the opportunity is thus given for impartial comparison with the two photographs found in the decedent's trunk, and admitted to be good likenesses of him. Such comparison leaves no doubt in the minds of any of this court of the strong resemblance. This in itself might not be convincing, for likeness may be accidental; and the wonder rather is, considering the small area of the human countenance, that among the countless thousands of faces such constant variation, rather than likeness, should be found. But that such resemblance should exist between portraits of two different men, of the same name, the same age, born in the same place, and following the same occupation, passes the bounds of credible accident. The auditing judge speaks of the decedent as having, or being "almost universally accredited" with having, black eyes. If this were so, it would be a serious difficulty in the way of treating the certificate of citizenship which

describes a man with gray eyes as the rightful description of the man in whose possession it was found. But the learned judge inadvertently fell into error. We do not find any such testimony, and counsel for appellees, though explicitly challenged to show it, failed to do so. Witnesses do say that Capt. Bryant had black hair, which is a much less important matter. Hair which may be described by one witness as brown may appear black to another, and it is conceded that Capt. Bryant dyed his hair black during the latter years of his life, when the recollection of him by the witnesses would be freshest. Against this claim is really only the single fact of the reported death of the Bridgewater Charles Bryant at about the time the decedent became a resident of Philadelphia. That a man reported to be Charles Bryant of Massachusetts did die in New Orleans at that time seems to be beyond doubt, and it is also clear that he was assumed to be from Bridgewater, his chest was sent there, and the family of the claimants accepted the announcement of death as that of their kinsman. But beyond this there does not appear any identification of the man himself. Was he a Charles Bryant from elsewhere in Massachusetts, and not from North Bridgewater? Or was he really the Bridgewater Bryant, and did the decedent assume his name after his death? Or was he not Charles Bryant at all, but erroneously so reported, and did the decedent ignorantly or knowingly permit the error to go without correction? The second supposition, that decedent assumed the name of the Bridgewater Bryant after the latter had died, is negatived by the miniature of 1844, and its undeniable resemblance to the decedent. The last supposition, that the Bridgewater Bryant, finding himself reported as dead, allowed the report to go uncontradicted, would most nearly reconcile the known facts. The decedent did keep himself apart from his relatives for the last 40 and more years of his life,—whether from a sailor's acquired indifference to home ties, or for other reasons, he did not tell, and the truth is now never to be known. Any of these conjectures may be made plausible, but none of them is anything but conjecture. There is difficulty in the appellants' case, but we do not think, on the whole, that it can outweigh the affirmative evidence in favor of the identity of decedent with the North Bridgewater Charles Bryant. The decree is reversed, the claim of George Lodge is disallowed, and the fund directed to be distributed to the appellants, George E. Bryant et al. Costs to be paid by appellees.

CORNELL v. TIVERTON & L. C. MUT. FIRE INS. CO.

(Supreme Court of Rhode Island. Oct. 13, 1896.)

INSURANCE—CONDITION OF POLICY—WAIVER.

A condition in an insurance policy that it should become void on an alienation of the prop-

erty insured by devise, unless revived as therein provided, is not waived by a letter written by an officer of the company after a loss, promising an adjustment, when such officer was ignorant of the fact that the property had passed to the claimant by devise, and was misled by a letter of the claimant's guardian into the belief that he acquired it as heir of the insured.

Action by Walter Cornell against the Tiverton & Little Compton Mutual Fire Insurance Company. Judgment for defendant.

Wilson & Jenckes, for plaintiff. James, Wm. R. & T. F. Tillinghast, for defendant.

PER CURIAM. The policy contains a condition that, in case of the alienation of the property insured by devise, the policy shall be void unless the devisee or the executor shall, within 30 days after the probate of the will, procure a revival of the policy as provided in it. It also contains a condition that no part of the contract can be waived except in writing, signed by the president and secretary. The plaintiff relies on a letter written to his guardian by Brownell, secretary of the defendant, to the effect that his claim for insurance would be settled in due time, as a waiver by the defendant of the condition in the policy making the policy void in case of the devise of the property unless it should be revived as stated. The testimony, however, shows that Brownell, when he wrote the letter, did not know that the plaintiff took his title to the property by devise, and that he was misled in relation to that fact by the signature of the plaintiff's guardian to a letter to him, in which she signed herself as guardian for the "heir." The letter, having been written by Brownell in ignorance of the true state of the plaintiff's title, cannot operate as a waiver of the right of the company to insist on the breach of condition as a defense. Judgment must therefore be rendered for the defendant for costs.

WARWICK & C. WATER CO. v. ALLEN et al.

(Supreme Court of Rhode Island. Oct. 8, 1896.)

STATUTE OF FRAUDS—EXECUTED CONTRACT—EVIDENCE—VARYING WRITTEN CONTRACT BY PAROL.

1. The statute of frauds cannot be invoked to defeat rights accruing under a contract which has been fully performed by one party, and partly at least by the other.

2. An oral agreement to waive the payment of interest on bonds, and to surrender the coupons, until the completion of a certain contract, does not vary the contract contained in the bonds or the mortgage securing the same.

Action by the Warwick & Coventry Water Company against John B. Allen, executor and trustee under the will of Enos Lapham, deceased, and others.

James Tillinghast, for complainant. Edwards & Angell, Joseph C. Ely, and Herbert Almy, for respondents.

PER CURIAM. This case is before us for the determination of the question from what date, in the taking of the account, interest is to be allowed to the respondent Allen, as executor and trustee under the will of Enos Lapham, deceased, on the 215 bonds of the complainant held by him as such executor and trustee. That a contract was made by the respondent Arnold, as president of the complainant, and in its behalf, with the deceased, Enos Lapham, to extend the works of the complainant into the Arctic district, and that he should receive the entire income of the complainant, to reimburse him for his outlay in making the extension, until such time as he should be repaid, is not denied. The point of difference between the respondents Arnold and Allen is whether Lapham also agreed merely to postpone the collection of interest on the bonds held by him until after such reimbursement, or whether he agreed to waive his claim for interest, and to surrender the coupons therefor down to the time of such reimbursement. The only testimony on the point is that of the respondent Arnold, who testifies that Lapham agreed to waive his claim for interest, and to surrender the coupons to the time of reimbursement; and this testimony is corroborated—First, by the fact that the entire revenue of the complainant was to be received by Lapham, as treasurer, and retained by him for his reimbursement, so that during the period which would elapse prior thereto the company would be absolutely without the means for the payment of interest on its bonds; secondly, by the fact that no claim was made by Lapham during his lifetime for the payment of interest on the bonds; and, thirdly, by the further fact that in December, 1892, when Arnold and Lapham were planning the extension of the works into the Arctic district, Lapham, in the adjustment of his claims with the company, received bonds very considerably in excess of the amount of his claims against the company. In this state of the evidence, we find the fact to be as contended by Arnold, and therefore decide that interest is to be allowed on the bonds from the date when the master shall find that the moneys received by Lapham, as treasurer of the complainant, for water rates, and also sums due from him to the company for use of the water supplied by it for his use, were or shall be sufficient to reimburse Lapham, or the respondent Allen, as his executor and trustee, for the moneys expended in the extension of the works of the complainant into the Arctic district.

We do not think that the agreement was obnoxious to the legal objections suggested by counsel for the respondent Allen. The receipt by Lapham of the income of the company for his reimbursement constituted a sufficient consideration for his agreement to extend the works, and for a waiver of his right to collect the interest on the bonds which formed a part of the agreement. There is nothing to show that the agreement could not have been fully performed within a year from the

date, when it was entered into, and therefore, if the contract had remained executory, it would not have been void, as within the statute of frauds. But the statute can have no application, for Lapham fully executed the agreement upon his part, and, for aught that appears, may have received from the water rates and his use of the water enough to reimburse him for his expenditures. The agreement to waive the payment of interest, and surrender the coupons, down to the date of reimbursement, does not in any way vary the covenants contained in the mortgage securing the payment of the bonds or the provisions of the bonds.

As to the point that Arnold had no authority, as president of the company, to bind it, and therefore could not make a valid agreement, Lapham, after going on with the agreement, and receiving the income of the company with its acquiescence, would have been estopped from denying its validity; and the respondent Allen, as executor and trustee, stands in no better position.

McKENNA v. BATES, City Treasurer.

(Supreme Court of Rhode Island. Oct. 3, 1896.)

CITIES—ACTION FOR DAMAGES—PRESENTATION OF CLAIM.

The provision of Pub. St. c. 34, § 12, requiring a claim for damages against a city to be presented to the city council before action thereon, is not complied with by its presentation to the board of aldermen:

Action by Margaret McKenna, administratrix, against Frank M. Bates, city treasurer.

Hugh J. Carroll, for plaintiff. James L. Jenks, for defendant.

PER CURIAM. The plaintiff's claim for damages in this suit was presented to the board of aldermen of Pawtucket, and not to the city council, as required by Pub. St. R. I. c. 34, § 12. In *Whalen v. Bates*, Index RR, 105, 33 Atl. 224, we held that such a presentation of a claim was not a compliance with the statute. That case is decisive of the present. Demurrer sustained, and case remitted to the common pleas division, with direction to enter judgment for the defendant for costs.

In re REGISTRATION OF VOTERS.

(Supreme Court of Rhode Island. Sept. 29, 1896.)

VOTERS—QUALIFICATIONS—RESIDENCE.

A voter of the state who becomes a resident of a town more than six months prior to an election, and files a certificate of the town clerk of another town of his registration therein within the year last past, as provided by Gen. Laws, c. 7, § 7, is entitled to have his name placed on the voting list of the town for general elections, and also for elections for town officers.

Opinion on question submitted by the governor.

To His Excellency, Charles Warren Lippitt, Governor of the State of Rhode Island and Providence Plantations.

We have received your excellency's communication of the 17th inst., submitting for our opinion a question raised by the town council of Johnston, as follows: "A voter of the state comes to this town, and has resided here for more than six months prior to an election. He files a certificate of his registration in another town or city of this state in the year last past. Must the board of canvassers place his name upon the voting list of this town? And, if so, shall the name be placed on the list for general elections only, or must it be placed on the list for the election of town officers as well?"

Assuming that the certificate of registration referred to in the question is the certificate of the town clerk of the town in which the name of the voter is registered, as provided by Gen. Laws R. I. c. 7, § 7, we are of the opinion that it is the duty of the board of canvassers, in the circumstances set forth in the question, to place the name of the voter on the voting list of the town, not only for general elections, but also for elections of town officers. Such a voter is clearly qualified to vote by article 7 of the amendments to the constitution (section 1), and the only restriction upon his right to vote is that contained in the proviso to article 7, § 1, viz. that he shall not be allowed to vote in the election of the city council of any city, or upon a proposition to impose a tax or for the expenditure of money in any town or city.

CHARLES MATTESON.
JOHN H. STINESS.
PARDON E. TILLINGHAST.
GEORGE A. WILBUR.
HORATIO ROGERS.
WM. W. DOUGLAS.

(33 Md. 549)

STATE v. COWEN et al.

(Court of Appeals of Maryland. Oct. 3, 1896.)

Supplemental dissenting opinion. For majority opinions and former dissenting opinion, see 35 Atl. 161, 354.

BRYAN, J. It is very unusual for a judge of this court to file a supplemental opinion. But I trust that a statement of my views will show weighty and sufficient reasons for the course which I have adopted. The reasons for my conclusions will be stated with simplicity; in no controversial spirit, and most certainly with no diminution of the unfeigned respect which the judgments of my learned brothers always receive from me, and which they are justly entitled to receive. When the court, after a long advisement, determined that the priorities in the distribution of the proceeds of sale should be settled before the sale took place, and therefore ordered the question to be argued at the bar, it was natural to suppose that it had come to the conclusion to order a

sale. At least this was my inference from the order. The event has shown that I made a mistake. The opinions in opposition to a sale which have been filed by the learned judges refer to matters which, when I wrote my former opinion, I did not consider as subjects of controversy in this case. In the amended bill in equity which the trustees under the act of 1844 filed in the circuit court for Washington county they alleged that the act of 1878 was invalid, and that consequently the bondholders under that act had no lien on the property of the canal; and they prayed, among other things, that the court would determine the status of these bonds. The trustees for these bondholders in their answer allege that the act of 1878 is absolutely valid and binding, and that the bonds issued under that act are a first lien on the whole estate and property of the canal; both corpus and revenues. They further allege that the act of 1878 was passed at the earnest request and solicitation of the canal company, and with the privity and assent of the then trustees under the act of 1844. They further state and insist that the mortgage under the act of 1844 given to secure the bonds issued under that act, and the statute authorizing its execution confer no lien whatever on the corpus of the canal, but only on such surplus of its revenues as might remain after paying the necessary and proper repairs and expenses of the work under the administration of the canal company. The answer of the state of Maryland alleged, among other things, that the lien of the bondholders under the act of 1844 was on the tolls and revenues of the canal, and not on the "canal property itself," and it prayed for a decree for sale. The trustees under the act of 1878 filed a bill in their own behalf, praying also for a sale. The two cases were consolidated by the order of the court, and were heard as one case. The trustees under the act of 1844 filed a petition praying that the case should be referred to an auditor to report on the priority of the liens on the canal so that the bondholders whom they represented might know before the sale what rights they had as to the proceeds of sale, and thus be enabled to protect them; and alleging that a sale, when the creditors' rights were unknown and unsettled, would be equivalent to turning the property over to a certain named bidder, who would have no competitor. The court determined that it was reasonable and proper to settle the question as to the right and position of the bondholders under the act of 1844 before decreeing a sale. The question being thus presented with all possible clearness and distinctness, it was decided that the lien given by the act of 1844 was limited to the net tolls and revenues of the canal company; and that upon failure of that security the bondholders under that act occupied the position only "of ordinary non-lien creditors of the company." It was also decided that the act of 1878 was valid. And thereupon, in pursuance of these decisions, a decree for sale of the canal was passed, with the suspensory

clauses so often mentioned in the discussion of this case. This decree has never been reversed. It was affirmed in the only appeals which have been taken from it. It must have the effect of settling conclusively and absolutely the questions decided, so far as the parties to the suit are concerned. They can never litigate them again in this case, or in any other. The matter decided is *res adjudicata*. In *Henderson v. Henderson*, 3 Hare, 115, the vice chancellor said: "In trying this question, I believe I state the rule of the court correctly that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as a part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence, or even accident, omitted a part of their case. The plea of *res adjudicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." This decision was approved and adopted by the supreme court of the United States in *Beloit v. Morgan*, 7 Wall. 622, and also in *State v. Brown*, 64 Md. 204, 1 Atl. 54, and 6 Atl. 172; *Trayhern v. Colburn*, 66 Md. 279, 7 Atl. 459; *Albert v. Hamilton*, 76 Md. 309, 25 Atl. 341; *Barrick v. Horner*, 78 Md. 258, 27 Atl. 1111. I think, then, that it is thus settled beyond any further controversy that the bondholders under the act of 1844 have no lien, and that the act of 1878 is valid, and that the canal must be sold. And every other question is settled which is involved in these conclusions. It cannot escape attention that the act of 1878, by its third section, granted to the bonds then proposed to be issued a lien on the property, tolls, and revenues in preference to any rights or liens which the state had on the same, "and also in preference to any other claims or liens upon the said Chesapeake & Ohio Canal Company, or its works or property." Now the state could not grant such a lien, unless at the time it held a lien superior to all other claims on the canal. Consequently the validity of this act is founded on the fact that the state had a lien on the corpus of the canal superior to any claim of the bondholders under the act of 1844.

As nothing can be added to the binding effect of a valid decree by a court of competent jurisdiction, it may be said that it is superfluous and unnecessary to say anything in support of its correctness. And so it would be in ordinary cases. But in questions of such vast public interest as those involved in this litigation the judges would gratify a reasonable expectation by stating the

grounds which, in their opinion, show the justice and propriety of decrees which have been rendered. It was from a consideration of this kind that I devoted a large portion of my former opinion to a discussion of the priorities. I do not desire to add anything to what was then said. But some other questions must now be considered. Much stress has been laid on the fourteenth section of the charter of the canal company. It is in these words: "And be it enacted, that the said canal, and the works to be erected thereon in virtue of this act, when completed, shall forever thereafter be esteemed and taken to be navigable as a public highway, free for the transportation of all goods, commodities and produce whatever, on payment of the tolls to be imposed, as provided by this act, and no other toll or tax whatever for the use of the said canal and the works thereon erected, shall at any time hereafter, be imposed but by consent of the said states, and of the United States." By the third section of the act it had enacted that the "Chesapeake and Ohio Canal Company" should be incorporated, and should have perpetual succession. So the fourteenth section could not have been intended to grant it the right to hold the canal in perpetuity, inasmuch as it necessarily had this right under the third section. It was rather a perpetual restriction on the right of the corporation to impose any tolls or taxes whatever for the use of the canal and its works except those provided by the act of incorporation. It manifestly was not intended to protect the canal property from the claims of creditors who might, by the ordinary processes of the law, acquire a right to have it sold for payment of debts due to them. The charter was granted by the legislatures of Virginia and Maryland and by the congress of the United States, acting in concert for the purpose. It was a contract with the canal company, and was not repealable by any or all of the legislatures which granted it. But they could amend it with the consent of the canal company. It was amended by the act of the legislature of Virginia passed January, 1844, confirmed by the act of the legislature of Maryland passed February, 1844, known as "chapter 124 of the Laws of 1843," likewise confirmed by an act of congress approved February 7, 1845, and the amendment accepted by the stockholders of the canal company in general meeting. This amendment gave the canal company the power to borrow money to carry into effect the objects authorized by its charter, to issue bonds or other evidences of such loans, and to pledge its property and revenues for the payment of the same in such form and to such extent as it might deem expedient. Whatever might have been thought before the passage and acceptance of this amendment, there can be no doubt that afterwards the canal company had full power to execute mortgages of its property. When the canal company, in ac-

cordance with its corporate powers, executed mortgages on its property in the usual form, it ought not to be seriously questioned that the mortgagees had the right to foreclose them, and sell the property. The charter granted to the canal company perpetual corporate existence, and it had, therefore, the right to hold the canal in perpetuity as a navigable highway. But a perpetual charter does not exempt a corporation from the obligation to pay its debts, and from the claims of its creditors. An individual has the right to hold his land to him and his heirs forever, but this right is subordinate to the claims of his creditors, and does not prevent them from selling it. It would be a most anomalous conclusion to hold that when it acquires a power to mortgage its property, and does voluntarily mortgage it, the creditor is debarred from the rights universally arising from a contract of mortgage.

In the able opinion of the chief justice the position is taken with great strength that we ought to look at certain documents and statements (which he mentions in his opinion) for the purpose of ascertaining the views and purposes with which the parties entered into the contract made by the act of 1844. It is true that the meaning of the contract is what both parties intended at the time it was made. But this meaning must be expressed on the face of the contract itself, and it cannot be affected by anything said before or at the time of the contract or afterwards. The rule of interpretation applicable to written contracts is thus stated in 1 Greenl. Ev. § 275: "When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous colloquium between the parties, or of conversation or declarations at the time when it was completed or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected." It must be observed that the learned author speaks of "oral" testimony of a colloquium, or of conversations or declarations, etc. Of course, he does mean to imply that, if either of the parties should reduce to writing such conversations or declarations, the rule of interpretation would be different. This is obvious enough from the reason of the case. He was noting the difference between oral and written evidence, and his meaning is made perfectly clear by the two sentences immediately preceding the passage quoted. "By 'written evidence,' in this place, is meant not everything which is in writing, but that only which is of a documentary and more solemn nature, containing the terms of a contract

between the parties, and designed to be the repository and evidence of their final intentions. *Fiunt enim de his (contractibus) scripturæ, ut, quod actum est, per eas facilius probari poterit.*" We must also bear in mind that the instrument embodying the contract is a public statute, which no one except the legislature has power to alter, vary, or modify in any particular. And the legislature could not do so except by another statute. Therefore none of the documents and statements mentioned by the chief justice were made by any authority which could bind the state. I infer that the act of 1844 is to be construed in the ordinary and accustomed manner; not forgetting that the surrounding circumstances and the public history of the times are to be considered. The supreme court of the United States in construing an act of congress said in *Aldridge v. Williams*, 3 How. 24: "In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intentions from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed." And to the same effect was the opinion in *U. S. v. Union Pac. R. Co.*, 91 U. S. 72. The documents referred to by the chief justice do not appear in the record, and were not brought to my attention. This must be my excuse for not noticing them in my former opinion. Counsel sometimes indulge themselves in a loose practice of stating matters which do not appear in the record, but every paper should be inserted in the record which it is desired that we should pass upon, or it should, by leave of the court and agreement of counsel, be exhibited, and left with us, as if it had been so inserted. I see no agreement of counsel in the record with reference to any additions or amendments except on the 228th page; and that refers to the annual reports of the canal company from the fiftieth to the fifty-ninth, inclusive, and to the sixty-first. These have never been filed in court, and their dates show that they are long subsequent to the documents and statements in question.

Some criticism has been made respecting the right of the attorney general to insert in his answer a prayer for the sale of the canal. The legislature of 1890, by joint resolution No. 1, among other things, stated as follows: "For the last twelve years the said canal has been maintained and operated at an average annual deficiency of fifty-six thousand dollars, and it is now apparent that in its

present deplorable condition its restoration as a waterway capable of earning annual revenues sufficient to pay its ordinary current expenses is wholly impracticable, and that a sale or lease of said work is sooner or later inevitable." It also passed joint resolution No. 2, as follows: "Joint resolution authorizing the attorney general to intervene in pending suit to protect the state's interest in the Chesapeake and Ohio Canal. Whereas, the proceedings now pending in the circuit court for Washington county and in the supreme court of the District of Columbia, for the appointment of a receiver of the Chesapeake and Ohio Canal Company, and for a decree of foreclosure of the mortgage executed by the canal company under the act of eighteen hundred and seventy-eight, chapter fifty-eight, affect most vitally the interests of this state; and whereas, if a receiver should be appointed and receiver's certificates should be issued for the purpose of raising funds to restore the canal, a heavy additional debt must necessarily be created, which will take priority over the liens now held by this state to the great prejudice of her claims; and whereas, it is necessary that the rights and interests of the state should be represented in said proceedings: Therefore, be it resolved, that the attorney general be and he is hereby instructed to intervene in said proceedings in the name of the state of Maryland, and to take such steps after consultation with the board of public works, as may be necessary to resist the application for a receiver, and the creation of any additional debt to take precedence over the claims and liens of this state." The attorney general made known this authority to the court, and was admitted to appear for the state of Maryland as a party defendant. He answered both the bills filed in the court for Washington county. And afterwards, on his petition, he obtained leave to amend both of his answers, and insert a prayer in each of them for a sale of the canal; and he accordingly made the amendments. The legislature stated that proceedings were pending for the appointment of a receiver and for a foreclosure of the mortgage, and the instructions to the attorney general were that he should resist the application for a receiver. The only way to defeat this application was to obtain a decree of sale, and he knew that the legislature had declared that a sale or lease was inevitable. It was a necessary part of his duty to exercise his best judgment to determine the proper means of preventing a receivership. And no one had a right to control his judgment as counsel in regard to the proper management of his case. The court decided that he had a right to amend his answers and pray for a sale, and it made this prayer, thus authorized, one of the grounds of its decree. No objection was made to this decision of the court at the time or afterwards by any of the parties to the suit, but the suit went on in regular course to a final decree. If any objection existed, it ought to have been

made at the time, and brought to the attention of the court. No rule of practice would authorize the other parties to the suit to go to trial on this prayer without dissent, and then raise an objection for the first time after a final decree had been rendered. This would be far more inadmissible than joining issue on a plea, and then moving to strike it out for irregularity. It is a familiar practice that this cannot be done. *Stockett v. Sasscer*, 8 Md. 374. Many cases are mentioned in *Hutton v. Marx*, 69 Md. 255, 256, 14 Atl. 684, where a party loses the benefit of a right if he does not claim it at the proper time and in the appropriate manner. The proceedings in this case have been well known to all persons interested in the public affairs of this state, yet three sessions of the legislature have passed since the decree for sale was rendered, and no dissatisfaction has been expressed in regard to the action of the attorney general. At the last session in section 2 of chapter 136½ this decree is mentioned, and provision is made for a disposition of a portion of the proceeds of sale to which the state would be entitled. So we may fairly infer that the legislature sanctions the construction given by the attorney general to joint resolution No. 2. I may dismiss the further consideration of this question by the remark that this decision of the court is involved in the decree which stands unreversed.

Even if the state had opposed the granting of the decree, its effect and operation would have been the same. All the lienors are entitled to the benefit of it. Where several mortgagees are parties to a suit, and a sale is decreed on the prayer of one of them, the rights of all are respected and protected; and each one has a vested interest in the sale to the extent of his debt. It would be very singular if it were otherwise, inasmuch as, after the decree, none of them could maintain a foreclosure suit on his mortgage. It would be merged in the decree. The state having the first lien on all the lands, property, and rights, net tolls, and revenues of the canal company makes the contract contained in the act of 1844. I think that I have shown in my first opinion that this contract secured to the bondholders under the act of 1844 "the surplus net revenues," as they are styled in the fifth section of the act, and nothing more. It did not give them the right to take possession of the canal in any contingency. The mortgage given by the canal company to the trustees under the act of 1844 (which was executed in 1848) gave this right under certain conditions which have been frequently mentioned in the discussion of this case. But this right, although good against the canal company, could not be asserted in opposition to a prior mortgagee whose title was paramount to that of the canal, and to all interests derived from it, whether by mortgage or otherwise. According to the opinion of this court in *Virginia v. Canal Co.*, 32 Md. 538, the security of these bondholders was "only upon expected tolls

and revenues, and only on so much of them as might remain after repairs and other expenses were first provided for." And it was also, in the opinion of the court in the same case, subject to the right of the canal company to issue bonds for the purpose of obtaining the necessary funds, and subject to the right to pledge its after-accruing revenues for the payment of such bonds. And in the mortgage of 1848, given to secure these bondholders, it is expressly stated that their claims are to be provided for "after the payment of the debt now existing, and that may hereafter be contracted and in arrear for repair of the canal, and for officers' salaries." When the storm of 1889 had wrecked the canal, it was the duty of the canal company to restore it, if it could obtain the means to do so by pledging its future tolls and revenues. But this was entirely impossible, and the company itself was hopelessly insolvent. It has not even yet been suggested that any one would have loaned the necessary funds on such security as it was in the power of the company to offer. The future tolls and revenues could have been pledged with priority over the pledge made by the act of 1844, but the act of 1843, c. 124, which authorized the canal company to pledge its property and revenues, expressly provided that the prior rights and liens of the state of Maryland under mortgages theretofore made to it should not be impaired, except in so far as the same should thereafter be waived, deferred, or postponed by the legislature. When there were no means of operating the canal any further, there was no legal or rightful impediment to a sale. But the court, at the request of the trustees under the act of 1844, suspended the sale, and allowed them to make the experiment which has already been mentioned, at their own expense. It has been made, and has failed. The canal has not earned anything approximating its expenses. The time for which the sale was postponed expired on the 1st day of May, 1895. And the proposition now before us is for a further postponement. The rights of these parties are matters of contract. The engagements of the state were completely fulfilled by relinquishing the net tolls and revenues and by permitting the canal company to remain in possession of the land, and use every attainable and possible means to earn tolls and revenue. When its existence had terminated as a living agency capable of carrying on its work, the possibility of net tolls and revenues was gone forever; and the decree was passed for a sale of its property. The further postponement of the sale enables subsequent mortgagees to hinder, delay, and defeat liens prior in time and superior in title, which have been adjudicated in the most authoritative manner known to law. A prior mortgagee, whose right of sale has been matured, is entitled to a sale without delay, and his right cannot be postponed to suit the convenience or interest of a subsequent lienor, who may suppose that by being put in pos-

session of the property he may make enough from it to pay his own claim. The rights of the prior mortgagee are secured by solemn contract, and in my humble judgment no court has the right to impair or delay them. And certainly no court has the right to impose as a lien on the property, prior to those already existing, the expenditures which a subsequent lienor has made for the promotion of his own interest in carrying out an experiment which was made against the earnest opposition of a prior mortgagee.

I have thought it due to myself that I should state the reasons for the judgment which I have formed on the questions which have been discussed. But it is also due to myself in a far higher degree that I should put on record my cheerful testimony that the opinions of my brother judges are eminently entitled to great consideration and respect.

OSCILLATING CAROUSAL CO. v. McCOOL et al.

(Court of Chancery of New Jersey. Sept 26, 1896.)

PRELIMINARY INJUNCTION—WHEN DENIED—PARTNERSHIP—WHEAT CONSTITUTES—EQUITY—RESCISSION OF CONTRACT.

1. In an action for an injunction, an accounting, and a receiver to take charge of a business carried on jointly by complainant and defendants, on the grounds of fraud and the financial irresponsibility of the defendant in actual control of the business, preliminary relief will be denied where the sworn answer is a complete denial of every matter alleged.

2. An incorporated company, which is a lessee of land on which it has a scenic railway, and one M., who owned a wheel used for amusement, agreed that such alterations of the premises should be made that M. might operate his wheel and the scenic railway "in conjunction with" such company; that M. should pay certain debts for improvements, etc.; that the net profits should be divided as specified; that the contract should continue as long as such company retained control of the premises and M. desired to remain, with an option to M. to cancel the contract, and remove the wheel; that the business should be carried on by two directors elected by M. and one by such company; and that the directors should select a manager. The president, M., and others organized a pavilion company, to which M. assigned his interest in such contract. In an action brought several months afterwards by the former company against the latter and M. for an injunction, an accounting, and a receiver, defendant company showed that it was organized for the express purpose of taking M.'s privileges; that the leases of subtenants were delivered to its officers by complainant; that such defendant's action had been in good faith, under the terms of the contract, and it was, and always had been, ready to exhibit an account of the receipts and disbursements. *Held*, that preliminary relief would not be granted on the ground that the privileges granted M. by such contract were not transferable.

3. It appeared that such defendant, or M., representing it, made large preliminary expenditures for the exclusive and immediate benefit of complainant, as required by the contract; that complainant received and retains the benefit of many of such expenditures; and that the expectation of the parties was that such expenses were to be reimbursed by subsequent profits of the whole period that the privileges could be

enjoyed. *Held*, that complainant alone could not rescind the contract while retaining such benefits and in control of the premises.

4. Such contract did not create a partnership or quasi partnership which either party can dissolve at will.

Bill by the Oscillating Carousal Company against William A. McCool and the Atlantic City Pavilion Company for an accounting, a receiver, and an injunction. There was a rule to show cause, with restraint against collection of subrents and paying out of money except for necessary expenses. Heard on bill, answer, and affidavits. Order to show cause dismissed, and restraint discharged.

The complainant is a corporation organized under the laws of this state to carry on the business of furnishing amusements, entertainments, etc. The complainant filed its bill in this cause against the defendants, praying for an account of the business hereinafter referred to, for a receiver to take charge of that business, and for an injunction restraining the defendants from interfering with it. An order to show cause has been allowed with restraint against the defendants, preventing them from collecting subrents, and from paying out moneys except for actual necessary expenses. The complainant had in February, 1894, rented from one Bacharach a lot of land in Atlantic City, near the board walk, on which, in May, 1895, it had a scenic railway and a carousal and other structures, and there were on the demised premises other small properties which were occupied by tenants. The defendant McCool had the control of a wheel known as the "MacKenzie Wheel," used for the amusement of those who would ride in it, which he wished to remove to Atlantic City. By an agreement, set out in full in the bill, between the complainant and McCool, it was recited that McCool desired to erect the wheel and "operate it in connection with the scenic railway," on the premises of the complainant. It was further agreed that such alterations should be made on the premises that McCool might operate the wheel and the scenic railway "in conjunction with" the complainant. McCool undertook to pay the past debts of the complainant for improvements on the property, to allow it to retain \$400 of the rentals of 1895, and thereafter to pay the rents, taxes, licenses, and running expenses from the receipts of the business. The complainant should receive "for granting licenses" to McCool "to use said premises" the first \$5,000 of net profit made each year, and the next \$10,000 McCool should retain. Of all additional profits McCool should have two-thirds and the complainant one-third. The agreement should continue as long as the complainant retained control of the premises, and McCool desired to remain in Atlantic City, with an option to McCool to cancel the agreement, and remove the wheel. There was a provision that the business should be carried on by a board of directors, two elected by McCool and one by the complainant company; the board to select a manager, and to have

free access to the books, but the members to have no salary. Shortly after this agreement was made, McCool and the president of the complainant company and several others organized under New Jersey laws the other defendant company, the Atlantic City Pavilion Company, and it received from McCool an assignment of all his interest under the agreement. The proposed changes were made, the new wheel was erected, and those who had incorporated the new company proceeded with the business of the scenic railway and the MacKenzie wheel. The complainant company turned over to them the leases for the small booths and shops on the premises, and, while this transfer is claimed by the complainant to have been made without its consent or knowledge, this is squarely denied by the pavilion company, which answers that the transfer to it, and its entering into possession of the premises, were with full knowledge and consent of the complainant. The complainant alleges that the MacKenzie wheel is a mechanical failure. This also is denied. It states that there was not enough money realized during 1895 to pay the rent, and that the complainant took steps to dispossess the pavilion company, and that the pavilion company obtained an injunction in this court restraining the complainant herein from attempting to take possession, etc. This suit is yet pending in this court, and the files were referred to by both parties on this hearing. The complainant alleged that the pavilion company claims the right to collect the rents due from the subtenants, which claim the complainant denies, and it asserts that because of this dispute the subtenants are withholding their rentals, and that it is necessary that some one be appointed to collect them; that the pavilion company is in exclusive possession of the premises, receiving all the income, and has failed to pay the rent to Bacharach, and has refused to account to the complainant for the receipts and expenses of the business; that the pavilion company had made two mortgages on all its available property for many times its value; that it was without financial responsibility; and was a mere tool of McCool, used to escape liability under the agreement, to collect the income from the property, and, without paying the expenses or rent, to cheat and defraud the complainant. The pavilion company answers these allegations, declaring that it claimed the right to collect the subrents under the agreement. The proofs show that the complainant company delivered the leases of the subtenants to the officer of the pavilion company, and the latter company, in its answer, explains that it had requested the complainant, who had forbidden the payment of these rents, either to collect them itself, and apply them on account of the rent due Bacharach, as provided in the agreement, or to permit the pavilion company to collect them. It admits it has possession under the agreement, but denies the exclusive possession. It admits it receives all the income of the business, but shows that it

has been used for the payment of the expenses of the business and on account of the rent, having paid on the latter item \$1,800. It denies that it has refused to account, and declares that it has always been, and is now, ready to account with complainant. It declares that the two mortgages referred to were canceled before the complainant's bill was filed, and that there is now no lien on its property in Atlantic City, and that its property there is worth \$25,000. It denies it is without financial responsibility, and that it is a tool of the defendant McCool to escape responsibility, or to cheat or defraud by taking income and avoiding payment of rent and expenses. It declares that the president of the complainant company joined in the organization of the pavilion company upon the understanding that the proposed company should be the holder of the privileges granted McCool, and that on the faith of the agreement thus made the wheel was brought from Pittsburg, and the premises at Atlantic City improved, at an expense of \$12,000; that the pavilion company's cashier at the end of the season exhibited the books and vouchers to Thompson, the president of the complainant company, the only representative of the complainant company who ever asked for such information; that the pavilion company, in good faith, and with honest purpose, is endeavoring to observe and carry out the terms of the agreement.

G. A. Bourgeois and D. J. Pancoast, for complainant. O. L. Cole, for defendants.

GREY, V. C. (after stating the facts). The complainant claims: (1) That the agreement with McCool was personal to him, and that he had no power to transfer its benefit to the pavilion company, defendant, and that the complainant company took action by its bill in this case to rescind, as soon as it was informed of the attempted transfer; (2) that the agreement creates a partnership or quasi partnership, and that it (the complainant) may dissolve this relation at its own will, as it claims to do by its bill in this case; (3) that the complainant has been denied an account, and that the defendants are seeking to cheat and defraud the complainant; (4) that the defendant company is financially irresponsible, and that it is necessary to wind up the business. So far as the bill bases the complainant's claim to the relief asked upon allegations of fact, the sworn answer of the defendant is responsive, and is a complete denial of every matter alleged upon which equitable relief is claimed on the third and fourth grounds above stated; and on this application for preliminary relief it must be given the same force as if called for under oath. As to the claim by the complainant that the privileges passing by the agreement were not transferable, the defendant company shows that it was organized almost coincidentally with the making of the agreement, and for the express purpose of accepting the

privileges secured to McCool by that agreement. This was the only business it ever did. The president of the complainant company (apparently the only active officer of that concern) participated in the original formation of the pavilion company for this purpose. The answer shows that the leases of the subtenants were delivered by the complainant company to the new company's officers shortly after its formation; that since that time the complainant accepted its statements and dealt with the officers of the new company, treating it as the holder of the rights and privileges conferred upon McCool by the agreement. The answer further states that the action of the pavilion company has been in good faith under the terms of the agreement, and that it has always been, and is now, ready to exhibit an account of the receipts and disbursements of the business. The terms of the agreement (which, on this motion, need not be definitely interpreted) seem to contemplate a possession, whether exclusive or not, by McCool. The control of the business was secured to him, as he had the power to nominate two of the three directors who should manage the business. All the incidents attending the formation of the pavilion company, the delivery of possession, the acceptance of its action in the subsequent conduct of the business, indicate that the original scheme contemplated by all the parties included the organization of the pavilion company for the management of the affair, and that McCool was understood to be a party to the contract to enable that purpose to be carried into effect when the new company should be formed. Nothing in the agreement or in the relation of the parties shows that the complainant agreed with McCool because he possessed, and the business to be done called for the exercise of, any special skill peculiarly his own. If, as above stated, the plan of the parties included a transfer of these privileges to the new company, which was subsequently executed and accepted by the complainant, it would be inequitable to permit this transfer to be questioned now. As to the power to rescind by the complainant alone, the case shows that large preliminary expenditures for the exclusive and immediate benefit of the complainant company were by the agreement required to be made by McCool, and these outlays, with other preparatory disbursements, have actually been made by him, or by the pavilion company, which he represented. The complainant company has received and retains the benefit of many of these payments. It is obvious that the expectation of the parties was that these expenses of the pavilion company were to be reimbursed by subsequent profits, not of one season, but of the whole period during which the privileges could be enjoyed. But, aside from collateral incidents, as indications of their purposes the parties themselves, by the contract itself, considered and acted on the right to continue

the contract or to rescind, and in express terms bound the complainant company to the continuance of the agreement so long as it retained control of the premises, and reserved the option to cancel it to McCool only. I see no equity in the complainant's claim that it alone may now rescind, and thus nullify its own agreement, though retaining its benefits. I do not think this agreement can be treated as if it created a partnership or quasi partnership, which either party might dissolve at will. The complainant is a corporation, and is not shown to have had any power given to it to enter into a partnership. Such a power cannot be implied. It is in no way necessary for the conduct of the complainant's corporate business. It would prevent the management of the corporation by its responsible officers. The policy of the state regarding corporations, which requires the control of the corporation by its chosen officers, would be defeated. Any partner with a corporation might, in the partnership transactions, create a debt or transfer property without the action of the corporation or of its officers. The complainant company is not required, under the agreement, nor by the interpreting action of the parties under it, to do anything in the conduct of the business. Its principal function seems to have been to furnish the premises where the business was to be done, and to be compensated by a share of the profits. This does not constitute a partnership *inter sese*. It is not claimed that the business cannot be carried on because the parties are at enmity with each other and cannot confer. The answer and affidavits deny explicitly every fact on which the complainant bases its equity, and I find no support in the construction of the agreement for the claims which the complainant makes for equitable relief. Under such conditions the complainant is not entitled to a preliminary injunction, and certainly not to the appointment of a receiver to take from the pavilion company the property and business which it was formed to receive and manage. I shall advise that the order to show cause be dismissed, and that the restraint be discharged.

(177 Pa. St. 76)

OAKFORD v. NIXON et al.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

LEASE—EVICTION—LIABILITY FOR RENT.

Plaintiff, proprietor of the north building in a row, the only one in the row more than one story high, leased to defendant the roof and south wall, for purpose of displaying advertisements on the wall. Though such wall was a party wall, the proprietor of the next building did not question the lease, but leased his roof to another for like purpose, the use being made possible by erection on the roof of a frame to support a screen, which nearly covered up the wall of plaintiff's building, and rendered it practically valueless to defendant. *Held*, that there was not an eviction or failure of consideration, excusing payment of rent by defendant.

Appeal from court of common pleas, Philadelphia county.

Action by William H. Oakford, agent, against Samuel F. Nixon and others. Judgment for defendants. Plaintiff appeals. Reversed.

Avery D. Harrington and J. Alfred Smith, for appellant. James H. Shakespeare, for appellees.

WILLIAMS, J. The facts upon which the legal question presented on this record is raised are quite novel. It appears from the evidence that Andrew Moore is the owner of a row of buildings between the hotel known as the "Girard House" and Ninth street, extending from Jayne street to Chestnut. The most northerly of these buildings is No. 29 South Ninth street, and it has been occupied for some time by the plaintiff as lessee of Moore. The building next to No. 29 is in the occupancy of George M. Moore as a tenant, and is but one story high. The other buildings, down to Chestnut street, are also but one story high, while No. 29 is two stories in height. The south wall of No. 29 is for this reason plainly visible above the buildings south of it to persons going in and out of the post office, and to persons passing along Chestnut street, at its intersection with Ninth street, and for some distance westwardly therefrom. The American Bill-Posting Company, Limited, desired to make use of the conspicuous surface so presented for the display of advertisements by means of pictures and words thrown upon the wall by a stereoptican; and it entered into a contract, in the form of a lease, with the plaintiff, for the use of the roof and south wall of No. 29 at an agreed rent. The defendants are the sureties of the company upon this contract. The company took possession of the roof and south wall in pursuance of its contract, and entered upon the display of its advertisements, which were thrown upon the south wall by means of a stereoptican. Some time afterwards George M. Moore made a lease of the roof of the building occupied by him, for a similar purpose, to the American Exhibition Company. The use of this building was made possible by the erection of a frame upon the roof to support a screen on which views could be displayed. This frame and screen, when in place, nearly covered up the south wall of No. 29, and rendered it practically valueless to the bill-posting company. It thereupon abandoned the effort to use it, and refused to pay accruing rent. The position taken by it was that it had been evicted from the leasehold, and that the rent was, as a matter of law, suspended in consequence.

If the facts amount to an eviction, the defense is well taken. It may be conceded that the plaintiff had no title to the south wall of No. 29. It was a party wall, and the rights of the plaintiff did not extend beyond its center. Its southern face belonged, for all purposes, to the owner of the land on which that half of the wall rested. But the company was put into actual possession of its surface.

Neither the plaintiff nor the owner nor the tenant of the adjoining building has objected, or denied the validity of the lease. What has happened is that the tenant of the adjoining property has made a contract with another company for the use, not of the wall of No. 29, but of a frame erected on his own roof, and that the use of this frame has the effect of covering up considerable of the surface of the south wall of No. 29, and greatly reducing its value as a surface for the display of advertisements. Is this an eviction? Originally an eviction was understood to be a dispossession of the tenant by some act of his landlord, or by the failure of his title. And. Law Dict. 418. It has come in later years to include any wrongful act of the landlord which may result in an interference with the tenant's possession in whole or in part. The act may be one of omission as well as of commission. The rent is suspended by an eviction because it is plainly unjust that the landlord should be permitted to collect it while, by his own act, he deprives his tenant of the possession which is the consideration for it. But the landlord is not responsible for the acts of others lawfully done on their own premises. He is liable only for his own acts, and for such acts of others as it was his duty to protect his tenant from. *Tiley v. Moyers*, 43 Pa. St. 404; *Hoeveler v. Fleming*, 91 Pa. St. 322.

If Mrs. Oakford or Andrew Moore, her landlord, or any person having an estate in fee simple or by lease in the party wall on the south side of No. 29, had objected to the use of that wall by the bill-posting company, and ousted it from its possession, whether by legal proceedings or by physical interference, an eviction would have taken place. The right to use the wall would in that case have been taken away from the tenant, and the duty to pay rent would have ceased. But neither Mrs. Oakford nor her landlord nor any other person has objected. No ouster by legal proceedings or by physical interference has taken place. The lessees are still in possession so far as the plaintiff or any one having any right to question its possession is concerned; but that possession has been lessened, perhaps practically destroyed, by the action of an adjoining tenant. If this action was a lawful one, within the limit of his own premises, the plaintiff cannot be held liable for it. The covenants for quiet possession relate only to acts of the lessor and those acting under him, or of the holder of a better title. They do not extend to the ill-natured conduct of other persons by which the value or the comfort of the leasehold may be diminished. The probability that the view of the south wall of No. 29 would be cut off by some intervening structure between it and Chestnut street, erected by one of the owners or tenants in the row, was one that could be estimated by the company as well as by Mrs. Oakford. If the company desired to guard against this contingency, it could have been

done by contract with the intervening tenants, or by a special covenant with Mrs. Oakford. But the company made no inquiry and took no precautions. It assumed the risk of the actions of the owners and tenants of the property between No. 29 and Chestnut street, and the result has been what should have been anticipated. The tenant of an intervening property has undertaken to furnish a wholly different surface for the display of advertisements, which, when in use, conceals the south wall of No. 29 from view, and takes away its value. This does not seem to us to be an eviction. The tenant has been disappointed, but not dispossessed. He is in possession of the space he leased, but he cannot use it in the manner he anticipated because of the action of a third person, done within the limits of his own leasehold. If this was not an eviction, for the same reason it does not amount to a failure of consideration, as the case appears on this record. The consideration of the promise to pay rent was the right to use the roof and south wall of No. 29. That right has not been legally denied, but its value has been reduced. Since the action of George W. Moore, it is not worth the rent the bill-posting company promised to pay for it. But, if the depreciation is not chargeable to the plaintiff, it is the misfortune of the company to have had their possession made useless by the intervention of parties with whom they had no contract, and against whose conduct they had no covenant. The judgment is reversed, and a venire facias de novo awarded.

(178 Pa. St. 198)

COMMONWEALTH ex rel. McCORMICK,
Atty. Gen., v. MORGAN.

(Supreme Court of Pennsylvania. Oct. 5,
1896.)

JUSTICES OF THE PEACE—BOROUGH ELECTIONS—
CONSTITUTIONAL LAW—STATUTES—CON-
STRUCTION—TITLE OF ACT.

1. Const. art. 5, § 11, declaring that "justices of the peace or aldermen shall be elected in the several wards, districts, boroughs, and townships at the time of the election of constables * * * in such manner as shall be directed by law. * * * No township, ward, district or borough shall elect more than two justices of the peace or aldermen, without the consent of a majority of the qualified electors,"—does not require that there be elected two justices of the peace for each ward of a borough.

2. Act 1878 (P. L. p. 51, § 1), supplementing Act 1874 (P. L. 159), and declaring that, whenever a borough is divided into wards by authority of Act 1874, every such ward shall annually elect certain officers, and such others as are authorized in boroughs, wards, and election districts, provided that "in every such borough there shall be elected * * * two justices of the peace * * * who shall be chosen by the concurrent votes of each ward," applies to a borough which, having previously been divided into wards, is further divided into wards under authority of Act 1874, and does not permit the election of justices of the peace by a single ward.

3. The title of Act 1878 (P. L. 51), "A supplement to an act entitled 'An act to prescribe the

manner in which the courts may divide boroughs into wards,' approved May 14, 1874," is sufficient to allow of a provision that justices of the peace be elected by concurrent vote of the wards, though Act 1874 says nothing about the election of justices of the peace.

Appeal from court of common pleas, Dauphin county.

Quo warranto on the relation of H. C. McCormick, attorney general, to test the right of Isaac Morgan to hold office as justice of the peace in the borough of Mahanoy City. Judgment of ouster. Defendant appeals. Affirmed.

The opinion of the trial court, per McPherson, J., is as follows:

"The undisputed facts in this case appear from the pleadings and an agreement filed by the parties. They are as follows: The borough of Mahanoy City was incorporated in 1863 by the court of quarter sessions of Schuylkill county under the general borough act of 1851 (P. L. 320). Two years later a special act of assembly (P. L. 1865, p. 639) divided it into two wards; and in the following year another special act (P. L. 1866, p. 403), after making a slight change in the division line, named the wards 'East' and 'West,' respectively. In March, 1875, upon petition of certain inhabitants of the West ward, and after a proceeding under the act of 1874 (P. L. 159), the court of quarter sessions of Schuylkill county divided the West ward into the First and Second wards; and at the same time, upon petition of certain inhabitants of the East ward, and after a like proceeding, divided that ward into the Third, Fourth, and Fifth wards. Since this division of the borough, the electors of each ward have voted for two justices of the peace, claiming that privilege by virtue of the act of June 21, 1839 (P. L. 376); and there are now ten of these officials in the borough, of whom nine (now before us in this and similar proceedings) are acting by color of an apparent election for each ward separately, and a formal commission from the governor. The defendant was thus elected to the office of justice of the peace by the voters of the Fifth ward of the borough at the February election of 1898, and thereupon a commission was issued by the governor; this apparent election and commission being the only support of his claim to exercise the duties, powers, and privileges of the office. He was elected by the separate votes cast in the ward, and not by the concurrent votes cast in all the wards of the borough. In February, 1896, votes were cast concurrently in each ward for Jonathan L. Jones and Philip E. Coyle to fill the office of justice in said borough, and they have since received commissions from the governor. Proceedings to contest their election are now pending in the proper court of Schuylkill county. The defendant denies the validity of their election, alleging that no vacancy existed, because his own election was lawful and valid, by virtue of the act of 1839, and, accordingly, that the present writ must also fail. The

parties have agreed, by writing filed, that if the court shall be of opinion 'that there may legally be elected two justices of the peace in each ward of the borough, then judgment to be entered in favor of the defendant; otherwise judgment of ouster to be entered against him.'

"Discussion.

"The decision of this case depends upon the constitutional provisions concerning the election of justices of the peace. As was frankly conceded in the argument, if the constitution does not command the election of two justices of the peace in each ward of a borough, the defendant has no case; for in the absence of such a command the number of justices to be elected in the several wards, boroughs, districts, or townships must be within the discretion of the legislature, and that discretion has been exercised, as will hereafter appear, in a manner adverse to the defendant's contention.

"In order to a clear understanding of the subject under the present constitution, it may be desirable to consider some of the earlier provisions of the constitutional and statutory law. The constitution of 1776, in section 30 of chapter 2, declares: 'Justices of the peace shall be elected by the freeholders of each city and county respectively, that is to say: two or more persons may be chosen for each borough, township or district as the law may hereafter direct; and their names shall be returned to the president in council who shall commissionate one or more of them for each ward, township or district so returning for seven years, removable for misconduct by the general assembly; but if any city or county, ward, township or district in this commonwealth shall hereafter incline to change the manner of appointing their justices of the peace as settled in this article, the general assembly may make laws to regulate the same agreeable to the desire of a majority of the freeholders of the city or county, ward, township or district so applying. * * * Under this section the legislative discretion was certainly very large. There is no command that one or more justices must be chosen in every ward, township, or district; but the provision is that two or more persons may be chosen for each borough, township, or district, as the legislature may direct, and when so chosen the president, in council, shall select one or more of them for appointment and commission. Moreover, the whole subject was expressly remitted to the assembly whenever majority of the freeholders of any city or county, ward, township, or district desired to change this manner of appointing. It is to be observed, also, that this section uses the word 'district,' which did not then, and does not now, apply to any known and definite municipal or political division of the commonwealth. This, of itself, is a strong indication that the subject was wholly committed to the discretion of the legislature, in whose power it must rest to form the district. The constitution of 1790, in article 5, § 10, reserves to the legislature the pow-

er of defining the districts in each county, but gives to the governor the power to appoint, and absolute discretion as to the number in each district. 'The governor shall appoint a competent number of justices of the peace in such convenient districts in each county as are or shall be directed by law. They shall be commissioned during good behavior, but may be removed on conviction of misbehavior in office, or of any infamous crime, or on the address of both houses of the legislature.' Under this section, the legislature was competent to declare the districts, but the governor had the power, which, as is well known, he exercised freely, of appointing as many persons in each district as he believed to be necessary. The power of appointment was taken away by the amendments of 1838; article 6, § 7, declaring as follows: 'Justices of the peace or aldermen shall be elected in the several wards, boroughs and townships at the time of the election of constables by the qualified voters thereof, in such number as shall be directed by law and shall be commissioned by the governor for a term of five years. But no township, ward or borough shall elect more than two justices of the peace or aldermen without the consent of a majority of the qualified electors within such township, ward or borough.' At this point the defendant begins his argument, contending that, under this section, at least two justices of the peace must be elected in every ward or every borough within the commonwealth. If this contention is not sound, his argument lacks an essential support; and it is necessary, therefore, to consider it with care.

"It is possible to argue that the word 'wards,' used here and in the constitution of 1776, meant wards in cities. It is to be observed that in the earlier constitution the justices are to be elected by the freeholders of each city and county, respectively, who are to choose two or more persons for each borough, township, or district. Boroughs and townships were well-known divisions of a county, and a ward was the usual district or division of a city. Without difficulty, therefore, 'ward' could be referred to the municipal division named by the section in which wards were chiefly known, and there is some probability that this construction is correct. The argument is somewhat strengthened by the fact that in the amendment of 1838 the word 'alderman' is also used in this connection. With us, an alderman is an officer peculiar to a city. Doubtless he resembles closely a justice of the peace. Nevertheless in this country the name has been confined to officers in a city. Therefore, when the amendment of 1838 provides that justices of the peace or aldermen shall be elected in the several wards, boroughs, and townships, a not improbable construction would refer the words to their appropriate consequences. If this view is correct, the section, so far as the present case is concerned, would read: 'Justices of the peace * * * shall be elected in the several * * * boroughs and

townships * * * in such number as shall be directed by law. * * * But no township * * * or borough shall elect more than two justices of the peace * * * without the consent of a majority of the qualified electors within such township * * * or borough.' It is not necessary, however, to insist upon this construction. Even if, in a proper case, the word 'ward' may apply to a borough as well as to a city, the section would continue to read that justices of the peace should be elected in the several wards, boroughs, and townships 'in such number as shall be directed by law,' thus committing expressly the number of these officers to the discretion of the legislature. The defendant's argument, that this language requires the election of two justices of the peace in each ward of a borough, would compel the further conclusion that two additional justices must be elected by the borough voting as a whole, and we are informed that in some of the boroughs this has actually been done. Each ward has elected two justices of the peace, and the whole borough has elected two by a concurrent vote. Presumably, the construction must be faulty which permits such a result. Moreover, as it is plainly declared that justices of the peace are to be elected 'in such number as is directed by law,' if the section itself is to be regarded as compelling the election of two—that number being also fixed as a maximum—it is difficult to see what discretion in this respect is left to the legislature. The amendment does not name a minimum number, but a maximum; and if at the same time it is supposed to fix a maximum, and also to command that the maximum must always be elected, it must certainly be using language without due regard to its ordinary and natural meaning.

"Exercising the discretion committed to it by the amendment just considered, the legislature in 1839 passed an act (P. L. 376) providing that the maximum number of justices of the peace and aldermen should be elected in each ward, borough, and township, except in the city of Philadelphia, where only one alderman should be elected in each ward. This exception shows clearly that the legislature did not understand the constitution as requiring the election of two officers in each ward or borough or township, but only as permitting it, and might be fairly set off against section 7 of the act of 1843 (P. L. 60), in which the phrase is used, 'the number of justices or aldermen allowed by the constitution to each ward,' if this phrase really bore the meaning upon which the defendant insists. We would then have two opposing interpretations by the legislature of the constitutional provision, of which both would be entitled to respect, but neither would be conclusive. But in our opinion the phrase means no more than 'permitted by the constitution to each ward,' and therefore the two acts are not at all in conflict. This appears distinctly from the act of 1846 (P. L. 105), which is evidently upon the act of 1843 as a model, and deals with a similar subject. It

omits, however, the phrase, 'allowed by the constitution to each ward,' and substitutes what is evidently regarded as an equivalent statement, namely, 'the proper number of aldermen or justices of the peace within the territories of either of such new divisions, according to the number allowed to each township, borough and ward, by an act of the twenty-first day of June, one thousand eight hundred and thirty-nine.' The next statute in order is the general borough act of 1851 (P. L. 320). The twenty-sixth section of that act provides that boroughs incorporated thereunder should elect at the first election two justices of the peace to serve for a term of five years, and declares distinctly that 'this section shall not be so construed as to authorize the commissioning of, or to have commissioned, more than two justices at the same time residing within said borough unless under the provisions of the existing laws they have by a vote of the electors increased the number of justices within the limits of any such borough or boroughs.' The thirty-fourth section of the act expressly repeals 'all general laws of the commonwealth' inconsistent therewith, probably intending by this unusual provision to save special charters. The question whether the act of 1839, so far as it required the election of two justices in each ward of a borough, continued to apply to boroughs incorporated under the act of 1851, was raised in *Com. v. Eno*, 1 Kulp, 343. It was there decided that to such a borough this requirement of the act of 1839 did not apply, and that only two justices of the peace for the whole borough could be elected, as is expressly directed by the act of 1851. This decision has been considered in several other reported cases in the common pleas, but, as they were finally put upon other grounds, it has not been necessary either to approve or disapprove its reasoning and conclusion. But, since the purposes of this case seem to make the declaration desirable, we have no hesitation in saying that we believe the decision to be correct. Section 26 of the act of 1851 is in this respect absolutely inconsistent with the act of 1839, and the repealing section makes it quite clear, as we think, that the legislature intended to establish a new rule for all boroughs to be incorporated under the general borough law. If this position is sound, none of the defendants, either in this case or in the others argued at the same time, has a valid defense; for the borough of Mahanoy City was incorporated by the court of quarter sessions of Schuylkill county in 1863, and the borough of Shenandoah was incorporated by the same court in 1866, under the provisions of this very statute. There has been no special legislation giving to either borough the right to elect more than two justices in the whole borough, and there is no other general law upon the subject except the act of 1839. It would therefore follow that the justices of the peace in these boroughs are not lawfully in office, and cannot successfully resist the commonwealth's writ.

"Thus far we have not considered the pres-

ent constitution. Section 11 of article 5 declares as follows: " * * * Justices of the peace or aldermen shall be elected in the several wards, districts, boroughs and townships at the time of the election of constables by the qualified electors thereof, in such manner as shall be directed by law, and shall be commissioned by the governor for a term of five years. No township, ward, district or borough shall elect more than two justices of the peace or aldermen, without the consent of a majority of the qualified electors within such township, ward or borough; no person shall be elected to such office unless he shall have resided within the township, borough, ward or district for one year next preceding his election. In cities containing over fifty thousand inhabitants not more than one alderman shall be elected in each ward or district.' The observations which we have made upon the amendment of 1838 apply with equal force to this provision. It means, in substance, what the amendment of 1838 means; and the construction above suggested receives additional support from the fact that in the section just quoted the word 'district' is used, which is not to be found in the amendment of 1838. No such defined municipal division is known in our policy, as has already been stated, and the use of this word is of itself enough to show that the present constitution did not intend to require the election of either one justice or two justices in each ward, because under the power to create 'districts,' wards, and perhaps other municipal divisions, might be grouped so as to form one district for the election of a justice or an alderman. It may be noticed also, without insisting upon its importance, that when cities only are spoken of the justices of the peace are not named, the section declaring that not more than one 'alderman' shall be elected in each ward or district. But it is important to observe, in considering further this particular provision, that the defendant's construction supposes that the constitution requires two justices to be elected in each ward of every borough, while the constitution itself is careful to say that in the wards of the larger cities not more than one alderman shall be permitted. Many of these wards contain separately a much more numerous population than any one of scores of boroughs in the state, and the volume of civil and criminal business is much more considerable. But, according to the defendant's view, the borough will certainly have two justices, and may have ten, or even more, while the city ward can have no more than a single alderman. Returning to the statutes of the commonwealth, and laying aside the general borough act of 1851, we may assume for the moment that the act of 1839 continued to apply to boroughs incorporated under the later statute. Nevertheless we think the defendant is in no better situation, for it is still true that by more recent legislation the act of 1839 has been so far repealed that, in boroughs which have been divided into wards since 1874, only

two justices of the peace can be elected by the concurrent votes of each ward. We refer to the act of 1874 (P. L. 159) and its supplement of 1878 (P. L. 51); especially to the supplement, of which the first section provides 'that whenever any borough in this commonwealth may be divided into wards in accordance with the provisions of the act to which this is a supplement, every such ward from and after such division shall be a separate election district, and annually thereafter shall elect not less than one or more than three members of borough councils, and shall elect such other public officers as are authorized in boroughs, wards and election districts under existing laws: provided, however, that in every such borough there shall be elected a burgess, assistant burgess, two justices of the peace, three auditors, high constable, and six school directors, who shall be chosen by the concurrent votes of each ward, and their election shall be ascertained and declared by the joint certificates of the judges of election as hereinafter provided: and provided, further, that school directors and other officers who shall be so chosen by the concurrent votes of said wards, shall be chosen for such terms as are now provided by existing laws.' The borough of Shenandoah was divided into five wards in the year 1875 by the court of quarter sessions in pursuance of the act of 1874, and therefore falls expressly within the language of the supplement just quoted. The situation of the borough of Mahanoy City is somewhat, although not essentially, different. It was divided into two wards by the special acts of 1865 (P. L. 639) and 1866 (P. L. 403). In March, 1875, as already stated, the court of quarter sessions subdivided these wards into five wards by proceedings under the act of 1874 (P. L. 159). There was no other authority for this subdivision, for no special statute authorized it, and the act of 1874 was the first general law upon the subject. It is therefore certain that the division of both boroughs into wards was made under the act of 1874, and as the supplement of 1878 provides distinctly that, in any borough divided by this authority, only two justices shall be elected by the concurrent votes of each ward, it follows as a necessary consequence that the defendant, who claims to have been elected by votes in one ward only, was not lawfully elected, and must be ousted from his pretended office.

'The questions arising upon this branch of the case have already been decided in two similar controversies, to which we venture to refer without repeating the reasoning by which the conclusions there reached are supported. We refer to *Com. v. Pattison*, 2 Pa. Dist. R. 128, in which Judge Simonton holds that the acts of 1874 and 1878 not only permit the erection of two or more wards in boroughs where none existed before, but permit also the division and subdivision of wards. As a consequence, where a borough already divided into two wards has been still further divided by proceedings under these statutes, he decided that

the act of June 21, 1889, so far as it required the election of two justices for each ward, no longer applied, and that the borough was entitled under the act of 1878 to only two justices, who must be elected by the concurrent votes of the several wards. If this decision is thought to be in conflict with the decision in *Com. v. Pattison*, 1 *Lanc. Law Rev.* 252, I am authorized to say that the difference is probably due to the influence of the special legislation concerning the borough of Pottstown, which was then under consideration. But if the conclusion in the two cases should be found irreconcilable the later decision is to be accepted as the final judgment of the court upon this subject. The other case is *Com. v. Pattison*, 3 Pa. Dist. R. 599, in which the court passed without decision the question whether a borough incorporated under the general borough act of 1851 can elect only two justices of the peace by the concurrent vote of the borough, but decided that the act of 1878, which also provides for the election of two justices by the concurrent vote of the borough, applies to all boroughs divided into wards under the power given by the act of 1874, whether the division was made before or after the passage of the act of 1878. In reply to a question in the defendant's brief, we may say that the sentence in the opinion which declares that 'since 1883, at least,' the wards of Ashley borough have had no right to elect justices by a separate vote, was affected by a doubt whether the act of 1878 would disturb justices who were in office at the date of its passage. But, as their term of five years must expire not later than 1883, the year was named as the point of time from which the act would, in any event, apply. We have reviewed and reconsidered these decisions, and, believing them to be correct, we adhere to the conclusions there announced.

'The defendant's final position is that the act of 1878 is void as to the election of justices, because its title does not obey the constitutional provision. This objection need not be considered at length. In effect, it has already been decided in *Com. v. Taylor*, 159 Pa. St. 451, 28 *Atl.* 348, in which the supreme court has held the title of this very act to be sufficient. In that case the election of school directors was in question, whereas now it is the election of justices of the peace; this being, as we think, an immaterial distinction. The defendant insists upon the difference as vital, and argues that the title of the act of 1878 might be held sufficient, so far as concerns the election of school directors, because their election is mentioned in the act of 1874, and therefore the supplement of 1878 is dealing with a subject embraced by the original act, and germane to its provisions, whereas the act of 1874 says nothing about the election of justices of the peace. There are two reasons against the validity of this argument: The first is that the title of the act of 1874 itself contains no reference to the election of councilmen and school directors, although this subject is regu-

lated by the fourth section. The title is simply 'An act to prescribe the manner by which the courts may divide boroughs into wards.' This language was considered by the legislature and by the supreme court to give sufficient notice that elections in the boroughs would be necessarily affected by the division into wards, and therefore to satisfy the constitutional requirements. Manifestly, under this ruling the act might have gone on to regulate the election of all other officers usually elected either in a borough as a whole or in the wards into which it might be divided. If the title was sufficient to cover the subject of the fourth section, it must also be sufficient to cover the provisions of the supplement, in which certain other officers of the borough are for the first time named, and their election regulated. In brief, the general subject expressed in the original title includes the incidental subjects, which are obviously connected so closely that the general subject cannot be touched without affecting the others. The second reason why the constitutional objection ought not to prevail is a reason of inconvenience. If the objection is sound, the provisions in the act of 1878 regulating the election of burgess, assistant burgess, auditors, and high constable must also fall, as well as the provision regulating the election of justices of the peace. This is not a valid reason, if a statute offends clearly against the constitution, but it is a relevant consideration, and entitled to much weight when there is room for doubt upon this subject. Indeed, to doubt concerning the constitutionality of any statute is to be resolved in its favor, and it certainly cannot be said that the acts now in question are in clear violation of the fundamental law.

"It was vigorously urged at the hearing of these cases that the business of both boroughs requires an unusual number of magistrates. Upon this point we need only say that by the necessary implication of the constitution the number of justices may be increased by the consent of a majority of the qualified electors within the borough. Whenever, therefore, the borough desires to elect more than two, it has the power and the right to declare its will by the proper procedure. There is no danger that any public interest will suffer because of the action we are now obliged to take.

"We have found the facts relating to the votes cast for Jonathan L. Jones and Philip E. Coyle in Mahanoy City, and for Martin J. Lawlor and John J. Cardin in Shenandoah, at the election in February, 1896, merely because these facts are part of the agreement. We express no opinion about their title to the office,—which the court of Schuylkill county will determine,—and consider the subject irrelevant to this proceeding. It is therefore adjudged that the defendant is guilty of unlawfully holding and exercising the office, privilege, and power of justice of the peace in the said borough of Mahanoy City; and it is further adjudged that he be ousted and altogether excluded from the said office, privilege, and power, and that the

commonwealth recover its costs from the defendant."

The title of Act May 10, 1878 (P. L. 51), is "A supplement to an act entitled 'An act to prescribe the manner in which the courts may divide boroughs into wards,' approved May 14, 1874."

A. W. Schalck and G. J. Wadlinger, for appellant. M. E. Olmsted, for appellee.

PER CURIAM. This case was argued with *Com. v. Toomey*, *Com. v. Shoemaker*, *Com. v. Rynkiewicz*, and *Com. v. Williams* (May term, 1896) 35 Atl. 1132, 1133, involving substantially the same questions. A careful consideration of the record has satisfied us that there is no error in the judgment. The controlling questions have been fully discussed and correctly decided by the learned trial judge. It would serve no useful purpose to add anything to what has been so well said by him. The judgment is therefore affirmed on the opinion sent up with the record in this case.

178 Pa. St. 140)

MILLER v. McALLISTER.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

FRAUDULENT CONVEYANCES—EVIDENCE.

On the issue as to whether a judgment confessed by a debtor in failing circumstances for more than the sum due the creditor was confessed with intent to defraud other creditors, or to secure future advances, evidence that soon after the confession of the judgment another judgment was confessed to a third person for such fraudulent purpose is inadmissible against the judgment creditor, he having had no knowledge of such fact.

Appeal from court of common pleas, Dauphin county.

Issues between James Miller, executor of Daniel Matter, and Joseph McAllister. There was a judgment for the latter, and the former appeals. Affirmed.

The plaintiff in the issue offered to prove by George Earnest, a witness on the stand, that he had a judgment against Daniel Smith entered to No. 212, April term, 1879, for \$1,500. At the time this judgment was confessed, Daniel Smith came to his place of business, and told him that he (Smith) was in financial trouble, and that he wanted to confess a judgment to him. "But," said Mr. Earnest, the witness, "I don't know what it is." "Well," said Mr. Smith, "I will make it \$1,500, and I want you to go down to Harrisburg and enter it at once." And this for the purpose of showing that this judgment was confessed six days or four days after the judgment to Joseph McAllister was confessed, and for the purpose of showing that he (Smith) was in failing circumstances, financial trouble, and that he was confessing judgments without consideration, in fraud of creditors.

L. D. Gilbert, for appellant. J. C. Durbin, for appellee.

STERRETT, C. J. This issue was awarded by the orphans' court to try and determine (1) whether the judgment against Daniel Smith in favor of Joseph McAllister was or was not "given to delay, hinder, or defraud the creditors of said Daniel Smith, and especially to delay, hinder, or defraud Daniel Matter or his estate"; and (2) "if said judgment is valid, how much is now due thereon?" Each of these questions depended upon facts which it was the exclusive province of the jury to determine. The burden of proving the invalidity of the judgment was on the plaintiff in the issue, and testimony was accordingly introduced by him for that purpose. On behalf of the defendant, rebutting evidence tending to show that the judgment was given for an honest and legitimate purpose, and not "to delay, hinder, or defraud" any of the creditors of Smith, the defendant therein, was also presented. The only testimony that was offered and rejected by the court is that referred to in the third specification. We are clearly of opinion that there was no error in refusing to sustain the offer. It is unnecessary to refer in detail to the testimony. It was all properly before the jury for their consideration in determining the question specified in the issue. The case was fairly and fully submitted to them by the learned trial judge, in a clear, comprehensive, and fully adequate charge, in which there appears to be no substantial error. The jury, by their verdict, impliedly affirmed the validity of the judgment and expressly found that the amount then due thereon to the defendant in the issue was \$2,425.41. These conclusions of fact were not only warranted by the testimony, but they are in accord with the manifest weight of the evidence. A careful examination of the charge, in connection with the testimony, has satisfied us that it is neither misleading nor erroneous. There is nothing in either of the specifications of error that requires further consideration. All the facts and circumstances were properly submitted to and passed upon by the jury, and the judgment entered on their verdict should not be disturbed. Judgment affirmed.

ville against Alfred Creveling, George W. Mills and Henry Levis, co-partners, now or lately trading as Creveling, Miles & Co., Limited. Judgment for plaintiff. Defendants appeal. Affirmed.

George Frederick Keene, Charles C. Lister, and John G. Johnson, for appellants. John Marshall Gest, Edmund G. Butler, and Richard C. Dale, for appellee.

STERRETT, C. J. In this case it was successfully contended by plaintiff bank that defendants were liable as general partners because of their failure to comply with some of the provisions of the act of June, 1874, and its supplements, under which, in March, 1880, they undertook to organize themselves into a partnership association limited; and judgment was accordingly entered against them. In October, 1879, the three defendants above named formed a general co-partnership, in the name of Creveling, Miles & Co., and soon thereafter they purchased, on credit, the property known as the "Chulaski Furnace." For the entire consideration (\$20,000) a purchase-money mortgage was given, payable in quarterly installments of \$1,250 each. The first installment was paid, but, before the second became due, the partners undertook to change their general partnership into a partnership association limited, under the act aforesaid. In their recorded articles of association, etc., they certified that the amount of the capital of said partnership association, limited, was \$99,000, consisting of, first, real estate described in schedule annexed thereto, etc., at a valuation of \$75,000 fixed upon it, and approved by all the members subscribing to the capital of the association. The schedule thus referred to as attached to and made part of the articles of association contains the following description of the real estate mentioned and referred to as forming part of the foregoing certificate and statement of Creveling, Miles & Co., Limited, contributed to the capital stock thereof at a valuation of \$75,000, in equal proportions, by the members thereof, to wit: "All that certain tract of land and furnace thereon erected, situate in Point township, Northumberland county, Pennsylvania, containing one hundred and fifty-four acres and one hundred and forty-two perches, strict measure. To this is appended the certificate of the defendants, Creveling, Levis, and Miles, in which they 'certify and declare that the foregoing schedule is a true and correct description of the real estate contributed by us to the association of Creveling, Miles & Co., Limited, at a valuation of \$75,000, approved by us who are all the members subscribing to the capital of said association.' Not a word is said as to the purchase-money mortgage incumbrance of \$20,000, on which only \$1,250 had been paid. It requires neither argument nor citation of authority to show that there was a manifest failure to comply with the provisions of the act in this regard. The statement not only fails to furnish any notice to

(177 Pa. St. 370)

FIRST NAT. BANK OF DANVILLE v.
CREVELING et al.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)
PARTNERSHIP ASSOCIATION—LIABILITY AS GENERAL
PARTNERS.

A certificate in articles of association is insufficient to create a valid partnership association limited, under Act 1874, and its supplements, where the partners certify that the amount of the capital is a certain amount, consisting, among other things, of certain described real estate, at a valuation of \$75,000, but do not mention a \$20,000 mortgage on it.

Appeal from court of common pleas, Philadelphia county.

Action by the First National Bank of Dan-

creditors of the existence of the mortgage lien, but it is positively misleading, in that it does not certify the character of the property "according to the fact."

Those who seek to have all the advantages of a general partnership, and yet limit their liability to creditors, as contemplated by the act, must comply with all its provisions; otherwise, they will be liable as general partners. The object in requiring a schedule of property contributed in lieu of cash was to enable creditors to ascertain precisely of what the property consisted, and to judge of its value. *Maloney v. Bruce*, 94 Pa. St. 249; *Vanhorn v. Corcoran*, 127 Pa. St. 255, 18 Atl. 16; *Gearing v. Carroll*, 151 Pa. St. 79, 24 Atl. 1045; *Haslet v. Kent*, 180 Pa. St. 85, 28 Atl. 501. The contributed real estate, as correctly stated by the learned referee, "was in effect an equity of redemption in the Chulaski Furnace property, which might have been set forth and described in any one of several forms. The mere description of the real estate was accurate enough if the statement had also been made that it was subject to a purchase-money mortgage of \$20,000, of which \$1,250 had been paid. The failure to do this leaves even the valuation doubtful, for it may be thought, on the one hand, that the whole property is worth \$75,000, considered clear of incumbrances, or, on the other hand, that the equity of redemption is worth \$75,000. If the valuation of the whole property were \$75,000, the effect of it, in this case, would be to render the whole statement false, because, as the \$75,000 would be subject to a deduction of \$18,750, it would follow that the net value of the property as put into the association was but \$56,250; and, as the additional capital subscribed was but \$24,000, the whole capital would be \$80,250, instead of \$99,000, as set forth in the articles." For those and other reasons, the learned referee rightly concluded that the certificate is ineffective to create a valid partnership association, limited, under the act. He and the court below were also right in holding that the defendant also failed in other respects to comply with the requirements of the act in question. We find nothing in the record that would justify us in sustaining any of the specifications of error, nor do we think that either of the questions therein presented requires further notice. Judgment affirmed.

(177 Pa. St. 57)

WOJCIECHOWSKI v. SPRECKELS SUGAR REFINING CO.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)
NEGLECT OF MASTER — ASSUMPTION OF RISK.

1. Plaintiff's duty was to empty sugar into a box, to be precipitated through a grating situated in one end, upon a screw conveyor. The grating was constructed of iron rods about $2\frac{1}{2}$ feet long and $2\frac{1}{2}$ inches apart. While standing with one foot on the grating, the bars sank down, letting plaintiff's foot through onto the screw, by which it was crushed. *Held*, that the mere proof of the accident was insufficient to show negligence on the employer's part.

2. Plaintiff, from knowledge of the existence of the grating and the machinery below, will be held, by having voluntarily placed his foot on the grating, to have assumed the risk of the injuries received.

Appeal from court of common pleas, Philadelphia county.

Action by Valenti Wojciechowski against the Spreckels Sugar Refining Company for personal injuries received while in its employ. There was a judgment for plaintiff, and defendant appeals. Reversed.

Frauk P. Prichard and John G. Johnson, for appellant. Abram S. Ashbridge, Jr., for appellee.

GREEN, J. In this case the plaintiff was an employé of the defendant. It was his duty, at the time of the accident, to empty bags of sugar upon a grating in the floor, so that the sugar might be precipitated upon a screw conveyor, which pushed it forward into a pan. The receptacle into which the sugar was dumped was a long box, the sides of which were composed of planks 15 inches high, and at the bottom was a grating of iron bars $2\frac{1}{2}$ inches apart, about half an inch thick, and about $2\frac{1}{2}$ feet in length. The sugar was brought to the workman engaged in dumping, on trucks, in bags, and two men lifted the bag, and turned out the sugar into the dump. The plaintiff was the only witness examined on his behalf to prove the facts of the accident. He said he put one foot on the grate bars and the other foot on the outside, and, while standing in that position, with his foot crosswise the bars, the bars sank down, and let his foot through, and it was caught in the machinery below, and badly crushed, so that amputation had to be performed. Another man, Joseph Novick, was working with him at the time. He was not called by the plaintiff, but by the defendant, and he testified that the plaintiff put his foot on the grate, "and then the crush came." The plaintiff, being a workman, was bound to prove, not only the fact of the accident, but also some specific negligence of the defendant which caused it. No proof of that kind was offered. No evidence was given to show either that the bars were bent out of their position, either before or after the accident, or that they were broken. No proof was made that the bars were not strong enough to hold the plaintiff's weight, or that there was any defect in the material of which they were made. The plaintiff testified that he had emptied 12 or 15 bags before he was hurt, and that in doing so he had stood in the same way as at the time of the accident, with one foot on the bars, and the other outside the upright plank on the floor. He was asked on cross-examination, "Q. Didn't you see the grates before the accident, at all? A. Yes; I did see them. Q. Then they were not covered with sugar, so that you could not see them? A. Sugar is always there, but when they put the sugar there the sugar goes down. Q. Did you see the grates on that very day,

before your foot went in it? A. Yes, sir." The plaintiff's personal testimony therefore shows that he knew the grates were there, that the sugar ran down through them, and that there was machinery below them to remove the sugar as fast as it came down. Without looking into the adverse testimony at all, it is manifest from the plaintiff's own statement that he knew the structure upon which he set his foot; he knew there was machinery below it; he placed his foot there voluntarily, and therefore took the risk, whatever it was, that was involved in that position. He did not testify that there was any defect in the bars, or that he had ever given notice of any to his employer, or to any agent of theirs; nor did he produce any testimony, other than his own, upon these subjects. He proved nothing but the fact of the accident, which, as we have repeatedly decided, is not sufficient to warrant a recovery by an employé against an employer.

In *Railroad Co. v. Hughes*, 119 Pa. St. 301, 13 Atl. 286, in a similar case of an action by an employé against his employer, our brother Clark, delivering the opinion, said: "The plaintiff undertook to trace the injury to the negligence of the company, and until he can show some negligent act which was the proximate cause of his injury he cannot recover. We know that when Hughes stepped on the brake with his whole weight it went down, and he went with it. But whether the pin broke from any defect which a proper inspection would have disclosed does not appear; that it broke at all is not shown; nor is there any evidence that the occurrence was owing to a dislocation of the key. It devolved upon the plaintiff to show negligence of the company, and that the negligence was the proximate cause of the injury. In this he has failed, and, in the absence of proof on that point, we cannot ascribe the accident to that cause. The judgment is reversed." On the same subject, and to the same effect, are the cases of *Manufacturing Co. v. McCormick*, 118 Pa. St. 519, 12 Atl. 273; *Mensch v. Railroad Co.*, 150 Pa. St. 598, 25 Atl. 31; *Augerstein v. Jones*, 189 Pa. St. 183, 21 Atl. 24; and *Bradbury v. Coal Co.*, 157 Pa. St. 231, 27 Atl. 400. The rule in this class of cases is so very familiar, and so entirely unquestioned, that any elaboration of the decisions is quite unnecessary. The plaintiff was allowed to recover upon mere proof of the fact of the accident without any proof of any specific negligence of the defendant, and this is not enough, under all the decisions. Nor is the case any better on the question of the release. That there was a formal release of all damages upon the payment of \$300, that it was properly and formally executed and attested, that it was both read and explained to the plaintiff in his own language, and that the plaintiff kept the money, and never returned or offered to return it, are facts incontestably established by the most satisfactory testimony. We have carefully read and considered all the testimony which

was offered and received for the purpose of making out an allegation of fraud in the transaction, and have no hesitation in saying that it is entirely inefficient for that purpose. No chancellor could possibly decree the reformation of such an instrument upon such insufficient, flimsy, and utterly unreliable testimony. After all the precautions that were taken by the counsel who drew the release and supervised its execution, including a formal certificate by both the interpreters that, the subject of subsequent employment having arisen, the defendant's counsel distinctly refused to agree to any promise of that kind, it cannot be tolerated that so solemn an instrument, so formally executed upon full consideration, should be abrogated and set aside by the kind and character of testimony offered for that purpose. No man's deed for the house he lives in would be safe if it could be destroyed by such testimony as this. The authorities are most abundant to this effect, and it is not necessary to cite them. In the case of *Gibson v. Railroad Co.*, 164 Pa. St. 142, 30 Atl. 308, we heard and disposed of and rejected a defense to a release of a similar character with this, and a bare reference to the case is enough for the purposes of the present contention. As we do not think the plaintiff is entitled to recover on the merits of his case, the enlargement of the discussion on this branch of it is not essential. We sustain the first, second, and eighth assignments of error. The others are not important. Judgment reversed.

(177 Pa. St. 159)

POTTER v. GILBERT et al.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

LANDLORD AND TENANT—INSOLVENCY OF TENANT—RIGHTS OF LANDLORD.

A mining lease provided that on violation of any of the covenants on the part of the lessee, among which was a covenant not to assign without the consent of the lessor, the lessor should have the right to declare the lease forfeited. The lease also provided that on expiration of the lease the lessor should have the right to take the improvements placed on the land by the lessee, at their appraised value. *Held*, that on the insolvency of the lessee, and an assignment by him of the lease for the benefit of creditors, the lessors, on declaring a forfeiture of the lease for default of the lessee preceding the assignment, were entitled to take the improvements at their appraised value, in satisfaction of rent due.

Appeal from court of common pleas, Schuylkill county.

Assumpsit by Robert F. Potter, assignee of Lawrence & Brown, against Samuel H. Gilbert, executor, and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

Wm. B. Wells and James Ryon, for appellant. J. W. Ryon and John G. Johnson, for appellees.

DEAN, J. The defendants were owners of a tract of coal land in Schuylkill county, known as the "George Flower Tract." The

property had been under lease to Lawrence & Brown. As this lease was about to expire, another was executed to them on the 1st of October, 1889, with a supplement dated 25th October, for the term of 15 years, and this gave to lessees the right to mine and market the coal from certain veins in the tract. For the right to mine, they were to pay lessors 5, 10, and 40 cents per ton, according to size of coal marketed. Lawrence & Brown were to pay all taxes assessed on improvements, which last were not to pass to the lessors by reason of erection on the land. The lease contains 29 distinct covenants or stipulations between the parties, clearly defining their respective rights and obligations. The lessees went into possession, made very valuable improvements, and up to 28th January, 1892, had mined and marketed large quantities of coal. On that day, they made a general assignment for benefit of creditors to Robert E. Potter, of all their property, including lease, fixtures, and personal property. The assignment was recorded same day, and possession taken by the assignee. The appraisers appointed by the court valued the assigned property at over \$100,000, and the assignee gave bond, with approved sureties, in sum of \$220,000. During the month of February immediately following the assignment, the assignee mined a small quantity of coal, for which he was charged the rates fixed in the lease. The lessees, at the date of the assignment, were in default as to several of the covenants. They had also covenanted not to assign or dispose of or incur the property without consent of lessors. On default or violation of any of these stipulations, the lessors reserved the right to declare the lease forfeited. In pursuance of this right to declare a forfeiture, the lessors, on 12th February, 1892, 15 days after the assignee took possession, gave notice to Lawrence & Brown, the lessees, and all others concerned, that they declared the lease forfeited. Section 25 of the lease embodied a power of attorney authorizing a confession of judgment in ejectment against the lessees, with right of landlord to issue hab. fa. possessionem thereon in case of forfeiture. Under this power, 10 days after notice of forfeiture, judgment in ejectment was confessed; and the sheriff, by virtue of writ issued thereon, put plaintiffs in possession of the leased property and improvements. But the landlord's interests were protected by a still further section of the lease, the nineteenth, which reads thus: "The said lessors may at the expiration of the aforesaid term, or other sooner determination thereof, or at any time previous thereto, give notice to the lessees that they are desirous of having a valuation made of the steam engines, pumps, breakers, chutes, iron on the railroads, and other fixtures in and about said colliery, by competent and disinterested men, appointed as provided in section fourteen (sixteen); and the said lessors may at any time within ten days after said

valuation, made and notified to them, elect to take at such valuation any of the said steam engines, pumps, breakers, and machinery, chutes, iron, or other fixtures (but not less than the whole of any one machine), and any other property in and about said colliery belonging to the said lessees, and valued as aforesaid, which, on payment of said adjudged value, shall become the absolute property of the said lessors, saving to the said lessees the right of using said machinery or other property so taken during the continuance of the said term, if taken before the end thereof by its own limitation or otherwise; and in case the lessors shall not elect to take the property so valued as aforesaid, or any part thereof, the said lessees shall have the right to take the same, or so much thereof as the lessors shall decline to take at such valuation from the lands of the said lessors, at any time within four months after the expiration of the said term, provided the said lessees have fully performed and complied with all the stipulations, terms, covenants, and agreements herein contained by them to be kept and performed." Under this power, soon after obtaining possession, the lessors had appraisers appointed, who valued the property at \$100,621.58; and they elected to take it at that valuation, and so notified the lessees. The lessors claimed that there was due and unpaid them from Lawrence & Brown at the date of the assignment, under the covenants in the lease, \$129,395.20. They further asserted that, by the contract, the entire property was pledged to them as security for payment of the lessees' contract liabilities. Therefore they set off against the appraisal so much of the debt claimed as equaled the value of the property taken under section 19, leaving still an unsecured balance due them. At the date of the assignment, there was due and unpaid from Lawrence & Brown, to creditors other than their landlords, debts aggregating over \$100,000. The assignee, claiming the appraised value of the property (\$100,621.58) was payable to him as assignee and trustee for all the creditors, brought assumpsit against defendants. On trial in the court below, the learned trial judge, being of opinion that under the lease the right of the landlords to appropriate so much of the debt due them from Lawrence & Brown as equaled the amount of the appraisal was undoubted, directed the jury to find for defendants, and we have this appeal by plaintiff.

All the assignments of error may be disposed of by deciding whether the law, when applied to the undisputed facts, sustains the peremptory instruction of the court. We are of opinion that all the covenants in this lease are dependent covenants. It is settled that the dependency or independency of covenants is to be determined, not alone from any particular words or phrases, but also from the nature of the transaction and object of the parties as evidenced by their contract.

The object of the landlords was to come into the enjoyment within 15 years of 1,500,000 tons of coal in place, of an approximate value to be paid during that period of about \$400,000. The object of the lessees was to mine and market this coal during the same period, at a profit. To carry out the purpose of both parties, the lessees exacted from the owners covenants for quiet enjoyment during the life of the lease, and stipulations which would protect them from loss incurred in the erection of valuable improvements upon land to which they had only a right of occupancy for a fixed term. As the improvements were, necessarily, preliminary to mining for 15 years, contingencies might arise which would cut off their enjoyment of the lease for the full term; and it was not intended by either party that the investment of the lessees should be thereby lost to them. The landlords exacted covenants which would protect them also against contingencies during this comparatively long period, such as default, insolvency, assignment, or abandonment by the lessees. The covenants and stipulations on part of lessees are not only a consideration to be paid for a valuable privilege, but they are also conditions upon which the grant of the privilege is made, and upon which its continuance depends. "We grant you," say the owners, "the right to mine, upon condition that you pay and perform as specified in the covenants, and upon the farther condition that, in case of default on your part or option on ours, we shall resume possession of our property, and take your improvements at an appraised value." This is the reasonable construction of the contract. Nor do we see that the bargain was a hard one for the lessees. If, by reason of abandonment, insolvency, or other cause, their operations ended, their improvements were practically valueless to them. Mine improvements, from their character, only have their real value at the particular mine or plant where first located. Removal to another mine largely depreciates them. They were also valuable to these owners, because already located on their lands; they were of little value to these lessees or other mine owners, if they had to be moved. Both parties, evidently, well understood this; hence the mutual covenants in section 19, on which to so great degree turns this controversy.

But, even if the contract making all the covenants and stipulations conditions of the right granted operates hardly on other creditors, nevertheless it is plainly the bargain of these parties, made when they had full power to make it. No truer principle of real justice was ever uttered than by Gibson, J., when he said, referring to hardship as an element in the construction of covenants, in *Lighty v. Shorb*, 3 Pen. & W. 451: "The greatest practical evil of the doctrine is that it subjects a contract to the control of a jury, prone to forget that to cut a man loose from

his bargain from motives of humanity is the rankest injustice." We hold that the rights of these parties must be determined from their written contract. That determines that their covenants were dependent; that at that date they assented to the same thing in the same sense. The subsequent independent action of either cannot in the least degree change the right under the contract of the nonassenting party. *Lea's Appeal*, 164 Pa. St. 407, 30 Atl. 389, and the cases which it follows, decide only that the rights of creditors as distributees of the assigned property are fixed as of the date of the assignment; that is, each creditor, by the assignment, becomes the owner in equity of such part of the assigned property as the debt then due him bears to the aggregate of the debts. The day of the assignment fixes the right, and not the day of distribution. But no case holds that every special security, covenant, or remedy existing for enforcing payment of the debt is taken away from the creditor by the assignment the day the deed is executed, and resort must be had to the fund in the hands of the assignee. The right of the creditor to collateral pledged by contract as security for payment exists afterwards as before. His right to the real estate pledged by mortgage covenant for the security of a debt evidenced by bonds remains unaffected. The creditor's judgment lien on land is not divested, nor is his remedy for its collection impaired.

The lessors' rights were here secured by conditions which, if broken before the assignment, determined their right to the remedy stipulated in the contract. The assignment, as before noticed, was 28th January, 1892. Up to this date there was due in royalties, and not paid, and other payments which under the contract ought to have been made by the lessors, not less than \$102,000. We have not included in this any royalties for coal after the date of the assignment. We have included the claims for labor prior to the assignment, which were an incumbrance or lien on the improvements, and which were embraced in the covenants of the lessees. We also include the amount paid by the landlords for tunnels, under the supplemental lease (date left blank), 1891. This is made part of the original, and subject to all its provisions. The money paid for insurance and taxes is also included, for these are covered by the covenants in the contract. The judgment notes, amounting to \$21,746, are not included, because default in payment of them was no breach of any covenant by lessees. They were, doubtless, from the fact their dates coincided with the monthly pay days and other testimony, taken for money advanced lessees by their landlords, to enable them to make payment of wages to miners; but this transaction is outside the contract, and constitutes only a loan, and gives no right to enforce payment, under any stipulation of the contract, out of the appraised

value of the property. This leaves the lessees in actual default, by breach of their covenants, at the date of the assignment, of, at least, \$102,000. As the appraised value of the improvements was \$100,621.58, if the lessors had the right to appropriate in payment of this the money the lessees were in default, the verdict for defendants was right. The default existed at the date of the assignment. The right in the lessors to forfeit the lease and resume possession then existed. The voluntary act of the lessees in making an assignment could not deprive them of this right. It might as well be argued that the vendee of land under articles, being in default in the purchase money, could defeat the vendor's right to bring ejectment to enforce payment by an assignment of his equitable estate for benefit of creditors.

The lessors' right to forfeit and re-enter for default of lessees preceded the assignment, and they, by reason thereof, being in possession of both land and improvements, then invoked in their favor section 19, and became purchasers of the improvements at the appraised value. It is stipulated in this section that, if the lessors shall not elect to take the improvement at the valuation, the lessees shall have the right to take them at the valuation from the land, "provided the said lessees have fully performed and complied with all the stipulations, terms, covenants, and agreements herein contained by them to be kept and performed." Then note further (section 24): "And the said lessees shall take, hold and enjoy the privileges hereby granted under and subject to the terms, payments, reservations, conditions, restrictions, and regulations herein stated." Then the last part of section 25: "And no determination of this lease, or taking or receiving possession of said premises, shall deprive the lessors, their heirs or assigns, of any action or remedy against the said lessees, their executors, administrators or assigns, for any damage for breach of any condition, covenant, promise or agreement by them in this agreement entered into and made, for any rent or sums of money that may be due and unpaid." There are other stipulations of like import, all going to show that the intent of the parties was that, if the lessees took the improvements at the appraisement, they could remove them on making good every default. If the lessors took them, the lessees had a right to receive the purchase money,—all of it if they were not in default; if in default, so much as was in excess of what was unpaid. As their default here exceeded the appraisement, there is nothing to be paid them.

The whole argument of appellant is based on the assumption that, by the lessees' deed of assignment, the assignee acquired a legal right, and the creditors an equity, superior to those of the assignors as fixed and limited by their contract. This cannot be. As is said in *Re Fulton's Estate*, 51 Pa. St. 211:

"Perhaps nothing is better settled in this state by uniform and numerous decisions than this: that a voluntary assignee is the mere representative of the debtor, enjoying his rights only, and no others, and is bound where he would be bound."

We are of opinion: (1) The lessees had failed in the performance of their covenants at the date of the assignment, and, by reason of their default, there was due the lessors at least \$102,000; (2) that neither the lessees nor their assignees had any right to receive any part of the appraisement money, because the amount thereof was less than was due the landlords from the tenants under the dependent covenants. The judgment is affirmed.

(177 Pa. St. 66)

MEIGS et al. v. MILLIGAN.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

DEED—BINDING RESTRICTIONS.

A covenant on the part of the grantee of one of two adjoining lots not to erect any building or part of a building or other obstruction within a certain distance of the street line, except a bath house and privy and walls or fences not exceeding eight feet in height from the level of the ground, binds the grantee not to erect a bath house exceeding eight feet in height as an addition to his house within such distance.

Appeal from court of common pleas, Philadelphia county.

Suit by Harry J. Meigs and others against William Milligan. There was a decree for plaintiffs, and defendant appeals. Affirmed.

Alex. Simpson, Jr., and Robert T. Corson, for appellant. John Samuel, for appellees.

STERRETT, C. J. After this cause was regularly at issue, it was agreed by the parties that certain facts, recited in their statement filed, shall "have the same force and effect as if duly proven and found according to equity practice," and that said facts shall "be a substitute for all allegations of fact in the bill and answer," and, further, that said last-mentioned allegations of fact "shall not be evidence for any purpose." The case was accordingly heard and disposed of on the substituted facts recited in said statement, and the sole question is whether upon those admitted facts the learned court erred in entering the decree from which the defendant has appealed.

Without referring in detail to all the recitals contained in the statement, it appears in the first and second paragraphs thereof that plaintiffs are the owners in fee of premises No. 1208 Walnut street, and the defendant, William Milligan, is the owner, by deed of July 10, 1894, of the adjoining house and lot, No. 1210 Walnut street, immediately west of plaintiffs' house and lot. The facts recited in the third and in the first sentence of the fourth paragraph show that by regular deeds of conveyance the title in fee to premises Nos. 1208 and 1210 Walnut street be-

came vested in Charles D. Meigs prior to July 1, 1854. On that day, as recited in the residue of the fourth paragraph, "Charles D. Meigs, being then owner of Nos. 1208 and 1210 Walnut street, conveyed No. 1210 Walnut street to John Forsyth Meigs in fee, by deed duly recorded, which recited the condition set forth in paragraph 3, and contained the following covenant: 'And the said John Forsyth Meigs doth for himself, his heirs and assigns, covenant, promise, and agree to and with the said Charles D. Meigs, his heirs and assigns, owners of the messuage and lot of ground adjoining the above described and granted lot on the east, that he, the said John Forsyth Meigs, his heirs and assigns, shall not and will not, at any time or times hereafter, erect or put up, or cause or suffer to be erected or put up, any building or part of a building or other obstruction except a bath house and privy and walls or fences not exceeding eight feet in height from the level of the ground, on the said above described and granted lot of ground, further south than fifty-nine feet from the original line of the said Walnut street.' On August 5, 1865, Charles D. Meigs conveyed No. 1208 Walnut street to John Forsyth Meigs, by deed duly recorded, under and through which plaintiffs own that lot. And on same day John Forsyth Meigs conveyed No. 1210 Walnut street to Charles D. Meigs, by deed duly recorded, under and through which the defendant owns that lot. This deed, and all the subsequent conveyances under which the defendant derives title, recite at length the conditions in the deed of 1828 (quoted in paragraph 3), and also the covenant of John Forsyth Meigs (above quoted), and all contain a recital, immediately after the clause of habendum et tenendum, that they are made 'under and subject to the above-mentioned conditions' as the same are above particularly mentioned." It is further agreed, *inter alia*, in paragraphs 6 and 8, that in August, 1894, the defendant commenced to construct a bath house jutting out from the rear wall of his house at or near the level of the second story, and extending up over his own lot more than 9 feet above said level. This structure—nearly 9 feet deep, 6 feet wide, and over 9 feet high—is more than 8 feet above the level of the ground, and more than 59 feet from the original south line of Walnut street. Immediately upon discovering defendant's intention to construct this bath house, plaintiffs warned him to desist, and thereupon filed their bill praying for an injunction, etc.

On behalf of defendant it was contended in the court below and here that the structure in question, which was completed and fitted up for a bath room or house, is not within the inhibition of the building restriction above quoted, because "a bath house" is one of the structures excepted from its operation, and the qualifying words, "not exceeding eight feet in height," etc., apply

only to inclosing "walls or fences," and not to either of the other structures, "bath house and privy," specified in the same exception. The learned judge of the common pleas came to a different conclusion, and, holding that the structure in question was prohibited by the building restriction, he accordingly entered the decree from which this appeal was taken. In thus construing the covenant running with the land, we think he was clearly right. Our consideration of the facts presented in the statement above referred to has satisfied us that the purpose of the parties was to create an easement of light and air in favor of plaintiffs' lot by imposing the same on the lot now owned by the defendant, and to that end the covenant above quoted was incorporated in the deed. This is substantially the construction put upon the restriction clause by the learned judge, and his decree should not be disturbed. Decree affirmed, and appeal dismissed, at appellant's costs.

(177 Pa. St. 112)

COMMONWEALTH *ex rel.* GRAHAM, Dist. Atty., *v.* DE CAMP.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

MUNICIPAL CORPORATIONS—OFFICERS CONTRACTING WITH CITY—STATUTE—REPEAL.

1. The secretary, who is also a stockholder, of a corporation having a contract for the lighting of a city, is within the prohibition of Crimes Act 1860, § 66, prohibiting any councilman from being interested in any contract with the city, though he was elected councilman after the execution of the contract.

2. Crimes Act 1860, § 66, prohibiting, under penalty of forfeiture of office and fine, any councilman from being interested in any contract with his city, was not impliedly repealed, as to cities of the first class, by the Bullitt bill (Act June 1, 1885, art. 14, § 1), entitled "An act to provide for the better government of cities of the first class," which enacts that if any councilman, during the term for which he shall have been elected, acquire an interest in any contract with the city, he shall forfeit his office.

Quo warranto, on the relation of George S. Graham, Esq., district attorney, against Andrew J. De Camp. From a judgment of ouster, defendant appeals. Affirmed.

George Wharton Pepper, for appellant. Clinton Rogers Woodruff, Joseph P. McCullen, David Wallerstein, and George S. Graham, for the Commonwealth.

STERRETT, C. J. This appeal is from the judgment of ouster entered against the defendant upon facts set forth in the suggestion of the commonwealth, and admitted by the defendant's demurrer and refusal to answer. In December, 1894, the Brush Electric Light Company, of which corporation the defendant then was and continued to be a stockholder, entered into a contract with the city of Philadelphia to furnish the municipality with electric light during the year 1895. That contract was evidenced by a written agreement, afterwards executed on behalf of the electric light company, by its president, Thomas Dolan, and

its secretary, the defendant. In February, 1895, the latter was elected to the office of common councilman in said city, and assumed the duties of that office on the first Monday of April following. It was claimed by the commonwealth that according to the true intent and meaning of the sixty-sixth section of the crimes act of March, 1860 (Purd. Dig. p. 532, pl. 351), the defendant was interested in said contract, and had no right to assume the duties of common councilman or continue to exercise the same. He demurred to the suggestion, and assigned as causes therefor (1) that he is not within the operation of section 66, above referred to; (2) that said section is superseded by the act of June 1, 1885; and (3) that he is not within the language or spirit of the act of 1885. The demurrer was overruled, and he was ordered to answer within 20 days. Having failed to comply with that order, judgment of ouster was entered, and he was enjoined from exercising or claiming to exercise the duties of the office of common councilman. Hence this appeal.

The first three specifications substantially charge error in overruling the demurrer, and in deciding that defendant was interested in the contract made by the city with the Brush Electric Light Company, within the meaning of the section under consideration, and may be considered together. Section 66 is virtually a transcript of sections 1 and 2 of the act of April 26, 1855. As was doubtless intended by the revisers of our Criminal Code, its scope is broad and comprehensive. Speaking of it and its cognate sections, they say: "They are generalized so as to meet cases supposed now not to be within their purview." They embrace breaches of various trust relations, which were, at least per se, offenses against good morals, and the evident legislative purpose was to make them also criminal offenses. Without referring at length to the several provisions of the section, it will be seen that the first clause thereof declares, among other things, that no councilman of any municipality shall at the same time be treasurer, secretary, or other officer, etc., or be surety for such officer, under the penalty therein prescribed. This provision was fully considered by this court in *Com. v. Allen*, 70 Pa. St. 465; and the penalty was enforced against two of the defendants by judgment of ouster from the office of councilman, because they were sureties on the official bond of the then city treasurer. After holding that the defendants in that case fell literally within the terms of the law forbidding a councilman to be, at the same time, surety of the city treasurer, it was said: "He cannot at one and the same time be both. While the bond lasts, the relation of principal and surety continues, and in becoming councilman the wrong relation begins. He is then surety and councilman at the same time, and, as a consequence, the law forfeits the office. It is the purpose of the law to cut off all opportunities for the councilman to aid his principal in the bond, either by doing or

forbearing to do that which duty would require, but which self-interest might forbid." The defendant in the present case is just as clearly within the prohibition of the second clause as the defendants in the case referred to were within the first clause of the section under consideration. When he entered upon the discharge of his duties as councilman, he was interested, as an officer and stockholder of the Brush Electric Light Company, in the contract which it had made with the city to supply electric light during the year 1895. The facts establishing that interest were admitted by the demurrer as well as by defendant's refusal to answer. The illegal relation, which, among other things, is forbidden by the second clause of the section, began the moment he assumed to act as councilman, and it continued until he was ousted from the office. Whether such relation should have been declared illegal or not was purely a legislative question. It is enough for us to know that the legislature, more than 36 years ago, declared that and similar relations illegal, and punishable by removal from office, indictment, etc. Without further elaboration, it is sufficient to say that the undisputed facts clearly bring the defendant's case within the terms of the section, and fully justified the court in ousting him from the office of councilman, etc., unless the section under which the proceedings were had was repealed or supplied by subsequent legislation.

The remaining specifications involve substantially the proposition so ably and ingeniously contended for by the learned counsel for defendant, viz. that the section in question was repealed, as to cities of the first class, by section 1 of article 14 of the act of June 1, 1885, known as the "Bullitt Bill." It is not claimed that it was repealed in express terms, but the contention is that it was impliedly repealed by that act, on the principle that a subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, must necessarily operate as a repeal of the former. While the soundness of the principle thus invoked in support of the alleged repeal need not be questioned, we are clearly of opinion that it is inapplicable to the case under consideration. There is nothing in the act of 1885, or in the facts of the case, to warrant the inference that said act, or any part thereof, is a revision of the whole subject of section 66 of the crimes act, or that it was ever intended as a substitute therefor. The object of the latter, as an integral part of the general criminal code of the commonwealth, is manifestly very different from that of the Bullitt bill, which is entitled "An act to provide for the better government of cities of the first class in this commonwealth." The subject with which it deals is the administrative government of cities of the first class, and its manifest purpose was to reform existing abuses in the executive department of the only city of that class. It contains nothing that is indicative of legisla-

tive intention to revise or repeal our Criminal Code, or any part thereof. In the absence of any repealing clause, it is essentially necessary, to the implication of repeal, that the objects of the two statutes be the same. If they are not, both statutes will stand, though they may refer to the same subject. *U. S. v. Claffin*, 97 U. S. 548. It is well settled that the leaning of all courts is strongly against repealing the positive provisions of a former statute by construction. There must be such a manifest and total repugnance that the two enactments cannot both stand. It is not enough that there is a discrepancy between different parts of a system of legislation on the same general subject; there must be a conflict between different acts on the same specific subject. An earlier statute is repealed only in those particulars wherein it is clearly inconsistent and irreconcilable with the later enactment. Illustrations of these familiar principles may be found in many of our cases, among the more recent of which are *Hendrix's Account*, 146 Pa. St. 285, 23 Atl. 435; *Com. v. Wilkes Barre & S. Ry. Co.*, 162 Pa. St. 614, 29 Atl. 696; *Danville State Hospital v. Bellefonte Borough Overseers of the Poor*, 163 Pa. St. 175, 29 Atl. 901; *In re West Chester Alley*, 160 Pa. St. 89, 28 Atl. 506; *Trust Co. v. Fricke*, 152 Pa. St. 231, 25 Atl. 530; *Hanover Borough's Appeal*, 150 Pa. St. 202, 24 Atl. 669; *Sifred v. Com.*, 104 Pa. St. 179. Independently of everything else, the defendant's case is not fairly within the terms of the act of 1885, while it is clearly within the provisions of the act of 1860. There is nothing in any of the specifications of error that requires further notice. Neither of them is sustained.

(177 Pa. St. 175)

HERRINGTON v. GUERNSEY et al.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

ACTIONS ON CONTRACT—INSTRUCTIONS.

1. On an issue as to whether plaintiff was to sell pianos for defendants on commission at their risk, as testified to by him, or was to look for his commission to the payments made by the purchaser, as sworn to by one of the defendants, one R. testified that all he heard of the agreement was that plaintiff should pay his own expenses, and receive certain commissions, while in another part of his testimony R. stated that the sales were to be at the risk of the defendants, though he admitted that such was contrary to the usage of the trade. *Held*, that a charge that plaintiff's contention was corroborated by R., without alluding to the contradictions in R.'s testimony, or to that portion relating to the usage of the trade, was inadequate, and erroneous.

2. A further charge in the same connection that "plaintiff alleges one agreement of employment, and the defendants, or one of the defendants, positively denies that agreement," is misleading and erroneous, as leading the jury to believe that defendants' version of the contract rested on the unsupported testimony of one of them.

Appeal from court of common pleas, Lackawanna county.

Assumpsit by A. B. Herrington against M. W. and H. D. Guernsey, co-partners as Guernsey Bros., to recover commissions on the sale

of pianos and organs. Judgment for plaintiff, and defendants appeal. Reversed.

S. B. Price and C. H. Welles, for appellants. Everett Warren and Henry A. Knapp, for appellee.

McCOLLUM, J. All the specifications of error relate to the charge, and the contention based upon them is that it was inadequate and misleading. In order to determine whether this contention is well founded, we must consider, in connection with the charge, the issues of fact made by the conflicting claims, and the evidence submitted in support of and against them. The plaintiff claimed that under an oral agreement with the defendants he sold for them, and at their risk, pianos and organs, for a commission of 15 per cent. on his sales of pianos, and a commission of 20 per cent. on his sales of organs; while the defendants claimed that he guaranteed the sales, and that their liability for commissions was measured by the amounts received on account of them. The defendants also claimed that they had a settlement with the plaintiff on the 23d of August, 1890, of all accounts between them to that date, which settlement disclosed a balance in his favor of \$179, that was promptly satisfied by a sale to him of three organs for \$170, a cash payment of \$3, and a discount of \$6. It was further claimed by the defendants that the settlement was made by the parties with a correctly itemized statement before them of the accounts as they appeared on the defendants' books; that these accounts were kept in accordance with the agreement between the parties, and that they were so kept was recognized and admitted by the plaintiff. The plaintiff conceded that he had a settlement with the defendants at the time mentioned by them, but he characterized it as a "preliminary settlement," and his testimony explanative of it was vague and unsatisfactory. He said, however, that he did not remember of seeing the itemized statement referred to as before and examined by the parties when they made the settlement, and that he never agreed that any portion of the commissions with which he was credited should be charged back to him. The defendants' claim respecting the settlement was supported by their own testimony and that of their bookkeeper, while the plaintiff's qualified denial of it had no support except in his own uncorroborated evidence. This claim was important, because, if established, it would have eliminated from the case every item of the plaintiff's account which antedated the settlement. It was consistent with, and the evidence supporting it was corroborative of, the claim of the defendants respecting the agreement under which the sales were made. The only direct support of the last-mentioned claim was in the testimony of the defendants, and this was opposed by the testimony of the plain-

tiff. It was said by the court in the charge that the latter was corroborated by Rockwell, that, as he remembered the agreement, "the sales were to be at the risk of the defendants." It should have been stated in this connection that Rockwell, when questioned about the agreement between the parties, said: "All that I can remember very positively was that he [the plaintiff] was to work for them [the defendants] on the road. He was to pay his own expenses. That he was not to have a regular salary, but was to receive commissions. The commissions were to be fifteen per cent. on pianos and twenty per cent. on organs." And, when further questioned respecting it, he said, "There was nothing said about anything, in my hearing, except that he was to have fifteen and twenty per cent." It was also said in the charge that "the plaintiff alleges one agreement of employment, and the defendants, or one of the defendants, positively denies that agreement." The charge upon this branch of the case was inadequate, because, while it called the attention of the jury to Rockwell's testimony, it did not allude to the contradictions in it, or to that portion of it in which he conceded that the agreement claimed by the plaintiff was not in accordance with the custom of the trade. It was misleading, because the jury might have reasonably concluded from it that the defendants' version of the agreement rested upon the uncorroborated testimony of one of them.

The usage of the trade, as explained by Rockwell, was to allow the agent to retain one-half the amount paid on the instrument until the amounts so retained equalled the commission he was to have for selling it. If his commission was 20 per cent. on an instrument sold for \$100, payable in monthly installments of \$5, the payment of eight installments, divided as above stated, would satisfy it. If, however, after the payment of two installments, the instrument was surrendered to the dealer on account of the purchaser's inability to pay for it, the agent would receive but \$5. In other words, the agent looked for his commission to the payments made by the purchaser. An agreement which ignored the usual custom of the trade, which gave the plaintiff liberal commissions, and allowed him to sell to whom he pleased at the risks of the defendants, and which required them to pay the full commission when the amount realized from a sale was not equal to one-fourth of it, was an anomaly. A majority of the so-called "sales" on which commissions were claimed and recovered were leases of instruments which were returned to the defendants. These instruments were valued at \$3,680. The whole amount paid upon them before they were returned was \$609.75, and the plaintiff's commissions were \$583.49. The payments made on nine of these instruments amounted to \$102, and the commissions to \$383.77. These figures show a loss to the defendants on nine

instruments of \$221.77, and to this may be added the cost of delivery, and the difference in market value between new and second-hand instruments. The figures are based on a statement in the appellants' printed argument, which is not denied by the appellee. The lease of an instrument is not a sale of it. It is true that the lease gave to the lessee an option to purchase at a price stated therein, but it did not make him the owner of the instrument. There is a broad and plain distinction between a sale of property and a lease of it, and, strictly speaking, an agreement for a commission on the former would not include or apply to the latter. But, as the parties made no distinction between them, and the business of the defendants included leases as well as sales, we may fairly infer that the commission was the same in each case. We think that the court, having referred in its charge to a part of the evidence affecting the issue concerning the agreement, should have directed the attention of the jury to all the evidence and circumstances affecting it, and that its failure to do so was prejudicial to the defendants' cause. We have already mentioned some of the omitted matters, and to these we may add the obvious inadequacy of the reference in the charge to the testimony of Miss Mills. The fifth specification of error is sustained. Judgment reversed, and *venire facias de novo* awarded.

(177 Pa. St. 208)

WANNER et al. v. SNYDER.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)
WILLS—TRUST ESTATE—LIABILITY FOR TRUSTEE'S DEBTS.

1. A bequest by testatrix of the entire income of her residuary estate directly to her husband, with power to collect and enjoy the same for life, to occupy the real estate, and lease it as he may deem proper, and to collect the proceeds of paid-off securities, and reinvest them with the assent of the executors, gives the legatee an absolute life estate, subject to the claims of his creditors, though the will declares that it shall not be liable for the legatee's debts.

2. Testatrix devised the entire income of her residuary estate directly to her husband, without the intervention of a trustee, with power to collect and enjoy the same during his life, free from liability for his debts, to occupy the real estate and lease it for the purposes of ore, etc., as he might see fit, and to collect the proceeds of paid-off securities, and reinvest the same with the assent of the executors. It was further provided that, out of said income, the legatee should educate one K., and pay her a specified annual sum while she remained unmarried. *Held*, that the absolute life ownership of the income which the legatee would otherwise have had was taken away by the charge in favor of K., so that no part of such income was liable for the legatee's debts. *Hahn v. Hutchinson*, 28 Atl. 167, 159 Pa. St. 133, and *Ehrisman v. Sener*, 29 Atl. 719, 162 Pa. St. 577, distinguished.

3. A married woman may create, by will, a valid spendthrift trust in favor of her husband.

Appeal from court of common pleas, Berks county; James N. Ermentrout, Judge.

Application by Daniel R. Wanner and others for a rule on Daniel K. Snyder to show cause

why a writ should not be awarded to sequester the rents and profits of certain land levied on by execution against said Snyder. From a judgment making the rule absolute, defendant appeals. Reversed.

The fourth item in the will of testatrix, referred to in the opinion, was as follows: "Fourth. I give, devise, and bequeath unto my beloved husband, Daniel K. Snyder, the interest and income and the rents, issues, and profits of the rest and residue of my estate, real, personal, and mixed, to have, collect, use, and enjoy the same for and during the term of his natural life, and free and discharged from and so as not to be in any way liable for his debts, now contracted, or which he may hereafter contract, and from all judicial process to levy upon and attach the same for the payment thereof; and I do further direct that the said Daniel K. Snyder may take possession of the property hereby bequeathed and devised to him without being required to give security for its safe-keeping, and shall also have the right, in the exercise of his enjoyment of the real estate hereby devised to him, to lease the same for the purpose of the ore, sand, stone, etc., as he may see proper. And in case any of the securities should be paid off, or it should become proper to change any of them, I do hereby authorize the said Daniel K. Snyder to collect the same, but to reinvest the proceeds thereof in other safe securities, with the assent of the executors hereinafter named."

A. G. Green and Isaac Hlester, for appellant.
Rothermel Bros., for appellees.

GREEN, J. It must be conceded that the terms of the will of Christina Snyder in relation to the gift of income to her husband are so entirely similar to the provisions of the will which we considered in the case of Hahn v. Hutchinson, 159 Pa. St. 133, 28 Atl. 167, that at first glance the decision in that case appears to control this. The entire income of the residue of the estate of the testatrix is given to her husband directly. He also has the right to take possession of the real estate of the decedent, and to occupy it, or to lease it, "for the purpose of ore, sand, stone, etc., as he may see proper." If any of the securities were paid off, he was authorized to collect the same, and to reinvest the money thus paid with the assent of the executors. No trustee was appointed to take the legal title to the estate, and pay over the income to the legatee. On the contrary, the legatee was to hold the legal, as well as the equitable, title to the income in his own right. Not even did the executors have any right to collect or receive any part of the income, so that they could pay it to the legatee. It is true, the testatrix directed that it was to be free from any liability for his debts, but that alone would not alter the character of his estate in the income. If it was exclusively his own property, unaffected by any other considerations, such a direction would not debar his creditors from having access to it. We

considered the subject fully in Hahn v. Hutchinson, and held that the estate of the legatee, although it endured during his life only, and although the will provided that the income should not be liable for any of the debts of the legatee, present or future, was nevertheless liable for his debts; and we sustained a sequestration of the income for that purpose. The decision in Hahn v. Hutchinson was based upon the absolute ownership of the income by the legatee. We held that there could be no valid spendthrift trust where the trustee is also the cestui que trust, with the absolute ownership of the subject of the trust, whether income or principal. We followed and applied that ruling in the subsequent case of Ehrisman v. Sener, 162 Pa. St. 577, 29 Atl. 719, where, also, the devise was by a wife to her husband. The estate, real and personal, was devised to the husband for life, with an express direction that no incumbrances or liens should be placed upon the property during the life of the husband, and that it should not be liable for any debts he might contract. But, notwithstanding the general similarity of the case at bar with those just cited, there is one most important and material feature in which it radically differs from them both. The will of the testatrix contains the following provision: "Sixth. I also order and direct that my husband, Daniel K. Snyder, shall properly educate Katie Glassmoyer, above named, education to be given her before she reaches her eighteenth year; and, in case of his death before such education is given, then I direct my hereinafter named executors shall make proper provision therefor out of my estate." In addition to the foregoing, the second codicil to the will contains the following direction: "I further order and direct my husband, Daniel K. Snyder, shall pay, out of the devise and bequest by me to him made, unto Kate Glassmoyer, annually, the sum of one hundred and fifty dollars, to be paid to her equally in four quarterly payments so long as she remains single; and I direct that my executors in my will named shall see to it that the quarterly payments are properly made." It is at once obvious that the whole income of the estate given to the husband is not his absolutely, but is subject to two serious and controlling charges. He must educate Kate Glassmoyer, and he must pay her \$150 a year as long as she remains single; and he must do these things out of the income derived from his wife's estate under her will. If that income is subject to the claims of his creditors, he cannot perform his duties as legatee of the income, and the will is defeated. In order to perform those duties, he must receive and control the entire income of the estate, and he must do it in the manner directed by the will. It follows hence that he has no absolute estate or ownership of the income in the sense which makes it liable for his debts, and the case, therefore, is not within the line of decisions above cited. On the contrary, we think the case is within the reasoning in Holdship v. Paterson, 7 Watts, 547, Ashurst v. Given, 5 Watts

& S. 323, and *Brown v. Williamson*, 36 Pa. St. 338, the first two of which go much further in the line of protection for such interests against the claims of creditors than it is necessary to go in this instance. In the case of *Huber's Appeal*, 80 Pa. St. 348, we said: "The extent and character of a devisee's estate depend on the qualities stamped on it, and the powers conferred over it, by the testator, and not alone in the parties in whom the title is formally vested." Thus, it is just as manifest that under this will the education and comfortable support of Kate Glassmoyer were to be provided out of the income given to Daniel K. Snyder, as that his support was to be provided out of the same fund. For aught that appears on this record, her support and education might require the whole of the income; but, whether that is so or not, a considerable part of the income would be required for that purpose, and that circumstance alone takes away the character of absolute ownership of the income from Daniel K. Snyder, and without that quality his creditors have no standing against any part of the income.

We do not approve of that portion of the opinion of the learned court below in which it was held that a married woman cannot make a valid spendthrift trust in favor of her husband. On that subject we differ altogether with the views expressed in the opinion.

The decree of the court below is reversed, the rule for the appointment of a sequestrator is discharged, and the record is remitted; all costs to be paid by the appellee.

(177 Pa. St. 224)

KLEIN v. LIVINGSTON CLUB.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)
INTOXICATING LIQUORS — USE IN CLUBS — INJUNCTION.

1. A member of a club may maintain suit to enjoin its commission of an alleged indictable misdemeanor, where commission of the act, if it be such a misdemeanor, will probably damage property rights of his in the club.

2. The furnishing by a club to its members of liquor, each paying the cost of what he consumes, is not a sale, within Act May 13, 1887, making sale of liquor without license illegal.

Williams, J., dissenting.

Appeal from court of common pleas, Lehigh county.

Suit by William R. Klein against the Livingston Club for an injunction. Decree for defendant. Plaintiff appeals. Affirmed.

James B. Deshler, for appellant. Edward Harvey, R. E. Wright, and M. L. Kauffman, for appellee.

DEAN, J. The plaintiff is a member in good standing of the Livingston Club of Allentown, Lehigh county. The club was duly incorporated April 7, 1890. Its purpose, as declared by its articles of association, is the social enjoyment of its members by friendly intercourse. It is the owner of a lot in the city, on which is erected a valuable

brick building, containing parlors, reception room, library room, banquet hall, dining rooms, kitchen, committee rooms, billiard rooms, and private rooms occupied by the club steward and servants. The cost of the buildings and grounds was \$23,000. The membership is limited to 100 residents of the city, or resident not exceeding one mile beyond, and all must be over 21 years of age. There are no sleeping rooms in the building for members or guests, but some of the members, not having families, make the club their home during club hours. No games of chance are permitted. The affairs of the club are controlled by a president, vice president, secretary, treasurer, and 12 governors, known as the "governing committee." Immediately before the filing of this bill, this committee adopted this resolution: "Resolved, that the steward be directed to purchase a stock of spirituous and malt liquors, &c., and furnish the same to the members of this club, and receive pay therefor from them, only, and turn over the moneys so received to the treasurer of said club, which money shall be again used to replenish the liquors, &c., so furnished to its members, and in the purchasing of eatables, cigars, &c., and also for the defraying of the expenses connected therewith." Plaintiff admits in his bill that the club receives no profit on liquors so furnished, but he avers that the steward is about to carry out the directions of the resolution; that the proposed action will be a violation of the license laws of the commonwealth, thus putting in peril the charter of the club, which may be forfeited, and, in consequence, he, as a member having an interest in the club property, will be thereby damaged. He therefore prays for an injunction restraining the steward and the governors from carrying out the resolution.

The purpose of the bill is to enjoin defendant from the commission of an alleged indictable misdemeanor, because the misdemeanor, if committed, will probably damage his property rights. A bill having for its sole purpose an injunction against crime or misdemeanor, it is well settled, does not lie; but it is just as well settled that equity will interfere if the alleged criminal acts go further, and operate to the destruction of or diminution of value of property. This case and that of *Manderson v. Bank*, 28 Pa. St. 379, are alike in their essential facts. In the bank case the law authorized the directors to discount paper at a rate not exceeding one-half of 1 per cent. a month. *Manderson*, a stockholder, averred that the president and cashier were in the habit of meeting after banking hours, and passing paper for discount at a rate exceeding the lawful rate; thus violating the usury laws, and subjecting the bank to the penalty therefor, and putting in peril the bank's charter. Therefore his property interest in the bank was endangered. It was decided that a

stockholder had the right to prevent by injunction a practice which might produce such injury to him, and the writ was awarded. In *Sparhawk v. Railway Co.*, 54 Pa. St. 401, the writ was refused by a majority of the court, because the sole purpose of the bill was to prevent an alleged violation of the act of 1794, in which question the complainant had no other interest than that of the public generally. If either the commission of the act here alleged or its criminality depended on the evidence of witnesses, we might well leave it to the proper criminal court for determination. The hand of a chancellor would not be put forth to restrain the commission of what might not be intended as, or what, if actually done, might not be, criminal, because of the absence of criminal intent. But here the declared purpose to commit the act complained of is admitted. Whether it be criminal, if committed, is a pure question of law, for defendant's only plea is that the proposed act is not in violation of law.

Would the act, when committed, be a sale of liquor? That is the only question, for it is not alleged that it is the purpose of defendant to furnish liquor to persons of intemperate habits, to those visibly intoxicated, or to minors. The act of May 13, 1887, known as the "Brooks Law," is entitled "An act to restrain and regulate the sale of vinous and spirituous, malt or brewed liquors, or any admixture thereof." This is a license act, and prohibits the keeping of any house, room, or place, inn, or tavern for sale of liquors, without a license first had and obtained. It further prescribes the mode of procedure, in all its details, to obtain license to sell, and prohibits the sale or gift either by licensed dealers or unlicensed dealers on certain days and to certain classes. Our Brother Williams, in *Com. v. Carey*, 151 Pa. St. 371, 25 Atl. 141, referring to the title of the act and the body of it, has so clearly stated its purpose that his reasoning and conclusion are almost as demonstrative of the truth as the solution of a problem in geometry. He says: "There is no hint of a purpose to restrain and regulate the use of them by private citizens in their own dwellings. We look next into the body of the act, and there we find a comprehensive license system. We have, first, a restriction of the sale to persons holding licenses, and punishments prescribed for sales by unlicensed persons; next, the proceedings to obtain a license; third, provisions regulating the exercise of judicial discretion in granting or refusing licenses; fourth, penalties for violations of the law by licensed dealers; fifth, exceptions from the power to sell conferred by a license, as to certain days and certain classes of persons. The seventeenth section belongs to this class of provisions. To the excepted classes and upon the excepted days no man can lawfully sell or furnish for use as a beverage any intoxicating liquors. The unlicensed cannot, for the traffic is wholly forbidden to them. The li-

censed cannot, for an express exception as to these is made in the law under which the license is granted. If, notwithstanding the prohibition, any person does sell or furnish contrary to the seventeenth section, his conduct is a misdemeanor, and the house, room, or place kept or maintained by him for such unlawful sales or furnishings may be abated as a public nuisance, under the provisions of the eighteenth section. These provisions are not applicable to the table or the personal habits of the citizens within the precincts of their own homes, and they cannot be extended by any known rule of interpretation so as to include them. The furnishing of liquors on Sunday, or to any of the excepted classes, that is made punishable, is a furnishing in evasion of the law forbidding sales. It would be of little avail to close the bars on election days if candidates might open rooms near the polls, and furnish liquors free to voters. It would not help the cause of good morals if those who were forbidden to sell on Sunday could, under some specious pretext, profess to supply their customers without charge on that day. But if, for reasons of health or habit, one chooses to supply his own table with his own liquors, for use by himself, his family, or his guests, on Sunday, there is not now, and, so far as I am aware, there has never been, in this state, any statute forbidding him to do so."

The Brooks law only reduced to a comprehensive system all the features of all the license laws at its date on our statute books. There is not in it, nor in any of the statutes which it replaces, a prohibition of the use of liquors in clubs, any more than there is a prohibition of its use in a family. No indictment for furnishing liquors to members of a club could be sustained unless the evidence showed beyond reasonable doubt that such furnishing constituted a sale. The statute being penal, it must be subject to a strict construction. We cannot extend it beyond its letter. If we, in construing the Brooks statute, adopt the settled rule of construction, consider the old law, the mischief, and the remedy, then we have these questions: The old law regulating and restraining the sale of liquors was disjointed or fragmentary, because it was made up of separate statutes passed at intervals of years, not seldom presenting conflicting provisions, and often provisions in conflict with special local laws. At the same time, there was a settled conviction in the public mind that the license laws did not produce the revenue that ought to have been exacted for the privilege of selling liquor. In view of the ineffectiveness of the old law, and the smallness of the revenue produced by it, the Brooks law was enacted. Its intention was to stop what, in the interests of good order, ought to be unlawful sales of liquor, and to exact a larger revenue from those sales made lawful by license. Probably, at the date of this act, club organizations wherein liquor was furnished, as here, had been in existence in large towns and cities for 50 years.

The legislature was not ignorant of the fact. If such use tended to disorder or bad morals, the legislature knew it. If such use was not of immoral tendency, yet was a luxury or privilege that would bear taxation and yield revenue, they knew that fact. Yet there are no words in the act which, by any possible construction, can be stretched into a prohibition of the use of liquor in clubs, or that can be deemed as requiring they shall be licensed. There is, in fact, no express legislation concerning this distinctive, open, notorious, long-existing use of liquor. The plain implication is that the consumption of liquor in clubs, as known to the legislature, was not deemed a sale. The general words of the law, however, make the sale of liquor without license illegal everywhere in the commonwealth; and whether this be a sale is now a judicial, and not a legislative, question.

The bill admits that the club will receive no profit on the liquors bought and consumed by the members, so that, as concerns this usual incident of a sale, it is not present. The club buys the liquors, and distributes them to the members. Those who drink them pay in proportion to the quantity drunk. The money for the purchase of the liquor in quantities from the liquor dealer comes out of the treasury of the club. Nothing in the shape of food or drink is distributed equally to the members. There is an equal distribution of light and heat. Members have like access to the reading rooms and library, but, when it comes to food and drink, each contributes to the common fund in proportion as he consumes. Some eat of terrapin and game, while others prefer less costly and plainer food. The member who is fond of terrapin contributes to the club the cost of it. It would be inequitable that the member who does not touch it should share in paying for it by an equal contribution. The same rule is enforced in regard to liquors. Some do not touch them. They pay nothing. Those who drink them pay. The purpose of the whole system is to distribute the advantages, comforts, and luxuries of the club among the members, so that there shall not be unequal contributions to the treasury which purchases them. They are all owners of the property when purchased in equal shares, and, if a division were then made, each would be entitled to an equal share of the liquor; but one consumes his share and that of others who do not drink liquor, and he puts back into the common treasury the value of the others' shares. Therefore, although by consumption the division is not equal, yet it is made equal by the contribution to the treasury. That has neither lost nor gained. Consequently, the distribution is equitable. Does this constitute a sale? We think not. There is no element of bargain, only a method of distribution of the common property. We are aware that there is and has been much difference of opinion among courts on the question. In England the transaction has been held no sale. *Graff v. Evans*, 8 Q. B. Div. 873. In a recent case in

Missouri (*State v. St. Louis Club*, 28 S. W. 604) the opinion contains a review of all the cases on the subject, and it is held to be no sale. In the still more recent case in New York court of appeals (*State v. Adelphi Club*, 43 N. E. 410, decided 7th of April last, and not yet officially reported in the books), all the judges concurred in pronouncing it no sale. The act then in force, and under which the indictment was framed and conviction had, prohibited the sale of spirituous liquors to be drunk upon the premises. There was no question as to the fact that, under substantially the same club rules as here, spirituous liquors were distributed to the members, and by them drunk upon the club premises, those drinking returning to the treasury the cost of the liquor. Black on *Intoxicating Liquors* (section 142), after citing the authorities from many states, comes to this conclusion: "Upon the whole, therefore, notwithstanding some conflicting rulings, the rational conclusion is that the intent must govern. On the one hand, if the object of the organization is merely to provide members with a convenient method of obtaining a drink whenever they desire it, or if the form of membership is no more than a pretense, so that any person, without discrimination, can procure liquor by signing his name in a book, or buying a ticket or a chip, thus enabling the buyer to conduct an illicit traffic, then it falls within the terms of the law. But, on the other hand, if the club is organized and conducted in good faith, with a limited and selected membership, really owning its property in common, and formed for social, literary, or other purposes, to which the furnishing of liquors to its members would be merely incidental, in the same way, to the same extent, that the supplying of dinners or daily papers might be, then it cannot be considered as within either the purpose or letter of the law." As before noticed, there could have been no special intent on part of the legislature to prohibit the act here complained of. There was a general intent to restrain the use of intoxicating liquor by prohibiting unlicensed sales thereof. If this were an unlicensed sale, under the guise of a club distribution, it would clearly be unlawful. The law would look through all disguises, and so pronounce it. But as, on the undisputed facts, we are of the opinion that the act apprehended by plaintiff is not a sale, there can be no violation of law which will imperil his property rights.

It has been argued that the effect of our decision, if against plaintiff, will be to deprive the licensed hotels of patronage to which they are impliedly entitled, by payment of heavy license fees under the Brooks law; that members of clubs will consume such liquors as they desire in their club rooms, instead of at licensed bars. This is not without force, but it should be addressed to the legislature, who seem for 50 years, in all the legislation on the liquor question, to have carefully refrained from prohibiting the furnishing of liquor to

club members by their clubs, as well as neglected to impose on them license fees. The decree is affirmed.

WILLIAMS, J., dissents.

(177 Pa. St. 301)

QUICKSALL et al. v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

OPENING OF STREETS—DAMAGES.

Under Act May 9, 1889 (P. L. 173), providing that any street laid out by a person in any plan of lots on lands owned by him, in case it has not been opened to or used by the public for 21 years next after the laying out of the same, shall not be opened, without the consent of the owner of the land on which it has been laid out, the municipality cannot, after such 21 years, open the street without compensation to the owner.

Appeal from court of common pleas, Philadelphia county.

From the awards of juries appointed to assess damages sustained by the opening of certain streets by the city of Philadelphia, appeals were taken by Edward Quicksall and Joseph Lee, owners of land as tenants in common, to the court of common pleas, where verdict was directed against them, and they again appeal. Reversed.

Samuel Wakeling, for appellants. E. Spencer Miller, Asst. City Sol., and John L. Kinsey, City Sol., for appellee.

FELL, J. The right contested is that of the plaintiffs to recover damages for the opening by the city of Ruan and Lelper streets. By reason of their purchase of lots bounded by the streets, the plaintiffs claim ownership of the land to the middle thereof. For many years stone has been quarried by them and their grantors from these lots, and from the beds of the streets; and at the time of the commencement of these proceedings the quarry had been worked to a depth varying from 40 to 80 feet. The streets were upon the public plan prior to the sale of the land in lots, and, as filled in by the city, they are not as high as the original surface of the ground. In 1847 the land in question was part of a tract of $5\frac{1}{2}$ acres owned by Peter and Rudolph Buckius. In that year they made a plan dividing the land into lots and streets. This plan was recorded November 6, 1847; and in January, 1848, the lots were sold at public sale. They were sold and conveyed according to the plan, and described as bounded by Ruan and Lelper streets, and these streets were mentioned in the deeds as having been "laid down on said plan for the accommodation of this and other lots." It is not disputed that the sale and conveyance of the lots passed the fee to the middle of the streets on which they fronted. Indeed, it could not be under the decisions in *Paul v. Carver*, 26 Pa. St. 223; *Cox v. Freedley*, 33 Pa. St. 124; *Baker v. Gas Co.*, 73 Pa. St. 116;

Falls v. Reis, 74 Pa. St. 489; *Firmstone v. Spaeter*, 150 Pa. St. 616, 25 Atl. 41. It is claimed, however, by the city, that these streets were dedicated to public use in 1847, and that consequently no damages can be recovered for their opening.

The sale of lots according to a plan which shows them to be on a street implies a grant or covenant to the purchaser that the street shall be forever open to the use of the public, and operates as a dedication of them to public use. The right passing to the purchaser is not the mere right that he may use the street, but that all persons may use it. *Dovaston v. Payne*, 2 Smith, Lead. Cas. 154; *McCall v. Davis*, 58 Pa. St. 431; *Davis v. Sabita*, 63 Pa. St. 90; *Transue v. Sell*, 105 Pa. St. 604; *In re Opening of Pearl Street*, 111 Pa. St. 565, 5 Atl. 432. In the case last cited, it was said that, when one "sells and conveys lots according to a plan which shows them to be on streets, he must be held to have stamped upon them the character of public streets. Not only can the purchaser of lots abutting thereon assert this character, but all others in the general plan may assert the same. The proprietor is in no condition to afterwards revoke this dedication." Such a dedication was said in *Heckerman v. Hummel*, 19 Pa. St. 64, to be a contract with the public. The distinction between the sale of lots according to a plan made by the owner upon which streets are laid out, and the mere reference in aid of description to streets projected by the municipality is manifest. In the former case the inference of dedication arises; in the latter it does not.

The dedication by the plaintiffs' grantors, in 1848, operated as a relinquishment of all claims for damages for the use of the land within the lines of the streets for street purposes; and no claim for damages can be sustained unless by reason of the act of May 9, 1889 (P. L. 173). The language of the act is: "That any street, lane or alley laid out by any person or persons in any village or town plot or plan of lots on lands owned by such person or persons, in case the same has not been opened to, or used by, the public for twenty-one years next after the laying out of the same, shall be and have no force and effect and shall not be opened without the consent of the owner or owners of the land on which the same has been, or shall be, laid out." The purpose of the act is to relieve land upon which streets have been laid out by the owner, but not opened or used for 21 years, from the servitude imposed. To what extent it may affect the rights of those who by purchase of lots within the tract, have acquired the right of the use of all the streets marked on the plan, we need not now inquire. We have before us only the question of the right of the municipality to open the streets without compensation by reason of the dedication in 1848. As against this right, the act establishes a limitation of time where none before existed. The streets were laid

out 44 years before the commencement of these proceedings. They have not been opened to or used by the public. During the whole of this time the beds of the streets have been in the possession of the abutting owners, and used by them for the purpose of quarrying stone. No possession or use was claimed by others. The case, we think, comes within the meaning of the act of 1889; and it is now too late for the city to assert the right founded upon the dedication in 1848. It follows that the cases should have been submitted to the jury. The judgment in each case is reversed, with a venire facias de novo.

(177 Pa. St. 292)

**CITY OF PHILADELPHIA to Use of
McCANN v. PHILADELPHIA
& R. R. CO.**

(Supreme Court of Pennsylvania. Oct. 5, 1896.)
**MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS
—ASSESSMENT OF BENEFITS—RAILROAD
PROPERTY.**

1. Under Act April 21, 1858, enacting that the real property of a railroad company, except the superstructure of the road and water stations, shall be subject to "taxation by ordinance for city purposes," such property is subject to assessments for street improvements.

2. Under Act April 21, 1858, enacting that the real property of a railroad company, except the "superstructure and water stations," shall be subject to taxation by ordinance for city purposes, land used by the company for a coal yard or ore terminal is subject to assessments for street improvements.

3. A judgment for an assessment for a street improvement against the coal yard and ore terminal of a railroad company should not be denied, as the purchaser would take the land subject to the easement on the part of the company for the roadbed running through the yard necessary to the existence of the company as a common carrier, which was not subject to assessment.

Mitchell, J., dissenting.

Appeal from court of common pleas, Philadelphia county.

Action by the city of Philadelphia, to the use of John McCann, against the Philadelphia & Reading Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Thomas Hart, Jr., for appellant. John M. Ridings, for appellee.

DEAN, J. The defendant is the owner of a large lot of ground in the city of Philadelphia, fronting on Richmond street about 1,547 feet, and extending back to the Port Warden's line on the Delaware river. Against this property the city filed a municipal lien for part of the cost of constructing a sewer on Richmond street, between Cumberland and William streets. Sci. fa. was issued on the lien, to which defendant made affidavit of defense, of which this is the material averment: "The said large lot of ground is entirely and exclusively used as the tide-water coal and iron ore terminal of the Philadelphia and Reading Railroad Company. As appears by the said plan, which is an accurate representation of the place, it is covered throughout with a great

number of diverging railroad tracks, the said main line entering the property near Somerset street, and spreading out and running to the ends of the wharves, some twenty in number, whereby coal is shipped into vessels for export, and iron ore is received from vessels bringing the same here, and loaded into the cars for inland transportation. Engines traverse all the tracks as upon other parts of the railroad. The said lot of ground is an absolutely necessary part of the railroad of the said company." There was a rule for judgment for want of a sufficient affidavit of defense, which the court below, in opinion filed, made absolute, and defendant appeals.

It was decided that the roadbed of a railroad is not, as land, subject to general taxation, nor to special assessments for city improvements, in *City of Philadelphia v. Philadelphia, W. & B. R. Co.*, 33 Pa. St. 41. This case was decided in 1856, but not reported and published until 1859, so that the act of April 21, 1858, could not have been before the court. The facts of the case show that it was a scire facias on a municipal lien for paving along the railroad, which occupied a strip of land 2,046 feet long by 47 feet wide. The court below says: "The single question is whether the remedy by scire facias on the claim filed can be enforced against a corporate body clothed with the usual railway franchise. The process which the plaintiff seeks to use is directed wholly against the soil of the railway, together with the structure of the railway itself; and, upon a judgment upon it for the plaintiff, this corpus may be sold under a *levari facias* to the highest bidder at a sheriff's sale. To authorize this would be to inflict a serious public evil; and this, too, without the pretext of a benefit having been received by the company, by reason of the paving of the public highway contiguous to the railroad." The court then cites a number of cases in this state, which hold that certain kinds of real estate cannot be taken away from the company by sale under the ordinary forms of adverse process; that, even conceding the railroad company might be charged in some mode of proceeding with the cost of paving, the proceeding by *scire facias* and *levari facias* was not the proper one, because directed against the roadbed. The judgment was affirmed in this court for two reasons, in substance the same as those given by the court below: (1) The claim had no foundation in the letter or spirit of the law. (2) The form of the remedy was one which was inapplicable as against a corporation operating a public highway, because it would destroy that in which the public had an interest. The decisions of the court below and this court are based mainly on the absence of statutory authority to seize and sell, for assessments, the roadbed of a railroad company as land; and reasons of more or less force are given why the absence of such authority is wise. While the facts in this case show the decision was eminently just, for the sale sought to be enforced by a *levari facias* was of a strip of land only 47 feet wide, on

which was the actual structure of the railroad, yet the cases decided up to that time show the exemption of property from taxation, on the plea that it was an indispensable part of the corporate franchise, had reached a point which, in the legislative mind, was no longer tolerable. Water stations, depots, toll houses, reservoirs, houses and gardens of lock tenders and collectors, engines, and machinery for raising cars up planes, collectors' and engineers' offices, all were exempt, on the ground that they were indispensable to the exercise of the franchise. As noticed, this last decision was in 1836, but then came the act of April 21, 1858, which contains this provision: "The offices, depots, car houses, and other real property of railroad corporations situated in said city (Philadelphia), the superstructure of the road and water stations only excepted, are and hereafter shall be subject to taxation by ordinances for city purposes." From its plain words, this was not an act defining what amount or what character of taxes might be imposed on corporate property, but an act declaring what property thereafter should not be exempt, and what should be, from taxation. It brought again within the taxing power a very large amount of property, which under the former decisions of this court had escaped. And it declared in explicit terms that the superstructure and water stations should be exempt. Although the word "superstructure" might, in present railway engineering phraseology, be limited to sleepers, rails, and fastenings (see "superstructure," Century Dictionary), yet we have no doubt that the legislature of that day, adopting the ordinary meaning of the word, intended by it the roadbed, with whatever had been constructed upon it. Except this and water stations, railroad real estate should be subject to taxation.

But it is argued that the words "subject to taxation by ordinances for city purposes" only mean taxation for ordinary revenue, and give no authority to assess for municipal improvements. Under the authorities, the word "taxation" does not always indicate a power of assessments for local improvements. The purpose as well as the language of the act may exclude such power. But this act plainly includes the power. The purpose, as declared in the preamble, is the equalization of the public burden. The burden, under the decisions, had not been theretofore shared equally, if the landowner for 1,500 feet of a large lot on one side of Richmond street escaped assessments for municipal improvements, while the lot owners on the opposite side paid the whole. The intention was, inequality should be remedied. How? By conferring power to tax it by "ordinances for city purposes." The construction of the sewer is a city purpose. Therefore the power to assess for payment of the cost of it, theretofore limited, is thereafter almost unrestricted. The power conferred is intended to be ample that the evil before existing because of want of it should be rem-

edied. We are of opinion that this act conferred fully on the city the power here claimed, to assess, by ordinance, railroad real estate for local improvements.

The Junction Railroad Case, 88 Pa. St. 428, following City of Philadelphia v. Philadelphia, W. & B. R. Co., supra, declares the roadbed exempt, but recognizes the well-marked distinction made by the act of 1858 between the roadbed and other real estate of the company. The claim in the Junction Railroad Case was filed against the strip of land constituting the roadbed, and on that ground was not sustained. Nor can the roadbed here be made subject to this lien. Just what portion of this land is subject to lien for this assessment we do not decide. Clearly, a large part of it is not roadbed. The affidavit and map filed show a large part of the land is a coal yard or terminal. Defendant, by its act of incorporation, is authorized to appropriate for roadbed a strip of land 4 rods or 66 feet wide. In addition, it can appropriate land for sidings and turnouts for the speedy and safe passage of its cars. Land so taken would properly be termed "roadbed," and be exempt from taxation. But a tract of land 1,500 feet wide, extending from Richmond street to the river, used as a coal and ore terminal, is not a roadbed, any more than the private coal yards, in the city, where, by turnouts and sidings, the company dumps coal, are parts of the roadbed. All are appurtenant to the business of the road, but are not an integral part of it in conducting its business as a carrier. If it did not provide these terminal facilities, private individuals, with a view to profit, would. The complete control of such a yard by the company, doubtless, adds to the efficiency and economy of shipment and delivery after the coal is carried between point of consignment and destination, and the company may properly own and control the land as a stimulant to its business; but, if it chooses to do so, it must pay municipal assessments, as other real-estate owners. While we can, from this record, determine that a large part of this 1,500 feet is not roadbed, we cannot say just how much is. But that fact prevents not the entry of judgment. The plaintiff has a lien on the land in excess of that not subject to municipal assessment. A sale of the land passes to the purchaser nothing the lien does not bind. He takes it subject to defendant's easement. In *Re Howard St.*, 142 Pa. St. 601, 21 Atl. 974, our Brother Mitchell, in passing on the constitutionality of this act of 1858, as to the apportionment of benefits and damages, suggests that serious difficulties may arise from lack of provision for collection and distribution; but he says none of them arise in that case, and they may never arise. A similar question was raised in *Re Opening of Berks St.*, 12 Wkly. Notes Cas. 10, where the court says it is something with which it has nothing to do. The same argument is pre-

sented here; that is, the insufficiency of the process to enforce the judgment. We might pass the question, as was done in the other cases, as one which could only arise when the writ was issued on the judgment. But the difficulties presented in the cases cited, which were to assess and apportion damages and benefits caused by the opening of streets, do not appear here. The city has its judgment in rem against land on which defendant had, under the law, before the filing of the municipal lien, a visible notorious easement or right of way to the extent of its roadbed. No adverse process could disturb it in the enjoyment of this easement, for, as is held in *Canal Co. v. Bonham*, 9 Watts & S. 27, and the many cases following it, "the franchises and corporate rights of a company, and the means vested in it, which are necessary to the existence and maintenance of the object for which it was created, are incapable of being granted away and transferred by any act of the company itself, or by any adverse process against it." The roadbed running to the river through this yard, being necessary to the existence of the road as a common carrier, cannot be taken from it by a proceeding in rem against the yard. The purchaser takes subject to the easement, just as the purchaser of land at sale under a mortgage takes subject to an open, visible easement antedating the mortgage. The argument of appellant's counsel, although a most able one, does not treat the act of 1858 as the undoubted law on which the case turns. We are clearly of the opinion that the city's claim is sustained by this act; that it, in effect, negated a large number of the decisions of this court announced before its passage, in view of the statutes on this subject then existing. Since 1858, what land held by railroads in Philadelphia shall be assessed for municipal improvements is no longer a judicial question. That statute has answered it in unmistakable terms. The judgment is affirmed.

MITCHELL, J. (dissenting). It is conceded that the roadbed or other part of the property essential to the franchise is not subject to taxation or municipal charges, while property merely convenient may be. The affidavits in these cases raise questions of fact as to which class the premises liened belong to, and I would send the cases to a jury to settle these questions before judgment, and not leave them to future contest as suggested in the opinion of the court.

(177 Pa. St. 492)

CALDWELL v. FIRE ASS'N OF PHILADELPHIA.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)
FIRE INSURANCE—BREACH OF WARRANTY—TITLE TO PROPERTY—ESTOPPEL.

Intestate, who acquired at sheriff's sale the legal title to certain premises, under an agreement to pay to others who had contributed

to the purchase money their pro rata shares of the proceeds of the property on sale thereof, applied for insurance thereon, and when asked by the agent, who had information of a mixed ownership, "Who is the title in?" replied, "The title is in me. I have the deed;" whereupon the policy was issued in intestate's name, without further inquiry. Held, that the company was estopped from asserting a breach of a condition for forfeiture of the policy "if the interest of the insured be not truly stated therein, * * * or if the interest of the insured be otherwise than unconditional and sole ownership."

Appeal from court of common pleas, Huntingdon county.

Action by I. C. Caldwell, administrator of the estate of David Caldwell, deceased, against the Fire Association of Philadelphia, to recover on a policy of fire insurance. Judgment for plaintiff, and defendant appeals. Affirmed.

Sharp & Alleman, for appellant. Hicks & Templeton, for appellee.

STERKETT, C. J. By agreement of the parties, trial by jury was waived, and the decision of this case was submitted to the learned president of the common pleas, who, upon the facts found by him, directed judgment in favor of the plaintiff for \$1,467.15. His findings of fact, together with his conclusions of law, are set forth in the record, and need not be repeated here. The policy in suit provides, among other things, that it "shall be void if the interest of the insured be not truly stated therein, * * * or if the interest of the insured be otherwise than unconditional and sole ownership." The learned judge was asked to hold, as matter of law, that there had been such violation of these provisions of the policy that there could be no recovery thereon. This he refused to do; and in view of the facts, and for reasons suggested by him in support of his judgment, we are not prepared to say there is any substantial error therein. We find nothing in the record that requires a reversal.

Plaintiff's intestate, David Caldwell, acquired title to the property insured by sheriff's deed in December, 1884. In January following, he signed a paper recognizing the fact that George A. Port and three others had contributed to the purchase money of the property at the sheriff's sale, and agreeing that, when the property is sold or disposed of by him, he will distribute and pay to said contributors each his pro rata share of the proceeds. This declaration left the property in the hands of Caldwell, the sheriff's vendee, with full power to sell or dispose of the same as he might deem best, and account to the parties above referred to for their respective portions of the proceeds. In that way he held the legal title to the property, and controlled the same, until his death, in April, 1893. In January, 1891, when he applied to Mr. D'Armitt, defendant's agent at Huntingdon, where the property was located, and where both the insured and the agent resided, for insurance on the buildings, said

agent asked Caldwell, "Who the title was in?" to which the latter replied: "The title is in me. I have the deed." D'Armitt further testified, in substance, that the reason he asked this question was because he had information of a "mixed ownership" of the property. He did not say from whom he derived that information. If he knew, as he testified he did, that more than one person was interested in the property or the proceeds thereof, and desired to ascertain who they were, etc., he should have prosecuted his inquiry further, by asking Caldwell who, if any one, other than himself, was interested in the property or the proceeds thereof; but he did not do so. On receiving Caldwell's answer, which was directly responsive to his question, he appears to have been satisfied with the information thus communicated, viz. that the legal title to the property was in Caldwell, and that he had the deed therefor; and thereupon, as he says, he wrote the policy in Caldwell's name individually, delivered it to him, and received the premium. In the circumstances attending the writing and delivery of the first policy, Caldwell doubtless believed, and was warranted in assuming, that everything was satisfactory to the company. In January, 1892, and again in 1893, the annual premiums were paid by plaintiff's intestate, and the insurance was renewed in his name alone, as before, without any further information or inquiry by either party. The company, through its agent, previously knew that more than one person was interested in the property or the proceeds thereof, and nothing was ever said or done by the insured to indicate anything to the contrary. As was rightly found by the court below, the insured acted in entire good faith. Whatever mistake or worse than mistake was made in writing the policy in the name of the holder of the legal title alone, it is clearly chargeable, not to the insured, but to the company's agent, and should be imputed to the company itself. Where, at the time of issuing an insurance policy, the company knows that one of the conditions thereof is inconsistent with the facts, and the insured has been guilty of no fraud, the company is estopped from setting up the breach of said condition. The same rule prevails when the insurance company ought to have known the facts constituting the alleged breach. *Wood, Ins. § 497; Insurance Co. v. Spencer*, 53 Pa. St. 353. Judgment affirmed.

(177 Pa. St. 312)

**NEW YORK NAT. EXCH. BANK v.
CROWELL et al.**

(Supreme Court of Pennsylvania. Oct. 5, 1896.)
CORPORATIONS—DEFECTIVE ORGANIZATION—FAIL-
URES TO RECORD CERTIFICATE—COMMERCIAL
PAPER—BONA FIDE INDORSEES—DISSOLUTION OF
PARTNERSHIP—NOTICE.

1. Failure to record a certificate of incorporation in the recorder's office of the county where

the association's chief operations are to be carried on, as required by statute, makes the incorporators liable as partners to persons who deal with the association without knowledge of the incorporation. *Guckert v. Hacke*, 28 Atl. 249, 159 Pa. St. 303, followed.

2. The fact that a note is signed by "the C. & C. Cold Storage Company, by C. H. N., Treas.," is not sufficient to put an indorsee for value before maturity on inquiry which would lead to the discovery that the maker is a corporation, and not a partnership.

3. A withdrawing member of a partnership cannot relieve himself from liability for debts subsequently contracted by the firm with persons who have had no previous dealings with it, and have not been notified of the dissolution by publication in a newspaper printed in the city or county where the business is carried on.

Appeal from court of common pleas, Philadelphia county.

Action by the New York National Exchange Bank against Harry P. Crowell, Charles Class, and others, trading as the Crowell & Class Cold-Storage Company, to recover on a note. Defendants Crowell and Class alone filed an affidavit of defense, and, from a judgment holding said affidavit insufficient, they appeal. Affirmed.

The note sued on read as follows: "\$2,500. Philadelphia, Sept. 5th, 1893. Four months after date, we promise to pay to the order of ourselves twenty-five hundred dollars at our warehouse, 50-52 N. Dela. Ave., without defalcation. Value received. [Signed] The Crowell & Class Cold-Storage Co., by Charles H. Newell, Treas. [Indorsed] The Crowell & Class Cold-Storage Co., by Charles H. Newell, Treas."

A. J. Kelly, J. H. Gendell, and John G. Johnson, for appellants. Ray W. Jones and Hood Gilpin, for appellee.

STERRETT, C. J. This suit, against Harry P. Crowell and four others, trading as the Crowell & Class Cold-Storage Company, was brought to recover the principal, interest, etc., of a note for \$2,500, at four months, from September 5, 1893, made by said company to its own order, and by it indorsed, etc. One of the defendants was not served. Two of the others filed no affidavit, and judgment by default was taken against them. The remaining two (appellants in this case) filed an affidavit, which was adjudged insufficient, and judgment was accordingly entered against them. It is claimed that, in so doing, the court below erred. That question must be determined by the averments contained in the statement of claim and affidavit of defense. Without referring in detail to the former, it is sufficient to say that they present a clear prima facie case against the defendants; and, unless some good ground of defense is presented in appellants' affidavit, there was no error in entering judgment against them for want of a sufficient affidavit of defense. While their affidavit contains a general denial of liability, and undertakes to traverse or qualify some of plaintiff's averments, it is not denied that,

for several years prior to giving the note in suit, appellants, Harry P. Crowell and Charles Class, as co-partners, carried on the cold-storage and general storage and warehouse business at their warehouse, 50 and 52 North Delaware avenue, Philadelphia; that in the spring of 1892 they signed and presented to the governor a certificate of association, and applied for a charter of incorporation as the Crowell & Class Cold-Storage Company, for the purpose of transacting the same general business at same warehouse. In that certificate it appears that appellants each subscribed for 647 shares of the stock of the proposed corporation, and their co-defendants in this suit, Charles H. Newell, J. R. Gibbs, and Amos H. Evans, each subscribed for two shares of said stock. The business aforesaid was continued at same place from September 5, 1893, to January 9, 1894, and before and after these dates, in the name of the Crowell & Class Cold-Storage Company; but notwithstanding letters patent were issued to the subscribers to said stock in April, 1892, the certificate of incorporation was not recorded in the office for recording deeds in the city and county of Philadelphia until November 13, 1893, more than two months after the note in suit was given. In the statement, it is averred, among other things, that the defendants, after making and indorsing the note in suit as aforesaid, caused it to be delivered to plaintiff bank, by which the same was thereupon discounted for value before maturity, and before the recording of the certificate in said recorder's office; that plaintiff bank became and was the holder of said note for value, before maturity, and before the recording of said certificates, without knowledge or notice of any of the facts therein averred in reference to the presentation of said application to the governor of Pennsylvania for a proposed corporation, and without knowledge or notice of any attempt or intention on the part of the defendants to form themselves into a corporation. These and other material averments, in support of plaintiff's claim, are either substantially admitted or not sufficiently traversed or denied in the affidavit of defense. In that part of their affidavit referring to the meeting of the board of directors of the proposed corporation on February 14, 1893, etc., appellants virtually admit that, therefore, they were interested in the association both as shareholders and officeholders therein, and say: "At said meeting these deponents having resigned their offices which they had previously held, their successors were duly elected," and, on the following day, "all their shares in the capital stock of said company were duly assigned on the books of the company to the purchasers, and from thenceforth neither of these deponents has had any interest in the said company or the capital stock thereof, or in its business, assets, or profits. Circulars were issued and

sent to all persons dealing with the concern, stating that these deponents had no further connection with said business." It will be noted that this was nearly 10 months after the certificate of association, as previously averred, "was duly approved, * * * enrolled in the secretary's office in Harrisburg, * * * and letters patent were issued," etc., and nine months before the certificate was recorded in the recorder's office of the county in which the chief operations of the intended corporation were carried on.

We find nothing in the affidavit of defense that can have the effect of relieving appellants and their associates from liability as partners to the plaintiff bank. It is not averred that any of the "circulars" alleged to have been "issued and sent to all persons dealing with the concern" were either sent to or received by the plaintiff, for it does not appear that plaintiff had any dealings with "the concern" prior to becoming the holder of the note in suit. The well-settled rule is that notice of the dissolution of a partnership given in a newspaper printed in the city or county where the partnership business is carried on is of itself sufficient notice to all persons who have not had previous dealings with the partnership, so as to relieve a withdrawing partner from liability for debts subsequently contracted in the name of the firm without his consent, express or implied. *Watkinson v. Bank*, 4 Whart. 482; *Robinson v. Floyd*, 159 Pa. St. 165, 28 Atl. 258.

There is no merit in the contention that the name of Crowell & Class Cold-Storage Company, and the form in which the note is signed, etc., were sufficient to put the plaintiff bank upon inquiry, and that due prosecution of that inquiry would have disclosed the fact that the maker of the note was an incorporated association, and not a partnership; and that appellants, who had previously been shareholders therein, had transferred their stock and withdrawn therefrom in February, 1893. Such business names are, perhaps, as commonly used at present by unincorporated associations, partnerships, and individuals as by corporations. The forms and methods of business corporations are frequently adopted by unincorporated associations, partnerships, etc., and their business conducted by a president, cashier, etc. *Scott's Appeal*, 159 Pa. St. 165, 28 Atl. 258. There is nothing in the case to justify the conclusion that plaintiff had notice, express or implied, that the maker of the note was a corporation. In fact, the final act necessary to complete the incorporation of the association was not performed until nine days after the note was made and indorsed. As we have already seen, it is positively averred in the statement that plaintiff became the holder of the note for value, without knowledge or notice of any attempt or intention on the part of the defendants to form themselves into a corporation.

As to recording the certificate of incorporation, it was held in *Guckert v. Hacke*, 159 Pa. St. 303, 28 Atl. 250, that failure to record it, as required by the act, in the recorder's office of the county where the association's chief operations are to be carried on, will render the incorporators personally liable to persons who deal with the association without knowledge of the incorporation. As was there said: "One of the purposes of the act being exemption from personal liability in the transaction of business, it was obviously material that the public should have notice; and notice by record was accordingly prescribed. Failure to record was failure to comply with one of the express conditions of the act, and consequently of exemption from liability." Our purpose is to adhere to that position. Without further elaboration, we are satisfied the learned court was right in holding that the affidavit of defense was insufficient. Judgment affirmed.

(177 Pa. St. 247)

SAMPLE v. HORLACHER et al.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

PAROL CONTRACT FOR LAND—SPECIFIC PERFORMANCE.

The jury is properly instructed for defendant where plaintiff claims specific execution of a parol contract for land, unless its terms are shown by full, complete, satisfactory, and indubitable proof, and unless the evidence define the boundaries and indicate the quantity of land, fix the amount of consideration, establish the fact that possession was taken in pursuance of the contract, and at or immediately after the time it was made, the fact that the change of possession was notorious, and the fact that it has been exclusive, continuous, and maintained, and show performance or part performance by the vendee which cannot be compensated in damages, and will make the rescission inequitable and unjust.

Appeal from court of common pleas, Lycoming county.

Ejectment by J. R. Sample against Elizabeth Horlacher and husband for land claimed by plaintiff under sale on execution against John H. Horlacher, and by reason of a parol contract of sale by said Elizabeth Horlacher to said John H. Horlacher. Judgment for defendants. Plaintiff appeals. Affirmed.

The charge of the court below was as follows: "This is an action of ejectment, brought by J. R. Sample against Elizabeth Horlacher and Daniel Horlacher, to recover a piece of land located in Montoursville, this county, containing in width about fifty feet, and in depth probably about two hundred feet. I don't remember the exact amount. This case was tried once before in this court, and a new trial was granted for certain reasons which were given in an opinion which the court filed in passing upon the motion for a new trial. It has been agreed in this case that the same evidence that was taken upon that trial should be regarded as the evidence in this trial, no more and no less; so that the case is now before the

court on precisely the evidence that was before the court at that trial. At the time of that trial there was no objection raised as to the competency of a married woman to bind herself by a parol contract of the character disclosed by the evidence in this case. The result was that that question was not ruled upon during the trial. It was, however, ruled upon by the court when the motion for a new trial was made. We then ruled the question, and we will adopt the ruling now, so far as it relates to this subject: That, Mrs. Horlacher having been a married woman at the time when this parol contract was made, such parol contract could not be enforced, because it was neither in writing nor acknowledged by her as provided by the act of assembly. We have had no reason thus far shown us to convince us that that ruling was wrong, and, if we are right in the ruling, then there can be no recovery in this case, because it is undisputed and the evidence shows that Mrs. Horlacher was a married woman; and while it is true that the husband was present when the conversation took place in reference to that contract, yet there was nothing done by her except what was done by word of mouth; and for this reason, if for no other, we would have to direct a verdict in this case in favor of the defendants. We also had grave doubts, after we came to examine the testimony in this case, when we were considering the motion for a new trial, as to whether there was sufficient in the case to warrant a chancellor in decreeing specific performance of the contract; and, of course, if there was not sufficient evidence to warrant a chancellor in doing that, then there was not sufficient evidence to submit to the jury from which they could find that the defendants were bound by that contract, and that it could be enforced in this action or any other action. We had grave doubts about that, and we still have, and I am inclined to the opinion that there was hardly sufficient testimony in this case to justify the court in saying to the jury that they could find a verdict against the defendants, even if the other question that I have referred to were out of the case. Yet it is really unnecessary to decide that at this time, because the other question in itself is sufficient to bar a recovery, without regard to this latter question as to the sufficiency of the testimony to establish a parol contract, so as to bring it within the measure of proof required to warrant a chancellor in decreeing a specific performance of such a contract when it relates to the sale of land. The principal testimony, as the court now recalls it, is the testimony of the plaintiff himself. There are some slight circumstances that were proven, but there is also some difficulty about the identity of the land in controversy. In fact, the contract does not seem to have been very definite and certain, but, on the contrary, seems to have been somewhat optional. They were to have forty feet in width for a certain price, and fifty feet in width for a certain price, and if he took forty feet he was to pay two hundred dollars, and if he took fifty feet he

was to pay two hundred and seventy-five dollars. There is also a great deal of testimony in the case going to show that it could be compensated for in damages. It seems that he (J. H. Horlacher) kept an account of the improvements that he made, and that there was a note given, or at least an account rendered, of the actual cost of the improvements that were made, and there were other matters that made the court doubt very seriously whether specific performance in this case could be decreed on the evidence before the court. But principally for the reason that we think a married woman cannot be bound by such a parol contract, made under the circumstances disclosed by the evidence in this case, we now instruct you to find a verdict for the defendants."

The opinion referred to in the foregoing charge is as follows (Metzger, J.): "The verdict in this case will have to be set aside, if for no other reason than that there is no time fixed within which the amount named is to be paid. The verdict in this case must be a conditional one, the same as in any other equitable action of ejectment. *McGibbeny v. Burmaster*, 53 Pa. St. 332. This might possibly be corrected, but we are also of opinion that some disposition should have been made of the mortgage. The mortgage is a lien on the entire lot, including the part in controversy, and some disposition should have been made of it, so as to avoid future difficulty, and prevent further litigation. We are also constrained to grant a new trial for the reason that, after a thorough examination of the law as applicable to this case, we have come to the conclusion that we ought to have given binding instructions. The plaintiff seeks to recover on a parol contract for sale of land, and it therefore became his duty to establish all the elements necessary to make it an exception to the statute of frauds and perjuries. He must establish the terms of the contract by full, complete, satisfactory, and indubitable proof. The boundaries must be defined, as well as the consideration fixed. He must further show such performance or part performance by the vendee as could not be compensated in damages, and such as would make a rescission inequitable and unjust. In short, the evidence must be such as would induce a chancellor to decree specific performance of the contract. No witness was adduced on the part of the plaintiff who was present at the making of the alleged contract. The only evidence is the statement the vendors should have made in the absence of the vendee,—that they had sold him 40 feet for \$200, or 50 feet for \$275. When this statement was made, no boundaries were designated, and no time of payment was fixed. The witness who testifies to the conversation had with the vendors as to the boundary heard nothing as to the consideration, and his testimony is vague and indefinite. There was some evidence on the part of the plaintiff as to the erection of the house by the vendee. To say the least, the case on the part of the plaintiff was not very strong. On the part of the defendants it was shown that he was to pay \$200 for 40

feet, or \$275 for 50 feet, and pay off a certain mortgage on the entire premises of \$800, before he was to have the lot; that it was to be his if he paid this consideration. They also show that they held a note against the vendee for this \$800, and that he was credited on this note the amount he expended in erecting the building. Both the vendors and the vendee testify to this. This testimony is not inconsistent with the plaintiff's testimony. As far as the plaintiff's testimony goes, it is not in conflict with that of the parties to the contract. It can easily be reconciled on the assumption that in speaking to him they only spoke of the amount to be paid them. That they did not state the entire contract to him is evident from the fact that no time of payment was fixed; and, according to his testimony, the mortgage, although a lien, was not mentioned to him. Taking all the testimony in this case into consideration, it amounts to this: That there was a contract, the terms of which are not clear, but it is certain that no part of the consideration was paid, and, although improvements were made on the property by the vendee, yet these were paid for by the vendors allowing him credit on his indebtedness to them. Under these circumstances this case cannot be an exception to the statute of frauds and perjuries. There is nothing in it that makes it either unjust or inequitable to rescind the contract. It will also be observed, by carefully examining the evidence, that no time was fixed by the plaintiff for the delivery of the possession to the vendee, while on the part of the defendants the testimony is to the effect that he was not to have it until after payment of the consideration. This he never did, and, although in possession a few months, he was not in possession at the time of the levy and sale of the property, but the defendants in this case were then in possession. That he was not in possession as owner is evident from the fact that he charged the vendors for the work he did, and the materials furnished by him for the erection of the house, and was allowed it on payment of his indebtedness to them. The truth is that, conceding a contract to have existed between the parties, the time had not arrived when he was entitled to possession of the property under its terms, and he therefore had no equity which could, by a sheriff's sale, give sufficient title to the purchaser to maintain this action of ejectment. There is another question involved in this case, which, though not raised on the trial, will have to be met, as it lies at the very foundation of the right of plaintiff to recover in any event. Elizabeth Horlacher is the owner of the property in dispute. She is the real defendant, and, being a married woman, the question arises whether such a contract as is set up against her can be enforced. I cannot find that this has been ruled by the supreme court since the passage of the act of 1893. It has been decided both ways by the common pleas courts. The last adjudication I can find is the case *Whittlinger v. Jack*, reported in 4 Pa. Dist. R. 254, in which Judge Rey-

burn holds that 'specific performance will not be enforced where the contract was executed by a married woman, but without separate acknowledgment.' The contract in that case was in writing, signed by both husband and wife, yet the court refused a decree of specific performance. It is needless to say that there is much less reason for holding a married woman to the performance of a parol contract. To do so is to unfetter her in every parol particular, and make nugatory the provisions of the act of 1893, which prohibits her from 'executing or acknowledging a deed or other written instrument conveying or mortgaging her real property unless her husband join in such mortgage or conveyance.' If anything in the act is clear, it is that she cannot convey or mortgage her property in any way than by deed or writing in which her husband must join. For the reasons given, we feel obliged to grant a new trial."

Charles J. Relly, J. C. Hill, C. E. Sprout, and W. C. Gilmore, for appellant. W. W. Achenbach and John G. Reading, Jr., for appellees.

PER CURIAM. We are by no means convinced that the learned trial judge erred in directing the jury to find for the defendants. On the contrary, a careful consideration of the evidence on which the plaintiff relies has led us to the conclusion that it does not come up to the measure of proof that is required in such cases. As was said in *Hart v. Carroll*, 85 Pa. St. 510: "In order to take a parol contract for the sale of lands out of the operation of the statute of frauds its terms must be shown by full, complete, satisfactory, and indubitable proof. The evidence must define the boundaries and indicate the quantity of land. It must fix the amount of the consideration. It must establish the fact that possession was taken in pursuance of the contract, and at or immediately after the time it was made; the fact that the change of possession was notorious, and the fact that it has been exclusive, continuous, and maintained. It must show performance or part performance by the vendee which could not be compensated in damages, and such as would make rescission inequitable and unjust." These rules have been firmly settled by a long line of cases, including those cited in *Hart v. Carroll*, *supra*, and many others. It is the duty of the trial judge—who, in such cases, exercises the functions of a chancellor—to determine, in the first place, whether the evidence adduced is sufficient to support an equity in the party claiming specific execution of the verbal contract, and then for the jury to say whether the testimony is true or not. If the evidence fails to make out a case that can be fairly classed as an exception to the operation of the statute of frauds, it is the duty of the judge either to reject it or to instruct the jury in favor of the defendant, as was done in this case. *Bowers v. Bowers*, 95 Pa. St. 489; *Allison v. Burns*, 107 Pa. St. 53; *Lord's Appeal*, 105 Pa. St. 460. Without further reference to the evidence ad-

duced by the plaintiff, or the principles of law applicable thereto, it is sufficient to say that the learned judge was right in giving binding instructions to find for defendants. It is unnecessary to notice the question of estoppel. It is not in the case, because the evidence adduced by plaintiff is insufficient. Judgment affirmed.

(177 Pa. St. 252)

BECKER v. PHILADELPHIA & R. T. R. CO.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

EMINENT DOMAIN—ASSESSMENT OF DAMAGES—ISSUE—PERSONAL PROPERTY—EVIDENCE.

1. An issue awarded "to determine the amount of damages * * * B. is entitled to in consequence of the entry upon, taking and occupation of premises * * * by the * * * railroad company" does not admit of any question as to merchandise.

2. Recovery for taking personal property, unless it was as materials used in construction, cannot be had in proceedings to assess damages for condemnation.

3. Loss of profits by reason of the necessity of making elsewhere a business conducted on land condemned cannot be recovered as damages done the landowner.

4. The jury assessing damages for condemnation of land cannot give interest on the damages, though, if they find that there has been additional damages because of the lapse of time since the taking of the property, they may add to the amount of their verdict.

5. The market value, as a measure of damages for land taken or injured by a railroad company, cannot be ascertained by evidence of particular sales of other properties alleged to be similarly situated.

Appeal from court of common pleas, Philadelphia county.

Proceedings to assess damages for the taking by the Philadelphia & Reading Terminal Railroad Company of land belonging to Henry Becker. From the award of the jury of view, Becker appealed to the court of common pleas, and from the judgment there rendered on a verdict for him he appeals. Affirmed.

Among the assignments of error were the following: "(1) The court below erred in overruling the following offer made by the plaintiff at the trial of the cause: 'Plaintiff offers to show by the witness that he was the owner of the premises 1114 Arch street; that he was carrying on his business in that building, being that of a merchant tailor, and for the purposes of his business he had a large amount of merchandise, consisting of cloths and other fabrics, especially purchased for his trade at this place; that by reason of the location of the defendant's road plaintiff could no longer carry on his business, and in consequence of said location said property was greatly injured and damaged; to show by the witness the difference between the market value of the merchandise or fabrics in the store to be used on the premises, and what they would be worth to be removed and applied to the same or some other use.' (2) The court below erred in not admitting the evi-

dence under the offer set forth in the first assignment of error. (3) The court below erred in refusing to charge the jury as requested by the counsel for plaintiff, as follows: 'Seventh. You will find the value of the plaintiff's property as of May 14, 1891, and you may allow additional damages in the way of interest for the lapse of time as a compensation for the delay in payment, and you may take the ordinary rate of interest as the fair measure of such damage.' Answer of the court: 'I decline that point, having already instructed you in my general charge as to what the law is with respect to damage because of the lapse of time, if there be any.' (4) The court below erred in affirming the defendant's eighth point, as follows: 'Eighth. The prices of the premises No. 1110, No. 1112, and No. 1125 Arch street, paid by the finance company for the railroad company in March, 1888, are not evidence of general selling value of property in the neighborhood, and should not be taken by the jury as evidence of such general selling value.'" "(9) The court below erred in charging the jury as follows: 'You are not entitled to give interest upon the damages, but you will remember that this property is taken as of the 14th day of May, 1891, and in estimating the amount of your verdict, if you find that there has been additional damage because of the lapse of time, you will add to the amount of your verdict; but this is entirely a question for you.'"

Defendant's sixth, seventh, eighth, and ninth points, and the answers thereto, were as follows: "Sixth. The market value of the premises in question is not to be fixed by the jury by evidence of particular sales of alleged similar property in the same neighborhood. Particular sales are not evidence of general selling value. Individual sales are governed by the circumstances of each case. The jury is to arrive at the general selling value of property in the neighborhood, which is the criterion by which the value of the plaintiff's property is to be measured, by the opinions of witnesses who, by their testimony, are shown to have the most experience, and give the best reasons for their judgment. Answer of the Court: I affirm that point. Seventh. Evidence of the amount paid by the railroad company itself for other property in the neighborhood is not to be taken by the jury as evidence of the general selling value of their property, and such general selling value is not to be fixed thereby. Answer of the Court: I affirm that point. Eighth. The prices of the premises No. 1110, No. 1112, and No. 1125 Arch street paid by the finance company for the railroad company in March, 1888, are not evidence of general selling value of property in the neighborhood, and should not be taken by the jury as evidence of such general selling value. Answer of the Court: I affirm that point. Ninth. If the jury believe that the plaintiff's witnesses based their opinion of the value of the plaintiff's ground as vacant land upon the prices paid by the railroad company

for Nos. 1110, 1112, and 1125 Arch street, and did not take into consideration in forming their opinion the prices paid for other properties upon Arch street, which were sold about the time in question, the jury may disregard the opinion of such of plaintiff's witnesses who so testified. Answer of the Court: I decline that point."

On the question of compensation for property taken for public purposes the court charged: "The measure of that compensation is the market value of the property at the time it was taken, which time is conceded to be the 14th day of May, 1891. Now, market value is the price which the property would probably bring at a well-conducted sale, to which proper attention has been called, and where every possible purchaser would have an opportunity to bid. It is not the price at which particular properties in the neighborhood about it have been sold. It is the general selling price which determines the market value. As you readily see, the particular sales depend upon the urgency, the necessity, upon the whim and fancy, if you choose, of the particular individual who chooses to buy that especial property; but that is not the test. An illustration of the impropriety of applying such a test is given in the present case. Suppose a railroad which has invested, or is about to invest, millions of dollars in the establishment of such a highway. Under the law the man who is living in his own house, dwelling in it, has such a right in it that this highway cannot take such a property. Now, assume a property of little comparative value standing in the way of such improvement. As you see, the railroad would be required and compelled, by the necessities and urgencies of the situation, to pay for that property what might be very much beyond its market value; so that I call your attention to the fact that what you are to ascertain is the general selling price, such a price as the property under proper and suitable circumstances would be likely to bring in the market at such a sale as that to which I have called your attention. You will regard the property with all of its advantages and disadvantages,—its location, the side of the street upon which it was situated, the size of the lot, the character of the improvements upon it,—and endeavor to determine, considering all the facts in the case, as to what that market value is. You should consider it with respect to the best uses to which it can probably be put. This was a property which was fitted as a merchant tailoring establishment, and in considering its value you will give to it the benefit of the uses to which it could probably be put if offered for sale in the market. If the prospective coming of the railroad has had the effect of enhancing the market values of properties in the neighborhood, and this particular property as well, the plaintiff is entitled to the benefit of that enhancement. As you readily see, to deprive him of it would be un-

just to him. If a coming railroad increases the values of property in the neighborhood, that is a benefit it confers upon the community, for which there is no recovery upon its part; and the plaintiff, like every other property owner, would be entitled to that proportion of it which comes to his property. In endeavoring to ascertain from the evidence which you have had presented to you in this case what that market value is, there are certain facts which appear. In the first place, you have the assessed value of this property, or the assessment which the real-estate assessor, representing the city of Philadelphia, has placed upon it. The assessment of this property at the time at which it was taken was \$17,000, and Mr. Adair, a real-estate assessor, testified to you that their habit in making their assessments was to fix them at about eighty per cent. of what they regarded as the value. This is one fact, and in considering it you will remember, however, that that assessment is made for the purposes of taxation, and not with a view of ascertaining for purposes of sale what the market value is. You have also presented to you what was the cost of this property and the improvements upon it. Mr. Becker has testified to you that when he bought this property in 1882 he paid for it \$25,000, and he has further testified to you that he has expended in improvements upon it from \$27,000 to \$30,000. That would make, taking the highest figure of \$30,000, and adding it to the \$25,000 which he paid for the property, \$55,000. You will remember, however, that it is not a question of what a property costs which is presented to you. A thing may cost a great deal more than it is worth, and it may also cost much less than it is worth. The real question is as to market value. You have also in evidence before you the rentals which have been produced by this property of the plaintiff. Mr. Becker has testified to you that the rental value was \$5,220 a year. For some of the stories and some parts of the building he had leases. As to the rest, he testified that offers were made. The actual amount received in the way of rentals was \$4,360, and he testified that he had offers amounting to \$860, which makes the total of \$5,220. Included in that item of rentals was the sum of \$2,500, which was the amount that he was paying to this defendant for the use of the first story, the part which he occupied after the time the defendant had given his bonds, and was entitled to take possession of this property. The defendant has disputed the value of that item by the testimony of Mr. Loomis, who says that it was intended not as to a determination of the rental value, but as a sort of penalty, in order that the defendant, when it wanted possession, should be enabled to get it. However, Mr. Kline and other witnesses have testified to you that that would be a proper rental value for that part of the premises. On the other hand, for the defendant, Mr.

Bonsall estimates the rental value at \$3,850, Mr. Jackson at \$3,600, Mr. Foulke at \$3,000, and Mr. Craven at from \$3,000 to \$3,500. In addition to this testimony concerning the rental values, you have what constitutes the most of the evidence in the case, the testimony of experts who have given you the benefit of their judgment as to what was the market value of this property. I shall not attempt to review that testimony at all. It has been fully argued before you. Twelve witnesses for the plaintiff have testified, and they differ in the amounts which they have presented to you from the lowest sum of \$70,000, which is the amount fixed by Mr. Miller, Mr. Hancock, Mr. Sylvester, and Mr. Lynch, to \$80,000, which is the estimate of Mr. Hason and the two Messrs. Becker. On the other hand, eleven witnesses for the defense have given you their views as to what is the market value of the property, and they range from \$40,000, the estimates of Messrs. Potts, Sibbs, and Sylvester, to \$46,000, the estimate of Mr. Redner. You will consider their testimony carefully. I have listened to it myself, and have gone over it more or less, and for my part I see no principle upon which it can be reconciled, nor do I see any principle which accounts for their difference of view, because, while a great deal has been said about the prices of properties which were sold to the railroad in the neighborhood, several of the witnesses for the defense, at least, have testified to you that they considered the prices of the properties sold to the railroad in reaching their estimates. You will take all of the testimony presented to you by these experts, and you will weigh the evidence, look at the reasons that they have given for the conclusions they have reached, consider their experience, their knowledge of the particular property, the grounds on which they base their judgment, and weigh it with all the care that you can give to it, and endeavor to reach a correct conclusion."

W. Horace Hepburn, for appellant. Thomas Hart, Jr., for appellee.

GREEN, J. In this case the petition for the appointment of viewers set forth that the defendant had located its railroad, and that it was necessary to occupy certain land at its terminus, of which the plaintiff was the owner, and prayed the court to appoint viewers to ascertain the damages sustained by the plaintiff by reason of the occupation of his land for the purposes of the road. A description of the lot or piece of ground to be occupied was annexed. An issue was awarded by consent of the parties "to determine the amount of damages which the said Henry Becker is entitled to in consequence of the entry upon, taking, and occupation of premises No. 1114 Arch street, by the Philadelphia & Reading Terminal Railroad Company." It will be seen, therefore, that the

sole question to be determined was the damages sustained by the plaintiff by reason of the taking of certain land belonging to him. No question as to the taking or injuring of personal property was within the terms of the issue, and hence no such question was on trial. As a matter of fact, no personal property was taken or injured in any way, nor was there any proposition to take or injure that kind of property. The value of land taken was the only matter for trial or which could be tried under the pleadings. Nevertheless the plaintiff now complains that he was not permitted to show that he was carrying on a business of tailoring on the premises, that he had a large amount of merchandise purchased for his trade at this place, that by reason of the location of the railroad on his premises he could no longer carry on his trade there; and he offered to show the difference between the market value of his merchandise and fabrics in the store and what they would be worth to be removed to some other place, and applied to the same or some other use. It was a very surprising offer of proof, and is the first of its kind of which we have any cognizance. We are referred to no authority in support of such an offer, nor do we know of any. There are plenty of reasons why such an offer cannot be entertained, and we cannot imagine any why it should be. It is enough to know that no such question arises, or can arise, under the pleadings. It is the value of land taken that is to be inquired of and determined under the issue framed; not personal estate of any kind, not profits of business, nor any kind of injury to any stock of merchandise, nor whether a better business could be done with a particular stock of goods on these premises or on some other. No personal property was taken, or injured, or touched, or handled in any way. The plaintiff had ample time in which to remove his goods. He agreed with the defendant, after the bond was filed, in writing, to occupy the premises for a short time at a rental value, and that the defendant might enter at the end of that time if he had not then removed. He was allowed to prove every kind of injury and damage sustained by taking his property, and recovered an exceedingly large verdict, much larger than the total cost of the property, and four or five times as large as the amount at which it was assessed. The new constitution made no change in the character of the property for which damages could be recovered. It merely enlarged the right of recovery from taking to injury or taking. It was the taking of land only that could be recovered for under the act of 1840, and up to the time of the constitution of 1874, and after that it was the injuring or destroying, as well as the taking, that was to be compensated. But recovery for taking personal property, unless it was as materials used in construction, was not recognized or provided for by proceedings for condemnation, either

before or after the constitution of 1874. Of course, for any trespass to personal property by taking or injuring it, there was always a common-law liability, but that is not this case.

We have so often said that the profits of business could not be recovered in condemnation proceedings that it seems like a waste of time to cite the decisions. As far back as *Thoburn's Case*, 7 Serg. & R. 411, it was held that in estimating the damages done to the landowner the jury are to value the injury to the property at the time the injury was suffered, without reference to the person of the owner or the state of his business. The allowance of damages for an actual or supposed loss of profits in a business carried on upon the premises by reason of the taking was most emphatically condemned in the opinion, and that decision has been followed by this court from that day to this. There, a real and serious injury was done to the plaintiff, as well to his business as to his land. He owned a tract of 71 acres with a cotton mill on it, near the river Schuylkill. His land was damaged by the backing of water from the defendant's dam, and his business was so impeded that he was obliged to remove it to another place; yet this court held he could recover nothing for the injury to his business, but only for the injury to his land just as it was at the time it was flooded. Damages were claimed not only for the land, but also for the injury to the business. Gibson, C. J., after stating that the compensation was to be the price of the privilege to swell the water to a particular height for an indefinite time, said: "Now, this price was due the moment the privilege was entered upon, and the price could be ascertained, which was obviously the time when the obstruction was first completed. The jury were therefore to ascertain what was then due; and the amount, clearly, could not be enhanced, or in any way affected, by subsequent injuries, the consequences of the obstruction. * * * But as the particular injury to the plaintiff in his business as a manufacturer was necessarily subsequent to the erection, and as the defendant prayed the direction of the court on the legal effect of the evidence relating to that part of the case, he was entitled to have it, for so far it would have operated in his favor. * * * It is evident that the profit in any branch of manufactures must mainly depend on the amount of capital invested, the number of workmen employed, and the extent of the business carried on." After stating the injustice of allowing for the profits of business to be carried on, the chief justice added: "That would make the defendant an insurer of ordinary profits in a new state of the business, pushed to a morbid extent, and would put it in the power of the plaintiff to increase the damages to any extent he might think proper. I mention this to show the danger of taking into consideration circumstances posterior to the time when the privilege is fully entered on, and its consequences to the individual

to be compensated are ascertained." In the case of *Searle v. Railroad Co.*, 33 Pa. St. 57, an effort was made to recover damages for the value of the coal lying under the surface of the ground taken for a railroad. But we held this could not be done, and that the measure of damage must be the actual value of the land taken, and not the loss of profit which might be made by taking the mineral underneath it. Lowrie, C. J., speaking of the rejection of an offer to prove that there was \$4,000 worth of coal under the land,—about one acre,—said: "We do not measure the value of land by such facts. Land may have \$4,000 worth of coal per acre in it, and yet sell at \$40 per acre. * * * Moreover, the offer impliedly requires a degree of refinement in the measure of values which seems to us totally incompatible with the gross estimates of common life. Though we might have the most accurate calculation of the quantity of coal in the land, yet, without knowing exactly the expense of bringing it to the surface and carrying it to market, and the amount likely to be lost in mining and conveying, and the times in which it would be brought out, and the market prices at those times, the quantity would not help us to the value of the land. The gross estimates of common life are all that courts and juries have skill enough to use as a measure of value. All other measures are necessarily arbitrary and fanciful." And so here the question whether or not the plaintiff's business, with the stock of goods on hand, could be carried on at a greater or less profit at some other place than on these premises is altogether speculative, remote, imaginary, and uncertain. No one can possibly have definite knowledge upon such a subject. It would depend upon contingencies, events, and methods which are incapable of statement, appreciation, or knowledge. What one man might do at a profit, another might only do at a loss. What this plaintiff might be able to do with his stock at another building, neither he nor any one else could possibly know. Perhaps he might do better, and perhaps he might do worse. It is enough to say that such contingencies are too uncertain and too remote to be tolerated as a source of proof upon which courts and juries could act with any safety. In *Railroad Co. v. Balthaser*, 119 Pa. St. 472, 13 Atl. 294, we held that the value of the plaintiff's land as limestone land is a proper subject of consideration, but not the value of the stone under the road. In *Railroad Co. v. Patterson*, 107 Pa. St. 461, we held that the jury cannot take into consideration any supposed loss to the plaintiff of profits in his business, by reason of the appropriation of his property by the railroad company. Said Clark, J.: "Such an assessment would be purely speculative, and a rule which justified it would lead to most ruinous results." The same doctrine was held in *Railroad Co. v. Eby*, Id. 166. There are many authorities that the removal of personal property cannot be considered as an item of damages in the taking of

real estate. In *Lewis*, Em. Dom. 488, it is said: "But the damages to personal property, or the expense of removing it from the premises, cannot be considered in estimating the compensation;" citing a number of cases. In *Cobb v. City of Boston*, 109 Mass. 438, it was held that, in assessing the value of a leasehold estate, damage to the business of the lessee and its good will is not to be included. The court said: "The only question was as to the value of his unexpired lease, and not as to the profits of his business, or the inconvenience of removing it to some other place." To the same effect is *Edmonds v. City of Boston*, 103 Mass. 535. Further references are unnecessary. The first and second assignments of error are dismissed. There is no merit in the third and ninth assignments. The learned court below charged the jury on the subject of interest in precise accordance with the decision of this court in the case of *Klages v. Terminal Co.*, 160 Pa. St. 386, 28 Atl. 862, where this whole subject was exhaustively reviewed by our Brother Williams.

The rulings of the court below as to the testimony in relation to sales of particular properties in the neighborhood were in conformity with our most recent decisions, and were, therefore, free of error. In *Railroad Co. v. Patterson*, 107 Pa. St. 461, we held that the market value as a measure of damages for land taken or injured by a railroad company cannot be ascertained by evidence of particular sales of other properties alleged to be situated similarly to the one in question. Such evidence would introduce collateral issues, and is not admissible in such proceedings. See, also, *Railway Co. v. Vance*, 115 Pa. St. 325, 8 Atl. 764, and *Curtin v. Railroad Co.*, 135 Pa. St. 20, 19 Atl. 740. Of course, such evidence may be brought out by the cross-examination of witnesses. In view of all that was said by the court on this subject in the general charge and in the answers to the sixth, seventh, and ninth points of the defendant, and in view of the testimony as to the three properties mentioned in the defendant's eighth point, we think the affirmance of the defendant's eighth point was correct, and therefore the fourth assignment of error is not sustained.

The remaining assignments of error are not pressed in the argument for appellant, and we think they are without merit, and hence are not sustained. Judgment affirmed.

(177 Pa. St. 335)

PETERSON v. ATLANTIC CITY R. CO.
(Supreme Court of Pennsylvania. Oct. 5, 1896.)
TRIAL IN ABSENCE OF COUNSEL—ATTENDANCE ON
SUPREME COURT.

A trial court should not commence the trial of a case where the counsel for one of the parties is absent arguing a case in the supreme court; Sup. Ct. Rule 41 declaring that during the period assigned to argument of cases from the county of Philadelphia engagement of counsel in the lower courts will not be recognized as a reason for continuance or postponement of a cause, except when they are actually engaged in

a trial which commenced in a previous week, and is unfinished.

Appeal from court of common pleas, Philadelphia county.

Action by Annie C. Peterson against the Atlantic City Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

Gavin W. Hart, for appellant. D. B. Meany, for appellee.

DEAN, J. This action was for damages for personal injuries from negligence of defendant. It was tried in the court below on 25th January, 1895, in the absence of defendant's counsel, and a verdict for \$6,000 given for plaintiff. The absence of counsel, Gavin W. Hart, Esq., was owing to his presence in this court at the argument of a cause in which he was of counsel for appellee (*Sheehan v. Railroad*, on supreme court calendar for same week, and for argument same day). The court below was moved for a new trial on this ground, which was refused, and judgment entered on the verdict. We now have this appeal by defendant, assigning for error the action of the court below in proceeding with the trial in absence of its counsel. Rule 41 of the supreme court is as follows: "That the hour list be suspended in the Eastern district during the period assigned to the argument of cases from the county of Philadelphia. The argument of each cause shall be limited to one hour, unless the chief justice, upon an examination of the paper books, shall consider more time to be necessary. Sixty causes shall be assigned to each week, and a list thereof shall be made up and published by the prothonotary on the Saturday preceding. Said causes shall be set down in the order of their term and number, and shall be numbered on said list consecutively. The first twelve cases on said weekly list shall be assigned for argument on Monday, and for each succeeding day of the week, except Saturday, the first twelve cases theretofore undisposed of on said list shall be assigned for argument. No cause on said list shall be continued when reached, except for a sufficient cause. Engagements of counsel in the lower courts will not be recognized as a reason for the continuance or postponement of a cause, except when they are actually engaged in a trial which has been commenced in a previous week and is unfinished." As by the constitution the jurisdiction of the supreme court extends over the state, it must, as an inherent judicial power, necessary to the exercise of its jurisdiction, have authority to make rules which, in its opinion, will enable it to dispose of the business which comes before it from every court in the state. Whether its rules, intended to speed hearings, are the very best to accomplish the purpose, or whether they in any particular instance operate hardly, are proper subjects of discussion in determining whether they shall be abrogated or amended; but when adopted such discussion is out of place in determining whether they should be recognized by the lower

courts. If the supreme court have authority to adopt rules which, in its judgment, are necessary for the prompt transaction of the public business, we think no lawyer will doubt its power to enforce them; and this without regard to a difference of opinion as to their equitable operation. Clearly, then, it is the duty of the lower courts to have regard to them, not because they, in all cases, are the best, but because, being in the judgment of the supreme court the best, it has adopted them. They then, necessarily, become a rule of action for the lower courts, in so far as their business is affected by them, because they are the law. The common pleas courts have power to adopt rules which shall facilitate the transaction of their business. We have always rigorously sustained this power, unless in rare cases, where the rules were in violation of law. We cannot, however, sustain a rule or an order, even though made with a view to compel prompt trial of an issue in the common pleas, if the effect of such rule is to deny other litigants their right to a hearing in an appellate court. In that case it is a manifest violation of law, and our judgment is final on that question. Besides, not only should we have the aid of the court below in the enforcement of rule 41, because it is a lawful exercise of the power of this court, but also because it is a reasonable exercise of that power. There are in the commonwealth 54 judicial districts, with 90 judges. From the final judgments and decrees of these courts there come before us annually, approximately, 1,000 appeals, which ought to be heard while this court is in session. After argument, many of these cases demand prolonged investigation and careful consideration. If we are to dispose of this litigation promptly, that disposition of it can only be accomplished by strict order of hearing, and rigorous enforcement of the order by such rules as 41. The court sits in Philadelphia five months. Seven weeks of that time are set aside for hearing appeals from the courts of that county; and this, in view of the whole calendar, is all we can afford to give, and, in our judgment, all it is entitled to, exclusively, in an equitable distribution of our time among all the litigants of the state. All the appeals assigned to the two Philadelphia periods are seldom got through with in that time. Those not reached are heard as we can find time on weeks assigned to other counties, and, if not heard then, they go over for a year. To keep down the number of those that go over, many of them involving large sums of money, it is imperative upon us to insist on the presence of counsel when their cases are called. The rule is not for our convenience, but to promote the interests of suitors. In some cases, such as illness or recent death of counsel, and like causes, the rule is relaxed, but not to suit the convenience of counsel who have causes for trial on the common pleas calendar. That, if permitted, would practically break up our calendar, and continue about one-half the cases for a year; and, if such a course were allowed it would not be three years until the Philadel-

phia list would be incumbered with cases which would not be reached for several years. This would be a denial of justice. In adopting and enforcing this rule, we appreciate the difficulties of the common pleas in disposing promptly of all the cases on their calendars in the order in which they are called, while this court is engaged on the list of appeals for Philadelphia. But their cases are more completely in their control than ours. The counsel and parties concerned, in most instances, all reside in the city. During our session they have 20 weeks for Philadelphia, while we have but 7. Under such circumstances, not without inconvenience, we admit, but without seriously delaying suitors, such order could be made by the lower courts as would guard against an adverse judgment to a client while his counsel was attending to his professional duty in this court. But, however this may be, the inconvenience to suitors in a few cases ought not to be permitted to work the eventual vexatious delay and gross injustice which otherwise would be suffered by all the parties to all the appeals from final judgments in all the courts of the city. In view, then, of these facts, and the further fact that neither the learned judge of the court below nor we can add anything to the 52 weeks of the year, what is his plain duty? As we see it, it is, not only in letter, but in spirit, to recognize this rule, and to so arrange the trial list of causes before him that counsel, by obeying it, shall not put in peril the interests of their clients. We think it not improbable, when the learned judge remarked, "I doubt the right of the supreme court to make any such rule, and I would like to test it," he for the moment misapprehended our relations to each other and to the public. Neither he nor we, as against each other, have any rights to assert. Both of us have only very plain judicial duties to perform. The public alone have rights to be insisted on, and rights which both of us are bound to keep in mind. These are to have justice administered without "denial or delay." If, in working together for this object, our rules or orders should, in rare cases, come into conflict, then the only question is, not which shall assert a right, but which has the authority to finally determine what shall best promote the public interests. We feel sure a glance at the constitution, from which both of us derive whatever judicial authority we have, furnishes a complete answer. If the authority to finally decide is reposed in us, then we are bound to exercise it, not as asserting a right, but as performing a public duty.

It would serve no good purpose to take up and discuss at length the conflicting statements of facts by the learned judge of the court below and the able counsel for defendant. The contradictions are more apparent than real, and such as usually arise where each of the parties, under a sense of injury, strenuously insists on what he conceives to be his personal rights, not regarding the situation from the standpoint of official duty; and, although we have carefully considered the testimony, it would only, per-

haps, aggravate the irritation were we to attempt to reconcile these conflicting statements. We believe each attempted to perform his duty as he saw it, though they do not seem to believe that of each other. Nevertheless, the main fact stands out prominently and unquestionably that the court below disregarded, in spirit at least, a rule of this court, and thereby this defendant, in the absence of its counsel, who was in attendance upon his duties in this court, was cast in a verdict for \$6,000. Lawfully defendant had a right to counsel. Through no fault of its own or of its counsel, but because of the erroneous ruling of the court below, it had none. The trial was not, therefore, lawful, and the judgment must be reversed. It is reversed accordingly, and a v. f. d. n. awarded.

(177 Pa. St. 340)

In re RUST.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

LUNATICS—PROCEEDINGS FOR RELEASE.

A petition for inquisition under Act June 13, 1836, is not the proper remedy for release of one confined as a lunatic, all the proceedings contemplated by that act being against one alleged to be a lunatic to have him declared such, and a custodian of his person and estate appointed.

Appeal from court of common pleas, Philadelphia county.

In re Frederick G. Rust, an alleged lunatic. Petition by Llewellyn Rust for his release was denied, and petitioner appeals. Affirmed.

George Thorn Hunsicker, for appellant.
George S. Graham, for appellee.

DEAN, J. Frederick G. Rust, in May, 1887, was brought from his home, in the state of Virginia, to Philadelphia, and upon a certificate of his insanity by two Philadelphia physicians was received into the Pennsylvania Hospital for the Insane, and was in confinement there as a lunatic up until June 20, 1895, the date of filing this petition. He was declared a lunatic by the hustings court of Staunton, Augusta county, Va., where he resided with his father, in October, 1886, and his father appointed committee of his person and estate. His lunacy, it is alleged, dated from 1870, and at the instance of his father he was confined most of the time between 1870 and 1886 in the Western Lunatic Asylum at Staunton, Va. In 1886 he obtained a writ of habeas corpus from the court in Staunton, directed to the authorities of the asylum, and, after hearing, the court remanded him to the asylum. His father, soon after, died, and Edmund T. Lee, brother of his father's second wife, was appointed his committee, and at his instance the alleged lunatic was removed to the hospital at Philadelphia. The property of the lunatic is real estate, situate in Flushing, Long Island, N. Y., and land in Loudoun county, Va., yielding an annual income of about \$2,000. He possessed no property in

Pennsylvania. Before the commencement of these proceedings he obtained a writ of habeas corpus, directed to the authorities of the Pennsylvania hospital, and returnable before Judge Hare, of common pleas No. 2. He, after full hearing, declined to discharge him. Then this petition was filed by Llewellyn Rust, a cousin, averring that Frederick G. Rust is now sane, and praying the court to award a writ de lunatico inquiring, to inquire whether, by reason of lunacy, he is incapable of managing his estate, under the act of June 13, 1836. This petition the court below, September 21, 1895, dismissed, filing no reasons therefor, and petitioner appeals, assigning for error the dismissal of his petition. It would have been much more satisfactory to us, in reviewing the case, if the learned judge of the court below had put upon the record his reasons for the decree. If the proceedings in Virginia were without notice to the alleged lunatic, were wholly *ex parte*, as he alleges, the decree in them would not be conclusive on any court in this state. There could be no jurisdiction of his person without personal notice to him, or to some one who represented him, as an adverse party to the proceedings. And, even if the proceedings were entirely regular down to and including final decree in 1886, it by no means follows that, because he was originally confined in an insane asylum under a proper decree, he might not be unjustly restrained of his liberty in Philadelphia 10 years after. All our statutes contemplate such a contingency. Nor could we for a moment entertain the doctrine that in a great city like Philadelphia, with its numerous hospitals for the detention and cure of the insane, to which annually many unfortunate patients are removed from other states, that the courts were powerless to interfere, because the judicial proceedings resulting in the confinement were had in another state. The writ of habeas corpus is a writ of right intended to protect the individual against illegal confinement at the time it issues, without regard to the legality of the confinement at its beginning. But the proceeding here, by petition for an inquisition, is evidently instituted under the act of 1836. While one of the objects of that act is to provide guardianship for the person of the lunatic, its principal purpose is to protect his estate. All the proceedings contemplated are against the one alleged to be a lunatic to have him declared such, and a custodian of his person and estate appointed. It is clearly not the proper proceeding, where the party confined by petition avers he is not insane, and seeks to be relieved from an unjust confinement. We think, on this ground, the decree of the court below dismissing the petition must be sustained. Whatever may be petitioner's remedy to obtain release from illegal confinement, it is clearly not a proceeding under a statute intended, through a jury of six and a commissioner, to confine him. The very first averment of such a petition is that

the subject of it is a lunatic. The principal averment of this one is that he is not. The decree is affirmed.

(177 Pa. St. 142)

NORTHERN CENT. RY. CO. v. HARRISBURG & M. ELECTRIC RY. CO. et al.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

STREET RAILWAYS—CONSTRUCTION OF CHARTER—RIGHT TO CROSS OTHER ROADS—INJUNCTION.

1. Act May 14, 1889 (P. L. 211) §§ 1, 4, provide that the articles of association of a street-railway company shall state the streets upon which the railway is to be constructed, and that the act of such company authorizing any extension or branch shall name the streets on which the same is to be laid. Section 18 authorizes said companies "to cross at grade, diagonally or transversely, any railroad operated by steam or otherwise." *Held*, that a street railway chartered under this act has no right to construct and operate its road across the lines of a steam-railroad company, without the latter's consent, at a point where the steam railroad is not crossed by a street or highway.

2. A steam-railroad company has such a substantial property interest in its right of way, as well as in land which it holds in fee, as to entitle it to an injunction against a street-railway company which threatens to span such property with a viaduct for the transportation of electric cars over complainant's tracks without authority.

Appeal from court of common pleas, Cumberland county; E. W. Biddle, Judge.

Bill by the Northern Central Railway Company to restrain the Harrisburg & Mechanicsburg Electric Railway Company and the Cumberland Valley Traction Company from constructing a bridge over complainant's tracks. From a decree dismissing the bill, complainant appeals. Reversed as to the first-named defendant.

Edw. B. Watts, W. F. Sadler, and John Hays, for appellant. A. G. Miller and J. W. Wetzel, for appellees.

STERRETT, O. J. It is unnecessary to consider all the questions presented by this record. Such of them as are worthy of notice have been referred to, at least briefly, by the learned president of the common pleas in his opinion, findings of fact, and conclusions of law sent up with the record. The general and controlling question, however, is whether a company chartered under the street-railway act of May 14, 1889 (P. L. 211), has the right to construct, maintain, and operate its road across the lines of a steam-railroad company, without the consent and against the protest of the latter, at a point where its roadway is not crossed by a public highway. The answer to this question must, of course, be sought for in the expressly granted or necessarily implied powers and authority with which the street-railway company has been invested by the law under which it was created, and subject to which it continues to exist. If the right referred to cannot be found therein, it necessarily follows that the question must be answered in the negative. Section 1 of the act of 1889 provides "that any num-

ber of persons, not less than five, may form a company for the purpose of constructing, maintaining and operating a street railway on any street or highway upon which no track is laid, or authorized to be laid or to be extended under any existing charter, with the privilege of so much of any street, used or authorized to be used under any existing charter, as is hereinafter provided, for public use in the conveyance of passengers, by any power other than by locomotive; and for that purpose may make and sign articles of association, in which shall be stated * * * the streets and highways upon which the said railway is to be laid and constructed," etc. Section 4, authorizing extensions and branches, declares that "the act of the company authorizing any extension or branch shall distinctly name the street and highways on which said extension or branch is to be laid or constructed." It also provides that "no extension or branch shall be constructed on any street or highway upon which a track is laid or authorized under any existing charter, except as hereinafter provided." Section 14 authorizes the use of "such portion of the track of any other company, already laid down, as may be necessary to construct a circuit upon its own road at the end thereof." The length of track to be thus used "only with the consent of the local authorities of the city, borough or township, in no event, shall exceed five hundred feet of single track." It also prescribes the mode in which compensation for such use shall be made, etc. The next section declares: "No street passenger railway shall be constructed by any company incorporated under this act within the limits of any city, borough or township without the consent of the local authorities thereof, nor shall any street railway be incorporated hereunder which shall not have a continuous route from the beginning to the end, forming a complete circuit with its own track, excepting the five hundred feet to be used under section fourteen." Section 17 authorizes the occupation and use of turnpikes, not exceeding sufficient width for two tracks, and requires that compensation for such use shall be first made to the owner or owners of such turnpike or turnpikes, in the mode prescribed in section 14, aforesaid. With the exception of above-mentioned restricted and qualified rights to use a small section of another company's track in forming a circuit, and to occupy and use longitudinal strips of turnpikes, etc., street-railway companies chartered under said act are certainly not, in express terms, invested with any other power or authority in the nature of eminent domain. Indeed, the specific grant of these qualified rights is strongly indicative of legislative intention to withhold from such companies every other power of eminent domain. This conclusion is further fortified by the provisions intended to restrict them to established streets and highways as the location of their main lines, extensions, and branches. As we have seen, their right to

construct, maintain, and operate street railways is specifically limited to existing streets and highways. The names of the streets and highways selected by them must be stated in each company's articles of association. In the recorded action of the company exercising the branching power, etc., authorized by the act, it must also "distinctly name the streets and highways on which said extension or branch is to be laid or constructed." In brief, in the selection or adoption of the route, either of their main line or of any extension or branch thereof, they are expressly confined to established streets or other avenues in cities and boroughs, and to public highways in townships, subject to such further restrictions, even as to them, as are specified in the act. Outside of and beyond the restricted power and authority as to selection and adoption of a route, etc., thus granted, they are not invested with any other authority in that regard except such as may be necessarily implied. Without ignoring the well-settled rules applicable to the construction of charters, it is impossible to reach any other conclusion than that the legislature, in this carefully drawn and well-guarded act, intended to withhold from companies chartered thereunder everything in the nature of a roving commission under which they might assert the right to locate, construct, and operate street railroads wherever they pleased. It was successfully contended in the court below that the authority given in section 18 of the act "to cross at grade, diagonally or transversely, any railroad operated by steam or otherwise," is general in its application, and confers an unqualified right to cross a steam railroad anywhere, without regard to whether there is an established street or highway crossing at the same point or not. This is a grave mistake. As we have seen, location, construction, and operation of street railways are authorized only on established streets and highways. Section 18 is evidently predicated of that fact, and hence the authority therein granted is necessarily applicable only to crossings at points where the railroad is crossed by a street or highway. In other words, it refers only to crossing at a point where the street or highway on which the street railway is located crosses the steam railroad. To hold otherwise would not only be contrary to the manifest intention of the legislature, but it would involve the constitutionality of the eighteenth section.

As to the property on which the alleged trespass was threatened, the learned trial judge found that "at the place of crossing plaintiff has a right of way sixty feet in width, and an adjoining strip of land twenty feet wide, which was acquired by deed"; and in sustaining plaintiff's eighteenth and nineteenth exceptions to his previous rulings he further found that said 20 feet wide strip of land is owned by it in fee, that prior to filing the bill defendant company attempted to cross plaintiff's land and right of way at the point in question, and that plaintiff had reason to apprehend that

such attempt was imminent, etc.; but, in view of the facts, as he found them, he held as matter of law that plaintiff's right of way and ownership in fee of said strip of land were immaterial; that the right to cross plaintiff's railroad, etc., at an elevation of about 22 feet above the surface of its tracks was conferred upon the Harrisburg & Mechanicsburg Electric Railway Company by section 18 of the act, and then said: "The long, narrow piece of land referred to, which is held in fee, is essentially part and parcel of the railroad, just as much so as the easement which it adjoins, and the right to cross it is as clearly given as is the right to cross the easement." For reasons already suggested, we think he was clearly wrong in this. Aside from the ownership in fee of the 20 feet wide strip, the plaintiff has a substantial property interest in its right of way which the defendant is bound to respect. While that interest cannot be called a fee, it is a species of title that has some of the incidents of an estate in land. As was well said by our Brother Mitchell in *Railroad Co. v. Reading Paper Mills*, 149 Pa. St. 18, 24 Atl. 205: "Such title is sometimes called an 'easement,' but it is a right to exclusive possession; to fence in, to build over, the whole surface; to raise and maintain any appropriate superstructure, including necessary foundations; and to deal with it, within the limits of railroad uses, as absolutely and as unconditionally as an owner in fee. There was no such easement at common law. * * * It would seem to be rather a fee in the surface, and so much beneath as may be necessary for support, though a base or conditional fee, terminable on the cesser of the use for railroad purposes. But, whatever it may be called, it is, in substance, an interest in the land special and exclusive in its nature, and which may be the subject of special injury, * * * and therefore within the rule which governs the application of equitable relief."

There is also manifest error in the tenth finding of fact, viz.: "So far as the evidence has disclosed, the building of defendant's railway and the running of cars thereon will not injure or affect the operation of plaintiff's railroad, or inflict upon plaintiff any actual damage. There will be no increase of danger from accident or other cause." Aside from the unauthorized occupation of plaintiff's property by spanning the same with an overhead bridge or viaduct, 100 feet or more in length and about 22 feet above its tracks, at a point where there has never been an overhead or grade crossing of any kind, it is impossible to reach the conclusion that such a superstructure, with electric cars running thereon at frequent intervals, will not result in a greater or less increase of danger to plaintiff company, its patrons and employees. To what extent the danger from accident or other cause would be increased would, of course, depend very largely on the degree of care and skill exercised in the construction and maintenance of the bridge and in the operation of the street rail-

way thereon; but that, under the most favorable circumstances, there would be an appreciable increase of danger, no one can doubt.

It follows from what has been said that plaintiff had standing to resist the threatened invasion of its rights by the Harrisburg & Mechanicsburg Electric Railway Company, one of the defendants, and, upon the facts shown by the pleadings and proofs, it was entitled to the relief prayed for. The decree dismissing the bill is accordingly reversed, and the perpetual injunction specially prayed for is now granted against the Harrisburg & Mechanicsburg Railway Company, with costs to be paid by said company; and as to the other defendant the bill is dismissed.

(173 Pa. St. 194)

**GREENFIELD v. EAST HARRISBURG
PASS. RY. CO.**

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

TRIAL—INSTRUCTIONS.

Instructions in part predicated of facts neither admitted nor conclusively established by undisputed evidence are properly refused.

Appeal from court of common pleas, Dauphin county.

Trespass by Elizabeth Greenfield against the East Harrisburg Passenger Railway Company to recover for injuries to plaintiff's husband resulting in his death. From a judgment for plaintiff, defendant appeals. Affirmed.

L. D. Gilbert, for appellant. M. W. Jacobs, for appellee.

STERRETT, C. J. While the testimony in this case is more or less conflicting and unsatisfactory, it sufficiently presented, inter alia, two controlling questions of fact, which it was the duty of the court to submit to the jury for their determination, viz.: (1) Whether defendant company's employees in charge of the car in question were guilty of negligence which occasioned the death of plaintiff's husband, and (2) whether any negligent act of the latter contributed to his injury and consequent death. These and all other questions of fact arising out of the testimony were fairly and fully submitted to the jury by the learned president of the common pleas in a clear and adequate charge, to which no exception appears to have been taken. Without referring to the charge in detail, it is sufficient to say that it embraces and correctly disposes of every legal question involved in the case. After fully explaining what constitutes negligence, contributory negligence, etc., and calling attention to the testimony relating thereto, the jury were instructed to determine, in the first place, whether the plaintiff had satisfied them "by the weight of the evidence that there was negligence on the part of the persons running the car. * * * If they were not negligent, there could be no recovery." If, on the other hand, the jury came to the conclusion that defendant's servants were negligent, their next duty was to determine whether plaintiff's husband was also

gully of negligence. After referring to the testimony relating to that question, the learned judge proceeded to further instruct the jury as follows: "All these matters you will have to take into consideration, and endeavor to ascertain what the facts really were, reconciling the testimony of the different witnesses, if you can, and determining which are entitled to credit, and what the facts really are; and, having ascertained that, determine whether the facts, as they are, show that the deceased acted as a person of ordinary care and prudence would act or ought to act * * * under the circumstances. If he did, he was not negligent. If he did not, he was negligent, and * * * the plaintiff cannot recover." Acting under full and comprehensive instructions, covering all the questions presented by the testimony, the jury, by their verdict, definitively settled in favor of the plaintiff every material question of fact in controversy. We find nothing in the record that would justify us in sustaining any of the specifications of error; nor do we think either of them requires discussion. In the fourth and fifth, binding instructions, unwarranted by the testimony, were requested. The others are, in part at least, predicated of facts which were neither admitted nor conclusively established by undisputed evidence. In the concluding clause of the third, it is assumed as a fact that "he [the deceased] did not, as he was legally bound to do, use his eyes or ears or senses as to the approaching car." No such fact was either admitted or conclusively proved. Whether it was so or not was a question of fact for the jury. As has been remarked, the testimony was more or less conflicting and unsatisfactory in relation to that as well as other matters that are improperly assumed in the first three points. The case was carefully tried, and the judgment should not be disturbed. Judgment affirmed.

(178 Pa. St. 124)

NYE v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

MASTER AND SERVANT—EVIDENCE—NEGLIGENCE OF MASTER.

It appeared that on a stormy, winter morning deceased was one of a gang sent out to release a train which had become snow-bound about two miles west of the city, on the east-bound track; that in order to keep open the west-bound track, between which and the other track there was a clear space of seven feet, it became necessary to run engines over it every few minutes; that in the afternoon deceased, while still at work shoveling snow from the east-bound track, was struck by a belated passenger train coming from the city, on the west-bound track, and was killed; that the division superintendent had not notified the engineer of said train, before it left the city, of the position of the blockaded train; and that such notice would have been impracticable, since the train might have been moved some distance since morning, and there were, moreover, about 100 gangs along the line, engaged in clearing the tracks. *Held* insufficient to show any negligence on the part of the railroad company.

Appeal from court of common pleas, Dauphin county.

Trespass by Sarah Nye against the Pennsylvania Railroad Company to recover damages for the negligent killing of her husband. From a judgment for plaintiff, defendant appeals. Reversed.

The material facts on which the decision rests are as follows: Early on the morning of February 8, 1895, there was a fall of snow, several inches in depth, in the city of Harrisburg and vicinity, accompanied by a high wind from the west; and as a consequence of this the railroad tracks of the defendant company between the main depot in the city and a station about three miles west, named "Lucknow," upon what is known as the "Middle Division" (extending from Harrisburg west to the city of Altoona), were so badly covered and obstructed by the drifting snow as to be almost impassable, and their continued use rendered exceedingly difficult. Between the two points named (Harrisburg and Lucknow) the defendant company had two passenger tracks, known as "No. 1" and "No. 2." These tracks were near together, and No. 1 was used for passenger trains running east, and No. 2 was used for passenger trains running west, and near to and east of No. 2 were sundry parallel tracks used for freights. By 11 o'clock a. m. the snowstorm and drifts had become so severe as to make it impossible to longer operate track No. 1, and a working train upon it, in charge of Conductor W. H. Foulke, composed of engines Nos. 105 and 361, a flat car, and a cabin car, was completely snowed up, and unable to move, at a point about three-fourths of a mile east of Lucknow; and, to keep track No. 2 open, it became necessary to run engines and cars over it every few minutes, which was done. George W. King, the supervisor of that part of the road reported the situation to Frank Ellmaker, the superintendent of the middle division, at his office in Harrisburg, and called upon him for a force of men to shovel snow, to release the snow-bound train, and enable him to keep the trains in operation at that locality. Ellmaker responded promptly, and, by an engine and car upon one of the freight tracks, sent him up a gang of about 20 men for the purpose, of whom Noah Nye, the husband of the plaintiff, was one. About 3:45 p. m., same day, a train known as "No. 3" (Pacific Express) came west about 12 hours behind time, by reason of the prevailing snowstorm and drifts; and as it passed on track No. 2, opposite the place where the snow-bound train was yet blocked on track No. 1, it struck Noah Nye, inflicting injuries from which he soon afterwards died.

L. W. Hall, for appellant. M. W. Jacobs, for appellee.

MITCHELL, J. There was considerable evidence of contributory negligence on the part of the deceased, but it is not necessary to examine critically whether it was so clear

as to require the court to pass upon it as matter of law, because, on the whole case, we fail to find any evidence of negligence on the part of defendant. The points of negligence suggested are failure of the division superintendent to notify the engineer of the west-bound train of the position of the blockaded train and the workmen engaged in freeing it, the failure of the engineer to whistle, and the speed of the train. As the last two matters, if proved, would be the action of fellow servants, the only real ground of contention is whether there was any duty of the division superintendent, before allowing the belated train to leave Harrisburg, to notify the engineer of the situation of affairs at Lucknow. We do not see anything on which such a duty can be predicated. As a matter of evidence, the superintendent testified that, owing to the stormy character of the day, extra men were employed to keep the tracks clear of snow; that he had at least a hundred gangs scattered along the road, engaged in this work; and that it would have been impracticable to give the engineer of the west-bound train any notice that would have been of any use, because, as to this particular gang, it was sent to move a train, and it might have moved 100 feet or a mile in 10 minutes. This testimony was not contradicted by any man with experience in such matters. Passing from the particular evidence in this case to the general principles applicable to the subject, it is plain that track-repairing or track-cleaning in the vicinity of moving trains is intrinsically a dangerous occupation. The men who went out to clear this blockaded train knew that the very object of so doing was to keep the track open so as to allow trains to run. The uncontradicted testimony is that the next track, No. 2, on which the accident occurred, was only kept open by constantly running a locomotive backward and forward on it at this point. The decedent's work was not on this track, but on No. 1, and there was a clear space of seven feet between them. The representatives of the railroad company had no reason to suppose that he would voluntarily put himself into unnecessary danger, by getting on track No. 2, or so near it as to be struck by one of its trains. It is a fair presumption not only that men take the risks of their employment, but that they are competent to keep themselves out of manifest and unnecessary exposure to danger. It is argued that the storm made the situation one of unprecedented peril to Nye and his fellows, and the court therefore could not say, as matter of law, that the railroad owed no unusual duty for the protection of its employes. But the situation was no more unprecedented for one than for the other, and the danger, though greater in degree, was no different in kind from that under ordinary circumstances; and, the more manifest the danger, the more the employer was entitled to rely on the presumption that the

employé would not unnecessarily incur it. It has not been shown that the defendant omitted any reasonable precaution which it could have taken against this unfortunate accident, and the jury should not have been allowed to find negligence, without some evidence of a definite basis on which to rest it. Judgment reversed.

(173 Pa. St. 149)

COMMONWEALTH, to Use of FARMERS' BANK OF HUMMELSTOWN, v. STRICKLER et al.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

ACTION ON TELLER'S BOND—EVIDENCE—INSTRUCTION.

The trial in an action on a teller's bond having been on the theory that he converted to his own use \$1,000 of the bank's money, there was no error in instructing that the bank had the burden of showing that he took the money, and converted it to his own use, and that a mere incorrect entry would not of itself impose an obligation on him, but that it would be necessary to show that a money loss accrued to the bank.

Appeal from court of common pleas, Dauphin county.

Action by the commonwealth of Pennsylvania, for the use of the Farmers' Bank of Hummelstown, against Frank S. Strickler and others. Judgment for defendants. Plaintiff appeals. Affirmed.

S. J. M. McCarrell, for appellant. M. D. Detweiler, for appellees.

McCOLLUM, J. It is not denied that this case was tried in the court below on the theory that the defendant on the 1st of April, 1887, converted to his own use a thousand dollars of the bank's money. The statement of claim was prepared in accordance with this theory, and the declaration of the plaintiff's counsel, when interrogated by the court in regard to the nature of their client's contention, harmonized with it. A claim of this nature, although made in a civil suit, necessarily involved a reflection upon the defendant's character. It was tantamount to, if not in plain terms, a charge of embezzlement. That both parties to the suit so regarded it is further shown by the fact that the defendant was allowed without objection to introduce evidence of his character for honesty. If the issue had related to an alleged loss caused by an error of the defendant in adding the items in the depositors' columns, there would have been no occasion or room for evidence of this nature. We have specifically referred to the matters above mentioned because they are proper for consideration in determining whether there is substantial cause for the complaint made by the plaintiff in respect to the charge. In view of the issue presented by them, we cannot regard the instruction concerning the burden of proof as prejudicial to the interests of the bank, or in any sense misleading. There was no warrant in the evidence for a conclusion that the bank sustained a loss by reason of an error in adding the items in the depositors'

column. It was not claimed that there was any error in any item of the column, or that the bank, in consequence of the error in adding the items, paid to any depositor more than he was entitled to receive. It required something more than the error complained of to sustain the claim that the defendant had appropriated the bank's money. The learned judge therefore made no mistake in saying: "A mere incorrect entry would not of itself impose an obligation on the defendant; it would be necessary to show that a money loss accrued to the bank." If the bank received and had the benefit of all the deposits made on the 1st of April, 1887, it was not injured by the error in footing them. The only ground on which a recovery was possible with due regard to the claim of the plaintiff and the evidence in the case was that the defendant withheld or abstracted from the bank for his own purposes a thousand dollars belonging to it. Whether he did so was a question for the jury upon all the evidence in the case. It was submitted to them in an adequate and impartial charge, and their decision of it was in accord with a fair preponderance of the testimony. Judgment affirmed.

(178 Pa. St. 180)

HARRISBURG NAT. BANK v. BRADSHAW.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)
ACCOMMODATION INDORSEMENT BY FEME SOLE—RENEWAL AFTER MARRIAGE—VALIDITY—WAIVER OF PROTEST—RATIFICATION.

1. Act June 8, 1893, forbidding a married woman to become an accommodation indorser for another, does not prevent her from making a binding renewal of a valid indorsement made before her marriage.

2. A married woman's renewal of a valid accommodation indorsement, made by her before marriage, is binding though such renewal be made after she has been released from liability on the original indorsement by failure of the obligee to protest for nonpayment; it appearing that the parties intended the renewal to be as of the date of the note renewed, and a mere continuation of the indorser's original obligation.

3. Such renewal, though made by an attorney under an insufficient power, may be ratified by the principal.

Appeal from court of common pleas, Dauphin county; J. W. Simonton, Judge.

Action by the Harrisburg National Bank against Elizabeth Rely Bradshaw on a note. From a judgment for defendant, plaintiff appeals. Reversed.

The trial court found the following facts: "(1) In July, 1889, Miss Elizabeth Rely indorsed a note for \$10,000 for the accommodation of her brother, John W. Rely, which was discounted for him by the Harrisburg National Bank, with knowledge that she was an accommodation indorser, and when this note matured on November 4, 1889, she in like manner indorsed a like note in renewal of the first. Before the second note matured, she became the wife of Walter J. Bradshaw, and executed, jointly with him, a power of attorney

to G. M. McCauley. * * * (2) After her marriage and the execution and delivery of this power of attorney, she removed to Helena, Montana, where she resided when the second note matured, on March 7, 1890. On that day the attention of her attorney was called to this note by the president of the bank, who asked him to indorse a note in renewal. Mr. McCauley expressed doubt whether he had authority so to do, and the president said, if he would indorse it, it would be satisfactory, which he then did. He had no knowledge of the execution of the note until this time, and Mrs. Bradshaw had not mentioned it to him, nor given him any authority to act for her, except the power of attorney above referred to. No protest or notice of nonpayment was made or given as to the note which then matured. At this time the balance to the credit of John W. Rely on the books of the bank was \$2,558.06. (3) Thereafter, at intervals of four months, until August 17, 1894, notes, each in renewal of the preceding one, were given to the bank with the accommodation indorsement of Elizabeth R. Bradshaw, the defendant. None of these renewal notes were protested, and there were intervals of, in some cases, two or three days, and in others as many weeks, between the maturity of a given note and the indorsement and delivery of the renewal. Most of the notes, when matured and renewed, were delivered to the attorney of John W. Rely and Mrs. Bradshaw, and the renewal interest was paid by him on account of John W. Rely. (4) When the last note matured, on December 20, 1894, it amounted, with interest, to \$10,817, and it was duly protested, and notice of nonpayment was sent to the defendant."

G. L. Bailey and R. Snodgrass, for appellant.
S. J. M. McCarrell, for appellee.

FELL, J. The question presented by this case relates to the power of a married woman to bind herself by the renewal of an accommodation indorsement made before her marriage. The defendant, when single, indorsed a promissory note at four months for \$10,000 for the accommodation of the maker, her brother. Once before marriage she renewed her indorsement, and after her marriage she renewed it as the notes became due, at intervals of four months, for the period of nearly five years. The last of the series of notes was protested, and this suit brought upon it. The statement was drawn and the case presented by the plaintiff upon the theory that the notes given before marriage and the renewals after marriage were parts of a continuing transaction, and that the defendant's liability was to be drawn from the whole of it. The marriage of the defendant did not affect her relation to obligations into which she had previously entered so as to release her from an antenuptial contract, and it is conceded that the protest of the first note which became due after her marriage would have fixed her liability as to it, but it is claimed that she was without power,

after marriage, to renew her indorsement, as she is not permitted by the act of June 8, 1893, to become an accommodation indorser. The learned judge, before whom the case was tried without a jury, held as conclusions of law that the defendant was discharged from liability upon the note indorsed by her before marriage and which matured thereafter by the failure of the bank to protest it for nonpayment; that the failure to protest was not waived by the indorsement of new notes from time to time; and that she was not bound by the indorsements made after marriage, for the reason that she was incompetent to incur liability as an accommodation indorser. The primary question is whether a married woman is bound by the renewal of an existing valid contract, entered into before marriage, when the contract is one which the law does not authorize her to make after marriage. The act of 1893 gives a married woman the same right to acquire, control, and dispose of property and to make contracts in relation thereto that she possessed before marriage. The limitation placed upon the power conferred is that she "may not become accommodation indorser, maker, guarantor, or surety for another." The purpose of the limitation is to protect her from contracts not connected with the management of her estate, and from which she could derive no advantage. As to contracts relating to her own estate or affairs, the existing restraint was removed. It remains as to a class of contracts into which she might be induced or constrained to enter for the benefit of others. The defendant was liable on the indorsement of the note which became due two months after her marriage. True, her liability was conditional only, but it would have been fixed and made absolute by protest and notice. By the renewal of her indorsement she did not enter into a new obligation for the benefit of another, but she continued and extended for her own benefit an existing obligation by which she was bound. By so doing she did not "become an accommodation indorser," and enter into a new forbidden contract. The contract already existed and its continuance was for the relief and benefit of her estate. A construction of the act which denies a woman, after marriage, the power to continue an antecedent obligation, would in many cases impose a hardship upon her. If she cannot continue, the alternative is to pay, however great may be the loss to her estate. Such a construction is not required by the letter of the act, and would not be in harmony with its spirit. The proviso of the act of 1887, which is incorporated into the act of 1893, is for the protection of women after marriage from a class of contracts in which they have no direct interest, and from which their estates can derive no advantage. The renewal of an obligation contracted before marriage, we think, does not come within the meaning of the act, although the obligation may belong to the prohibited class. The bank could have bound the defendant to the pay-

ment of the note absolutely by protest. She could have bound herself by a waiver of protest. The renewal of her indorsement at the maturity of the note was but the recognition and continuance of an obligation which she had before assumed, and which was binding upon her. Whether the power of attorney given by the defendant to G. M. McCauley authorized the indorsement made by him of the note of March 7, 1890, is not material. If she had power to renew the indorsement after marriage, she could do it by her attorney, and, if the power under which he acted was not broad enough, it was competent for her to ratify and confirm his act. This she did. The indorsement of notes in renewal by the defendant after she had been released from liability on preceding notes because of the failure of the bank to protest them for nonpayment was not, under the circumstances, the assumption of a new liability as accommodation indorser. After her marriage she resided in Montana. The notes were sent to her by her attorney for indorsement. Most of them were returned to the bank before the maturity of the notes which they were intended to renew. The bank relied upon her carrying out in good faith the understanding which existed between them as to renewals. She did carry it out. It was not at any time the intention of either party that she was assuming a new obligation for her brother, but it was the intention of both that the renewals should be as of the dates of the notes renewed; that there should be no gap; and that she was continuing her own obligation, entered into before marriage, by which she was bound. While the defendant was not authorized, after marriage, to enter into a new contract as accommodation indorser, it was competent for her to continue her valid antenuptial contract. In dealing with this the act of 1893 imposed no limitation upon her power. She could have taken advantage, as could any indorser, of the failure of demand and notice by the holder of the note, or she could overlook the omission and recognize and reassert her liability by a new indorsement. By so doing she was not entering into a new contract not authorized by the act. Substantially the same principle was asserted in *Brunner's Appeal*, 47 Pa. St. 67. Under the act of 1848 a married woman was liable on her antenuptial contract, but was without power to confess judgment for a debt due by her. It was held in the case cited that she could agree to the revival of a judgment entered after marriage by virtue of a power of attorney signed by her before marriage, for the reason that it was not the creation of a new liability by the renewal of one already existing. We are of opinion that under the findings of fact judgment should have been entered for the plaintiff. The judgment is reversed, and set aside, and now, October 5, 1896, judgment is entered for the plaintiff for the amount of the note of August 17, 1894, with interest and costs of protest, \$12,202.06.

(178 Pa. St. 186)

CHEETHAM et al. v. McCORMICK,
Atty. Gen.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

**STREET RAILWAYS—STOCK—PREVENTING UNLAW-
FUL ISSUE—ACTION BY ATTORNEY
GENERAL—DISCRETION.**

1. Const. art. 16, § 7, provides that "no corporation" shall issue stock except for money, etc., actually received, and that fictitious increase of stock shall be void. Act 1887, No. 44, entitled "An act to enforce section 7 of article 16 of the constitution, against railroad corporations," provides that no "railway corporation" shall issue stock for less than its par value, which shall be actually paid in cash. *Held*, that street-railway companies were included in the statutory prohibition.

2. Under Act 1887, No. 44, § 4 (providing that on complaint of any stockholder of any railroad corporation, or of two reputable citizens, it shall be the duty of the attorney general to institute proceedings to enforce the act which prohibits the issuance of stock by railway corporations for less than its par value paid in cash), the attorney general has no discretion, where the complainants show a prima facie case, to refuse to institute proceedings.

3. The attorney general is not required to institute such proceedings until a prima facie case is made by the complainants.

Appeal from court of common pleas, Dauphin county.

Petition by J. H. Cheetham and another against Henry C. McCormick, attorney general, for a writ of mandamus. From a judgment for petitioners, defendant appeals. Reversed.

H. C. McCormick, in pro. per. C. G. Derr, for appellees.

WILLIAMS, J. The constitution provides (article 16, § 7) that "no corporation shall issue stock or bonds except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void." There is no exemption from the operation of this prohibition, and it is perfectly obvious, therefore, that street railways are within it. They are exposed to the mischief to be guarded against. They are within the remedy proposed by the people in the fundamental law. A few years' experience under the new constitutional provision appears to have satisfied the legislature that the frauds forbidden by article 16, § 7, were most frequently perpetrated by railway corporations. Accordingly, in 1887 (Acts 1887, No. 44) a law was passed having for its title "An act to enforce section 7 of article 16 of the constitution, against railroad corporations." Not only does the title indicate its purpose, but its preamble also recites the constitutional prohibition, its violation, by means of various devices, by railroad corporations, and the intent to provide a more effective means for the protection of the public against the evil. The several sections of the act provide that "no railway corporation of this commonwealth, its directors or officers," shall issue, or authorize the issue, of any stock of the corporation "for less than its par value," which par value in money shall be actually paid into the treasury of such corporation before the stock issue. They further pro-

vide that no bond shall be issued for less than its fair market value, and that all stock and bonds issued in violation of the provisions "shall be void." The act then provides a form of procedure by means of which the several provisions of the act may be enforced, and the stock or bonds, or both, issued in violation of the act, may be adjudged to be void, and the officer or officers issuing such stock or bonds punished, as they most richly deserve to be. This was a proceeding under the act of 1887, to have certain shares of stock and certain bonds, alleged to have been issued in violation of its terms and of the provision of the constitution, declared to be void, and to restrain the officers from the delivery of such of the shares and bonds as might still be within their control. The application was first made to the attorney general, and was refused by him, on the theory that street-railway corporations were not "railroad corporations," within the meaning of Act 1887, No. 44. The application for a writ of mandamus was then made; and to that an additional defense is interposed, on the ground that the refusal by him to proceed against the corporations alleged to have violated the act of 1887 was the exercise of an official discretion by the attorney general, and was not reviewable in the common pleas. The learned judge of the court below ruled in favor of the petitioners on both points. The attorney general appealed for the purpose, as we have no doubt, of getting an authoritative construction of the act of 1887, by which the position of street railroads under its provisions, and the limits of his own official duty, might be definitely settled.

We have therefore two questions presented on this record: First. Are street railroads within the purview of the act of 1887? Second. What, if any, discretion, does the fourth section of the act leave to the attorney general in regard to its enforcement?

The first of these questions does not require an elaborate consideration. The constitutional provision includes all corporations, organized for business purposes, in its prohibition. The act of 1887 selects from the mass of corporations a single class, viz. "railroad corporations," and provides for them. These words include all railroad corporations unless their comprehensive character is restricted by words of limitation found in the title or in the body of the act. *Rafferty v. Traction Co.*, 147 Pa. St. 579, 23 Atl. 884; *Millvale Borough v. Evergreen Ry. Co.*, 131 Pa. St. 1, 18 Atl. 993. There are no such restrictive words in the title. There are no words in the body of the act that were intended or that can fairly be used to differentiate steam railroads from all other railroads, as the corporations to be affected by its provisions, or that were intended or can be fairly used to exempt street-railroad corporations from its operation. There are some expressions made use of in the second section, and some in the fourth, that are more usually used with reference to steam railroads, some that are equally applicable to any sort of a railroad corporation, but none that may be said to be peculiar to any

one class of railroads. There is therefore nothing in the words employed in the body of the act that requires us to restrict the generality of its title, or that would justify us in so doing. Street railways are clearly within the constitutional prohibition. They are within the mischief recited in the preamble to the act of 1887. They are within the remedy which the act provides. The ruling of the learned judge of the court below on this point is affirmed.

This question being settled, the right of the petitioners to be heard follows. They are clearly within the class of persons authorized to proceed by section 4 of the act. Having a right to be heard on the question of the validity of the stocks or bonds issued, when that right is denied they are persons beneficially interested in the subject-matter in regard to which the writ of mandamus is prayed for.

The second question still remains to be considered. The learned judge of the common pleas denied the possession of any discretionary power by the attorney general so far as proceedings under the act of 1887 are concerned, and held that, "on the facts shown by the petition, it became the duty of the attorney general to proceed against the corporations named." On the other hand, it is contended by the learned attorney general that the complaint provided for in the fourth section of the act¹ is addressed to him as the law officer of the commonwealth, is to be heard and disposed of by him, and that his decision not to proceed in the courts upon the facts so presented is a final disposition of the complaint, and conclusive upon the petitioners. We cannot adopt either of the views so presented without considerable qualification. The attorney general is the law officer of the commonwealth, and represents her in all her litigation. In proceeding under the act of 1887, he must use the name of the commonwealth, and the costs, if he is unsuccessful, must fall on the commonwealth. When a complaint reaches him, an inquiry into the facts may satisfy him that the complainants have been misled; that they really have no information on the subject, but are acting from malicious motives, or for stock-jobbing purposes. He may see very clearly that to proceed under the

act would be unwise, would invite certain defeat, and fasten a bill of costs unnecessarily on the commonwealth. Under such circumstances, it is the duty of the attorney general, under his official oath, to say to the complainants, "You have no case"; and it is his right to decline to ask for the complainants what he is satisfied they have no right to. If, then, the complainants have any proofs to submit in support of their complaint, they should present them. If they can show a *prima facie* case in support of the facts alleged they have met the only objection the attorney general can interpose, and it will then become his duty to proceed. The question of public benefit, and that of public policy, have been settled by the action of the legislature. Have the complainants a *prima facie* case? is the question which the legislature has not conclusively settled, and which is therefore open for consideration by him. If, after they have presented for his consideration facts that justify their complaint, he still refuses to proceed, it may well be urged that he is not exercising the sound discretion of a public officer, but the arbitrary will of one who refuses to discharge a public duty, because he has the physical power to do so.

Before the attorney general is subject to a writ of mandamus to compel him to proceed under the act of 1887, he has a right to know the strength of the case he is asked to present in the name of the commonwealth; and, unless the petitioner shows a *prima facie* case under the statute when a mandamus is asked for, it should be presumed that the refusal of the attorney general rested on his conclusion, from all the facts before him, that the complaint could not be sustained by proof. We reverse the decree in this case for this reason only. The record is remitted, and the petitioners may present the facts to the attorney general by the affidavits of any competent witnesses; and, if they are able to show *prima facie* a case which would justify the proceedings they invoke, we have no doubt the respondent will give prompt and vigorous attention to their complaint. The investigation made by him will be *ex parte*, and carried so far only as to show that a *prima facie* case in support of the complaint exists.

¹ Act 1887, No. 44, § 4, provides: "That upon complaint of any stockholder in any railroad company of this commonwealth, or of any two reputable citizens resident in the region traversed by the line of the railroad of such company, or the traffic of which will be affected by its construction, that the said company is about to issue, or has issued since the passage of this act, either stock or bonds, or other certificates of indebtedness, in contravention of the provisions of this act, or of section seven of article sixteen of the constitution (which complaint shall be in writing, verified by affidavit, and filed with the attorney general of this commonwealth), it shall be the duty of the said attorney general at once, to institute proper proceedings at law, or in equity, or both, in the name of the commonwealth to enforce the provisions of this act, and to restrain and prevent the company from consummating, or continuing any act, or acts, so alleged to have been done, or to be contemplated, in violation of the terms of this act."

(178 Pa. St. 171)

COMMONWEALTH v. ANDERSON, Registrar and Recorder.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

CONSTITUTIONAL LAW — SPECIAL LEGISLATION — TAXATION — OFFICERS' COMPENSATION.

1. Act 1874, which imposes a tax of 50 per cent. on fees over a certain amount received by certain officers in counties not containing over 150,000 inhabitants, the constitution providing that in counties having over 150,000 inhabitants the officers shall be paid yearly, is not unconstitutional as a local or special law.

2. Such act is not an act regulating the "affairs of counties," within the meaning of Const. art. 3, § 7, which prohibits the enactment of local or special laws regulating the affairs of counties.

3. Act 1874, imposing the same tax on the excess of fees received by an officer holding one

office over a certain amount, less office expenses, as that imposed on the excess of the aggregate fees received by an officer holding several offices over the same amount, less office expenses, does not violate Const. art. 9, which provides for uniformity of taxation.

4. Act 1874 provides that certain officers shall pay into the treasury, for the use of the commonwealth, after deducting office expenses, 50 per centum on the amount of any excess above \$2,000 received in one year, provided, if two or more of said offices are held by one person, the auditor shall add together the fees received in the offices so held, and charge the same percentage on the aggregate amount of fees. *Held*, that in the case of an officer holding several offices only one salary should be deducted from his gross receipt of fees.

Appeal from court of common pleas, Dauphin county.

Proceeding by the commonwealth against David R. Anderson, register and recorder, etc. From a judgment for the commonwealth on appeal by defendant from the auditor general's settlement, defendant appeals. Affirmed.

The opinion of the trial court was as follows (McPherson, J.):

"Since the entry of judgment in this case the attorney general has agreed that the defendant may file the following additional exception to the ruling of the court: 'The court erred in directing judgment in favor of the commonwealth and against the defendant, because the settlement of the auditor general and state treasurer, which purports to have been made under the act of April 2, 1868 (P. L. p. 11, § 8), is in fact a settlement under the act of May 6, 1874 (P. L. 125); and, if the proviso in said last-mentioned act is so construed as to allow the defendant but one salary for the several offices which he holds, thus discriminating against him and in favor of other persons who hold like offices separately, it is unconstitutional, null and void, being contrary to article 9, § 1, of the constitution, as well as article 3, § 7, cl. 2. The defendant's argument is that the body of the act of 1874 repeals all preceding acts on this subject, because it provides a new system for taxing the fees of officers in counties having less than 150,000 inhabitants; but that the proviso of the act is void because it offends against article 9 of the constitution providing for uniformity of taxation, and against article 3, § 7, forbidding the legislature to pass 'any local or special law * * * regulating the affairs of counties. * * *' In our opinion this position is unsound throughout. It is not the proviso, however, but the whole act which the defendant ought to attack, if he desires to insist upon an alleged violation of article 3, § 7, for it is not the proviso, but the body, of the act which confines its scope to counties having a specified population. But, whatever may be his point of attack, we believe that the act of 1874 does not offend against article 3, § 7, because it is not a local or special law. It applies to all the counties of the state containing less than 150,000 inhabitants; and, while statutes upon certain other subjects hav-

ing a similarly restricted scope have been held to be unconstitutional in several cases, which it is not necessary to cite, the act in question is valid, because it is restricted by the constitution itself to the class or subject with which it deals, and therefore is not within the reason of these decisions. In effect, this was declared in *Morrison v. Bachert*, 112 Pa. St. 322, 5 Atl. 739. The subject of the act then under consideration was the fees which the citizens of the state should pay in consideration of the services rendered by certain officers. The statute was held to be unconstitutional because it excluded permanently from its provision every county containing more than 150,000 inhabitants; its subject being clearly a county affair, upon which local legislation was prohibited. But the court was careful to distinguish between a fee considered as a sum which the citizen is to pay and a fee considered as the sum which the officer is to receive. In the latter aspect the constitution itself has made a classification which the legislature is not at liberty to disregard. 'It is further to be observed,' Mr. Justice Paxson says on page 330, 112 Pa. St., and page 741, 5 Atl., 'that, so far as the compensation to county officers is concerned, the constitution has classified the counties of the state.' Moreover, the act of 1874 does not in any respect regulate 'the affairs of counties.' It does not increase or diminish the fees which the officers are to receive; thus affecting the people who pay as well as the officer who earns the fees. Leaving the amount of his fees to be determined by other statutes, the act of 1874 is concerned simply with the subject of taxation by the state upon the receipts of the office. This treats a fee as the compensation of the officer, and taxes it in his hands as his property. From this point of view his fees are in no sense a county affair. The act affects the profits of the officer and the receipts of the state treasury, but, except remotely, no other consideration is involved. Therefore, even if the act is to be regarded as local, it is not forbidden by the clause to which we have just referred. Neither is it forbidden by section 1 of article 9, which requires uniformity of taxation within the limits of a particular class. The body of the act provides for taxation upon a certain subject, namely, the fees of one office when received by a person who holds no other office, while the proviso imposes a tax upon a different subject, namely, the aggregate fees of several offices when they are held by the same person. These two classes are formed in the exercise of the legislative power to classify subjects for taxation, and, if the power has been lawfully exercised, article 9 has not been violated, for the act bears uniformly upon every subject in each class. Considering the wide discretion left to the legislature in this matter of classification, we decline to hold that the act in question offends against the constitutional provision by putting into one class those offices of which each is held by a separate person and putting into

another class those offices of which two or more are held by the same person. The following cases will illustrate the extent of the power to classify: *Com. v. Germania Brewing Co.*, 145 Pa. St. 83, 22 Atl. 240; *Com. v. Westinghouse Elec. & Manuf'g Co.*, 151 Pa. St. 272, 24 Atl. 1107, 1111; *Com. v. National Oil Co.*, 157 Pa. St. 516, 27 Atl. 374; *Com. v. Sharon Coal Co.*, 164 Pa. St. 304, 30 Atl. 127, 128; *City of Pittsburg v. Coyle*, 165 Pa. St. 61, 30 Atl. 452; *City of Williamsport v. Wenner*, 172 Pa. St. 182, 33 Atl. 544. This disposes of the defendant's exception; for, even if the act of 1874 is looked upon as furnishing a new system of taxing fees of office in counties containing less than 150,000 inhabitants (as the defendant contends), his position is no better than it was under the eighth section of the act of 1868 (P. L. 11), unless he can divide the act of 1874 as the exigency of his argument requires. He must sustain the body of the latter act as a substitute for the section referred to, but must get rid of the proviso, before he can escape the taxation he is now resisting.

"The commonwealth seemed content to rest its case upon the act of 1868, apparently believing that the entire act of 1874 was local and unconstitutional. It may be as well, therefore, to repeat briefly that, in our opinion, this position is not correct. For the reasons already outlined, the cases cited by the learned deputy attorney general in support of his view do not sustain it, if we understand their scope. So far as the compensation of county officers is concerned the constitution, in article 14, § 5, has certainly classified the counties of the state. It there directs that 'in counties containing over one hundred and fifty thousand inhabitants all county officers shall be paid by salary'; and thereby has divided the counties of the state into two classes, one having a population of over 150,000, and the other containing a population less than that number. Therefore, in taxing the compensation of county officers by the act of 1874, it was not only proper for the legislature to confine its attention to the officers in the latter class, but it would have been practically useless to do otherwise. To have made the act apply to officers in the former class would certainly have violated the spirit at least of the constitution, which enjoined the legislature to provide for the payment of salaries to officers in this class. Moreover, while it is true that the preceding statutes fixing the compensation and taxing the fees of officers in counties containing more than 150,000 inhabitants continued in force until the passage of the act of 1876 (P. L. 13), which established a new system in these counties; and while, therefore, it may perhaps be true that the act of 1874 might conceivably have been so framed as to embrace formally and for a year or two, the fees of office received in all the counties of the state, this would have been a formal and temporary inclusion only. In the counties of the first class the officers ceased to receive fees

for their own benefit after the act of 1876 provided salaries for their compensation, and therefore any tax upon fees which might have been imposed by the act of 1874 would have disappeared ipso facto with the officers' interest in the fees themselves. *Com. v. Mann*, 168 Pa. St. 290, 31 Atl. 1003. Manifestly, as it seems to us, the legislature, in 1874, properly excluded the class of counties containing more than 150,000 inhabitants, reserving that class for the separate treatment which it received two years later in accordance with the command of the constitution. The act of 1874 is almost an exact transcript of the eighth section of the act of 1868, and the reason why it was enacted is to be found in the last section of the act of 1868, which exempts a few counties from the operation of that statute. The act of 1874 follows the constitutional classification, and extends the scope of section 8 of the act of 1868, so as to embrace those counties theretofore exempt which belong to the class with which it is concerned; the result being that the fees of office in all the counties of this class are now taxed by the acts of 1868 and 1874, except perhaps the fees of the clerk of the oyer and terminer. The omission of this particular office has been recently considered in *Com. v. Fry*, No. 24, commonwealth docket, Dauphin common pleas; and it is mentioned now only because it might otherwise appear to have been overlooked. It has no effect upon the question raised in this controversy. The defendant's additional exception is accordingly overruled, and the judgment already entered will continue to stand as the judgment of the court. Exception to the defendant."

B. M. Nead, for appellant.

STERRETT, C. J. This case came into the court below on defendant's appeal from the auditor general's settlement against him for 50 per cent. of the excess of fees collected by him in his several official capacities as recorder of deeds, register of wills, and clerk of the orphans' court of Fayette county; and, by agreement filed, it was tried without a jury, under the provisions of the act of 1874. Defendant's accounts had been examined and passed upon by an auditor appointed by the common pleas under section 10 of the act of April 21, 1846 (P. L. 415), whose report, filed with the auditor general, formed the basis of the settlement from which this appeal was taken. In that report allowance is made for only one salary of \$2,000. Deducting that, together with clerk hire and office expenses, from the gross amount of fees collected, leaves the excess of fees \$2,541.70. A further deduction of 50 per centum from this latter sum gives \$1,270.85 as the balance due by the defendant to the commonwealth on account of tax on fees. For that sum, together with interest and attorney general's commissions, judgment was entered against the defendant by the court below. This appears to have been fully war-

ranted by the law and the facts of the case as they appear in the opinion of the learned trial judge. There is no merit in either of the technical positions taken by the defendant; and, in so far at least as the offices in question are concerned, there appears to be no good reason for assailing the constitutionality of the act of May 6, 1874 (P. L. 125). The correctness of the judgment in favor of the commonwealth is so fully vindicated in the opinion referred to that further discussion of the questions involved appears to be unnecessary. The act of 1874 requires that clerks of the orphans' court, registers of wills, recorders of deeds, etc., "of this commonwealth shall pay into the treasury, for the use of the commonwealth, after deducting all necessary clerk hire and office expenses, fifty per centum on the amount of any excess over and above the sum of two thousand dollars, which shall be found by the auditor, appointed by the court to settle accounts of county officers, to have been received by any office in any one year: provided, if two or more of said offices shall be held by one person, the auditor general shall add together the fees received in the offices so held, and shall charge the same percentage on the aggregate amount of fees received by such person holding more than one of said offices." This language admits of no other reasonable construction than that only one salary shall be deducted from the gross receipts, etc. The construction contended for by defendant would render the proviso inoperative. On the other hand, the commonwealth's construction harmonizes and gives effect to all the provisions of the act. For those and other reasons, more fully given by the court below, neither of the assignments of error should be sustained. Judgment affirmed.

(177 Pa. St. 236)

EVANS v. TAYLOR.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

VENDOR AND PURCHASER—EXECUTORY CONTRACT
—COVENANT AGAINST INCUMBRANCES—
KNOWLEDGE OF VENDEE.

1. The right of a city, under Act April 3, 1851 (P. L. 327), to open a street without paying any damages for buildings erected in the bed thereof after the street was laid out and platted on the city plan is an incumbrance that will justify the purchaser in refusing to complete an executory contract for the purchase of the property which the vendor covenanted was "clear of all incumbrances."

2. A vendee is entitled to the benefit of an express covenant against incumbrances in the contract of sale, though he had knowledge of an incumbrance at the time the contract was made.

Appeal from court of common pleas, Philadelphia county

Action by Margaret Evans against Benjamin Taylor to recover for breach of a contract for the purchase of land. From a decree for defendant, plaintiff appeals. Affirmed.

J. Howard Morrison, for appellant. William H. Peace, for appellee.

GREEN, J. It was agreed upon the trial that Hilles street, between Frankford avenue and Thomas street, was laid out on the city plan as a public street 40 feet wide, and was confirmed, in 1858. It was never opened, and at some time after it was laid out, and before the title of Mrs. Evans accrued, certain buildings were erected on the front of the lot, and upon the part of it which was the bed of Hilles street. This was the situation of the property when Mrs. Evans contracted to sell it to Taylor. Under the act of April 3, 1851 (P. L. 327), no damages could be recovered for the loss of these buildings by the opening of the street, because they were erected after the street was laid out and platted on the city plan. The contract of sale by Mrs. Evans to Taylor, as expressed in the receipt for \$50 of the purchase money, was that the property was to be "clear of all incumbrances"; and the question is whether the right of the city to open the street without paying any damages for the buildings which were on the lot, and within the bed of the street, was an incumbrance, so as to constitute a breach of the condition against incumbrances contained in the receipt. So far as the offers of testimony to show knowledge of the incumbrance on the part of Taylor are concerned, we think they were immaterial, because he protected himself by a positive covenant that there was to be no incumbrance on the title, and he would, therefore, be entitled to the benefit of his contract, whether he had knowledge of an incumbrance or not. It is also to be borne in mind that the contract was executory, and not executed, and the case therefore involves the question whether the contract is to be enforced against the will of the purchaser. That the purchaser, if obliged to take the title, will or may suffer a serious detriment, is very manifest from the consideration that the buildings on the lot naturally constituted a large part of the value of the property. If these may be taken from him without compensation, he has no equivalent for their loss in a reserved right to have damages for the taking. He is therefore by that much a direct loser upon the terms of his contract as it was made, and presumably he would not have made it. But whether he would or would not have made it, if he had had knowledge of the contingency, he saw proper to stipulate for a title free of any incumbrance; and that feature of his contract cannot be rejected without altering the contract itself. This equity will not do, even when the title is clouded only, because specific performance is matter of grace, and not of strict right. But when a positive term of the contract must be disregarded, neither equity nor law will interfere, where the contract is executory. These considerations eliminate much of the discussion, and distinguish the present contention from the authorities relied upon for the appellant. While an existing street upon a lot, or the mere liability to have a street opened upon it, are matters of which

a purchaser is bound to take notice, and therefore, on that account, cannot defend against an action for the purchase money after the deed has been accepted, the case is very different when no deed has been accepted, no mortgage or other lien for the purchase money has been given by the purchaser, no possession has been taken, nor any other act done by the purchaser in affirmance of the contract. And when, in addition to all this, a large loss of the actual consideration of the contract may, and probably will, be suffered by the enforcement of the contract against the will of the purchaser, surely an express provision against the possibility of such a loss, embodied in the written terms of the contract, will not be violated or disregarded by the courts, when they are asked to enforce it as an executory contract only. This reasoning was followed and enforced in Appeal of People's Sav. Bank, reported in 3 Atl. 821, decided in 1886, in which the decree of the court refusing specific performance was affirmed by this court. The facts in that case were very similar to the facts in this, except that here buildings had already been erected on the lot, the loss of which could not be replaced by an assessment of damages when taken. In Appeal of People's Sav. Bank the master said: "It has been stated in the findings of fact that this street has been laid out thirty feet wide over a portion of the lot." This fact presents a most serious obstacle to the granting of a decree for specific performance of the contract between the parties. It is true, the street is not opened, but is laid out on the city plan. The effect of this is to give notice to whomsoever takes the lot of the possibility, or rather the probability, that the street will be opened at any time, and therefore he cannot claim damages from the city should he erect improvements upon it. See Act April 3, 1851 (P. L. 327). He finds himself in the awkward position of not being able to claim damages, as there has been as yet no physical taking, and yet he cannot improve except at his peril. At the best he is subject to uncertainties, and is liable to a lawsuit to test the question of benefits or damages to which he may be entitled, or for which he may be liable. This would seem to present a very similar state of facts to that governed by the decision of the supreme court in *Speakman v. Forepaugh*, 44 Pa. St. 374. This is an executory contract, and the rights of the vendee are more jealously guarded than if it were executed; or, perhaps more accurately, the presumptions of law are different from those arising where a contract has been executed. In the last case cited it is said: "In this state, when contracts for the sale of land have been executed, and securities for the purchase money have been taken, if there be a known defect of title, and no covenant against it in the deed, there is a presumption that the purchaser undertook to run the risk of the defect; and, if he did, he cannot detain the purchase money on account of it. This is a

rule in regard to executed contracts, but even in them it is not a conclusive presumption. See Rawle, Cov. 723-727. It is inapplicable to a mere executory contract which is only preparatory." In the foregoing case of *People's Sav. Bank* the report of the master was sustained by the court below, and that decree was affirmed by this court in a per curiam opinion. There the proceeding was a bill for specific performance, and here the action is assumpsit to recover the purchase money. The same principles and reasoning are applicable in both. The plaintiff in this case has not conveyed, and is not able to convey, a title clear of incumbrance, and is therefore not entitled to the purchase money. The assignments of error are not sustained. Decree affirmed, and appeal dismissed, at the cost of the appellant.

(178 Pa. St. 154)

FINK v. FARMERS' BANK et al.
(Supreme Court of Pennsylvania. Oct. 5, 1896.)

NOTES—SUFFICIENCY OF CONSIDERATION.

1. The surrender to a surety of a bond on which he can be sued, and on which the result of a suit is open to doubt, is a sufficient consideration for notes given by him in settlement of an undisputed claim made on the bond.
2. An agreement to forbear to sue on the bond is also a sufficient consideration for such notes.
3. Where such notes are given and received as part payment of the indebtedness of the principal to the obligee, and accordingly credited on his account in the obligee's books, in pursuance of a clearly implied agreement as part of the arrangement, there is sufficient consideration for the notes.
4. Where, after the giving of such notes, in reliance on the settlement, there is such a change in the position of the parties as to make a restoration of the status quo impossible, there is sufficient consideration.
5. Where such obligation is the bond of a bank cashier, and in reliance on such settlement credit is given to the bank, and the superintendent of banking permits it to continue business, there is sufficient consideration for the notes.

Appeal from court of common pleas, Dauphin county.

Action by Henry Fink against the Farmers' Bank of Harrisburg, Peter K. Boyd and others, directors, and Edward Bailey, agent, of such bank, to compel defendants to surrender notes executed in settlement of a claim of the bank on the bond of Frederick O. Fink, cashier, on which plaintiff was surety, and for the cancellation of such notes. From a judgment in favor of plaintiff, defendants appeal. Reversed.

L. D. Gilbert, for appellants. R. Snodgrass, for appellee.

MITCHELL, J. The plaintiff, by his bill, seeks to rescind a contract and repossess the evidence of his liability. It is admitted that there was no accident, and no concealment, imposition, or other element of fraud. But the learned master found there was such a mistake by the plaintiff as to his liability on the bond as to bring his case within that

class of mixed mistake of law and fact against the consequence of which courts of equity sometimes relieve. After a very clear and able review of the decisions in England and some other states, the learned master says frankly that he "feels some embarrassment in applying this doctrine to the case in hand, in view of some of the decided cases in this state," but nevertheless concludes that he may do so. The Pennsylvania cases have not yet followed the refinements by which the ancient rule that ignorance of the law excuses no man has been restricted, if not frittered away, by exceptions, and equity has so far contented itself with relief in cases of mutual mistake of legal rights where it was possible to restore both parties to status quo. If that cannot be fully done, equity will not assist one party to unload the burdens on the other. An illustration may be drawn from the present case. If the bank had first come to the opinion now advanced by the complainant,—that, not being liable on the bond, he could not be held on the notes,—and had at once passed the notes away for value, and then filed this bill to rescind, the case would have met a summary dismissal for inability to restore the status quo. It is said that complainant tenders a return of the bond, but this would not restore the parties to their former situation, as in the meantime, in reliance on the validity of these notes, some of the defendants have incurred personal liabilities in aid of the bank. The evidence on this point was excluded for irrelevancy by the master, but this was error, and we are entitled to take the averment as true, in view of the burden of proof on complainant to show that the status could be restored. It is not necessary to follow the master in his detailed examination of our cases on mistake of law, as the court below was of opinion that that question did not arise, and rested the decision exclusively on two grounds: First, that the bond was not continuing, and there was no liability upon it; and, secondly, that there was no other consideration for the notes.

First, as to the bond. The condition is "that, whereas, F. C. Fink has been appointed cashier," etc., "if he shall well, truly, and faithfully perform all the duties," etc., "so long as he shall continue in that capacity," then the obligation to be void, etc. The master learnedly and ably traced the rule as to the liability of sureties on official bonds from its origin in *Lord Arlington v. Merricke*, 2 Saund. 411, and other cases, in which the term of office was recited in the bond itself, down through its gradual enlargement until it has come in some states to a strong and almost conclusive presumption, which is most fully stated by Poland, C. J., in *Treasurer of Vermont v. Mann*, 34 Vt. 371, as follows: "It seems now to be perfectly settled by authority, in reference to bonds or obligations given to secure the performance of offi-

cial duties, that where the appointment is for a limited period, which is recited in the condition, or where it is not recited in the condition, but is fixed and determined by law, the obligation only extends for the period named in the condition or the term fixed by law, and will not extend to cover any extension of the time by a future appointment or subsequent election, although the language of the condition as to time be general and unlimited. The presumption in such cases is held to be that the language is used in reference to the existing office or appointment which the principal holds, and that the sureties do not intend to bind themselves for any indefinite and unlimited extent of time, depending upon the contingency of future elections." It is conceded that this rule, even thus carefully stated, has never been expressly adopted in any Pennsylvania case. As a surety's contract is usually for the benefit of others, rather than directly for his own, it has always been held that he is entitled to have the conditions of his liability strictly fulfilled before it is enforced; and in the liberal application of this principle cases are probably not few in which courts have carried adherence to the letter in favor of sureties beyond any substantial equity. An illustration will be found in *Bank v. Yard*, 143 Pa. St. 129, 22 Atl. 908, which will be referred to further on, and there is an instructive passage worth quoting in the argument for appellant in that case, by one of the most learned lawyers that ever adorned the bar of this court, the late Richard C. McMurtrie: "There is no distinction between a surety and a principal so far as the construction or meaning or effect of a document is concerned. There is a broad distinction between the liability of the principal and of the surety. But not under the written contract. That may be varied by the principal. But it is not the contract that is varied; it is another contract, that arises by implication, which varies the liability. Naturally, the plea of non in hæc foedera veni is never used by the principal, because he is sued, not on the express contract, but on that growing out of his conduct. I think it is sometimes overlooked that the apparent strain not to hold a surety is nothing but a strict exaction of the very contract, and this only because there is no other ground of liability." The contract of suretyship, though only enforced according to its strict terms, is nevertheless nothing more than a contract. No particular form of words is necessary to be observed, and in construing it there is no reason why courts should not be governed by the rule, applicable to all other contracts, that the actual intention of the parties must prevail. As to official bonds, the presumption that they apply only to the existing term of the officer may be admitted; but the presumption is very far from conclusive, and, if it is clear that the parties meant to create a continuing liability, the bond must be held

to have done so. This was very explicitly and forcibly laid down as the rule in the well-considered and leading case of *Bank v. Yard*, 143 Pa. St. 129, 22 Atl. 909. The condition of the bond was for the faithful performance of the duties of cashier "during the time of his employment by the said bank, whether under his present election or under any subsequent election to the said position." The cashier held over, but without re-election, and the default occurred after the expiration of his first term. The court below, adhering to the strict letter of the bond, held the surety discharged by the absence of a formal re-election, but this court reversed the judgment, and put the decision explicitly on the intention of the parties. "The purpose," said our Brother Williams, "to make the bond impose a continuing liability, and relieve against the necessity for annual renewals, was a lawful one, and the words employed for that purpose are apt and sufficient." If the present case was of first impression, we should have no hesitation in holding that the bond was continuing. The complainant himself, in paragraph 3 of his amended bill, so states the belief and intention of the parties at the time of execution. How far deference to a line of cases in which the language was similar, but in none of them identical, might lead to a different conclusion, it is not now necessary to decide, as we are of opinion that there was ample other consideration for the notes.

Secondly, as to consideration. Whatever the extent of the liability on the bond might finally have been determined to be if the contest had been fought out on it, there can be no question that it was an obligation to which complainant was a party, on which he could have been sued, and upon which the result of suit would have been open to doubt. Its surrender, therefore, was the settlement of a claim made on it, not then disputed, and not now open to dispute on the ground that it could not have been successfully maintained. The sufficiency of the consideration for a compromise is not to be determined by the soundness of the original claim of either party. The very object of compromise is to avoid the risk or trouble of that question. The settlement in the present case had all the substantial elements of a compromise, with only the unusual, but immaterial, feature that the claim was made and received, not in a hostile, but in an amicable, spirit. The bank claimed \$20,000 in cash on a bond on which it had an immediate right of suit. The complainant first promised Mr. Bergner part cash and the rest in notes, and at the meeting with the directors offered part in Allegheny Valley Railroad bonds and the rest in notes. The bank refused to take the railroad bonds, but, after some negotiation, agreed to accept four notes, payable at various dates up to January, 1894, the effect of which would be to postpone the bank's present right of suit until the maturity of the notes respectively. The notes were made and

delivered by complainant, and in return for them, as he says himself, he received back his bond. In the entire absence of fraud, accident, or mistake of any of the facts, there is no equity on which a court ought to disturb such a settlement. The cases on this subject have been diligently collected and very clearly arranged in the excellent argument of the counsel for appellant, but it is sufficient here to refer generally to the American notes to *Stapilton v. Stapilton*, 2 White & T. Lead. Cas. Eq. 1703.

Other items of consideration were urged by appellant: (1) Agreement for forbearance, already discussed incidentally in the preceding paragraph. (2) That the notes were given and received as part payment of the brother's debt, and were accordingly credited on his account in the bank's books. The master finds this a voluntary act, there being no evidence of any express agreement that it should be done; but we cannot doubt that it was a clearly implied part of the arrangement, and would have been so held if the bank had at once sued *F. C. Fink* for his whole debt. (3) That in reliance on this settlement there was a change in the position of the parties, so as to make a restoration of the status quo impossible. This also has been incidentally discussed already. (4) The credit to the bank, and the permission from the superintendent of banking to continue business. On this I will merely cite *Sickles v. Herold* (per Pryor, J.) 11 Misc. Rep. 583, 32 N. Y. Supp. 1083; affirmed in general term, 15 Misc. Rep. 116, 36 N. Y. Supp. 483; and affirmed with modification on minor point, 149 N. Y. 332, 43 N. E. 852, 989. All or any of these matters would afford sufficient consideration for the notes, but it is not necessary to discuss them further. Decree reversed, and bill dismissed, with costs.

(177 Pa. St. 117)

NALLY v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)
STREET—DEDICATION—PRIOR RIGHTS—LATERAL
RAILROAD—DAMAGES.

1. A conveyance of land described as bordering on a certain street, while effecting a dedication, for the purposes of a street, of the strip described as a street, as between the parties, is subject to a prior grant of a right of way over such strip, and a prior appropriation of part of its width for the building of a lateral railroad.

2. Damages having been assessed and paid to the owner of land for building a lateral railroad over his land, no recovery can be had by a subsequent grantee of lands described as bordering on a street, within which was such railroad, for the laying of new tracks within the space allowed for such railroad, by a railroad company acting as agent for the owner of such railroad rights.

Appeal from court of common pleas, Montgomery county; Aaron S. Swartz, Judge.

Action by John E. Nally against the Pennsylvania Railroad Company for damages for alleged construction of railroad in a street. Judgment for plaintiff. Defendant appeals. Reversed.

Charles H. Stinson, C. Henry Stinson, and William F. Solly, for appellant. N. H. Larzelere and M. M. Gibson, for appellee.

GREEN, J. Both parties to this contention claim title from a common grantor, Robert T. Potts. The deed from Robert T. Potts and wife to Thomas J. Potts and Griffith Jones, defendant's predecessors in the title, was made April 3, 1849, and was recorded the same day. The land conveyed was a tract of 12 acres and 13 perches, and the deed also granted a right of way, which is thus described in the deed: "And a right of way from the said lot to the back road on a downward course, so as to make the easiest and best slope to the rise of the hill, said right of way to be thirty feet in width." The next conveyance in the line of the defendant's title was a deed made by Thomas J. Potts and wife and Griffith Jones to the Swede Iron Company, dated August 26, 1852, and recorded September 13, 1852, and it conveyed the same premises and the same right of way mentioned in the preceding deed. This title was regularly passed to Richard Heckscher & Sons, the present owners, so that they are in position, and the defendant, acting by their authority, to claim and exercise whatever rights were held under the original deed from Robert T. Potts to Thomas J. Potts and Griffith Jones in April, 1849. In addition to this, the Swede Iron Company, which was incorporated by act of assembly dated April 15, 1851 (P. L. 701), under proper proceedings in the court of common pleas of Montgomery county, at August term, 1852, located and constructed a lateral railroad, under the general law of 1832, to extend from their furnace property, being the tract of 12 acres and 13 perches of land above mentioned, to their mines. This railroad extended on lands of the Swede Iron Company and lands of Robert T. Potts, "partly on a thirty-foot street on the same," by courses and distances mentioned in the petition. So that at that date—1852—an open space, 30 feet in width, and called a street, was already in existence, and presumably in use, leading from the 12-acre tract to the mines of the company.

On the trial, a witness named Daniel Kinsey testified as follows: "Q. You told us you lived in Upper Merion, and have been a surveyor for a good many years. Do you know this property, and this 30-foot right of way? A. I know the property; yes. I know the right of way spoken of here,—what is called 'Centre Street.' I know where the track lays. I have known it ever since it has been there. It has probably been there 30 years,—from 1850, or thereabouts. The first I took notice of it, the track was there. I knew it before it was there. Q. Did you know it when Griffith Jones bought the property from Potts? A. I remember very well when he bought it. I don't just remember about that right of way being there. Q. Have you had occasion to examine the street where it was

located? A. I measured all around it different times. So far as I know, this right of way is in the same place as it was when I first knew it. I measured both sides of it. I was supervisor of the township once. I never knew of the public taking charge of this road as a public road while I was in office. The 30 feet stopped abruptly at the furnace property, now owned, I believe, by the Heckschers. What is now called 'Flint Road' was formerly called the 'Back Road.' It is called the 'Back Road' sometimes now, and sometimes the 'Flint Road.'" David Mulholland, a witness for the plaintiff, testified that he knew the property for many years; that he moved into the Nally house in 1857, and lived there 24 years. He said: "Centre street was always 30 feet wide. * * * This track was on this 30-foot wide street. I call Centre street 30 feet wide. The railroad track was on that street. That street was 30 feet wide in front of the Nally property. It ran from the Flint Hill road to the Swede Iron Company's property, and there terminated, but it was used always as a road to the company's ground, but it was not a street." There was an abundance of other testimony showing that the space called "Centre Street" was always of the width of 30 feet; that it was not a public street, but a short passageway leading from the Flint road back to the furnace property, where it stopped; that the township authorities had never worked, or exercised any authority over, it; that it was used, both by the owners of the furnace property and by the occupants of the houses bordering upon it, for all their private purposes; and that it was at no time of any other width than 30 feet. The width of the way or street which the lateral railroad might occupy was 20 feet, and it not only does not appear in the testimony that this width of 20 feet was exceeded, but there was affirmative and uncontradicted testimony that the whole space between the outside rails of the two tracks as they were after the new track, now complained of, was built, was but 17 feet. George Shafer, a civil engineer, testified to actual measurements made by him to this effect.

Recurring now to the title of the plaintiff, we find that it originated in a deed from Robert T. Potts to Patrick Flynn, dated April 1, 1853, recorded October 4, 1853. After various intermediate conveyances, this title came to the plaintiff, in 1891, by a sheriff's deed upon a sale under a mortgage. At the time that Patrick Flynn purchased, in 1853, the space called "Centre Street" was opened and in use, with a lateral railroad built upon it. He therefore knew at that time what its character was, and was bound by all the consequences of such knowledge. In his deed Centre street is named as an adjoiner on one side, and other deeds were also given in evidence, made to other parties, in which also Centre street was named as an adjoiner. There is no doubt that, as between Robert T. Potts and Patrick Flynn and his successors in the

title, and all others who received similar conveyances of lots bordering on Centre street, a dedication of the street was accomplished for the common use of all. It is also true that Robert T. Potts became subject to a personal covenant that such a street should be there according to the provisions of the deeds. But another question arises here, to wit, how far does the prior grant of a right of way to another person over the same ground covered by the street affect or restrain the rights of the owners of the lots abutting on the street? Is not the prior grantee of the right of way entitled to the exercise of every use of the right of way which he would or could have enjoyed under his grant, without reference to any subsequent grants to others of rights to use the same way? Or, to be still more precise, in order to meet the exact question raised on this record, when the first grantee obtains a right to build a lateral railroad over a portion of the width of the same right of way, and extending through its length, and pays damages to the then owner of the adjoining property, assessed in proper legal proceedings, as the price of the privilege, may he not lay a second track within the limits of the space allowed for his railroad, without being again liable to a proceeding for damages occasioned by the laying of the second track? It seems to us this is the very precise question raised on this record, and which requires solution.

There are some things contained in the charge and answers to points by the learned court below to which we are unable to agree. The objectionable matters in the charge and answers are these: The learned judge did present this subject in his charge on the question of damages very fully and clearly, but in doing so he said, speaking of the plaintiff's right: "What was the right? It is said that there was the right of way granted by Robert Potts to Potts and Jones in 1849, and that this right of way extended over the thirty-foot street or way called 'Centre Street.' I charge you that there is no evidence here to show where Potts and Jones, the original owners of this furnace property, located their right of way that was secured to them by the deed." In this, we think, there was error. The witness Daniel Kinsey testified that he knew the property when it was bought by Jones, and that he knew the right of way, "what is called 'Centre Street,'" to use his own expression, and said also: "So far as I know, this right of way is in the same place as it was when I first knew it. I measured both sides of it." Then it is undoubted, under all the evidence, that there was never any other space than this that was used by the furnace owners at this place. In the deed it is described as 30 feet in width, which is precisely the width of the space called "Centre Street," and it did extend "from the said lot to the back road on a downward course," as described in the deed. Moreover, it was always used by the owners of the furnace lot from the beginning, and as early as 1852 they caused the lat-

eral railroad to be built upon it. There are other facts tending strongly in the same direction, and, to our minds, all of this testimony is highly persuasive, and indeed convincing, to prove that this very space of ground subsequently called "Centre Street" was the very right of way which Potts and Jones opened and used as the right of way granted to them by their deed from Robert T. Potts. The same idea is repeated by the learned court in the answer to the first point, when it is said, "I may add that the uncontradicted testimony does not show that the right of way spoken of is Centre street." We have not been able to discover any evidence in contradiction of the proposition that the right of way was Centre street, and we think the answer was erroneous in this respect.

In the answer of the court to the second point, and in the charge, it was left to the jury to say whether the space called "Centre Street" became a public street by dedication on the part of Robert T. Potts on account of the descriptions of the lots sold, including the plaintiff's, as bordering on Centre street. No qualification was made in this part of the charge on the proposition that the jury might find it to be a public street in the ordinary sense of that term. But, whatever might be the intent of Robert T. Potts in this regard, or whatever might be the effect of his conveyance as between himself and his grantees, it is very certain that he could not give them a free public street, in the unqualified meaning of that expression, because he did not have it to give. His conveyances were necessarily subject to the operation of his prior grant of the right of way to Potts and Jones, and to the appropriation of 20 feet in width of the street space, for the building of the lateral railroad. Robert T. Potts had received the damages for this appropriation before any of these conveyances were made, and it cannot be tolerated that his subsequent grantees can recover either any part of the damages for the original erection, or for any subsequent erection within the 20-foot space, for which Robert T. Potts could not have recovered. That consideration raises a question which we will presently indicate. For the present purpose it is enough to say that we think it was error to submit the question whether this was a public street by dedication, without at the same time limiting the definition of such public street by the qualifying effects of the prior grant of the right of way, and the construction of the lateral railroad. Now, it is true that when the learned judge charged the jury upon the question of damages he did very carefully and fully set out this distinction. He told the jury that they could not assess the damages "as if the plaintiff had a free, open right over the full length of this street, unobstructed by anything, because that was not the case." But he nevertheless did assume, and so charged the jury, that they might allow damages for the erection of the additional track, and simply left it to them to say as a matter of fact what those damages

should be. This was giving to the jury the whole question of the right to have any damages. But that was a question which the court alone should decide. True, the court did virtually decide it by assuming it in favor of the plaintiff, and simply directing a verdict on the fact of the damages, but that was not a distinct presentment of the question as a legal question, and then ruling upon it. The learned court below did distinctly charge the jury as follows: "If this is Heckscher's road, and the Pennsylvania Railroad Company were simply employed to do the work, then the Pennsylvania Railroad Company is not responsible." And again: "Therefore, unless you find that this was the railroad siding or track of the Pennsylvania Railroad, there is no evidence here upon which the plaintiff can recover. I repeat, that unless you find that this railroad put there is the railroad of the Pennsylvania Railroad Company, the defendant in this case,—if this siding or track is the work of the Pennsylvania Railroad for Heckscher, and not for themselves,—then the plaintiff cannot recover." We are of opinion that there can be no recovery in this case—First, because the tracks laid are within the 20-foot space allowed for the lateral railroad, and, as the damages for building that railroad were assessed and paid to the former owner while he held the title, and before any conveyance was made to the plaintiff's predecessor in the title, there cannot be a second recovery for the mere shifting of the tracks or laying new tracks within the width of the space allowed for the road; and, second, because the defendant company was acting merely for Heckscher & Co. in the work that they did in shifting the tracks, and there is no evidence on the record showing that Heckscher & Co.'s ownership of the road was divested because of that work. The Pennsylvania Railroad Company makes no claim to the ownership of the road, and there is no evidence in the case that they ever became the owners of it. It was error, therefore, to leave that question to the jury.

After the conveyance of the right of way by Robert T. Potts to Potts and Jones in 1849, he could make no conveyance to other persons that would confer rights inconsistent therewith. And after the lateral railroad was built on the right of way it was not possible to make any kind of a grant which would be inconsistent with the right of the owners of that railroad or their successors in the title thereto. The plaintiff took his title fully subject to these rights, and in suberviency thereto. As a matter of course, no public highway, in the literal sense of that term, could ever be made of this right of way in hostility to its owners. It may well be conceded that Centre street might be described as an adjoiner in subsequent deeds for lots bordering on it, and, if any use of the street was made by such subsequent grantees of lots which was not in hostility with the prior right granted to Potts and Jones, or with the rights of the lateral railroad owners, such user would not be disturbed, but that consid-

eration does not dispose of this case. The present claim of the plaintiff is in entire hostility with the rights of the owners of the railroad, and therefore cannot be sustained. The judgment is reversed.

(64 N. J. B. 473)

LYNDE v. LYNDE.

(Court of Chancery of New Jersey. Oct. 19, 1896.)

DIVORCE—ALIMONY—AMENDMENT OF ENROLLED DECREE.

1. A decree for alimony cannot be made against a defendant who is not served with process for appearance, does not appear in the cause, and has no property within control of the court.

2. Alimony is not an independent claim or right. It is incidental to a bill for divorce or other relief, between husband and wife.

3. Whether it can be had after a final decree in the divorce case, which is silent as to it, except through amendment of the decree, *quære*.

4. While this court will not vary or alter an enrolled decree in a material point without a bill of review or a rehearing, it will, upon petition, amend its enrolled decree, when the amendment is necessary to give full expression to its judgment, and is matter which would, without doubt, have been incorporated in the decree when made, if attention had been called to it.

(Syllabus by the Court.)

Bill by Mary W. Lynde against Charles W. Lynde for a divorce. Petition of Mary W. Lynde for a vacation of the enrollment in this case, and amendment of the decree made on the 7th of August, 1896, by the addition of a clause thereto which shall reserve to the court the right to pay alimony to the petitioner, and to regulate the amount thereof from time to time. Decree amended.

James Westervelt, for petitioner. J. Herbert Potts, for defendant.

McGILL, Ch. The petition for divorce in this case was filed in November, 1892, by James S. Aitken, Esq., as the solicitor for the petitioner. When it was filed, the defendant did not have any property, but his father was alive, and was a man of considerable wealth. In giving her solicitor instructions, the petitioner discussed this fact with him, and the probability of the defendant ultimately having bounty or inheritance from his father. She was anxious that she should obtain a decree which would admit of her having alimony thereafter, the amount of which could be fixed according to her husband's wealth, and accordingly her petition contained a prayer for alimony. When the petition was filed, the defendant was not resident in the state, and, upon proof of that fact, he was proceeded against as a nonresident or absent defendant. Notice was duly published and mailed to him, which expressly declared that the suit was for divorce from the bond of matrimony, "and for alimony." The defendant was not served with process, and did not appear in the suit. Knowledge of the pendency of the suit reached his brother, a lawyer in the city of New York, who, at the instance of his father, retained a solicitor of

this court, to prevent, if possible, the entry of a decree for alimony, but not to contest the application for divorce. It was the object of the father and brother to have the decree to be made in the case expressly provide that there should be no alimony, and, if possible, to secure a written agreement to such a decree. The testimony of the solicitor so employed is that he examined the petition for divorce, and found that it did not pray for alimony, and that he had an understanding with Mr. Aitken that a decree for alimony would not be demanded. It is evident, from the fact of the presence of the prayer for alimony in the petition, that the recollection of the solicitor upon that point is at fault; and, as Mr. Aitken has no remembrance of making any agreement with him to the effect that alimony should not be demanded, his memory or understanding of the effect of his interview with Mr. Aitken, possibly, is at fault there also. But, however that may be, the solicitor thus employed did not enter an appearance for the defendant in the suit. Nor did he undertake to act for the defendant. Any such agreement, as is insisted upon, should have been in writing, to entitle it to recognition by the court. Mr. Aitken's client's instructions forbade any agreement which would abandon alimony. In preparing the decree in the case, it is clear that Mr. Aitken did not deem himself to be bound in any way to omit reference to alimony. His testimony is that it was his purpose to so draw the decree as to reserve for the petitioner the right to thereafter have alimony. He says that it was impossible at that time to have any amount of alimony allowed and fixed, because the defendant then led a worthless, vagabondish existence. He attributes his failure to make the proposed insertion in the decree solely to the facts that in drawing that document he followed a form which did not contain the provision, and that, through inadvertence, he omitted it. Neither he nor his client became aware of his omission until about the time of making the application. As the proofs stand, I think that the agreement insisted upon is not proven, and that the omission in the decree is shown to have arisen through inadvertence.

As the decree was against the absent defendant, who was not served with process, did not appear in the case, and did not have property which was under the court's control, it could not have given alimony,—a judgment in personam in favor of the wife. *Brown, Jur. § 11; 2 Bish. Mar., Div. & Sep. § 844; Browne, Div. 267.* At best, it could only have reserved the question as to the allowance of alimony for future determination, upon application to be made upon due actual notice to the defendant. By the unwritten law, alimony is not a matter of independent claim or right. *2 Bish. Mar., Div. & Sep. § 839; 1 Bish. Mar., Div. & Sep. § 1368.* It is incidental to a bill for divorce or other relief, between husband and wife, *Anshutz v. Anshutz, 16 N. J. Eq. 162; Miller v. Miller, 1*

N. J. Eq. 386; Yule v. Yule, 10 N. J. Eq. 138; Cory v. Cory, 11 N. J. Eq. 400; Rockwell v. Morgan, 13 N. J. Eq. 119, 121. The nineteenth section of our statute (*Gen Laws, p. 1269*) treats of it as attendant upon a suit for divorce. It declares that, "when a divorce shall be decreed, it shall and may be lawful for the court of chancery to take such order touching alimony and maintenance of the wife * * * by the husband as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just;" and, where the wife is the complainant in such a suit, to require security from the husband, and, in its default, to sequester his personal estate, and the rents and profits of his real estate, and apply the same "to such maintenance and allowance as to the said court shall from time to time seem reasonable and just." The contemplation of the legislature in this section is that, when the divorce shall be decreed, the court may "take order"—make some direction—touching alimony for the wife. Its action need not be final upon the subject. It will deal with the conditions then existing, and allow and fix the alimony, or reserve the question pending future changes in circumstances. In providing that the personal estate and rents of the realty of the husband may be applied to "such maintenance and allowance as to the said court shall from time to time seem reasonable and just," the statute exhibits an intention that the subject shall be continuously dealt with according to the varying conditions and circumstances of the parties. *Richmond v. Richmond, 2 N. J. Eq. 90; Calame v. Calame, 25 N. J. Eq. 548, 551.* The reason of such legislative purpose is obvious. Consummated marriage carries with it rights and duties which, so far as a true and faithful wife is concerned, can morally end only with the life of one of the parties. Her right to support and maintenance continues so long as it is just that she shall retain it. It is co-extensive with the husband's position and ability. His ability and the justice of her enjoyment of her right are subject to the change of circumstances which the court cannot anticipate, and hence complete justice requires that the court's power to act shall be kept open so long as it may be needed to direct just variation. It is plainly the legislative contemplation that the subject of alimony is to be dealt with as an adjunct of the divorce suit, and I cannot but deem it, at least, a question of grave doubt whether, when the final decree in such a case fails to treat of the question of alimony in any way, and more particularly when, in a case like the present, where alimony is specially asked, it so fails, it will not be taken to have determined all matters involved in the suit, and to have ruled adversely to the question of alimony, which it has not affirmatively responded to by allowance or reservation. I need not decide this question. Its gravity is enough to satisfy me that the amendment sought will be of material value to the petitioner.

I am satisfied that the omission of the decree to reserve the question as to alimony was not a deliberate act of the petitioner's counsel, based upon the exercise of his judgment, but was due to the inadvertence of that gentleman in drafting the decree. The evidence in the cause makes a prima facie case for the allowance of alimony, to be limited in amount by the defendant's ability; and I perceive no ground upon which the court could or should have refused to reserve the question as to the allowance if such reservation had been asked when the decree was signed. Respecting such an amendment, the rule recognized by this court is that, while the court will not vary or alter an enrolled decree in a material point without a bill of review or a rehearing, it will, upon petition, amend its enrolled decree when the amendment is necessary to give full expression to its judgment, and is matter which would, without doubt, have been incorporated in the decree when made, if attention had been called to it. *Dorshelmer v. Rorback*, 24 N. J. Eq. 33; *Jarman v. Wiswall*, Id. 68; *Jones v. Davenport*, 45 N. J. Eq. 83, 17 Atl. 570. I think that the amendment should be made in this case. The petitioner's delay in asking for it is not attributable to laches or to acquiescence in the decree as made. The proof is uncontradicted and satisfactory that she did not know of the deficiency in the decree until just before she made the present application. Her attention was then called to it, because the defendant's father had died, and it was ascertained that he would take a valuable interest in the residuary estate, and she prepared to ask the court's assistance under the decree. It is true, the defendant has married again. He represents this fact by an affidavit which fails to disclose the date of his remarriage. Whether the marriage took place before or after the present application does not definitely appear by admissible evidence. But I do not think that the fact of his remarriage changes the situation. It exhibits the defendant's acquiescence in the divorce. The matter of the amendment will not disturb the divorce. The decree will be amended, without being opened, either by insertion of the matter in the decree itself or by a supplemental order.

(54 N. J. B. 636)

FLUCK et al. v. LAKE.

(Prerogative Court of New Jersey. Oct. 15, 1896.)

ADMINISTRATORS—SALES—ACCOUNTING—INTEREST—COMMISSIONS—ATTORNEY'S FEES.

1. Where an administrator pendente lite holds stock of a railroad company, which he does not need to convert into money to enable him to execute his trust, he will be justified in selling it only when he acts, in so doing, upon an honest and well-founded apprehension, predicated upon the exercise of reasonable care and caution, that to longer hold it will endanger or prejudice the estate.

2. One holding moneys in trust, who makes use of them for his own purposes, or suffers

them to remain idle when they should be invested, will be charged interest upon them, or held accountable for the profits made from their use.

3. Commissions to an administrator will be rated within statutory limits, in accordance with the actual pains, trouble, and risk which his faithful performance of his duty has caused him; but no commissions will be allowed to him when he makes use of moneys belonging to the estate for his own purposes, and keeps meager and inaccurate accounts, thereby involving the estate in expensive litigation; nor will payment of the charges of his counsel in such litigation be allowed from the estate.

(Syllabus by the Court.)

Appeal from orphans' court, Hunterdon county; Chamberlain, Baker, and Kugler, Judges.

Exceptions were filed by Henry A. Fluck and Jacob R. Wert, executors of George A. Rea, deceased, to the account of W. Howard Lake, administrator pendente lite of said estate. From the decree rendered, exceptants appeal. Reversed.

The appellants claim that the decree is erroneous, because it does not charge the accountant a greater sum than \$6,388.25 for 202 shares of the capital stock of the Lehigh Valley Railroad Company, which he sold in August, 1893, and does not charge him with a greater sum than \$352.50 for interest upon moneys of the estate which he suffered to lie idle, or used for his private purposes, and because it allows him \$625.97 for commissions as administrator, and allows to his counsel \$280 for their services upon the hearings upon the exceptions which were filed to his account, and because it allows to the counsel of another exceptant than the appellants, Nora Closterhouse, \$140.

John A. Bullock, for appellants. John N. Voorhees, for appellee.

McGILL, Ordinary. The evidence shows that the par value of the stock of the Lehigh Valley Railroad Company was \$50 per share; that in June, 1892, when the administrator, Lake, inventoried it and had its value appraised, it was worth \$58.50 per share; that in the summer of 1893, a dividend or dividends having been passed, its value fell to 10 or 20 per cent. below par; that, during the summer of 1893, Lake repeatedly declared to one of the appellants that he did not propose to sell the stock, but would hold it, and turn it over to the permanent representatives of the estate; that in May, 1893, he contracted to purchase from one Casterline an hotel, at a place called High Bridge, for \$10,000, \$4,000 of which would be represented by a mortgage for that amount, subject to which Lake was to take the property, and \$6,000 of which Lake was to pay in cash; that the time fixed for the performance of this agreement to purchase was the 1st of September, 1893; that, during July and August, Lake endeavored to borrow the \$6,000 needed for the cash payment; that on the 29th of August, without previous conference with the appellants or el-

ther of them, the accountant, accompanied by his counsel, went to the office of the Lehigh Valley Railroad Company in Philadelphia, and there consulted two gentlemen, whom, I infer, were officers of the company, and after talking with them, and being advised by his counsel to sell the stock, went to a firm of brokers, and had it sold for \$31.75 a share, which was its market value on that day; that although he had accounts, as administrator, in two banks in Flemington, he deposited the broker's check for the proceeds of the sale of the stock, on the 31st of August, in a bank at Lambertville, in his individual name, and on the same day drew upon that bank his check, to the order of himself, for \$5,000, and had it certified by the bank, and on the next day, September 1st, took the certified check to Clinton, and there, at the Clinton National Bank, received for it that bank's check for \$5,000, payable to his own order, and \$500 in cash, which last-mentioned check he indorsed to Casterline as part payment for the hotel, and which \$500 in cash he expended to Casterline in buying personal property attached to the hotel; that the remainder of the proceeds of the sale of stock was used by him for his own purposes.

The appellants' argument from these circumstances is that, failing to borrow the \$8,000 he needed to enable him to carry out his agreement with Casterline, Lake determined to sell the stock he held as administrator, and use the proceeds of sale for that purpose; and at the same time, to put himself in position to claim that he exercised due care and an honest discretion in the sale, and thereby to justify his action, if it should thereafter be questioned, he took with him to Philadelphia his counsel, and with his counsel went to the railroad office, to inquire about the stock; also, that after the sale, in order that his use of the proceeds of his sale might not be known, he deposited the broker's check in the Lambertville bank, and took from that bank a check, which he exchanged at the Clinton Bank for its check and \$500 in cash, and then gave the check of the Clinton Bank, and the cash, to Casterline.

The circumstances proved show a measure of clandestinity in the procedure of Mr. Lake which stands in marked antagonism to the truth of his professions of good faith and concern for the interests of his trust, and leads to the belief that his testimony is not to be relied upon. The inference which the appellants' argument invokes is, at least, strong enough to create serious doubt as to the good faith of the administrator in making the sale, and to call for the full and clear disclosure of the information and conditions which induced his action; not from his mouth alone, but by the oaths of other witnesses, who may show themselves to be entitled to belief. Here is presented an administrator pendente lite, who did not need to sell the stock to pay debts, who could not make distribution of the proceeds of such a sale (*Benson v. Wolf*, 43

N. J. Law, 78), selling without previous conference with the permanent representatives of the estate, for little more than half the inventory valuation of the stock, under circumstances of self-interest, which must have strongly influenced his judgment, and tended to sway him from fidelity to his trust, and then virtually secreting the fact of the sale by hiding away the proceeds thereof. To justify any sale of this stock, he should show that he acted upon an honest and well-founded apprehension, predicated upon the exercise of reasonable care and caution, that to longer hold the stock would endanger or prejudice the estate, either by permanent decline in its value, or by serious or permanent loss of income therefrom. *Green's Case*, 37 N. J. Eq. 254. The burden of proof rests upon him, for the matter is, in effect, discharged. It may be possible that a reasonably prudent and cautious man would have sold as he did; but as his sale is tainted by motives of self-interest, and was accompanied by secrecy, much more is needed to satisfy a court of its propriety than his unsupported oath.

It is difficult to say what he should be charged for the stock. He should be held accountable, at the least, for the amount he received for it, and, I think, also for the difference between that price and a higher price at which a reasonably careful and prudent trustee, influenced by an honest intent to serve only the best interests of his trust, would have sold it for. If such a trustee would not have sold it at all prior to the accounting, then he should be charged with the price he realized for the stock, and whatever additional sum would be required to raise the price realized to the market value at the time of the accounting. The proofs do not enable me to deal in a satisfactory manner further with this matter. It must go back to the orphans' court, where opportunity must be given the accountant to supplement his proofs. If he fails, for any reason, to do so, he should be charged the difference between the amount he realized at his sale and the inventory value of the stock, for it does not appear that the stock was not, at the accounting, worth the inventory value.

The second objection to the decree is that the administrator should have been charged a greater sum than \$352.50 for interest upon moneys of the estate which he used for his private purposes. It is apparent from a comparison of the account which the administrator rendered to the court, with his bank account as administrator, that he never at any one time had all the estate's moneys, with which he was chargeable, in bank to his credit as administrator. He has failed to give any satisfactory explanation of this circumstance. He has not even pretended to tell what disposition was made of the moneys which were not so deposited. An examination of the debit and credit sides of his account demonstrates that in June,

1892, he commenced his trust with upward of \$2,400, and that his subsequent receipts maintained the surplus in his hands over his disbursements at upward of \$2,200 at all times until August, when the surplus rose to more than \$5,400, and September, when it was in excess of \$5,900, and October, when it exceeded \$7,100, and November, when it further increased to more than \$7,700, and so remaining till, in January, 1893, it passed \$8,000, and in April, 10 months after his appointment, it reached nearly \$11,000. In that month he paid a debt of the estate amounting to about \$6,000, and thus had the surplus reduced to about \$5,000. Other receipts were had, and other allowed disbursements were made, until, late in July, the surplus stood at a little more than \$3,500, the lowest amount since the 1st of August, 1892. His subsequent receipts, exclusive of the proceeds of the sale of the Lehigh Valley Railroad Company stock, were in excess of \$1,400, and his subsequent disbursements were less than \$3,200; leaving him, at the accounting, a surplus of some \$1,700 over the proceeds of sale of the railroad company stock. For the purpose of paying debts or making other legitimate disbursements, the sale of the Lehigh Valley Railroad Company stock was not requisite, nor does he pretend that it was. At the end of November, 1893, when he was chargeable with more than \$8,000, he had less than \$50 in bank to his credit as administrator. Confessedly, he used the entire proceeds of sale of the Lehigh Valley Railroad Company stock, and, I think, more than that sum; but precisely how much, and at what times, and for what periods, has not been made clear by the proofs. I have no doubt of the justness of charging him interest upon the proceeds of sale of the railroad company stock from their receipt to the date of the decree in the accounting, and, resting there, interest on the balance of account until its payment to the appellants. Under the proofs, I cannot, with certainty of doing justice, charge him more. The interest upon the proceeds of the sale of the railroad stock, to the date of the decree of the orphans' court, amounted to \$374.93, a sum which is a little in excess of the interest charged him by the orphans' court. He is chargeable with that interest, not only because he used the money upon which the \$374.93 is calculated, in his own affairs, but also because it was to the interest of the estate he managed that such money, immediately upon its receipt, should have been put where it would have yielded an income. As I have said, Mr. Lake was an administrator pendente lite, appointed to preserve the estate, and without power to distribute. When the railroad stock was sold, the will contest was pending in the court of errors and appeals. The sale was made more than two months before the argument of the case before that

court was possible. If he did not invest, he should, at least, have applied to the orphans' court for direction as to his duty in dealing with the money. *Revision*, p. 776, § 113; *Hetfield v. Debaud*, 54 N. J. Eq. —, 34 Atl. 882. He was in a situation where he should not have suffered the moneys to lie idle without the sanction of the orphans' court, and should not have mingled them with his own funds, or used them for his own purposes. *King v. Berry*, 3 N. J. Eq. 261; *Frey v. Demarest*, 17 N. J. Eq. 71; *McKnight's Ex'r's v. Walsh*, 23 N. J. Eq. 136, Id., on appeal, 24 N. J. Eq. 498; *Frost v. Denman*, 41 N. J. Eq. 47, 2 Atl. 926; *Hetfield v. Debaud*, supra. If it had been made to appear that, in the use of the money, he made profits greater than the interest thereof, he would have been chargeable with those profits. *McKnight's Ex'r's v. Walsh*, supra.

The appellants further object to the allowance of any commissions to the accountant. The orphans' court allowed commissions at the highest rate permitted by the statute. The accounts this administrator kept were meager, and replete with inaccuracies and errors. His testimony respecting his conduct in the management of the estate was vague and unsatisfactory, and entirely without support in its professions of his care, prudence, and good faith in the sale of the railroad company stock. He used a large part of the moneys belonging to the estate for his private purposes. His conduct has led to confusion, and has thrown the estate into an expensive litigation. Commissions are allowed as compensation for the faithful discharge of duty, and their rate, when they are allowed, within fixed limits, is determined by reference to the actual pains, trouble, and risk involved in the performance of that duty. *Revision*, p. 776, § 109. In this case the authorities are clearly against the allowance of any commissions. *Frey v. Demarest*, *McKnight's Ex'r's v. Walsh*, and *Hetfield v. Debaud*, supra; *Blauvelt v. Ackerman*, 23 N. J. Eq. 495, affirmed, on appeal, 25 N. J. Eq. 570; *Dufford's Ex'r's v. Smith*, 46 N. J. Eq. 216, 18 Atl. 1052.

The services of the administrator's counsel at the accounting were made necessary by the same shortcomings and misconduct which deprive the administrator of commissions, and I do not think the estate should be mulcted to pay these counsel fees. The allowance of them should have been denied.

I do not perceive sufficient reason for interfering with the allowance to counsel of the exceptant Nora Closterhouse. It is insisted that her exceptions were filed in interest of the accountant, but I do not find that this insinuation is sustained by the proofs.

The decree will be reversed, and the record will be remitted to the orphans' court, in order that additional proofs may be taken, and a new decree may be made, in harmony with the views I have expressed.

(50 N. J. L. 97)

**STATE (TROSS et al., Prosecutors) v. BOARD
OF EXCISE OF CITY OF
ELIZABETH et al.**

(Supreme Court of New Jersey. June 4, 1896.)

INTOXICATING LIQUORS—RENEWAL OF LICENSE.

Under the act of 1891 (P. L. p. 12) the board of excise, after a license has been granted and once renewed upon an application made in due form, cannot again renew the license without a new application, duly recommended.

(Syllabus by the Court.)

Certiorari to review the action of the board of excise of the city of Elizabeth.

Certiorari by the state, on the prosecution of Fred F. Tross and others against the board of excise of the city of Elizabeth and others to review the action of such board in granting a renewal of a liquor license. License vacated.

Argued February term, 1896, before DE-PUE, VAN SYCKEL, and GUMMERE, JJ.

P. H. Gilhooly, for prosecutors. E. S. Atwater and J. C. Connolly, for defendants.

VAN SYCKEL, J. The question to be decided in this case is whether under the act of 1891 (P. L. p. 12) the board of excise, after a license has been granted and once renewed upon an application made in due form, can again renew the license without a new application duly recommended. The act of 1891 provides: "That hereafter in all cities of the second class in this state (whether such licenses are now granted by a board of excise, or by commissioners of excise, or by the governing board of such city or its city council), that after a license has once been granted in any such city to keep an inn and tavern, or a license to sell all beer and wine, or a license to keep a victualing house, with privilege of retailing spirituous liquors within such city, to any person or persons at any place in such license designated according to the terms of the charter of such city or cities as they now exist, it shall not be requisite in order to give such board of excise, or commissioners of excise, or city council or other governing body jurisdiction to grant renewals of such licenses, that a new application recommended by freeholders shall be first signed and presented to such board; but that the filing with the board or body authorized to grant and renew licenses in any such city of a petition for renewal signed by the applicant, accompanied by a new bond of the same tenor, as accompanied the first application, shall confer full power upon such board to renew such licenses for the term of one year; provided always, that the freeholders who may have recommended the former application shall not be eligible as signers for any new application for the term of one year from the granting of such renewal; and provided further, that this act shall in no wise affect applications for new inns and taverns or saloons or victualing houses in such cities." No argument in favor of the defendants can be drawn from the word

"renewals" in the act. The language of the act is not "renewals of a license," but "renewals of licenses." The former phrase might indicate a purpose to permit more than one renewal; from the latter no such implication arises. The first proviso expresses the intention of the draftsman of the act that the freeholders who sign the original application shall not be competent signers for any new application for the term of one year from the granting of such renewal. The provision of the general law concerning inns and taverns, that no person could in the same year recommend two applications, was intended to be retained in this act. Such incapacity is limited by the words of the proviso to the term of one year after a renewal is granted, and therefore, after the expiration of that year, the freeholders who recommended the applicant are free to recommend any other application. This seems clearly to indicate that but one renewal is to be granted; otherwise, after the expiration of one year from the first renewal, the freeholders may sign for other licenses, and the renewed license may continue to be renewed from year to year, without limitation, on the original application signed by them. This would defeat the manifest object of the proviso. My conclusion therefore is that but one yearly renewal of a license can be granted. In *Decker v. Board* (N. J. Sup.) 31 Atl. 235, Mr. Justice Reed expressed the same view, although that question was not necessarily involved in the case. The board of excise was without power to grant the license to Charles Itgen, and such license is vacated, and set aside.

(50 N. J. L. 99)

OXX v. STATE.

(Supreme Court of New Jersey. June 4, 1896.)

INDICTMENT—FALSE PRETENSES.

1. There is sufficient averment of the pretense and its falsity, and that the complainants were induced to part with their money by relying on the false pretense.

2. The indictment is good although the false pretense charged may be such that a person of ordinary prudence and caution would not be deceived by it.

(Syllabus by the Court.)

Certiorari to court of quarter sessions, Monmouth county; Conover, Judge.

Certiorari by Charles Oxx to review a refusal of a motion to quash an indictment. Writ dismissed.

Argued February term, 1896, before DE-PUE, VAN SYCKEL, and GUMMERE, JJ.

E. W. Arrowsmith and Nevius & Wilson, for prosecutor. Chas. W. Ivins, for the State.

VAN SYCKEL, J. The prosecutor moves to quash an indictment which he has procured to be certified from the Monmouth sessions into this court. The alleged defects in the indictment, so far as it is deemed necessary to consider them, are as follows:

The first ground relied upon to quash is that there is no specific averment in the indictment that the pretenses charged are false. It will be admitted that, in the absence of such averment, the indictment would be fatally infirm; but in this case the indictment sufficiently alleges the pretense and its falsity. It sets forth the intent to cheat; that the defendant falsely and designedly pretended that they would deliver \$2,000 for \$200; that the complainants paid the defendant \$200 for the box in which he represented there was the sum of \$2,000; and that the said box contained only the sum of \$1, as the defendant well knew; and that defendant, by means of such false pretense, unlawfully, knowingly, and designedly obtained \$200 lawful money from the complainants, with intent to cheat and defraud them. This is a sufficient allegation of the pretense and its falsity.

The second ground relied upon by prosecutor, that there is no averment that the complainants were induced to part with their money by relying on the false pretenses, is equally without merit. It is distinctly averred that the \$200 were obtained by means of the false pretenses.

The third alleged infirmity in the indictment is that the false pretense charged is such that a person of ordinary prudence and caution would not be deceived by it. To this, it is a sufficient answer that it is of common knowledge that many persons have been deluded by a like artifice. Laws are made to protect weak-minded and credulous, as well as sagacious, persons. The wise and wary can protect themselves.

The writ should be dismissed, with costs.

(59 N. J. L. 48)

**ATLANTIC COAST BREWING CO. v.
DONNELLY. SAME v. ATLANTIC
LUMBER CO. SAME v. PHOENIX
IRON CO. SAME
v. CLEMENT.**

(Supreme Court of New Jersey. June 4, 1896.)

**MECHANIC'S LIEN—FAILURE TO FILE CONTRACT—
FORFEITURE OF LIEN—QUANTUM MERUIT.**

1. Under the mechanic's lien law (Revision, p. 668), when the building is erected under a contract with the owner of the land, it is erected by the owner, and is not within the provisions of the fourth section of the act.

2. In such case, if the contract be not filed, the fact that therein the builder has agreed that there shall be no liens does not affect others who, under section 1, have a right to lien.

3. For materials furnished under an entire contract, there may be a recovery had upon a quantum valebat if the unfulfilled contract was lawfully rescinded by the parties thereto.

4. One of several sureties upon a bond conditioned that the builder shall keep the building free from all liens, does not, by the fact of such suretyship, forfeit his right as a material man to enforce a lien against the building.

(Syllabus by the Court.)

Error to circuit court, Atlantic county; before Justice Ludlow.

Actions by Edward Donnelly, the Atlantic Lumber Company, the Phoenix Iron Company, and Joseph C. Clement against the Atlantic Coast Brewing Company. From the judgment in each case, the defendant brings error. Affirmed.

Argued February term, 1896, before the CHIEF JUSTICE and DIXON, MAGIE, and GARRISON, JJ.

J. J. Crandall, for plaintiff in error. D. J. Pancoast, for defendant in error Phoenix Iron Co. C. L. Cole, for other defendants in error.

GARRISON, J. These four cases arose out of the same transaction, and may be considered together, although each case has some feature not common to all. Of the several assignments of error, there is one that runs through the entire group, and raises this question, viz.: Whether, under our mechanic's lien law (Revision, p. 668), where the building is erected under a contract with the owner of the land not on file, a material man must, in order to have a lien, under section 1, show a written consent of the owner, under section 4.

In the transaction before us the contract was between the Atlantic Coast Brewing Company, owner, and Frank Math, builder. The sixth section was in these words: "The owner shall not in any manner be answerable or accountable * * * for any of the materials or other things used and employed in finishing and completing [said building]."

When this contract was offered in behalf of the plaintiff, who in each case claimed for materials furnished, it was objected to upon the ground that "It is so inconsistent with the offer to show that it is a consent to the builder in writing, that it clearly shows that it is not."

The major premise in this proposition is that a building erected under a contract with the owner of the land is a building erected by a person other than the owner of the land. If this be not so, the objection is without force. We think that it is without force. The construction uniformly given to this fourth section of the lien law from 1855, when *Babbitt v. Condon* (27 N. J. Law, 154) was decided by this court, down to 1893, when *Earle v. Willets* (56 N. J. Law, 334, 29 Atl. 198) was decided in the court of errors, has been, in the language of the later opinion, that "It is obvious that a contract, when the building is so erected, must be signed by a person other than the owner of the land. Such a contract must be made by a person other than the owner, else it would be the contract of the owner."

The matter seems to be entirely at rest.

In the case of the Atlantic Lumber Company, plaintiff, the court was requested to instruct the jury that a certain bond to secure the builder's contract, from which the plaintiff's name had been erased, imputed to the plaintiff notice of such contract, and that, as the contract provided against liens, the plaintiff was debarred from asserting its lien.

The testimony did not establish all of the facts recited in this request, so that it could have been charged as a whole. It was therefore not error to deny it. If the substantial question be severed, the refusal was still correct. The facts touching the plaintiff's knowledge of the bond, and the time it was acquired, whether before or after the materials were furnished, must, in any event, be for the jury. So that the plaintiff was not injured, unless the bare existence of the waiver of liens in an unfilled contract protects a building from liens. This, obviously, is not so. The right of lien given by the first section is fixed when materials are furnished, unless it is taken away by section 2. The fact that the builder who made the contract has waived his right does not affect the rights of others. In each case the right is personal, and is vested, unless personally waived.

There is nothing substantial in the assignment.

In the case of the Phoenix Iron Company, plaintiff, there are two assignments of error based upon a request to charge, and an exception to the charge of the court as delivered. These exceptions tend to raise the question whether a material man who has made an entire contract with the builder may, upon the failure of the builder to make the payments called for by each contract, refuse to complete it, and lien the building for the material actually delivered, as on a quantum valebat. The assignment, however, does not call for decision of this question.

The jury were correctly instructed by the trial court that the right of the plaintiff to a lien for materials furnished the building under an entire contract depended upon whether the contract had been lawfully rescinded by the parties thereto. This was left to the jury, although the testimony upon this point was practically undisputed. There was no occasion for charging an abstract proposition of law, unsupported by adequate proof.

The case of Joseph C. Clement, plaintiff, presents a somewhat novel question. Math, the builder, had given a bond to the owner for the faithful performance of his contract. Clement was one of the sureties on this bond. The condition of the bond was that Math should indemnify and save harmless the owner from all claims, demands, suits, and actions, and should keep the said building and lot free from incumbrance and lien of any and all debts, and furnish complete release of liens. Clement furnished materials for the building, for which he filed a lien. The contention of the owner is that Clement, by executing the bond as surety, barred his own right to lien the building.

The bond was put in evidence incidentally,—almost accidentally,—since the fact of its mechanical attachment to the contract seems to have been its only relevancy to the plaintiff's case, at the time it was impliedly offered. Its introduction was opposed by the defendant below, who now

seeks to make the case turn upon its controlling import. After the issue raised by the pleadings had been tried, the defendant asked "that a bonding instruction be given the jury to find that the debt is not a lien, for the reason that the plaintiff has undertaken in a bond that there shall be no lien as per the terms of the bond itself offered in evidence." The refusal of this request is the point upon which a reversal of the judgment is now sought.

It will be seen that the proposition is presented in a mode ill adapted to its proper consideration. If true, it constituted a complete defense; yet it was not pleaded. It falls to the ground if there was any material alteration in the contract without the assent of the surety; yet no opportunity for a replication was afforded. A demurrer to such a plea, or a joinder to such a reply, would have presented an issue capable of definite disposition. As the case stands, the question upon which it turns does not appear upon the record, and its adjudication will not be within any issue the parties set out to try, or that, in point of fact, they did try. The defense is clearly not estoppel, for the issue concerned a transaction in which the obligee took no part. It is not a waiver, because the plaintiff's agreement was of a secondary character, resting upon no direct consideration. At bottom, the defense is that it would be circuitous, and hence oppressive, to permit the surety on the contractor's bond to proceed with a lien, after the enforcement of which the obligee would be compelled to sue on the bond in order to get back the money recovered on the lien.

The "vigilance and jealousy" with which the law "favors a surety, and protects him" (De Col. Guar. p. 277), would be a very empty phrase if his legal liability may be enlarged upon the ground that it is inequitable to limit it by the express terms of his undertaking.

Avoidance of circuity of action is, at best, a doctrine of convenience,—a secondary equity, so to speak,—and not to be resorted to in the face of either legal rule or substantial right. Nor is it to be rashly assumed that the equity of the case is with the obligee. The plaintiff is one of three sureties, between whom the right of contribution exists, as part of the contract of each. This right at law rests upon an involuntary payment made for a defaulting principal. This right is not only a principle of equity, but inheres also at law, in the contract itself. As was suggested by Lord Eldon in *Craythorne v. Swinburne*, 14 Ves. 164: "The principle of equity being in its operation established, a contract may be inferred upon the implied knowledge of that principle by all persons." This legal and equitable right of the plaintiff to contribution with respect to every injurious default of the principal debtor will not arise in the case before

us, if the debt in question be deemed to be barred upon the ground now advanced; for then it would be, in law, the voluntary act of the creditor, not a payment made necessary by the breach of the debtor. The superior equity, therefore, is with the plaintiff. The sole authority cited to us is *Pinning v. Skipper* (Md.) 18 Atl. 659, which is wide of the mark in about every way in which one case can differ from another, having been decided (1) upon the terms of a statute concerning waiver of liens, (2) by a court administering equity, (3) in a case where there was no surety, but a principal debtor, who (4) had contracted not "to indemnify," but "to bar against liens." There is, however, an adjudication in the same jurisdiction in which the rights of a surety in such case were indirectly considered. I refer to the case of *Lutheran Church v. Wehr*, 44 Md. 453. There the obligation of the surety was that the builder should deliver the building "free from all claims, liens, and charges whatsoever." The surety, having furnished materials to the building, filed a bill in equity,—the established method of enforcing a lien. The answer of the owner set up the bond as a bar. The claimant replied that he was discharged as surety by reason of unauthorized changes in the principal contract. The lower court, without passing upon the question raised by this course of pleading, viz. the discharge of the surety, held that he was not barred from asserting his claim, and that the owner's remedy was at law on the bond. The sale of the property in equity was accordingly decreed. Upon appeal it was held that it was error to direct a sale, and that the bill should be retained, in order to have it determined, by suit on the bond, whether the surety had been discharged. In this connection it was said that "there was no reason or justice in requiring the church to pay off the lien, and then sue on the bond to recover the money back from the same party receiving it under the lien, and that a court of equity should rather stay than enforce such a proceeding."

The question of the surety's right to contribution was not stirred, although the opinion stated that the claimant was surety with others. The decision itself went no further than to vacate the decree of sale until the rights of the parties had been adjudicated at law. For the reasons already given, I am not greatly impressed with the judicial view of the inequity of the claimant's suit; but, if this were otherwise, it would not tend in the least degree to affect a court of law, called upon, not to consider the reason or justice of a proposed line of conduct, but to construe a written contract, and say whether the surety therein had debarred himself at law from a right of action given by a general statute of the state.

My own opinion is that, if a surety lives up to his undertaking according to its pre-

cise terms, he has filled the measure of duty demanded of him at law, and has suffered all that his agreement calls for, without stripping himself of the right to partial reimbursement with which he was clothed by his contract.

This leads to a denial of the doctrine that a surety on a contractor's bond, by the bare fact of agreeing to indemnify against liens, has barred his own right of lien in the premises.

The judgment rendered in each of these cases is affirmed, with costs.

(59 N. J. L. 119)

STATE (CARTER, Prosecutor) v. WADE,
Collector of Taxes.

(Supreme Court of New Jersey. June 15, 1896.)
CONSTITUTIONAL LAW—ESTABLISHMENT OF ROAD
DISTRICT—REFEAL OF ACT.

1. The act of the legislature of this state entitled "A supplement to an act entitled 'A supplement to an act concerning roads so far as it applies to the township of Union in Union county,' approved April 16, 1846," approved March 23, 1871," approved April 4, 1873 (P. L. 1873, p. 644), is unconstitutional, because it erects, or delegates the erection of, part of the township of Union, called a "road district," and of less area than the township, into a taxing district for the improvement and repair of the public roads therein, without constituting the district a political corporation or division of the state, and without endowing it with any power of local government whatever.

2. The supplement of 1873, to which reference has been made, has been repealed by the supplement to the general act concerning roads, approved March 12, 1891 (P. L. 1891, p. 137), which supplement devolves upon the township committees of the respective townships of this state the full supervision, management, and control of the making and repairing of all roads therein. This act repeals all special as well as general laws inconsistent therewith, except such as the act expressly provides shall not be affected thereby.

(Syllabus by the Court.)

Certiorari to review an assessment of taxes in Union township, in Union county.

Certiorari by the state, at the prosecution of Josiah M. Carter, against Lewis H. Wade, collector of taxes in the township of Union, in the county of Union, to review a tax assessment. Tax set aside.

Argued February term, 1896, before LIPPINCOTT and LUDLOW, JJ.

James McC. Morrow, for prosecutor. Nicholas C. J. English, for defendant.

LIPPINCOTT, J. This writ brings up for review an assessment of taxes made against the prosecutor for a special road tax in district No. 2 in the township of Union, in the county of Union, for the year 1895, by the assessor of taxes of that township. This special road tax for this road district has been assessed against the prosecutor for the improvement and repair of roads in this district, over and above his other general taxes in the township for the same year for such purposes. This special tax for road purposes

within this district has been assessed under the authority of an act of the legislature entitled "A supplement to an act entitled 'A supplement to an act concerning roads so far as it applies to the township of Union in Union county, approved April 16, 1846,' approved March 23, 1871," approved April 4, 1873 (P. L. 1873, p. 644). By an act entitled "A supplement to 'An act concerning roads so far as it applies to the township of Union in Union county,' approved April 16, 1846," approved March 23, 1871 (P. L. 1871, p. 786), it was by the second section thereof provided that the township, at the annual town meeting, should elect three freeholders to be commissioners of highways, whose duty it should be to lay off the township into districts of usually not less than three miles in length of road, and to assign to each district the amount of road to be worked by each overseer, and apportion the moneys assessed for roads to each district, in proportion to the amount of labor required to be done in each district. During the year 1871, in accordance with this act, the township was laid off into 11 road districts; and the district in which the prosecutor resides, and in which he is assessed for the special road tax, is known as "District No. 2." By the first supplement of 1873, p. 644, to which reference has been made, it was provided that whenever a petition in writing, signed by at least five of the legal voters in any one of these road districts in this township, should be presented to the overseer of the roads for such district for that purpose, the overseer should immediately call a public meeting of the legal voters of such road district, at which public meeting the legal voters so convened, or the majority of those present, should be authorized and empowered to raise by tax, over and above the regular township tax for the improvement and repair of public roads, such sums of money in such district as they may determine, for the purpose of making and repairing the roads, streets, highways, or avenues in such district, which tax should be levied and collected as the township taxes were levied and collected, and, when collected, should be paid by the township collector to the commissioners of highways of said township for the time being, for the use of such road district. Under this section of the act an election was held of the legal voters of this road district, and the sum of \$250 was ordered raised, as a special tax, over and above the general township taxes for the improvement and repair of the public roads, for these purposes in this district; and the sum of \$12.24, a part of the \$250, has been assessed against the property of the prosecutor lying in this district.

I think the statement of the case answers the question whether, under this act, this assessment of tax is valid. By the act of 1871 the commissioners of highways divided the township into road districts, and apportioned

the money assessed for the repair and improvement of roads and highways between the different districts. The division of the township into road districts was for convenience, and for the appointment and election of overseers of the roads. There are other provisions, in relation to the method by which the moneys raised by taxation shall be expended. It will be noticed, under this act, that the money to be raised to be expended upon the highways is assessed as a general township tax, and not by districts. The act of 1871 does not, by any of its provisions, constitute the road districts separate political subdivisions; and the act, in so far as its provisions relate to the division of the township into road districts, concerns only the election of overseers of the roads, and the apportionment to, and the expenditure of road moneys in, the different road districts of the township. But the first section of the act of 1873 constitutes each one of these road districts created by the act of 1871 a district for taxation, for the improvement and repair of roads, over and above the general taxes of the township for the same purposes. This section of this act takes hold of these road districts within the township, and, upon the presentation of certain petitions by five legal voters to the overseer of the road, authorizes him to call a meeting of the legal voters of the district, and at such meeting of the legal voters a majority of those so convened are authorized to raise by tax, over and above the regular taxes of the township for the improvement and repair of public roads, such sum or sums as they may determine, for the making and repairing of the highways of such district. This sum so fixed and determined by the legal voters of the district is assessed by the township assessor, collected by the township collector, and by him paid to the commissioners of the highways of the township for the use of such road district. It is clear that this act, for the purposes of the making, repairing, and improvement of the roads in each district, creates a taxing district within, and less in area than, the township, yet it does not raise the district into any political division, nor does the act intend that this shall be accomplished. The district is given no corporate name, and the money fixed and determined as a tax is assessed and collected by the township assessor and collector, and paid over to the township authorities, to be expended according to their discretion. The district has no officer to direct or control its collection, custody, and expenditure. The legal voters have not even any voice in these matters. The legislature did not by this act create this district a political corporation or division of this state. But whether so intended or not is not material, for it has been determined in this state that the legislature is without power to create or establish, much less to delegate the power to create or establish, such a district, less in area than a polit-

ical corporation or division of the state, within which merely to impose taxes. This district is given no separate or independent existence, nor is it given any power, except as a part of the township. In order to have this existence, it must have a public character, and be endowed with some power of local government. In this case the act does not endow the district with any power to assess, collect, or expend this tax. It merely creates a taxing district, within a township, which was beyond the power of the legislature. The act of 1873 is therefore unconstitutional, and no power to impose any tax existed under it. *Peck v. Township of Raritan*, 52 N. J. Law, 319, 19 Atl. 610. It is also appropriate to say that the act of 1873 has been repealed and superseded by later legislation covering the same subject-matter. The supplement to the general road act approved March 12, 1891 (P. L. 1891, p. 137), conferred upon the township committee of each township in this state the entire management, control, and supervision of the making and repairing of roads in townships, and provided that all taxes assessed for such purposes should be collected by the township collector, and paid to the township treasurer, and be disbursed by the township committee. This statute was upheld in *Road Commission v. Collector of Harrington Tp.*, 54 N. J. Law, 274, 23 Atl. 666, and in this latter case this court declared that the act repealed special as well as general laws inconsistent therewith. The act of 1873 is therefore repealed. The tax is set aside, with costs.

(59 N. J. L. 123)

BARR v. VOORHEES et al.

(Supreme Court of New Jersey. June 15, 1896.)

PLEADING — BILL OF PARTICULARS — MOTION TO STRIKE — ATTORNEY'S FEES — RIGHT TO RECOVER.

1. The bill of particulars of a demand upon which an action at law is founded forms no part of the declaration to which it is annexed.

2. A bill of particulars is not within the meaning of the term "pleading," as used in section 132 of the practice act (Revision, p. 868).

3. The bill of particulars annexed to a declaration is designed to give notice to the defendant of the specific character of the demand, whereof the declaration is general; and, where the items thereof are uncertain or misleading, the proper practice is to demand a better bill of particulars, or by a special rule of the court, obtained upon notice, compel a more specific one to be furnished, rather than to move to strike out the uncertain or misleading items.

4. If the defendant, by the bill of particulars annexed to the declaration, or furnished on demand or in compliance with a rule of the court, fairly and substantially sets forth the character of the services or claim for which the action is brought, and the items and amounts for which recovery is sought, with the dates, it must be deemed sufficient. It need not state the terms of the contract for such services, or upon which the claim is founded, nor the evidence to be produced at the trial to sustain the action.

5. Attorneys and solicitors may lawfully charge reasonable fees for services rendered without a contract for a specific sum, and coun-

sel fees for advocacy are recoverable if an express contract therefor exists between counsel and client.

(Syllabus by the Court.)

Action by John J. Voorhees and Theodore Booraem against Henry J. Barr. On motion to strike out the bill of particulars annexed to the declaration. Denied.

Argued at February term, 1896, before LIPPINCOTT and LUDLOW, JJ.

Chauncey Beasley, for the motion. Voorhees & Booraem, per se.

LIPPINCOTT, J. The plaintiffs in this action are attorneys and counselors at law of this state, and this action is by them, as partners, against the defendant, for services as his attorneys and solicitors, and for counsel fees for advocacy in the courts of this state and the courts of the United States in his behalf, as well as for other items,—for money loaned, and taxed bills of costs incurred in litigations between the defendant and other parties. The motion is to strike out of this bill of particulars all items for services as attorneys and solicitors to the defendant, and all items of charge against him for counsel fees. It may well be questioned whether the court has any power to strike out such a bill of particulars, or any of the items thereof. Section 132 of the practice act (Revision, p. 868) seems to restrict the power to any pleading which is irregular or defective. It has been held in this state that the bill of particulars forms no part of the record. *Church v. Gordon*, 31 N. J. Law, 264. The copy of a bond annexed to a declaration, but not referred to therein, is not a part of the record. *Harrison v. Vreeland*, 38 N. J. Law, 366; *Brown v. Warden*, 44 N. J. Law, 177. Consequently a bill of particulars does not come within the legal meaning of the term "pleading," as used in the statute. There are cases in which the notice of special matter intended to be proved under the plea of the general issue has been stricken out, where the special matter constituted no defense to the action. *Bank v. Chetwood*, 8 N. J. Law, 1; *Little v. Bolles*, 12 N. J. Law, 171; *Miller v. Halsey*, 14 N. J. Law, 50. But such notices of special matter fulfilled in many cases the office of a special plea. *Little v. Bolles*, 12 N. J. Law, 171; *Ackerman v. Shelp*, 8 N. J. Law, 125; *Tillou v. Britton*, 9 N. J. Law, 120; *Beale v. Berryman*, 30 N. J. Law, 216. The notice should contain only such matter as, if pleaded, would be a bar to the action, and must be set forth in the notice with as much certainty and sufficiency as in a special plea. *Id.* Nothing which would be of substance in a special plea could be omitted from the notice, and, when the general issue was the apt and only plea, the statute was not designed to permit the defendant to give notice. The bill of particulars annexed to a declaration is designed to give notice to the defendant of the specific character of the demand, whereof the pleadings are general;

and where the items are uncertain or misleading the proper practice is, if the bill of particulars annexed to the declaration be defective, uncertain, or insufficient, to make application to compel it to be made certain, specific, and sufficient. The power of the court is ample to compel a sufficient bill of particulars to be furnished, and, if failure be made in this respect, to stay the action, or nonsuit the plaintiff. The bill of particulars may be amended by the plaintiff. *Tillou v. Hutchinson*, 15 N. J. Law, 179. The conclusion is, upon this ground, that this motion to strike these items should be refused, and that if, under the practice, a better bill of particulars be required, the plaintiff should be permitted to furnish it upon demand, or by a rule of the court.

There exists another reason why this motion should be refused. The examination of the bill of particulars reveals that items of the services of the plaintiff, of the character to which reference has been made, are set forth separately and specifically, with date to each, and the amount thereof. It would thus appear that the defendant is made aware, fairly and substantially, of the character of the services for which the action is brought, and the amounts for which recovery is sought. There seems to be no defect in the information given him, and it is difficult to perceive how he can be misled or deceived as to the grounds on which the action is based, or the nature of the evidence to be relied on to sustain the right of recovery. We can have nothing to do on this motion with the question whether the plaintiff will succeed or not, and it is no part of the bill of particulars to acquaint the defendant with the principles of law which the plaintiffs will invoke to sustain their action, nor to set forth the details of the evidence which will be introduced. The contract for these items of service need not be set out in the bill of particulars. If the contract be in writing, and in the possession of the plaintiffs, they are bound, upon demand, to furnish a copy to the defendant, and to submit to an inspection of it. The bill of particulars need only to substantially apprise the opposite party of the nature of the claim against him. *Stothoff v. Dunham's Exrs*, 19 N. J. Law, 181. It need not show the cause of action as the declaration does. *Stead v. Kehrnan*, 16 Phila. 79. It indicates the transactions out of which the demand arose, without specifying a technical description of the right of action. *Jacobi v. Pfar*, 25 Ark. 4. It is sufficient if, on the part of the defendant, there can be no mistake as to the preparation to be made to resist the claim. *Smith v. Hicks*, 5 Wend. 48. It is the particular subject-matter which is to be set forth in the bill of particulars. *Van Voorst v. Canal Co.*, 20 N. J. Law, 200.

But it is, again, contended that these items in this bill of particulars are for services of the plaintiffs rendered for the defendant in his litigations in the courts, and for counsel

fees for advocacy therein in his behalf in such litigations, and that there can be no recovery for such items without an express contract fixing the sum for such services can be shown, and, as such contract is not set forth in the declaration or the bill of particulars, these items should be stricken out. As has been said, the bill of particulars is no part of the declaration; and, if the proposition here presented was one about which there could arise a difference of opinion, it would be the manifest duty to refuse the motion to strike out the items. But the nature of the services and the amounts charged are fully stated, and if the contention of the defendant be correct in law, that no recovery can be had for such claims, his defense will be that no express contract existed between them; and upon that subject no more explicit information can be imparted to him than that already possessed by him, and it is not incumbent upon the plaintiffs to state the evidence in their particulars, nor the names of the witnesses by which the express contract is expected to be proved. It has been held in this court that an attorney at law can contract for a remuneration for his legal services. *Schomp v. Schenck*, 40 N. J. Law, 195. It has also been held in the court of errors and appeals that attorneys and solicitors may lawfully charge reasonable fees for services rendered, without a contract for a specific sum. *Strong v. Mundy*, 52 N. J. Eq. 833, 31 Atl. 611. It also appears settled in law that counsel fees for advocacy are recoverable if an express contract for a specific sum to be paid therefor existed between counsel and client. *Schomp v. Schenck*, 40 N. J. Law, 198; *Hopper v. Ludlum*, 41 N. J. Law, 182; *Zabriskie v. Woodruff*, 48 N. J. Law, 610, 7 Atl. 336; *Strong v. Mundy*, 52 N. J. Eq. 833, 31 Atl. 611. It is entirely sufficient to say that the character of the evidence at the trial may be such as to establish the right of recovery against the defendant in favor of the plaintiffs for the items in question, and they cannot be deprived of the opportunity to present such evidence. It is not necessary on this motion to determine whether the declaration is in such legal form that such proof may be admitted. That is a question with which the trial court must deal when it is presented. Here this motion is considered as if the bill of particulars, which is no part of the declaration, was entirely consonant with the pleadings. Motion to strike out is denied, with costs.

(59 N. J. L. 186)

KOHL v. STATE.

(Court of Errors and Appeals of New Jersey.
Oct. 7, 1896.)

CONVICTION OF CAPITAL OFFENSE—RIGHT TO WRIT OF ERROR.

1. Under the act of March 12, 1878 (P. L. 1878, p. 80), the writ of error, in cases punishable with death, is a writ of right, but such writ

must issue out of the court of errors and appeals in the first instance.

2. Quere, whether the authority of the supreme court to review convictions in cases punishable with death, on writ of error issued by order of the chancellor, still remains.

(Syllabus by the Court.)

Error to supreme court.

Henry Kohl was convicted of murder, and brought error. The writ was dismissed, and from the order of dismissal defendant brings error. Affirmed.

Thomas S. Henry and Chauncey H. Beasley, for plaintiff in error. Elvin W. Crane, for the State.

DIXON, J. The plaintiff in error, having been convicted in the Essex oyer and terminer of murder in the first degree, and sentenced to be hanged, caused a writ of error to be issued from the supreme court on April 6, 1895, in order to test the legality of his conviction. On motion of the public prosecutor this writ was dismissed by the supreme court because it had not been allowed by the chancellor. This action of the court is now before us for review.

On behalf of the plaintiff in error it is urged that his writ of error was a writ of right, by virtue of the amendment to the criminal procedure act, approved March 12, 1878 (P. L. 1878, p. 80), which is as follows: "Be it enacted," etc., "that the eighty-third section of the act entitled 'An act regulating proceedings in criminal cases' [Revision] approved March 27, 1874, which is in these words, viz. 'Writs of error in all criminal cases not punishable with death shall be considered as writs of right and issue of course: and in criminal cases punishable with death writs of error shall be considered as writs of grace, and shall not issue but by order of the chancellor for the time being, made upon motion or petition, notice whereof shall always be given to the attorney general or the prosecutor for the state,' be and the same is hereby amended, and it is hereby enacted as follows, viz.: Writs of error in all criminal cases shall be considered as writs of right and issue of course; but in criminal cases punishable with death, writs of error shall be issued out of and returnable to the court of errors and appeals alone, and shall be heard and determined at the term of said court next after the judgment of the court below, unless for good reasons the court of errors and appeals shall continue the cause to any subsequent term." It is plain that, if this enactment is to have the force which its language imports, the writ of error is, in all criminal cases, including those punishable with death, a writ of right. But it is equally plain that, in cases punishable with death, the writ of right is to issue out of the court of errors and appeals alone. Hence, taken as a whole, the words of the statute afford no support to

the claim that such a writ may issue out of the supreme court.

Counsel for the plaintiff in error, however, further argue that, according to the decision of this court in *Entries v. State*, 47 N. J. Law, 140, the constitution has vested in the supreme court the power of reviewing judgments of the courts of oyer and terminer in criminal cases, and the legislature cannot prevent the exercise of that power by authorizing writs of error from this court directly to those inferior tribunals; and thence they infer that so much of the act of 1878 as requires the writ to issue out of the court of errors and appeals alone is unconstitutional, and the residue of the enactment, making the writ a writ of right, remains without limitation. The language of the opinion in the *Entries Case*, which was not a capital case, must be restricted to the principle on which the decision rested. That principle is that the jurisdiction of the supreme court existing at the adoption of our present constitution was established by that instrument, and cannot be taken away by statute. What jurisdiction the supreme court had at that time by writ of error in criminal cases was defined by the thirteenth section of the criminal procedure act passed March 6, 1795 (Pat. Laws, p. 162), which prior to 1878 stood as the eighty-third section of the present act (Supp. Revision, p. 209), and is above recited. Under this law the supreme court had absolute jurisdiction to revise on writ of error all judgments in criminal cases not punishable with death, and in such cases the legislature could not confer on this court the primary right of review. But in cases punishable with death the authority of the supreme court was confined to the review of those judgments whereon the chancellor should order a writ of error to issue. Whether this dependent authority is a jurisdiction guarantied by the constitution we need not now decide. If it be not, it forms no impediment to the legislative grant of the writ of error issuing as of right out of this court in all criminal cases punishable with death. If it be, it narrows that grant only so far as the jurisdiction of the supreme court extends, leaving the convict entitled as of right to his writ of error out of this court whenever the chancellor refuses to order the writ of grace out of the supreme court. It thus appears that there is no constitutional obstacle in the way of our giving reasonable effect to the will of the legislature that in all criminal cases there shall be a writ of error as of right, but that in cases punishable with death the writ of right shall issue out of this court alone. The writ sued out by the plaintiff in error was neither the writ of grace provided by the act of 1795, nor the writ of right given by the act of 1878, and therefore was properly quashed. The decision under review should be affirmed.

(59 N. J. L. 112)

STATE (NIERENBERG et al., Prosecutors)
v. WOOD.

(Supreme Court of New Jersey. July 6, 1896.)

TORTS—JOINDER OF ACTIONS.

A joint action will not lie against the separate owners of dogs which unite in destroying the property of a third person. Each owner is liable only for the damage done by his own dog, and not for that which is done by the dogs which do not belong to him.

(Syllabus by the Court.)

Certiorari to court of common pleas, Passaic county; Hopper, Inglis, and Van Hovenberg, Judges.

Certiorari by the state, on the prosecution of Henry Nierenberg and Emil Zukugman, against James Wood. Judgment set aside.

Argued at February term, 1896, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

William W. Watson, for prosecutors.

GUMMERE, J. This action was brought by Wood, the plaintiff below, against the prosecutors, Nierenberg and Zukugman, jointly, to recover compensation for damages done by two dogs, one owned by Nierenberg, and the other by Zukugman, in trampling down and destroying certain cabbage plants, beans, etc., which were growing in Wood's close. The property was all destroyed at the same time, the two dogs uniting in committing the mischief; and a judgment was entered in the court below against the prosecutors, by which each was made responsible for the whole of the injury done.

The theory upon which the suit was tried and judgment rendered seems to have been that, as the loss suffered by the plaintiff was the result of the joint act of the two dogs, their respective masters stood in the same position, so far as liability to respond for the damage done was concerned, as if they personally had broken and entered the plaintiff's close, and destroyed his growing plants. But the reason which makes one who personally aids in or abets the wrong done by another liable for the whole amount of the injury done does not apply in a case like that under consideration. In the case of a joint tort, each offender's liability arises out of the fact that his participation in the wrongful act was voluntary and intentional; and the law, as a punishment for his wrongdoing, as well as for the protection of the rights of the injured party, makes him answerable for all the consequences of that act. But, in the case of animals which wander off and unite in perpetrating mischief, there is no actual culpability on the part of their owners. Liability in such a case only exists by reason of the negligence of the owners in permitting their animals to stray away and commit the depredations, and it has therefore always been held, when the question has come before the courts, that a joint action will not lie against separate owners of dogs which

unite in committing mischief. One of the earliest cases on this subject is *Russell v. Tomlinson*, 2 Conn. 206, in which the plaintiff sought to hold the defendants jointly liable for injuries done to his sheep by their dogs. Swift, C. J., in delivering the opinion of the court, said: "Owners are responsible for mischief done by their dogs; but no man can be liable for the mischief done by the dog of another unless he had some agency in causing the dog to do it. When the dogs of several persons do mischief together, each owner is only liable for the mischief done by his own dog; and it would be repugnant to the plainest principles of justice to say that the dogs of different persons, by joining together in doing mischief, could make the owners jointly liable. This would be giving them a power of agency which no animal was ever supposed to possess." A similar view is expressed in *Van Steenburgh v. Tobias*, 17 Wend. 562; *Auchmuty v. Ham*, 1 Denio, 495; *Partenheimer v. Van Order*, 20 Barb. 479; *Adams v. Hall*, 2 Vt. 9; *Buddington v. Shearer*, 20 Pick. 477; and *Denny v. Correll*, 9 Ind. 73. Nor does the fact that there may be difficulty in ascertaining the quantum of damage done by each dog afford any ground for holding their owners jointly liable. As was said in *Van Steenburgh v. Tobias*, supra, the difficulty of such ascertainment is not an argument of sufficient strength to warrant the injustice of punishing a man who is entirely innocent.

The liability of the prosecutors in this case for the mischief done by their respective dogs was a separate, and not a joint, one; and the plaintiff, in order to recover for the loss which he had sustained, should have brought actions against each of them for so much of the injury as was caused by the dog which he owned. By doing so, he would have been fully indemnified, for the recovery in any action against one owner would have been no bar to the action against the other. The judgment of the court of common pleas should be set aside.

(64 N. J. E. 496)

RILEY v. ALLEN et al.

(Court of Chancery of New Jersey. Oct. 14, 1896.)

RESCISSION OF CONVEYANCE—RIGHTS OF MINORS.

A man promised his daughter-in-law that, if she would convey to him a certain tract of land, he would, by his will, give to her and her husband each the interest of \$25,000 during their several lives. On the strength of that promise, the daughter-in-law and her husband conveyed to him the land in question. He died testate of a will by which he failed to fulfill his promise, but disposed of his property otherwise, for the benefit of the infant children of his son and daughter-in-law. The daughter-in-law filed a bill against her children, praying that the conveyance from her to her father-in-law might be set aside, and for other relief. *Held*, that her proper remedy was either—First, by action at law against her father-in-law's estate for damages for the breach of his contract; or, second, by bill in equity praying for the specific performance of the contract to establish the two funds, and that the land conveyed might stand

as security for the sums; and that she could only have the alternative relief of rescission and reconveyance at the option of the defendants, if they were adults, or by the consent of the court as guardian of the infants. As it appeared in this case that it was not to the interest of the children to have the funds established, but to give the relief sought for, it was so decreed.

(Syllabus by the Court.)

Bill by Kate M. Riley against Charles F. Allen and others for the rescission of a conveyance. Judgment for complainant.

Howard Carrow, for complainant. E. S. Fogg, for defendants.

PITNEY, V. C. This is a suit for the rescission of a contract (in the shape of a promise) to make a certain provision for the complainant by will. The contract is alleged to have been made by Joseph K. Riley, since deceased, who is represented here by the defendant Allen, his executor. The real defendants are the ten children of the complainant, and one nephew, who are the beneficiaries under the will of the testator. The nephew, however, is affected remotely, if at all. The allegations of the bill are that at and before April 20, 1885, the complainant, who was then, and still is, the wife of one Edward B. Riley, son of Joseph K., deceased, was seised of two parcels of land situate in or near the borough of Woodstown, Salem county, of the value of about \$25,000; that, on the 20th of April, Joseph K. Riley, who was a man of large wealth, entered into an agreement with the complainant to the effect that in consideration that she, with her husband, would convey to him all their right, title, and interest in the lands just mentioned, he (said Joseph K. Riley) would, in and by his last will and testament, at his death, give and bequeath unto the complainant and her said husband the use, interest, and profits of \$50,000, namely, \$25,000 to each, for and during the terms of their natural lives, and that, in pursuance of that agreement, she, with her husband, conveyed the premises to Mr. Riley; that the title so remained in him, and he had the benefit of the ownership thereof, until he died, which was January 2, 1894, a period of a little less than 9 years; that at his decease the complainant had 10 children (who were all made defendants), the oldest of whom at that time was 18 years of age, and the youngest less than a year. The bill further states that the testator failed to keep his agreement, but by his will gave neither the complainant nor her husband anything, but provided (after some trifling bequests, not worth setting out here) that \$6,000 of his estate should go to his grandson Joseph K. Riley, Jr., the son of a deceased son, James R. Riley, and the remainder of his estate, both real and personal, he gave to his executor, in trust for and during the lifetime of complainant's husband to apply the income, in his discretion, to the support, maintenance, and education of the 10 children of the complainant, and to permit the family of his son Edward B. Riley (which includes, of course,

the complainant) to occupy such portion of his real estate as they may desire for a home for him and his family, free of rent, upon condition that they keep the premises in good repair, with the privilege of cutting timber for firewood and for repairs and improvements to buildings, with power of sale in the executor, the proceeds of the sale to become part of his estate, and at the death of Edward B. Riley the property to be divided among the children of complainant. The prayer of the bill is that the conveyance from the complainant to the testator may be set aside and decreed to be null and void, and that she may have such further and other relief as the nature of the case may require.

The facts of the case, as they appeared at the hearing, are that Mrs. Sarah Riley, the wife of Joseph K. Riley, deceased, died seised of the lands in question in February, 1874, and by her will gave the use of them to her husband, Joseph K. Riley, during his natural life. She then, after providing for an unmarried daughter, Beulah, by devising to her certain real estate, which is not brought in question here, gave all the remainder of her real estate, which includes the premises here in question, to her son Edward B. Riley. She also gave him a farm of about 40 acres, the title to which was in her husband, so that as to that the devise was futile. Out of her personal property, which she gave to her husband, she requested that \$6,000 should be taken by her husband's executors, and put at interest, and the same given to her son James R. Riley during his natural life, and, at his decease without issue, that sum to be divided between her two children Beulah and Edward. It would seem that at this time neither of her sons was married. Afterwards her son James did marry, and died, leaving one son, Joseph K. Riley, who was provided for, as above stated, in his grandfather's will. Edward B. Riley, after marrying, engaged in various pursuits in Woodstown and its neighborhood, without financial success, with the result that debts accumulated against him, and his father came to his relief, and loaned him money, and paid debts for him; so that on the 11th of February, 1884, judgment by confession on bond and warrant was entered in favor of the father against the son in the Salem circuit court for the amount of \$7,123, besides costs, and execution was issued on it, and levied on the personal property of the defendant in execution, and also upon the land in question. Joseph K. Riley had previously set about, as he declared, trying to prevent his son from spending the balance of his property, and tried to induce him to make a conveyance of it to him, Joseph K. This the son at that time declined to do, but as a compromise, on the 8th of February, 1884, conveyed, through a third party, the whole of the premises to his wife, the complainant, for the nominal consideration of one dollar. The father, three days later, procured from his son the judgment above mentioned, and then paid

or settled all his outstanding debts. The situation, however, did not satisfy the father, as he had, or affected to have, fear that, through the influence of the son over his wife, the property would still be at his disposal. He therefore brought further influences to bear on the son and his wife to convey the property to him (the father), and that resulted in the conveyance of April 20, 1885, now sought to be set aside. In September, 1885, the father satisfied the judgment of record, and allowed the son to live upon the premises, substantially free of rent, during his lifetime. He was about 60 years of age when he died.

The promises and representations made by the father to the daughter-in-law, which constitute the contract, are proven by several witnesses besides herself and her husband, principally by a Mr. Holmes, a real-estate and insurance agent and conveyancer in Woodstown. Mr. Holmes swears that the father applied to him to use his influence with the son to get a deed to him for the farm, and for that purpose to make certain representations as to what he would do. In fact, this gentleman assisted the father in procuring the conveyance in the first place to the wife; that is, the conveyance to the wife was not suggested in the first place by the father, but was the result of a request that the son should convey to the father, and was in the nature of a compromise, the son preferring to convey to his wife rather than to the father. The conveyance from the son and wife to Holmes, and by the latter to the wife, was prepared by the father either in person or by his procurement. Mr. Holmes swears that the father told him at the start to tell Edward that, if he would make him a deed for the farm, he would will it to him, or deed it back to him again, and he would leave him the interest of \$25,000, and his wife the interest of \$25,000; that he thought that his personal property would amount to about \$50,000, and that he (Holmes) made that statement to Edward. Soon after the title was vested in the wife, negotiations by Mr. Holmes with complainant, at the instance of the father, were continued; and Mr. Holmes swears that the father told him to tell Kate, the complainant, that he would leave his personal property, which would amount to about \$50,000, at interest, and give each one of them the interest of one-half, and he would see that they got a good title in the farm back again, free of all incumbrance. Another witness is Mr. Johnson, the father of the complainant, who lived in an adjoining township, and who was sent for by Joseph K. Riley to come and see him, and consult about this affair. He swears that Riley asked him to use his influence with his daughter to procure a conveyance to him (Riley); that Riley said that he would give them each the interest of \$25,000 a year as long as they lived, and at his death they should have the property back; and that, on the strength of that, he advised his daughter to make the conveyance. In addition to these

two witnesses is the evidence of a colored witness, very much to the same effect, who was either present or within hearing in the next room at the time the conveyance was actually signed.

I am compelled by the force of this evidence, without relying upon either that of the complainant or her husband, which fully agrees with it, to the conclusion that the deceased did make these promises to his daughter-in-law, the complainant, on the strength of which she made the conveyance. He was either mistaken as to the value of his personal property, or he met with losses before his death, for it amounted to only about \$23,000 net; and out of that he was in honor, if not in equity, bound to provide for his grandson Joseph K. Riley, Jr., the \$8,000 mentioned in his wife's will. The result was that his personal property subjected to the trust of his will amounted to only \$16,000 or \$17,000. He owned, besides the land here in question, a farm of 40 acres in an adjoining township, the value of which is not fully stated. Whether his pecuniary situation changed materially from the time he stated to Mr. Holmes that his personal property was worth \$50,000, or whether he was then mistaken in his estimate of it, or was making false assertions in order to influence his son and daughter-in-law, does not appear. He disposed in his will of his real estate and the residue of his personal estate precisely as stated in the bill, giving the beneficial use of it to the children, with incidental benefit to the parents.

The bill, it will be perceived, does not allege the promise to reconvey the land, nor does it seek to enforce such a promise, although it is quite as clearly proven as the promise to set aside \$25,000 for the benefit of the complainant and \$25,000 for the benefit of her husband. The bill is based upon the failure of the testator to provide the two funds of \$25,000 each, and the relief asked is a rescission and a reconveyance, and not an establishment of complainant's right to the legacy of \$25,000. If complainant had asked for the establishment of such fund for her benefit, such relief, I think, is practicable, and could be granted. The personal property that remains, together with the landed property, is ample for that purpose. But it does not appear affirmatively, or even inferentially, that, taking the whole of the residue of the estate, it is sufficient to establish the two funds of \$25,000 each, one for the wife and the other for her husband. Now, the wife had the right to stipulate for a fund for her husband's benefit. She would have had this right if it had been to a stranger, without benefit to her; but the stipulation in favor of her husband was, in substance, one for her own benefit, or, at least, might prove so in the ordinary course of events, and she is entitled to treat it as an integral part of the contract. And the only question that remains is whether or not the entire failure of the promisor to make any provision whatever in pursuance

of his promise for the benefit of the complainant or her husband, and the apparent inability of his estate to fulfill that promise, entitle her to the particular remedy asked for, namely, a reconveyance of the land conveyed.

I do not infer from the proofs in the cause that the father practiced, or intended to practice, any actual fraud upon his daughter-in-law. It is quite possible that at the time he made the promise he was possessed of the \$50,000 in personalty and real estate, independent of the lands belonging to his daughter-in-law, and he may have honestly intended at that time to perform his promise. The will of which he died testate was executed in November, 1893, only two months before he died, and may have been the result of his observation during the previous eight years of the character and ability of his son for business. He may have thought that, considering the then state of his pecuniary affairs, the best thing he could do for his son's family was to make the will he did; and it is by no means certain that his judgment in that regard was not accurate.

But granting that the conduct of the deceased was free from all fraud, and that his judgment as to what was best for his son's family was sound, the question still remains whether or not he had the right, under the representations and promises which he had made to his daughter-in-law, to make the disposition which he did of the property in question. The land which she conveyed to him was her land, never had been his, except that he had a life estate in it, both as tenant by the courtesy and as devisee of his wife, but at his death it belonged absolutely to her; and his devisees have no right to retain it against their mother, claiming, as they do, as volunteers, he having failed to pay the consideration which he agreed to pay, unless they shall themselves pay it. I come to this conclusion with regret, but it seems to me inevitable. The case of *Johnson v. Hubbell*, 10 N. J. Eq. 332, decided by Chancellor Williamson in 1854, seems to me to lead to that result. The doctrine laid down by the learned chancellor in the latter part of his opinion in that case has never been, and I think cannot be, questioned. There a son had, at the request of his father, conveyed to his sister an interest in real estate, which descended to him from his mother, upon the promise of the father to make a certain disposition of his real estate which would benefit both the son and his sister. Instead of doing so, the father made a different disposition of his property, which was injurious to both the son and the daughter, and for which the daughter was not in the least responsible. Yet Chancellor Williamson held that it was inequitable for her to hold the title so conveyed to her by her brother. The language of the learned chancellor, at page 343, is significant: "There are several objections interposed to this form of relief. It is said no fraud is imputed to any of the parties at the time of making the agreement, and no fraud is alleged to have

been committed by Mrs. Hubbell since; that Mrs. Hubbell made no promise which was to be fulfilled on her part; and that she is not responsible for the nonfulfillment of the agreement by her father. The fraud of the father was in not making his will, and dividing his estate between his children. It does not divest the breach or nonfulfillment of the contract of its fraudulent character because the fraud was not meditated at the time the agreement was made. The fraud [the learned chancellor evidently uses this word here in the sense of "inequitable conduct"] of the daughter consists in retaining her brother's land without consideration, which is against good conscience. It is to protect the complainant against this fraud that this mode of relief is proper. That Mrs. Hubbell made no agreement or promise with her brother that she would be responsible that the contract should be carried out does not make it the less unconscionable that she should hold her brother's land, conveyed to her under a family compact made for their mutual benefit, which has failed of execution through default of either of them, but of a third party. She accepted the land under the family arrangement. That arrangement has fallen through. The position of the complainant is of some consideration with the court. * * * Under such circumstances, to permit the sister to enjoy, without any consideration, a part of that inheritance which the complainant derived from his mother, is unjust, and a court of equity ought to prevent it."

The complainant prays for a rescission of the contract, with the usual prayer for other relief. The rescission of the contract is not the relief to which the complainant is primarily entitled. The legal aspect of her situation is this: She conveyed property to her father upon his parol promise at his death to do a certain thing. This he failed to do. Her remedy is either by an action at law to recover damages for the breach of his contract, or in equity for the specific performance of the contract by the establishment of the two funds, and declaring the same to be a lien upon the land she conveyed; or, in other words, the enforcement of her vendor's lien for purchase money. Hence her right to a reconveyance of the lands conveyed does not arise until there is a failure on the part of the present defendants to pay the purchase price. And it seems to me that, if it should appear to the court that it is to the interest of these infants that the two funds of \$25,000 each should be established by way of paying the complainant the consideration contracted for by the testator, the court would confine her to that relief. But it does not so appear. I am of the opinion that it is decidedly to the interest of the infants not to attempt the establishment of the two funds, even if it were practicable to do so, but to give the complainant, as an alternative relief, that which she prays for in her bill, viz. the reconveyance of the premises. I will advise a decree accordingly, with costs to be paid out of the estate.

(54 N. J. E. 463)

BROOKS et al. v. KIP et al.

(Court of Chancery of New Jersey. Oct. 10, 1896.)

CONSTRUCTION OF WILL—CONDITIONAL FEE—DESCRIPTION OF DEVISEES.

A., by his will, devised certain of his lands to his son B., and certain other of his lands to his son C., and charged his sons, respectively, with the payment of moneys to his wife and daughters. The will contained this provision: "If they [referring to the sons] should die, or either of them," without "child or children, * * * the real estate" given "to them or either of them" shall go to "my other children, share and share alike." *Held*: (1) That the sons each took a conditional fee in his holding, with a limitation over to the testator's "other children" by way of executory devise; (2) that among the "other children" of the testator intended was included one of the sons, who died leaving a child; (3) that the children of the testator who survived him took contingent interests in severalty, which were transmissible by descent and devisable by will.

(Syllabus by the Court.)

Action by Julia G. Brooks and others against Henry Kip and others to construe a will.

The following facts are established by admissions and undisputed proofs: John A. Ackerman, of the township of Acquackanock, in Passaic county, in September, 1839, for the consideration of \$3,800 purchased from Marcellus Parks 25 acres of land now in the city of Jersey City, which Parks, two months before then, had bought at public sale for \$3,350; and in April, 1841, he, Ackerman, conveyed the same to his son Albert Ackerman by deed which purported to be made in consideration of \$1,400, the payment whereof the father acknowledged, subject to a mortgage for \$1,675, which mortgage appears to have been paid and satisfied in the year 1848. In July, 1850, John A. Ackerman died testate, leaving, him surviving, his widow, Matilda, and four children (two sons,—Albert, born September 21, 1814, and John I., born March 17, 1823; and two daughters,—Gertrude, married to one Van Horne, and Catharine Maria, married to one Kip). His will, bearing date on the 22d day of August, 1849, after ordering the payment of his debts and funeral expenses, is in this language: "Item 2. It is my will, and I do give unto my son John the house and outhouses where I now live, together with fifteen acres of ground bounded on the west by lands of Jacob Jno. Vreeland, on the east so as to take in the dock, south by the Passaic river, and thence to run so far north as to make the fifteen acres. Also two acres of cedar swamp and the whole of my woodland lying in Hudson county, containing about seventeen acres, together with my horses, cows, oxen, and farming utensils, except one horse and cow, which are to be kept on my farm for the use of my wife during her widowhood. I also give unto my son John my notes, bonds, obligations, and money, if any, after my debts are paid; and it is my further will that my son John pay my daughter

Ann, wife of Albert Ackerman, the sum of six hundred dollars in two equal payments, one-half in one year after my decease, and the balance in two years after my decease, without interest. Item 3. It is my will, and I do give unto my son Albert my salt meadow at Newark, containing about seven acres; and I do order that my son Albert pay my daughter Ann, wife of Albert Ackerman, six hundred dollars,—three hundred dollars in one year after my decease, and the balance in two years after my decease, without interest. Item 4. It is my will, and I do give unto my sons John and Albert all the rest, residue, and remainder of my real estate, whatsoever and wheresoever, not before bequeathed, to be divided between them, share and share alike; and it is my further will, and I do order, that they pay my two daughters, Gertrude, wife of Van Horne, and Catharine Maria, wife of Kip, each fifty dollars one year after my decease. Item 5. It is my will, and I do give unto my wife, Matilda, one hundred and twenty dollars per year during her widowhood in lieu of her dower, and I bind my two sons John and Albert to pay her the said sum of one hundred and twenty dollars yearly and every year as long as she remains my widow if she accepts the same in lieu of her dower; also her choice of one room on the first floor in my house and two bead rooms in the garret, together with my furniture, such as beadstids, beads, beading, chairs, table, looking glasses, &c.; also the use of the kitchen for washing, baking, &c., as she may need it during her widowhood; also the use of one horse and one cow, to be kept on the farm as above mentioned. Item 6. It is my will, and I do order, that the real estate given to John and Albert, if they should die, or either of them, leaving no child or children as lawful heirs, then the said real estate so before bequeathed to them or either of them (or the value thereof) shall descend to my other children, share and share alike; that is to say, it is not my intention by this item that my said sons, John and Albert, or either of them, shall not have the privilege and right to sell the real estate, or any part thereof, at a fair valuation, if they or either of them wish so to do, but it is my will that the money arising from such sale or sales (exclusive of the int.) shall be by them, or either of them, put on bond, and mortgage or real estate purchased therewith or safely invested, so that if they or either of them should die without lawful heir, as above mentioned, then the same to descend to my other children, share and share alike. Item 7. And lastly I do hereby appoint my said sons, John and Albert, executors of this, my testament and last will, hereby revoking all former wills by me made and executed."

The testator's daughter Ann Ackerman died after the will was made, and before the 4th of May, 1850, at which date the testator made a codicil to his will, which provided that his son John should pay the \$600 which the will directed him to pay to his sister Ann

"to [using the language of the codicil] my other two daughters, viz. Gertrude, wife of Van Horne, and Catharine Maria, wife of Kip, share and share alike, and in the same manner that he was to pay to Ann"; and that the testator's son Albert should pay the \$600 which, by the will, he was directed to pay to Ann, "to [resuming the language of the codicil] my other two daughters, viz. Gertrude and Catharine Maria, as aforesaid, in manner as directed in my will; and I make and publish this, my codicil, as explanatory of the legacy in my last will directed to be given to my daughter Ann, now deceased, which is now, by my codicil, made void, and the same to be given to my other two daughters, as is hereinbefore directed." The testator's wife received that which the will gave to her, and the sons, John and Albert, paid her the \$120 annuity till she died. Albert duly paid each of his sisters, Gertrude and Catharine, \$625, and John paid them each a similar amount. In 1852, Albert and John, by deed, partitioned between themselves the residuary real estate devised to them by the fourth paragraph of their father's will. That real estate consisted of about 170 acres of land. Albert died testate, in Marca, 1876, leaving, him surviving, his widow, Helen, and one child, Jane, the wife of John R. Vreeland. By his will he bequeathed and devised his residuary estate, which would include any devisable interest he might have in the property of his brother, John I., to his widow, who, in July, 1884, while yet a widow, died intestate, leaving Jane Vreeland her only child surviving. Jane Vreeland survived her husband, and died in 1895, leaving an only child, the defendant Albert J. Vreeland. Gertrude Van Horne died on the 12th of September, 1887, testate, leaving, her surviving, two sons, Cornelius and Garret, and three daughters, the complainants herein,—Anna, married to one De Motte; Mary, married to one Justin; and Julia, married to one Brooks. By her will she bequeathed and devised her entire estate to her three daughters, and made them the executrices of the will. John I. died on the 1st of September, 1892, without issue. Previous to his death he sold all his real estate, realizing therefor upwards of \$20,000, which he mingled with moneys he had from other sources, and did not distinctly invest, as the sixth paragraph of the will contemplated he should do. At his death he was seised and possessed of a house and lot in Jersey City, and three houses and lots in Passaic, and real estate known as the "Acquackanock Lot" and "Dock Lot," and also was possessed of personal estate valued at between five and six thousand dollars, in the acquirement of which properties he used portions of the proceeds of the sale of the real estate devised to him by his father. He left a will, by which he bequeathed all his personal estate to his wife, Clara, and devised to her, for her life, part of his land. He devised to the heirs of his sisters Gertrude and Catharine, in equal shares, the residue of his

estate. His entire estate is worth less than the amount he realized from the sale of the real estate which was devised to him by his father's will. His widow survives him. Catharine Kip died in August, 1895, after the commencement of this suit. She left a will, by which she bequeathed and devised her entire estate to Euphemia Kip, whom she also made executrix of her will. The suit has been revived against Euphemia Kip as a defendant in the place of Catharine Kip, deceased. The object of the bill is to have it decreed that Albert J. Vreeland has no title or interest in the proceeds of the sale of the lands which John Ackerman had from his father in virtue of the sixth paragraph of the will of John A. Ackerman, and to secure for the complainants and Euphemia Kip the amount of the proceeds of such sale. The complainants claim that the entire estate should go to them as devisees of their mother, and to Euphemia Kip as the devisee of their aunt Catharine Kip, and that neither their brothers nor their cousin Albert J. Vreeland are entitled to any part thereof. By some arrangement between the complainants and Euphemia Kip and the executors of the will of John I. Ackerman, the widow of John I. Ackerman is to have, for her life, the provision made for her by her husband's will, and the complainants and Euphemia Kip will take the residue of his estate. If they are successful in their contention that Albert J. Vreeland and their brothers are without interest, as stated, their arrangement will terminate further litigation. The only answer in the case has been filed by Albert J. Vreeland, who claims that he is entitled to an equal third of the recovery to be had from the estate of John I. Ackerman, and, by way of cross bill, asks for the same relief against the estate of John I. Ackerman which the complainants pray for.

Charles H. Hartshorne, for complainants.
William Brinkerhoff, for defendant Albert J. Vreeland.

McGILL, Ch. The principal question to be determined at this time is whether Albert J. Vreeland has any interest in the proceeds of the sale of the lands which John I. Ackerman took by his father's will. The quantity or duration of the estate which John I. Ackerman took in the realty devised to him by the second and fourth paragraphs of his father's will is not expressly defined in those paragraphs. At the common law, such a devise, standing by itself, would give only a life estate. By force of our statute of 1784 (Revision, p. 300, § 13), the devise, standing by itself,—that is, as stated in paragraphs 2 and 4,—in absence of paragraph 6, would give a fee, but, as the sixth paragraph makes further devise of the property at the death of John, the case is not within the statute. Yet it appears that both the second, fourth, and fifth paragraphs impose a charge upon John personally. By the second paragraph

he is required to pay his sister Ann \$600, the receipt of which payment is transferred by the codicil to the sisters Gertrude and Catharine; by the fourth paragraph he and his brother Albert are required to pay Gertrude and Catharine each \$50; and by the fifth paragraph he is charged with the payment of an annuity to his father's widow. It is a well-settled rule of construction "that," using the language of Mr. Justice Depue in *Groves v. Cox*, 40 N. J. Law, 40, 43, "a devise indeterminate in its terms, and without words of limitation, which, standing alone, would create only an estate for life, will be enlarged to a fee by the imposition of a charge upon the person of the devisee or on the quantum of the interest devised to him; but not if the premises are merely devised subject to the charge." Hawk. Wills, 134. The charges imposed upon John as stated, I think, bring the devise to him within this rule. Thus, when we come to the sixth paragraph of the will, to consider the effect of the devise over there provided for, John is, by implication, clothed with a fee simple absolute in the lands devised to him. But this implication is overcome in the sixth paragraph by the provision that, if John should die without leaving a child or children who might lawfully inherit from him,—"leaving no child or children as lawful heirs,"—then the real estate was to "descend," meaning, in the connection in which it is used, "go to" (*Ballentine v. Wood*, 42 N. J. Eq. 558, 9 Atl. 582; *Den v. Blackwell*, 15 N. J. Law, 389) his other children. The devise over is not upon the death of John without issue, but upon his death without "leaving * * * child or children." The import of this expression is not failure of issue at some indefinite future period, but dying without children at the death of John,—a definite event. *Fairchild v. Crane*, 13 N. J. Eq. 105, 107; *Brokaw v. Peterson*, 15 N. J. Eq. 194; 2 Jarm. Wills (R. & T. Ed.) 146, 762; 2 Washb. Real Prop. (5th Ed.) 763, note 4; Kent, Comm. 278. The effect of the provision upon the estate of John is that it was thereby made a fee simple conditional, with a limitation over by way of executory devise to the testator's "other children." *Den v. Allaire*, 19 N. J. Law, 6; *Groves v. Cox*, supra; *Wilson v. Wilson*, 46 N. J. Eq. 321, 19 Atl. 132.

It is immaterial to here consider whether the term "my other children" referred to those who answered that description at the time of making the will, or to those who answered it when the testator died, for the will was republished by the codicil after the death of Ann, and is to be considered as then made, and no child of the testator died after this second publication of the will and before the death of the testator. The term "my other children" does not refer, as "my surviving children" would, to the time of the happening of the contingency, but, at the furthest, to those living at the death of the testator (*Den v. Mannors*, 20 N. J. Law, 142;

Seddel v. Wills, Id. 223; *Winslow v. Goodwin*, 7 Metc. [Mass.] 363), who, by force of the succeeding words, "share and share alike," or even without them, took in severalty (*Ballentine v. Wood*, supra; *Winslow v. Goodwin*, supra; *Emerson v. Cutler*, 14 Pick. 108) contingent interests, which were transmissible by descent and devisable by will (1 Redf. Wills, 391; *Winslow v. Goodwin*, supra; *Thornton v. Roberts*, 80 N. J. Eq. 473, 476, and cases cited; cases in reporter's note to *In re Bartles*, 33 N. J. Eq. 51). The question which was really mooted at the argument is whether within the term "my other children" the testator intended to include the survivor of the two brothers, Albert and John. The complainants contend that it was not intended to include either brother. They insist that the conveyance in 1841 of the Parks property by John A. Ackerman to his son Albert was in reality an advancement, which was equalized to John I. Ackerman by the devise of the homestead, and that it was the purpose of the testator that his sons, who might perpetuate the family name, should have all his estate in equal shares, and, after the fashion among the Dutch farmers in those days, that his daughters should be put off with a small gift of money; but that, in default of either son leaving issue at his death to perpetuate the name, the share of that son should go to the daughters. They argue, first, that it must be presumed that the testator wished to deal equally with his children, and that it will best subserve equality, in view of the provision for Albert and the small portions of the daughters, to construe the words "my other children," as used in the sixth paragraph, to mean his daughters; second, that the natural and grammatical reference of the words "other children," in the connection in which they are used, is to the testator's daughters; and, third, any other construction than that insisted upon would be inconsistent with the language used, that the "other children" are to "share and share alike," for his obvious intent is that his son is to take only a conditional fee, which is not the absolute fee that his sisters are to have.

First. I cannot assent to the proposition that it is apparent that the testator intended to deal equally with his children. It is clearly demonstrated by a mere cursory examination of the will that the sons were preferred, and that, as between them, so far as the will goes, John received the larger bounty, and, as between the daughters, that, if Ann had lived, she would have had a greater share than either of her sisters. It is not established that the conveyance of the Parks land to Albert was an advancement from his father. The proof on that subject comes from one of testator's daughters, who, when she testified, was aged, and in feeble health, and spoke of matters which occurred when she was a mere child, when it is evident that she may not have correctly un-

derstood their meaning, and may have confused mere paternal assistance in a purchase by the son with gift by way of advancement. Her testimony stands in opposition to a deed made for substantial consideration, in which the testator acknowledges that he received such consideration from his son. It was not the \$3,800 consideration for which the testator received a conveyance from Parks, but \$3,075, \$1,400 of which is admitted by the deed to have been paid when the deed was executed, and \$1,675 of which appears to have been represented by a mortgage, then an incumbrance upon the property, which was satisfied in some undisclosed way seven years later. Pinned to the deed is a promissory note for \$250 to Parks, the name of the maker being torn off, dated on the very day of the date of the deed to Albert, upon the back of which are indorsements indicating that Albert paid the note. The note is evidently in the handwriting of the scrivener who prepared the deed, and bears the marks of being as old an instrument as the deed itself. Coming, as it does, attached to the deed, with evidences of equal age with that instrument, even though it comes without proof or explanation, it has enough evidential weight to satisfy me that it is at least uncertain that the conveyance of the Parks land to Albert was by way of advancement. The conclusion, I think, follows that it cannot be assumed that even the sons were equally dealt with. I think, therefore, that no tenable position can be predicated upon a purpose of the testator to treat his children equally in the disposition of his estate.

Second. The sixth paragraph of the will treats of the real estate previously given to John and Albert. They did not take it jointly. Each was entitled alone to that which was specifically devised to him, and, in the undivided property mentioned in paragraph 4, to his share as a tenant in common, and not as a joint tenant. As has been seen, but for the sixth paragraph, the quantity of estate of each would be a fee simple. In the sixth paragraph the testator imposed a condition upon the fee of each son in his respective holding. Each son must leave lawful issue at his death, or he shall not take any of the testator's real estate, or at least any part of that which, in the paragraphs of the will preceding the sixth, was devised to him. To express his purpose in this respect, the testator used a single sentence, clearly intended by him to be applicable to the happening of either of these two contingencies: (a) The death of both sons without leaving issue; (b) the death of one son without leaving lawful issue. He says: "If they should die, or either of them," without "child or children," "the real estate" given "to them, or either of them," shall go to "my other children, share and share alike." The words "they" and "them" do not refer to a joint holding of property, but

to two deaths; and hence illustrations used by counsel in the argument, having reference to a gift to two persons, or either of them, are misleading. Now, in a separate application of the sentence quoted to the two contingencies, we have, in the first place, where the contingency contemplated is the death of both the sons without issue, this reading: "If they should die without child or children, the real estate given to each of them shall go to my other children;" and, in the second place, where the contemplation is the death of one, this reading: "If either of them should die without child or children, the real estate given to him shall go to my other children." The definition of the word "other," as it is used in the sixth paragraph, is "different from that which has been specified." It is obvious that, in the sentence having the double application referred to, the word "other" is intended to have a double reference. When the sentence is applied to the death of both sons, the word "other," excluding those sons, because they are the children specified, refers to the daughters only; but when it is applied to only one son then the word "other" refers to all children except that one son. I conceive this to be the natural or true, though perhaps not grammatical, meaning of the sentence. The will, clearly, does not pretend to be a grammatically correct instrument.

Third. If we interpret the language of the sentence considered literally, neither son can take any portion of the testator's real estate, either directly from the testator or through a deceased brother, free from the condition imposed, for the provision is that, if they both die without children, the real estate is to go over; hence, in giving the effect to the devise over when one dies, which will include the surviving son among the "other children" who are to share the property of the one dying, the condition must attach to that which he will take from his brother's holding. This situation gives rise to the criticism that he cannot "share and share alike" with his sisters, and hence a construction that he will take at all will not admit of harmony between all parts of the sixth paragraph. I apprehend, however, that the complete answer to this suggestion is that the expression "share and share alike," following the words "other children," has reference to the quantity of property that each child is to take, and not to the estate each shall have in the share taken. Because I entertain this view of the meaning of the expression "share and share alike," and because Albert left a child at his death, I deem it unnecessary to determine whether Albert would take in a share of John's property an absolute or conditional fee. If he took either, the fee taken, at his death, at least, was absolute.

I am influenced in my conclusion upon the main question mooted by another considera-

tion. It is thus: When his daughter Ann died, the testator deemed it proper to dispose of the \$1,200 which he had charged his sons to pay her. To do this, he made a codicil to his will, which republishes the will, and becomes a part of it. In this codicil he does not direct his sons to pay the money to "my other children," but specifically directs each of them to pay \$600 to "my other daughters, viz. Gertrude, wife of Van Horne, and Catharine Maria, wife of Kip, share and share alike," etc. Here is observed a remarkable similarity to the language of the will. The expression "my other daughters" is used in the codicil. The expression "my other children" is used in the will. In the codicil the money, like the real estate in the will, is to go "share and share alike." If he had intended that his real estate should, by the devise over, go to his daughters only, it thus clearly appears that he could have said so, not only by reference to "daughters" generally, but by the specific mention of their names; but, if he meant that a surviving son should share in the real estate with the daughters, being without knowledge as to which son would survive, a more difficult task was presented. He was not able to describe the prospective takers by sex, nor could he name the individuals who were to take, for he could not tell which son would survive. He could, of course, explain his purpose by lengthy expression, but would not the general expression "my other children" suffice to manifest his purpose?

My conclusion is that a surviving son was intended to be included in the expression "my other children," and that Albert J. Vreeland is entitled to one-third of the proceeds of the sale of the lands which John I. Ackerman took by his father's will.

(59 N. J. L. 11)

MARTINETT et al. v. MACZKEWEZ.

(Supreme Court of New Jersey. June 5, 1896.)

CONVERSION—EVIDENCE OF VALUE.

1. In an action of tort for the conversion of chattels, an offer to show what such articles brought at a previous sheriff's sale was properly overruled.

2. Such a sale has no tendency to show the real value of the property.

(Syllabus by the Court.)

Error to circuit court, Mercer county; before Justice GUMMERE.

Action by Antonina Maczkewez against John H. Martinett and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Argued February term, 1896, before the CHIEF JUSTICE and MAGIE, GARRISON, and DIXON, JJ.

John H. Backes, for plaintiffs in error. Barton & Dawes, for defendant in error.

BEASLEY, C. J. On this record but a single question is presented for decision. The

litigation originated in this wise: The plaintiffs in error obtained a judgment against the wife of the defendant in error, and, by execution, sold the goods forming the subject of this suit, which has been brought by the husband of the said defendant in execution against the plaintiffs therein and the sheriff.

The bill of exceptions states in these words the proceeding at the trial which is alleged to be erroneous, viz.: "And thereupon the defendants, to maintain the said issue on their part, and for the purpose of showing the value of the goods and chattels mentioned in the declaration of the plaintiff, at the time when the alleged trespass set forth in said declaration was committed, offered to prove the price for which the said goods, and each of them, were sold by the defendant Augustus T. Ege, sheriff of the county of Mercer, at a public sale held on the 29th of March, 1895, by virtue of an execution issued out of the circuit court upon a judgment recovered in said court by John H. Martinett, defendant aforesaid, against Antonina Maczkewez," etc. This offer was objected to by the plaintiff, and was overruled. The inquiry, therefore, is whether, in a trial for the tortious taking of chattels, in elucidation of the value of such chattels, it is competent for the defendant, being the trespasser, to show the price they brought at a sale made by the sheriff by force of a judgment and execution against a third party. It is not observed that any court has ever rendered an affirmative answer to this inquiry. The only authority even tending in that direction are two or three decisions in the courts of New York, which held that sales of the kind in question may be received for the purpose specified when it has been made to appear that they have been conducted under such circumstances that it can be reasonably inferred that the articles were disposed of at fair rates. The language used by the court in these instances appears to preclude the doctrine that, for the purpose in question, the result of one of these official sales, unexplained with respect to its methods or concomitants, should be regarded as legitimate evidence. Such an idea seems to be concluded, *ex industria*, in *Parmenter v. Fitzpatrick*, 135 N. Y. 190, 31 N. E. 1032, which is the last expression on the subject. In that case a number of creditors had caused a sheriff's rule to be made, and the court, in assigning its reasons for its conclusion in favor of the admissibility of such official procedure as tending to show the value of the things thus cried off at auction, expresses its views in these terms, viz.: "In this case it appears beyond all controversy that it was to the interest of these judgment creditors, the sellers of the property, etc., to obtain as high a price as they could; and, where the offer is to show that in fact the property was sold to the best advantage, we think that the evidence as to the result of the sale should, under the circumstances of this case already detailed, have been admitted. It was not conclusive. Perhaps a

jury might think it was very uninfluential, but we simply say that it is competent, and should have been admitted." From this citation it may be said to be clear that the rule approved by the court was that, as applied to the class of cases to which the present one belongs, the sale by the sheriff has, per se, no evidential force whatever, but that, under the influence of certain conditions, it may become infused with such potency. It has not been observed that the rule, even when thus limited, has been approved or adopted by any tribunal outside of the state in which it appears to have originated. It is not to be found among the institutes of the common-law practice, nor among the decisions of the English courts. It is true that it has been sometimes supposed that in the case of *Whitehouse v. Atkinson*, 3 Car. & P. 344, the admissibility of testimony of this kind has received the approval of Lord Tenterden; but this is deemed an unwarrantable assumption, for no such question was presented or decided. On that occasion it does not appear how the fact of the sale by the sheriff and its results came into the case; and all the information that we have touching the matter is that the chief justice, in charging the jury, adverted to the fact that, as the plaintiff in the case was an assignee in bankruptcy, he would, if the goods had come into his hands, have been obliged to sell them very much in the same way as the sheriff had; closely observing, therefore, that, in the presence of such conditions, it often happens that a jury considers the sum at which the goods were actually sold at auction as a fair measure of damages. From this judicial instruction it is entirely manifest that it was not intended to be intimated that the product of the sheriff's sale was any criterion of the fair value of the articles disposed of, and, on that account, was admissible as evidence on the subject. The proposition that, it being the unquestionable duty of the jury to award the plaintiff the real value of the chattels at the time of conversion, they had the right to award less than that measure, on the ground that a sale by the assignee would not be likely to produce a greater sum than that realized from the sheriff's sale, is not to be justified on any known legal principle; but, as that subject is altogether foreign to our present inquiry, it is not necessary to discuss it.

In our own state we have no pertinent decision. It is deemed, however, that the practice of our courts has been to exclude testimony of the kind in question. In inquiries of this nature it has been customary to show the market value of the property if it has a fixed rate of that kind, and, if it has no such estimation, to prove its value by the opinion of experts, and by an exposition of the state and condition of the things sold. In such an inquisition the price obtained at a sheriff's sale would seem to be wholly valueless. When a willing seller and a willing buyer agree and fix the price of an

article, it is obvious that it is reasonable to infer that such estimation approximates closely to the real value of such article; but in an official sale by auction the owner has no voice in the affair, and each bidder is striving to obtain the thing sold, not at its actual worth, but at a bargain. It is vain to deny, for all experience attests the fact, that, as a general thing, the attendants at a public auction of personal property are there with the expectation of acquiring the articles purchased much below their cost in the market, and it is deemed that, as criteria of real value, such transactions can have no effect except to mislead. Nor is the affair ameliorated to any great extent by the addition to it of the requirement of the New York courts. To show the fairness of such a procedure by the sheriff can mean nothing more than that it shall appear that there was a reasonable attendance of bidders, and that the sales were made and cried off in the usual way. The inconvenience would be great to attempt further to test the qualities of these auctions, as it would often occur that such an investigation would be more laborious than the examination of the main issue between the litigants. The result is that it is conceived that these public forced sales cannot be resorted to as affording a reasonable standard of the real value of the things sold, and that, consequently, they should not be admitted in evidence for that purpose. The two following cases accord with this view: *Steiner v. Trantum*, 98 Ala. 315, 13 South. 365, and *Cassin v. Marshall*, 18 Cal. 689. Let the judgment be affirmed.

(54 N. J. E. 473)

McMICHAEL v. WEBSTER.

(Court of Chancery of New Jersey. Oct. 8, 1896.)

VENDOR AND PURCHASER — PURCHASE MONEY MORTGAGE—FORECLOSURE—SET-OFF—FRAUD—DAMAGES.

1. The vendor of real estate remained in possession of the premises after passing of the title, without the consent of the vendee, and collected some rents which accrued after such conveyance. *Held* that, in the foreclosure of a consideration money mortgage given by the vendee to the vendor, the vendee was not entitled, by way of offset, to an allowance for the use and occupation of the premises and the rent received.

2. While so in possession, after conveyance, the vendor committed waste upon the premises, resulting in a deterioration of their value. *Held*, that the defendant was entitled to a corresponding abatement upon the mortgage given for consideration money.

3. The premises conveyed were a farm, consisting of four lots, bounding on one side upon a tidal stream. The call of the description of one course of one of the lots was along the course of the creek at low-water mark. In the preliminary negotiations the vendor falsely asserted that the farm contained 185 acres, and the preliminary written contract for the sale described it as a farm containing "about 185 acres, more or less." In point of fact, it contained 149.68 acres, by actual survey, and that was the sum of the footings of the four lots contained in the description in the deed under which the vendor held. The difference between 149.68 acres and 185 acres came to the attention of

the defendant at and just before the passing of the title; and the vendor, upon inquiry by the vendee, declared that the course of the creek had been changed, and the protecting bank along its side had been pushed out, so that the quantity of 185 acres was actually included within the description. This statement the vendor knew to be false. *Held*, that the vendee was not estopped by the mention of acreage in the conveyance from setting up the fraudulent representation in defense to a foreclosure of the consideration money mortgage, and being allowed an abatement therefor.

(Syllabus by the Court.)

Bill by Thomas McMichael against Henry C. Webster. Decree advised for complainant.

This is a bill to foreclose a mortgage upon land, dated the 12th of November, 1894, to secure \$5,000 in one year, with interest semi-annually, with a clause providing for the maturity of the principal in case the interest was not paid. Default was made in the payment of the first six months' interest, and this bill was filed on the 18th of July, 1895. The answer admits the making and execution of the mortgage, and sets up several defenses, which may be stated thus, in the inverse order of their importance: First. That the mortgage was given for part of the consideration money of the conveyance by complainant to defendant of the mortgaged premises, and that the complainant remained in possession of the premises for several months after the conveyance and time for delivery of possession had passed, and claims for use and occupation. Second. That he collected in cash certain moneys for wharfage on a wharf situate on the mortgaged premises, which accrued after the conveyance. Third. That, while so in possession after the conveyance, he committed waste upon the premises, by cutting and carrying away trees, destroying sheds and fences, and removing bridges. Fourth. That the complainant willfully and fraudulently misrepresented to the defendant the quantity of land to be conveyed, namely, that he represented the mortgaged premises, which consisted of a farm, to contain 185 acres, when, in point of fact, it contained only about 150 acres. The property was conveyed by the complainant to the defendant by deed dated November 12, 1894, in pursuance of a contract in writing entered into between them on the 17th of October, 1894. So much of the contract as supports this last defense of the defendant is in these words: "The party of the first part agrees to sell to the party of the second part all that farm, buildings, meadow, etc., situate at Borden's Landing, N. J., containing about one hundred and eighty-five acres, more or less." The land as described in the title deed of the complainant is comprised of four different tracts, which, when plotted, block in together and form one compact piece. These four tracts are stated in the deed to contain, respectively, 100.34 acres, 6.25 acres, 41.97 acres, 1.12 acres, a total of 149.68 acres, and two several careful surveys made during the hearing showed that it contained no more. The farm is situate on the southwest side of Rancocas creek, a tidal stream in Burlington county, and about

six miles from its debouch into the Delaware river. By the calls in complainant's title deed of the description of the tract of 100.34 acres which bounds on the creek, it runs, as is usual in West Jersey, to low-water mark, and, of course, includes all the lands between high and low water mark; and the surveys above referred to also ran to low-water mark. The course along the river is given in the deed without courses and distances, thus: "Thence northward and northwesterly, along the several courses of said creek or river, to the place of beginning." Along the river the farm has been protected from the overflow of the creek by an artificial berm bank, running parallel with low-water mark, the base of which is high-water mark.

Charles E. Hendrickson, for complainant. John W. Wescott and S. Morris Wain, for defendant.

PITNEY, V. C. (after stating the facts). Both the parties to this action were at the time of the occurrences which gave rise to the litigation engaged in real-estate transactions, and both had their places of business in Philadelphia, and were brought together by a real-estate broker of Philadelphia, acting on behalf of the complainant, named Garretson, who died before the hearing of the cause. He represented the complainant in making the bargain. The defendant was assisted by a Mr. Gimber, a member of the bar of Philadelphia, who also died before the hearing. The original contract of October 17, 1894, was not produced, but it was admitted to have been prepared by Mr. Garretson. It was executed at the office of Mr. Gimber, in Philadelphia. There is much conflict between the evidence of the complainant and the defendant as to the occurrences throughout the transaction; and I may say at the start that, judging from the manner of the witnesses and all the developments of the hearing, I am constrained to place much more reliance upon the evidence of the defendant Webster, than I can upon that of the complainant, McMichael. McMichael swears that the contract was written in Mr. Gimber's office, in the presence of both parties. Webster swears that it was brought there by Garretson and the complainant already prepared. I adopt Mr. Webster's statement. So that the complainant is clearly responsible for the quantity of 185 acres expressed in the contract. The parties met on the premises a few days before the execution of the contract, and, on inquiry by the defendant, the complainant, as defendant swears,—and I believe him,—stated that the farm contained 185 acres and more. The complainant denies this but faintly, if at all. In fact, he admits that he did say that it contained about that amount. He says, however, that, when the moment of the execution of the contract arrived, he strongly objected to naming 185 acres, as the contents, and only consented after an explanation by his broker, Mr. Garretson, that it made no difference, as it was stated to be

"about 185 acres, more or less." He swears that this discussion took place in Webster's presence. This is denied by Webster, and I accept his denial as worth more than complainant's assertion, not only because he is the more reliable witness, but because his conduct immediately after he discovered the shortage indicates that he relied upon the quantity as a material matter. The effect of complainant's evidence on this part of the case, however, is to show that he did not execute the contract unadvisedly, and without knowing its contents and considering its effect. The deed of conveyance under which the complainant held the farm was not produced or shown to the defendant or his counsel, so far as appears, at any time until after the contract was signed.

The primary and important question to be determined is whether or not this representation of quantity was made through a mistake based upon an honest supposition that the farm actually contained that quantity of land, or whether it was willfully and knowingly false, and made for the purpose of influencing the defendant to purchase the property. I am unable to find anywhere in the case the least evidence to support the theory that the complainant had any ground whatever to suppose that his farm contained any more than the sum of the acreage expressed in the deed. There was not the least dispute or doubt about the boundaries. It was flanked on two sides by a public highway, on the third by the creek, and on the fourth by a well-defined line of partition with the adjoining owner. The description of the line along the creek inferentially called for low-water mark, and could not possibly go beyond it. There was no contention, or room for any, that there was any mistake in the computed areas stated in the deed by which the actual contents were understated. But, in fact, no contention was made by the complainant that he thought that the several contents as stated in his deed were in any wise erroneous. He at first put himself upon the ground that the creek had changed its course along his line, and that a new berm bank had been built along the creek, subsequent to the origin of the description contained in the deed, and that, by that means, more land had been taken in. But there was not the least evidence to show any such change of course, or that the new berm bank pushed the low-water mark into the creek a particle. The evidence shows that at one end the new bank was further away from the creek than the old one, and that at the other end it was somewhat nearer. The complainant's evidence tended to show, but not in a satisfactory manner, that at one end the acreage inside of the new berm bank was increased by five acres and one-half, and on the other end the proof is clear that it was diminished about an acre. But such change did not affect the low-water mark a particle, nor had the complainant the least ground to suppose that it did; and, so far as regards the acreage within the bank,

the change would make an increase, at best, of not more than four acres. But a change in the bank would not necessarily change the low-water-mark, which could result only from a change in the bed of the creek.

After the conveyance was passed and the transaction closed, under circumstances presently to be stated, and the defendant had discovered the deficiency in acreage, he notified the complainant, demanded reparation, and the complainant then stated to him (defendant) that the 185 acres were all there, and would so appear by a new survey, and that it was to be found by this increase of land taken in by a new bank. At the hearing, complainant produced a rough, inartistic map, made by himself, from measurements which he swore were made by himself shortly after the date of the conveyance, by which he shows a strip of land outside of the bank, between that and low-water mark, containing about 40 acres. He made it up in this wise: He made the length along the river 8,920 feet (the actual distance is about 4,000 feet), and the average width of the strip between high and low water 198 feet, which made, as he swore, 40 acres of land; and he swore positively that there is an average of more than 200 feet in width from the bank to low-water mark. Now, the base of the bank is at high-water mark, and a careful measurement, taken at an extreme low tide, shows the contents of the strip between high and low water mark to be 7.07 acres, leaving 142+ acres within and including the bank. Another measurement, taken at ordinary low-water tide, makes the strip between high and low water 5.61 acres; and the proofs show that, in order to include 185 acres, substantially the whole bed of the creek would be taken in; that it would require 11 feet in width and the whole length on the creek to make 1 acre, or 385 feet in width to make 35 acres. The average width of the creek is about 400 feet. No attempt was made by the complainant, although he had ample time and opportunity, to overcome these careful measurements made by the defendant's surveyors, of the last one of which he had previous notice, and an invitation to be present. The result of these measurements shows clearly that the complainant deliberately attempted, by means of a grossly untruthful map, to mislead the court, and to thereby justify his assertion that there were 185 acres in the tract. Moreover, on the question of fraud there is direct evidence. John Plasket, who lived in the neighborhood, testified that in a conversation with the complainant shortly after the sale, in speaking of it, he said: "There was a little humbugging, but there was so much 'more or less,' and that settled it; that he sold it for 'more or less,'"—emphasizing the words "more or less."

I conclude, from a consideration of all the circumstances, that the representation of acreage was made by the complainant fraudulently, and that the case is brought within

the canon laid down by the late Judge Parker, speaking for the court of errors and appeals, in *Melick v. Dayton*, 84 N. J. Eq. 245, at page 249, where he says: "There is no doubt that the question of abatement can be raised by a mortgagor, by answer in foreclosure proceedings; and, under certain states of facts, deduction from the mortgage will be ordered to the extent of the value of the deficiency. If a vendor fraudulently represents the number of acres to be greater than the actual number conveyed, and thereby induces the vendee to give more for the tract than he otherwise would, the vendee is entitled to an abatement. Abatement will also be made where there is gross mistake. Gross mistake is where the difference between the actual and the estimated quantity of land represented is so great as to clearly warrant the conclusion that the parties would not have contracted had they known the truth." It is hardly necessary to say that a difference of 35 acres in a farm of 150 acres would be a "gross mistake," and cannot be overcome by the use of the words "about" and "more or less."

But the answer mainly relied upon by the complainant to this part of the defendant's case is that the defendant had notice of the actual quantity of land comprised in the conveyance before the transaction was closed, and had an opportunity to recede from the contract, and is therefore estopped from setting up this defense. This renders necessary a consideration of the circumstances attending the transfer of title. The transaction was not an ordinary sale for cash, but an exchange of properties; that is, the defendant conveyed to the complainant certain real estate in or near the city of Philadelphia in exchange for this farm. After the preliminary contract had been executed, the transaction took this course: The complainant handed to Mr. Gimber, counsel for the defendant, the deed under which he claimed title to the farm, made to him by one Craig, dated September 2, 1890; and in that document is found the description of the land in four tracts before referred to. The defendant delivered to the complainant the title papers to the lands which he agreed to convey to the complainant. Each party, of course, wished to examine the title of the other; and it was agreed that each party should prepare the conveyance which he expected the other to execute. This cast upon Mr. Gimber the burden of examining the complainant's title to the farm, and preparing the conveyance from the complainant to the defendant. In order to the proper carrying out of the transaction, it became necessary for the defendant to procure a loan on the premises in question; and Mr. Gimber agreed to advance the money, but required a guaranty of the title from a title guaranty company, and for that purpose lodged complainant's deed with the Real-Estate Title Insurance & Trust Company of Philadelphia. The delivery of the deed to the insurance company, and the signing of the formal application for insurance,

were made by a Mr. Frank Benham, a clerk of Mr. Gimber. There was some discrepancy in the testimony as to what occurred on that occasion. Mr. Benham swears that he took the complainant's deed to the insurance company, handed it to the proper clerk, and signed an application in blank, and left the clerk to fill up the description himself from the deed, so that he (Benham) did not discover that the quantity of land described in the deed was less than 150 acres; and, further, that the application was to insure a farm of 185 acres. In contradiction of Mr. Benham, two clerks in the insurance company's office swore that the description in the application was filled up by the insurance company's clerk, in the presence and by the dictation of Mr. Benham, who read from the deed for that purpose; and there is nothing on the face of the written application which was produced to show that 185 acres were mentioned. I am inclined to think that Mr. Benham is mistaken in his recollection, but I do not think that it was anything more than an honest mistake. The description in the application is abbreviated, and, in effect, simply states the four lots by the amount of their acreage. There is nothing to show, or lead to the belief, that either Mr. Benham or Mr. Gimber, at or before that time, had footed up the acreage of the four tracts, so as to ascertain the sum of the four. The regular course of business in such transactions is for the insurance company to make a preliminary examination of the title, and send to the applicant a paper, called a "settlement certificate," which shows the present condition of the title, and the incumbrances thereon. The object of this is to enable the parties to pass the title with safety, after which the conveyances are recorded, the searches continued down, and the policy of insurance issued. In this case the settlement certificate is dated November 10, 1894, and was returned on or about that day to Mr. Gimber, with the complainant's deed, to enable him (Gimber) to prepare the conveyance. Mr. Benham swears that according to his recollection, when the settlement certificate came in, he first learned that the quantity of land was less than 183 acres; that it was so reported to him by the insurance company. I am satisfied that that occasion was the first that he or Mr. Gimber knew of it, but I think he was probably mistaken as to the mode in which the same came to their knowledge. I think it was brought to Mr. Gimber's attention by his then looking over the settlement certificate and deed for the first time with care.

In the insurance certificate are these words, "Contents will be insured as 'more or less,' unless survey is produced;" and a short description of the land gives the four tracts with their several contents, but not footed up to show the total. More than that, a Mr. Henry, who was the conveyancer chosen by the complainant to prepare his conveyance, and who attended to the passing of the title, swears that he had an interview with Mr. Gimber,

after the settlement certificate came in, in which the subject was first discussed. So I think the weight of the evidence is that Mr. Gimber knew of the apparent discrepancy before the conveyance was passed. Mr. Webster (the defendant), however, swears—and I believe him—that he did not hear of it either from Mr. Gimber or any other source until after the affair was closed. He swears that he and his wife executed the deed and mortgage, and handed them to Mr. Gimber, on the morning of the 13th of November; that the amount to be paid in cash was then ascertained; that he left his check for it, and left the city for the country before the matter was entirely closed, and without any knowledge, as I have said, of the shortage; that a few days afterwards, he called at Mr. Gimber's office, and then, for the first time, learned from Mr. Gimber of the shortage; that they immediately called in Mr. McMichael (the complainant), and had an interview on the subject; that he (McMichael) then stated distinctly that the actual acreage, notwithstanding what was stated in the description, was 185 acres, and that he would show it and make it right. The language imputed to him by Mr. Webster is: "I will make that good. The ground is there. We will have it surveyed, and I will make it good. He said the acreage was there, but, if not, that he would make it good by other means." The effect of Mr. Webster's evidence is that Mr. McMichael stated to him that he had built a new bank around the marsh, and taken in a quantity of land, not reclaimed when the survey was made upon which the acreage in the deed was based. In this statement Mr. Webster is sustained by Mr. Gimber's clerk, Benham, who swears that he heard Mr. Webster say on several occasions that there were 185 acres within the bank, and that, if they were not there, he would make it up; and that afterwards, and after defendant had had his survey made (in the same year, 1894, by a surveyor who was out of the state at the time of the hearing), and the result stated to the complainant, he attempted to make it up by showing by the map which he had that the land was outside of the bank, and between that and low-water mark, instead of inside the bank, as first stated. Benham says that this first statement of complainant that the acreage was within the bank was made in Gimber's office, about a week after the deeds were passed, when he was called there to meet Mr. Gimber and the defendant about this matter of shortage, and that it was repeated on several occasions, and adhered to until defendant's survey proved the contrary, when he shifted his ground, by attempting to make it up outside of the bank, and between that and low-water mark. Mr. Henry, the complainant's solicitor, above mentioned, swears that the interview between him and Gimber, in which Gimber called his attention to the shortage in acreage, took place on Saturday, the 10th of November, or Monday, the 12th, as the title finally passed, I think, on

the 14th or 15th. In this, I think, he is mistaken, because Mr. Webster swears positively that he did not hear of it from Mr. Gimber before he left, on the 13th; and Mr. Henry swears that while the deeds were all ready for delivery on the 13th, and they met for the purpose of passing them, and the amount to be paid was agreed upon, yet the deeds were not passed on that day, but on a subsequent day, when Mr. Gimber, being asked whether Mr. Webster was satisfied (about the shortage), replied that he had not been able to hear from him, but he guessed it would be all right. This shows that, after Mr. Gimber discovered the shortage, he tried to communicate with Mr. Webster on the subject.

Now, let us inquire what passed between Mr. Henry and Mr. Gimber (as I think, on November 13th, after Webster left) with regard to the shortage in quantity. This is the language used by Mr. Henry: "Mr. Gimber told us that there would not be any settlement on that day, and referred to a settlement certificate. He said: 'I see that we only get one hundred and forty-nine acres and a fraction.' McMichael said that he thought there was more than that; that he ran to low-water mark in the creek; that there had been some land made by change in the course of the creek; and that his new bank was further out than the old bank was. But he said that it didn't make any difference. It was not too late, and there was no harm done yet, if Mr. Gimber was not satisfied." Upon that subject he says: "There was nothing done until the following day, when we called upon Mr. Gimber, McMichael and myself did; and I believe he was to hear from Mr. Webster, and he then told us that he hadn't heard from him, but that he would not wait any longer; he would take the responsibility of delivering the papers (the deeds) himself; and he did deliver them, and told us it was all right, and he could record the papers and consider the matter settled." That, he says, was after the day when Mr. Webster was there to leave his deed and mortgages, properly executed, after which he left for the country. Now, the fact that Mr. Gimber had tried to hear from Mr. Webster about the acreage indicates that he had learned of the shortage after Mr. Webster left. This witness, Mr. Henry, though he had been for years employed professionally by the complainant, and would naturally be interested on the side of his client, gave his evidence in a manner that leads me to believe that it is fairly reliable. McMichael's account of the interview makes it much stronger for him, but, for reasons already stated, I place no reliance whatever on his evidence. It appears that as soon as Mr. Webster returned from the country, which was in about a week, Mr. Gimber called his attention to the amount of acreage stated in the deed, and caused a letter to be sent to the complainant to come to his (Gimber's) office, and meet the defendant; that the complainant did come, and that then he made the statements and

promises which are testified to by the defendant and Mr. Benham; that the defendant shortly after that went on and had a survey made, which (though not proven in court, by reason of the absence of the witness, and was over and above the two made at the hearing) showed the acreage to be but 150 acres, and communicated that to the complainant; and then the complainant, as hereinbefore stated, declared that the acreage was there, and pretended to make the measurements, and did make the map, to which I have already referred.

The question is whether what occurred between Mr. Henry and McMichael, on the one side, and Gimber, acting for the defendant, on the other side, on or about the 13th of November, created an equitable bar against the defendant setting up this defense. I think it did not. The complainant did not state or admit to Mr. Gimber that the whole number of acres mentioned in the contract, namely, 185, was not actually contained within the description in the deed, and would pass thereby, but declared that the quantity was actually there; and it will be observed that, by reason of one of the courses running along the low-water mark of the stream, it was impossible to ascertain whether this allegation was true or not without an actual survey on the ground. Now, Mr. Henry reports his client as saying that the course of the creek had been changed, and that the embankment had been put farther out, whereby the quantity of land was increased, which was, in effect, saying that, "when that measurement was made which resulted in the acreage contained in that deed from Craig to me, there may have been only 140 acres and a fraction there; but since that, by the change in the course of the stream, and the pushing out of the embankment, the quantity has increased, so that my original representation contained in the contract of sale is true." Now, Mr. Gimber had a right to rely upon that. The time for the closing of the transaction was close at hand. Only a day or two remained. His client was in the country. The statement of Mr. McMichael was not of a mere matter of judgment, but of a positive fact, namely, a change in the course of the creek, and an advance of the low-water line and of the embankment, making an increased acreage. Now, it seems to me too clear for argument that it does not lie in the mouth of Mr. McMichael to say, "You should not have believed me, or relied upon my statement, but should have gone on the ground and made a measurement." On the contrary, under these circumstances, I think that Mr. Gimber was justified in accepting McMichael's assurance as to quantity. And here it is to be observed that there was no necessity to change the description, for if it were found that, in running the course along the creek, the actual quantity of 185 acres, instead of 140 acres, would be contained, it would pass by the new deed, notwithstanding the quantity was stated at a less amount

than was actually contained within its limits. Then, what occurred about a week after the defendant's return from the country is significant. The complainant, when called upon, did not say, "Why, you knew all about this beforehand. You knew there were only 149 acres there, and accepted the conveyance by your attorney, Mr. Gimber, on that basis;" but, on the contrary, insisted that the whole quantity was there, and would so prove on a survey, and then, when the survey showed that it was not there, that, even when going to low-water mark, there were no more than 149 acres, and at high-water mark only about 142 acres, he resorted to the miserable fetch of attempting, by a false map, to show 40 acres between high and low water mark, thereby taking in the whole bed of the stream. The remarks I made, and the authorities cited, in *Turner v. Houpt*, 53 N. J. Eq. 526, at page 535 et seq., 33 Atl. 28, seem to me to apply with more or less force to this case. It is not worth while to repeat them.

There can be no doubt but that the quantity of land influenced the defendant in the bargain. He swears distinctly that the complainant stated to him that the land was worth \$200 an acre, and some of it \$250 an acre, for farming purposes; and, while the farm was not sold by the acre, yet its fertility was discussed and highly commended by the complainant, and its value consisted chiefly in its use for farming purposes, in which case, of course, acreage counts. Hence the presumption must be that the amount of acreage, in the absence of proof, influenced the defendant's mind. It is here impossible, of course, to say, as was said in *Melick v. Dayton*, that the relative quantity is so small, taken in connection with other circumstances, as to show that it did not influence the mind of the purchaser.

The conclusion at which I have, for these reasons, arrived, is that the defendant is entitled to an abatement from the mortgage on account of its shortage of acreage; and the only remaining question is on what basis it should be ascertained. Defendant claims that it should be at the rate of \$151 an acre, which is the rate by the acre at which the property was priced. The consideration mentioned is \$28,000, which, for 185 acres, is a little over \$151 an acre. But I am unable to come to that conclusion. In the first place, it does not appear with sufficient certainty that the price named in the deed was fixed as the actual value of the property in the same manner as it would be if the transaction had been one for cash, instead of an exchange of properties. In the next place, such a valuation leaves out of account the buildings and fixed improvements, the value of which was not shown by any proof. Taking all the evidence together, I am inclined to think that \$100 an acre, or \$3,500, should be credited on the mortgage as of the day it bears date. Against this result, the complainant makes the point that the mortgage can only be treated as a consideration money mortgage to the extent of \$2,500, because, by the orig-

final contract, \$2,500 was to be paid in cash by the defendant to the complainant, and included in this mortgage. Besides that, a certain mortgage on defendant's property, which he, by the contract, should have paid and removed, and certain taxes and assessments, amounting in all to \$2,500 more, the defendant failed to remove, and the complainant was obliged to assume those, and include them in this mortgage, and in that way the amount was raised to \$5,000. But I am unable to adopt that view. When the parties came to settle the amount to be paid by the one to the other it was found that, counting the incumbrances on the defendant's property, it would fall short of paying the complainant the amount of \$28,000 by \$5,076 and some cents, whereupon this mortgage was made, and the \$76 and odd cents paid in cash. The whole affair was a single transaction, and I am unable to perceive how the mortgage is anything other than a consideration money mortgage to its whole extent, and will so hold.

The other matters set up by the answer can shortly be disposed of. With regard to the use and occupation of the premises, I hold that it is a mere matter of offset, and cannot come in here, under the ruling of the court of errors and appeals in *Brown v. Coriell*, 50 N. J. Eq. 753, 26 Atl. 915, which binds me. The same with regard to the few dollars that were collected for wharfage while the complainant remained in possession.

With regard to waste committed by the complainant, I am of the opinion that it comes in under the same principle as the shortage in the acreage of the land, and should be allowed for. It was a willful diminution in value, wrought by the complainant while mortgagee in possession of the mortgaged premises, by which they were rendered less valuable. And while I have been unable to find any direct authority upon the subject, and none was cited by counsel, I think allowance should be made for the waste. And without going into the evidence on this point, which was voluminous and quite contradictory, I will state my conclusion, briefly, to be that the complainant did, after the contract of October 17th, and I think, in the main, after the deed passed, and while he was in possession, cut divers cedar trees, and removed them from the premises, carefully concealing the stumps, and removing the brush, so as to prevent the discovery of their cutting; that he tore down some sheds, and removed some plankings from the bridges, and some other articles about the premises, which should fairly be treated as fixtures. But I think that the damage to the premises by so doing has been overestimated by the defendant's witnesses, and that \$100 will cover the whole. In arriving at that sum, I estimate the cedar trees cut at their full value, and I think that the defendant is entitled to have them so estimated as against the complainant, for the reason that they were growing trees, and steadily increasing in value, and the injury to the farm by their removal was

probably much greater than the present selling value of the trees when cut.

If either party is not satisfied, with my estimate of the difference in value between the farm as it stood and what it would have been if it had contained 185 acres, there may be a reference for that purpose. But, if neither party asks for a reference, I will advise a decree for the complainant for \$1,400, with interest from the date of the mortgage, and the costs of the suit, not including the cost of witness fees and process therefor, but including the cost of one copy of the evidence, which was written out for the use of the court, and necessary for the determination of the cause.

(177 Pa. St. 450)

In re MEYER'S ESTATE.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

ADMINISTRATORS—FINAL SETTLEMENT—DEBITS.

At a sale of decedent's land for the payment of debts, the property was knocked down to the administrator, to whom the court had granted permission to bid; but no return was made, for the alleged reason that the heirs objected to the price. On October 11, 1890, the tract was again offered under the previous order, and was knocked down to the administrator at \$36.25 per acre, and after the sale one L., who was the next lowest bidder, offered to take the land at \$36.50, but afterwards withdrew his offer; and the administrator reported that he was unable to sell the property, "for want of good and sufficient bids." The order of sale was continued from term to term, and until April, 1892, when an alias order was issued, leave again being given the administrator to purchase at his own sale, and at that sale he became the purchaser at \$26 per acre; but the sale was set aside, and on resale one I. bid in the property at \$30 per acre, the sale being subsequently confirmed. *Held*, that the administrator, who was not acting at the request of the heirs when he made his several bids, should be surcharged, on final account, with the difference between the price at which the land was finally sold and the price at which it was bid in by him on October 11, 1890.

Appeal from orphans' court, Center county; A. O. Furst, Judge.

Exceptions by certain heirs of Henry Meyer, Sr., deceased, to the report of an auditor in the matter of surcharging J. Henry Meyer, administrator of decedent. From a decree sustaining the exceptions, and surcharging said administrator with a certain sum, he appeals. Affirmed.

Ellis L. Orvis and Calvin M. Bower, for appellant. J. M. Kelchline and Charles P. Hewes, for appellees.

STERRETT, C. J. The only question properly before us for decision is the action of the orphans' court in surcharging the appellant as administrator of Henry Meyer, Sr., deceased. The only material and practically undisputed facts are as follows: In August, 1889, the decedent's real estate, consisting of several tracts, was offered at public sale, under an order of the orphans' court, for the payment of debts. One tract

of 190 acres having been returned as unsold, the order as to it was continued; and it was again offered June 11, 1890, and knocked down at \$33.25 per acre to the administrator, appellant, to whom permission had been granted by the court to bid at his own sale. The next lower responsible bid was \$33 per acre. No return of this sale was made, because, as alleged by appellant, some of the heirs objected to the price. On October 11, 1890, the same tract was again offered, under the previous order, and was knocked down to the administrator at \$36.25 per acre. The next lower responsible bidder at this sale was John Lowder, whose bid was \$36 per acre. Shortly after the sale, Lowder offered to take the property at \$36.50 per acre, and a return of sale to him was accordingly prepared, but, before it was presented to court, Lowder withdrew his offer; and thereupon the administrator changed his return, and reported that he was unable to sell the property, "for want of good and sufficient bids for the same." The order of sale was continued from term to term, but nothing further was done until April, 1892, when an alias order was issued, and leave was again given the administrator to purchase at his own sale. At that sale, on June 16th, following, he became the purchaser of the tract at \$26 per acre, and return thereof was accordingly made to court. Exceptions thereto were filed, and, a guaranteed bid of \$30 per acre having been made, the sale was set aside and a resale ordered. At that sale, in January, 1893, W. A. Ishler became the purchaser at \$30 per acre, and upon due return thereof the sale was confirmed. When the administrator's final account was filed, the appellees (two of the heirs) excepted thereto, and asked that the accountant be surcharged with the difference between the price at which the property was knocked down to him at the sale on October 11, 1890, and the sum for which it was finally sold and conveyed to Ishler. The auditor to whom the exceptions were referred, after reporting the facts substantially as above recited, and referring to other facts and circumstances which he regarded as explanatory of the administrator's conduct, etc., concluded as follows: "While the auditor cannot altogether approve the course followed by the administrator, yet he believes it was an error of judgment, and not such negligence or willful default as to make him liable to surcharge." Exceptions to the auditor's report were filed by the appellees, and were finally argued before the learned president of the Forty-Fifth judicial district, who, in an opinion filed, sustained the same, and surcharged the appellant with \$1,187.50, the difference between \$30 per acre, the price at which the 190-acre tract was finally sold, and \$33.25 per acre, the price at which it was bid in by him at the sale of October 11, 1890. In this

we think he was fully warranted by the evidence. The conduct of the accountant was unjustifiable and inexcusable. There is nothing in any of the facts found by the auditor to relieve him from liability for the loss occasioned by his own improper acts. There is no sufficient evidence to warrant the inference that, in assuming to bid (as he expresses it) for the benefit of the heirs, he was acting at their request, or at the request of any of them. There appears to be nothing in the case that requires further discussion. Decree affirmed and appeal dismissed, at appellant's costs.

(177 Pa. St. 323)

HOVEY v. HOWARD et al.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

VENDOR AND PURCHASER—RESCISSION BY VENDOR
—NOTICE TO VENDEE.

1. Where a vendor orally agrees to sell certain lots in a plan, but, by mistake, his clerk gives the vendee a receipt for the cash payment, which describes the property so as to include other lots not intended to be sold, and the vendee refuses to accept a deed in accordance with the real terms of the sale, the vendor may, on tender of the money paid thereon, maintain an action to rescind.

2. Where a vendee refuses to complete the contract in accordance with its terms, a tender of the amount already paid, made by the vendor to a third person, to whom the vendee has assigned his interest in the contract, is sufficient notice to such vendee of the vendor's purpose to rescind.

Appeal from court of common pleas, Philadelphia county.

Bill by Franklin S. Hovey against James Howard and others to rescind a contract for the sale of land. From a decree for plaintiff, defendant Howard appeals. Affirmed.

The bill set forth that on October 3, 1888, Howard made an oral contract with Hovey to purchase certain lots of ground at Nicetown, of certain numbers on a plan; that the agreed price was \$16,000,—\$3,000 cash, \$2,000 on January 1, 1889, and the balance to be secured by ground rents; that upon payment of the \$3,000 Hovey directed a clerk to make out the receipt, who erroneously, and without authority from Hovey, so made the receipt that the description of the property in the receipt was erroneous, a mistake and inadvertence, as it comprehended all the ground shown on the plan, whereas certain lots had been sold to other persons, and streets marked; that Howard was immediately notified of the error, and refused to correct it; that on January 1, 1889, Howard refused to complete the contract on its real terms; that on April 3, 1889, Hovey tendered Howard deeds for the lots of ground, reserving the ground rent, which the latter refused to accept; that on May 1, 1889, Howard conveyed his rights in the tracts to Teller, and the same was recorded; that on November 21, 1889, Teller reconveyed to Howard (which was recorded), and on November 30, 1889, Howard conveyed to Richards; that the latter convey-

ance was as collateral security; that on July 10, 1890, Hovey elected to rescind the contract, and tendered Richards \$3,000, which he refused to accept; and that the existence of the receipt was a cloud upon his (Hovey's) title, and interfered with his sale of same. Howard answered that the contract was made, denied it was oral, and avowed that it was written, and not for the purchase of lots according to a plan, but for the entire lot; that the terms were admitted; that the receipt was not erroneously given, or without authority, but that the draft was submitted to Hovey, and examined and approved by him; that the description in the receipt was in absolute conformity to the contract; that the lots mentioned by Hovey as having been sold to other parties were not sold, and only an agreement to sell existed, and Howard, desiring the whole tract, agreed with Hovey to increase the price \$500, and include those lots; that the agreement was reduced to writing, Hovey releasing his rights in the lots, Howard to receive the price, and indemnify Hovey, and that in pursuance thereof Howard bought three of the lots, and was prevented from buying the fourth by Hovey; that Howard was not immediately notified of the alleged error, and requested to accept a new one, and that Hovey made no complaint until near the time of settlement; that it was not true that Howard was not ready to settle on January 1, 1889, as he offered then to complete the contract, and tendered the \$2,000, and Hovey refused to comply; that Howard had no notice of the election of Hovey to rescind the contract, and never tendered him the \$3,000 paid, and that, when the tender was made to Richards, Hovey was aware that Richards had no title to the premises, and could not convey the same except to him, Howard; that he was at all times prepared to comply with his contract, and was then, but, the property having greatly increased in value, Hovey desired to avoid his contract, and that by reason of Hovey's refusal he had been deprived of the profits therefrom, and was entitled to a decree against Hovey for specific performance. Defendant Richards answered, admitting divers facts alleged in the bill, and stating that he had held the receipt as collateral security for a debt due by Howard to one Susan A. Dickson.

William F. Johnson, for appellant. Henry W. Hall, Dwight M. Lowrey, and John G. Johnson, for appellee.

McCOLLUM, J. We are unable to discover any particular force in the contention that the bill should have been dismissed on the ground that Howard had no notice, before it was filed, of Hovey's purpose to rescind the contract. Howard had assigned to James T. Richards, by deed dated November 30, 1889, and duly recorded in the proper office, whatever interests he acquired under his contract with Hovey. Before the institution of the suit, Hovey had tendered to Richards all the money he had received from Howard on account of the contract,

and it is clear that, in the event of rescission, Richards was the party entitled to receive it. He was made a co-respondent with Howard in the suit, and the same was heard and disposed of on its merits. There is no discernible cause for setting aside the decree if the findings on which it was based were warranted by the evidence. The material question in the case is whether the learned court below erred in sustaining and entering a decree in conformity with Hovey's contention in regard to the nature and terms of his contract with Howard. Hovey claimed that the contract was oral, and limited to certain lots of ground situate at Nicetown, and numbered on a certain plan of lots belonging to him, while Howard claimed that the contract was written, and included all the ground "bounded by Blabon Carpenter, on a line 220 feet northwest of Nicetown lane, and the Richmond branch of the Reading R. R." Hovey also claimed that the description in the receipt was erroneous, and unauthorized by him; that it was made through the inadvertence of his clerk; and that immediately upon the discovery of the mistake he sought from Howard, and was refused, a correction of it. It was further claimed by Hovey that before the contract in question was made he had sold to other parties four lots upon the plan, which were expressly excepted from his sale to Howard, and that the land he sold to the latter was sold subject to the easements which the plan gave to the owners of other lots located upon it. These claims were also denied by Howard, whose principal insistence was that the land sold to him was correctly described in the receipt. In all the issues of fact made by the bill and answer the findings of the master are against the appellant. Those findings were warranted by the evidence, and approved by the court. They established the contract as claimed by the appellee, and show his willingness and the appellant's refusal to comply with it. They also show that the latter sought to acquire, through the mistake of the clerk, that which he knew was not included in their contract. Surely, under these circumstances, he ought not to complain of the rescission of the contract, and the payment of the money received thereunder to the party who, by his own deed, was entitled to it. Decree affirmed, and appeal dismissed, at the costs of the appellant.

(177 Pa. St. 441)

**In re HOUSER'S ESTATE.
Appeal of BAKER'S EX'RS.**

(Supreme Court of Pennsylvania. Oct. 5, 1896.)
**EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST
ESTATE—EVIDENCE.**

On the trial of a claim by the executors of B., a deceased executor, against the estate of his testate, evidence that "the fourth partial account" of B., filed two years before he died, showed a balance due him from his testate's estate, is insufficient to support the claim, in the absence of a final account of B.'s executorship filed by claimants, as his representatives, or of

equivalent evidence, showing the state of his account as executor at the time of his decease, he having continued to act as such till then.

Appeal from orphans' court, Center county.

Claim by Lizzie F. Wileand and another, executors of the estate of Joseph Baker, deceased, against John Dale, as administrator de bonis non of the estate of Martin Houser, deceased. From a decree confirming the amended report of the auditor appointed to distribute the moneys in the hands of defendant administrator, rejecting said claim, claimants appeal. Affirmed.

A. O. Furst and Harry Keller, for appellants. Clement Dale, W. E. Gray, and Wilbur F. Reeder, for appellees.

STERRETT, C. J. Without assenting to all that has been said by the learned judge of the orphans' court in support of the decree from which this appeal has been taken, we are satisfied that, in the circumstances, there was no error in refusing to permit the appellants, executors of Joseph Baker, deceased, to participate in the distribution. It was undoubtedly incumbent on them to show that as a creditor of the estate of Martin Houser, deceased, or in some other capacity, their testator had a valid claim on the fund in question, or on the property which it represents. They undertook to do this by giving in evidence "the fourth partial account of [said] Joseph Baker, surviving trustee and executor of Martin Houser, * * * deceased," filed October 21, 1882, and confirmed on December 5th, following. In that account, covering a period of about 3½ years from April 5, 1879, the accountant charges himself with cash received from farm produce, wheat, corn, oats, hay, etc., amounting to \$1,290.58, and takes credit for \$473.55, "balance due at settlement former account," sundry payments to the widow of his testator, etc., showing balance due him of \$460.61. That sum, with interest from confirmation of his account, constitutes the claim of these appellants. The auditor in this case found that, by virtue of the order of court removing one of the executors of Martin Houser in 1871, Joseph Baker became sole executor, and acted in that capacity until his death, in 1884, after which he was succeeded by John Dale, the present administrator de bonis non, etc. In March, 1894, after the death of Martin Houser's widow, the real estate of said deceased, as directed by his will, was sold for \$4,000. Thereupon the administrator de bonis non, etc., filed a final account showing \$4,250.95 balance for distribution. About \$585 of this sum represents income or rent of farm, and the residue, \$3,665.95, represents net proceeds of the sale of the farm. The above balance is the fund in which appellants claim the right to participate. It appears, as we have seen, that the account showing balance claimed by appellants does not purport to be a final account of their testator as sole executor of the estate of Martin Houser. On the contrary, it is specifically designated as

his "fourth partial account," etc. It is also expressly found as a fact that for nearly two years after filing said account, and down to the date of his death, he continued to act as such executor. To what extent he received and disbursed funds of the estate during that period, or what was the state of his account at the time of his death, does not appear. The only way in which these facts could have been regularly shown would have been by a final account stated and filed by his personal representatives, and adjudicated by the proper court. For aught that appears in this case, the balance referred to may have been, and probably was, adjusted and paid by funds of the estate which came into the hands of the executor in 1883 or 1884. If the estate was indebted to him in October, 1882, for money advanced, it may be fairly presumed that funds subsequently received would be applied to the payment of such indebtedness. It was the duty of appellants, as the personal representatives of the deceased executor, to have prepared and filed a final account of his executorship. If they had done so, the question as to whether the estate was indebted to him at the time of his decease or not would have been definitively settled in the regular and orderly way. In the absence of any such account, and of any evidence that can be regarded as equivalent thereto, the appellants have failed to show any right to participate in the fund for distribution. This view of the case renders it unnecessary to consider other questions presented by the specifications of error. Decree affirmed and appeal dismissed, at appellants' costs.

(177 Pa. St. 433)

McNAUL v. ARNOLD et al.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

TRIAL—DIRECTION OF VERDICT.

In ejectment, where the evidence as to plaintiff's title is conclusive, and the defense rests on the merest scintilla of evidence, the court properly directs a verdict for plaintiff.

Appeal from court of common pleas, Clearfield county; Cyrus Gordon, Judge.

Ejectment by Zachariah McNaul, trustee, against Samuel Arnold, Jr., and Samuel Arnold, Sr. From a judgment entered on a verdict directed by the court in favor of plaintiff, defendants appeal. Affirmed.

Roland D. Swoope and W. C. Arnold, for appellants. McEnally & McCurdy, for appellee.

DEAN, J. This is an ejectment for about 190 square yards of land in Curwensville, Clearfield county. It formed part of a large tract owned by William Irvin, who died in 1869. Partition was then had of his estate, and the disputed piece made part of purpart No. 15, which was taken by one of the heirs, Ellen A. Irvin, in payment of a debt due her from the estate, and the others delivered to her a deed for it. She died, intestate and un-

married, February 28, 1878; and the title passed to her heirs at law, who, on the 20th of April following, conveyed a part of this purpart to McNaul, this plaintiff, by this description: "Beginning at a post on State street; thence, by land of William Irvin estate, south, $30\frac{1}{2}$ degrees west, 80 feet, to a post; thence, by land of said estate, south, $59\frac{1}{2}$ degrees east, 180 feet, to a post; thence, by lot of Hiram Caldwell, north, $30\frac{1}{2}$ degrees east, 80 feet, to a post on line of State street; thence, by said street, north, $59\frac{1}{2}$ degrees west, 180 feet, to a post and place of beginning." On November 19, 1881, the same heirs conveyed to E. A. Irvin, among other land, the whole of this purpart 15, and he, by deed, quitclaimed to McNaul that part of 15 conveyed to him by the heirs on 20th of April, 1878. By virtue of these conveyances, McNaul, the plaintiff, claimed all the land in dispute. Defendants claimed under a deed from E. A. Irvin, dated August 19, 1884, to N. E. Arnold, for the undivided one-half of purpart 15, reserving the lot conveyed to McNaul, the plaintiff; but the description in the deed, as defendants averred, embraced the land in dispute. The title to the undivided half thus conveyed to N. E. Arnold afterwards, by sheriff's deed, passed to Samuel Arnold, Sr., the other defendant, to whom, by deed of February 25, 1893, E. A. Irvin conveyed the other undivided half of purpart 15. The learned judge of the court below, being of opinion that the description in the first deed of the Irvin heirs to McNaul, on April 20, 1878, embraced the land in dispute, directed peremptorily a verdict for plaintiff; and we now have this appeal by defendants, who assign 14 errors, arguing from all of them that either the case should have been submitted to the jury, or that there should have been a binding instruction to find for defendants.

It will be noticed, as undisputed facts, that the title to the whole of purpart 15 was at the date of the first deed, April 20, 1878, in the heirs of Ellen A. Irvin, who, by metes and bounds, conveyed to this plaintiff. The exact location of the boundary at the north, State street, is in dispute; and, as the starting point is a post on that boundary, the quantity of land embraced within the boundaries is larger or smaller, according to the location of the post. The description says, "Beginning at a post on State street." There was no State street at this point. It was the northwestern corner of the lot, and State street, a street of the borough of Curwensville, terminated at the southwestern corner of the adjoining lot of Hiram Caldwell; and, if this street had been continued in a straight line to the northwest corner, then, starting from a post on the street, and running around the tract according to the courses and distances in the deed, the disputed piece would be outside plaintiff's description, and would not belong to him. But from the termination of State street, at the Caldwell lot, there ran an open highway, with a course deflecting to the north

of it, known as "Erie Turnpike"; and, so far as the traveling public was concerned, there was nothing to indicate where the street ended and the turnpike began. If the place of beginning had been the corner of Caldwell's lot, thence, by the line of State street, to a corner, the defendants might have stood with safety on the description in the deed, for there was such a point of beginning, and it might have been said that the intention was to continue the line of that street. But the place of beginning was at a post at the northwest corner on State street. There was, in fact, no such street there. There was, however, a turnpike; and when the description is 180 feet from the Caldwell corner, along line of State street, to place of beginning, it is an impossible line so far as name was concerned, and must have meant the turnpike, following up which alone would stop the distance at the place of beginning on a highway.

It was, then, an error in name to say that the starting point was State street. Was it intended to be the Erie turnpike? The northern boundary of purpart 15 in the proceedings in partition is the turnpike. The deed of E. A. Irvin, in August, 1884, for the undivided half of 15, to N. E. Arnold, one of defendants, and which is expressly intended to exclude the McNaul lot, speaks thus: "Beginning at a post on state street and corner of Friends' Meeting House lot; thence north, by the turnpike." This is the same starting point as in McNaul's deed, and it treats the turnpike as a continuation of State street. If the post were on the line of State street extended from the Caldwell corner, then the line by the turnpike in Arnold's deed was a mistake, for the post was far south of it. All the deeds clearly show that the turnpike was adopted for purposes of description, as a continuation of State street, and not that State either was or would be continued in a straight line from where, by the borough plot, it was laid out and terminated. Further, if State street was continued on west from the Caldwell corner, the same course as it had in the borough, defendants, after the date of their deed, erected their house upon 38 feet of it, still, however, keeping to the south of the turnpike. There is, then, the positive testimony of E. A. Irvin the grantor in the deed to defendants, that in the negotiations preceding the deed it was understood that the land fronting the meeting house, up to the turnpike, had already been conveyed to McNaul, as trustee, and was not included in the conveyance. He further states that the highway in front was sometimes called "State Street," and sometimes the "Turnpike." Samuel Arnold, Sr., when called, does not contradict this testimony, but goes further, and says that Irvin told him he did not want to convey the strip in front of the Quaker Meeting House, because it belonged to the street. He corroborates Irvin in his statement that the land was reserved from his deed. Taking the descriptions in the partition and all the deeds,

with the oral testimony, the starting point was, without doubt, at a post on the line of the turnpike, mistakenly called "State Street" in the deed, because it was on the turnpike leading to that street, and 180 feet beyond where the street, by borough ordinance, terminated.

The contention of appellant that, even if State street were not laid out at the time, nevertheless bounding the lot by that street was a dedication to public use of a street in line with that laid out in the borough, is untenable. The evidence conclusively shows that the conveyance to McNaul was of a lot fronting on the turnpike, and by mistake called "State Street." Therefore the intention to dedicate had no existence. On the whole evidence, the learned judge of the court below could not do other than direct a verdict for plaintiff, for the defense rested on the merest scintilla of evidence. The judgment is affirmed.

(34 Md. 179)

HANNA v. YOUNG, Treasurer.

(Court of Appeals of Maryland. Oct. 28, 1896.)

CONSTITUTIONAL LAW—VOTERS—PROPERTY QUALIFICATION—MUNICIPAL ELECTIONS.

Const. art. 1, § 1, prescribing the qualifications of electors at all elections under it, among which there is no property qualification, does not apply to elections for municipal officers (outside the corporate limits of Baltimore city), and hence is not violated by Laws 1896, c. 359, which repeals certain sections of Code Pub. Loc. Laws, entitled "Harford County," subtitle "Bel Air," and provides (section 30) that as a condition precedent to voting at municipal elections in the town of Bel Air each elector must show that he was assessed with \$100 worth of real or personal property on the tax book of said town.

Appeal from circuit court, Harford county.

Petition by John B. Hanna for a writ of mandamus to compel James C. Young to deliver to him, as treasurer, the books and other property belonging to the town of Bel Air. The court directed the writ to issue, and defendant appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

H. I. Jewett, for appellant. Geo. L. Van Bibber, for appellee.

ROBERTS, J. The sole object of this appeal is to test the validity of the thirtieth section of the act of the general assembly of Maryland, passed at January session, 1896, c. 359, entitled "An act to repeal section 23 of article 13 of the Code of Public Local Laws, entitled 'Harford County,' sub-title 'Bel Air,' as repealed and re-enacted by the Acts of 1890, chapter 154, and also to repeal section 30 of article 13 of the Code of Public Local Laws, entitled 'Harford County' sub-title 'Bel Air' and to re-enact the same with amendments." The facts proper to be stated are that an election for five town commissioners

was held in the town of Bel Air on the first Monday of May, 1896, and was conducted in accordance with the provisions of its charter as amended by the act of 1896, except that the judges of election, as required by section 30 of said act, did not, as a condition precedent, require of each person offering to vote at such election to show that he was assessed with \$100 worth of real or personal property on the tax book of said town before he was entitled to vote. The said judges of election ignored this provision of the act of 1896, and allowed all male citizens residing within the corporate limits of Bel Air, above the age of 21 years, to vote, notwithstanding the right of a number of said citizens to vote was challenged, upon the ground that they were not assessed with the requisite amount of property. The election was accordingly conducted as if the act of 1896 had not been passed, or was void of legal effect. The result of the election was that the five persons receiving the highest number of votes acted as if they had been duly elected. Having qualified and organized, they proceeded to elect James C. Young, the petitioner in this case, treasurer of the town of Bel Air for the ensuing year. The petitioner and appellee here, having qualified, demanded of the appellant, who had on the first Monday of May, 1896, been elected treasurer of Bel Air, the possession of the books, papers, and other property of the town then in his possession. This the appellant refused, and the appellee accordingly filed his petition in the court below for the writ of mandamus to compel the delivery to him of said books, etc. The appellant answered said petition, denying the validity of said election, and justifying his refusal to deliver said books, etc., because the judges conducting said election had failed and refused to observe and give effect to the provision of the act of 1896 which prescribed a property qualification for said electors voting at said election; whereupon issue was joined, and the case was heard by the court below without the aid of a jury. The court directed the writ to issue, and from the order of the court this appeal is taken.

The question lies within very circumscribed limits, but it is nevertheless a question which has not heretofore been passed upon by this tribunal. While it has received consideration in some of the courts of the other states of the Union, it does not, however, appear to have been determined except in a very limited number of cases. The contention here is that the thirtieth section of the act of 1896 is directly in conflict with the provisions of article 1, § 1, of the constitution of the state, which reads as follows: "All elections shall be by ballot; and every male citizen of the United States, of the age of twenty-one years, or upwards, who has been a resident of the state for one year, and of the legislative district of Baltimore city, or of the county, in which he may offer to vote, for six months next preceding the election, shall be entitled

to vote, in the ward or election district, in which he resides, at all elections hereafter to be held in this state."

It is contended on the part of the appellant that this section of the constitution plainly comprehends and includes within its express terms all elections, whether state or federal, county or municipal. Yet there is but one municipality mentioned in this section of the organic law, and in fact Baltimore city is the only municipality mentioned *eo nomine* in any part of the constitution. This court, in *Smith v. Stephan*, 66 Md. 381, 7 Atl. 561, and 10 Atl. 671, Mr. Justice Bryan delivering the opinion of the court, said: "It is sufficient to say that no municipal elections, except those held in the city of Baltimore, are within the terms or meaning of the constitution." While the constitution (article 3, § 48) authorizes and empowers the general assembly to create corporations for municipal purposes, it nowhere prohibits the legislature from imposing upon the qualified voters residing within the corporate limits of a town any reasonable restrictions it may deem proper, when seeking the exercise of the right of elective franchise, in the selection of its officers. In this respect, the power of the legislature is unlimited. The argument was advanced at the hearing in this court to the effect that the act in question is void because the constitution has conferred the right and prescribed the qualifications of all electors in this state, and the legislature is without authority to change or add to them in any manner. If the premises of this contention were correctly stated, the argument and sequence would undoubtedly be correct. But, as already observed, the constitution (article 3, § 48) only in general terms authorizes the creation of corporations for municipal purposes, and leaves to the legislature the enactment of such details as it may deem proper in the management of the concerns of the corporation, or which may be regarded as beneficial in the government of the same. The constitution of this state provides for the creation of certain offices, state and county, which are filled either by election or by appointment; and we regard it as an unreasonable inference to suppose that municipal elections held within the state (outside the corporate limits of Baltimore city) can be properly termed elections, under the constitution, such as state and county elections; or that the framers of the constitution ever contemplated that article 1, § 1, of that instrument was intended to apply to municipal elections, such as the one now under consideration, which is the mere creature of statutory enactment. In the creation of a new municipality, the constitution devolves upon the general assembly the entire duty of giving vitality to and of organizing and fostering the body corporate without any other constitutional regulation than the mandate to provide for the system itself. It is there-

fore the mere creature of legislative sanction, and the subject of statutory regulation. In the case of *State v. Dillon* (Fla.) 14 South. 383, it was held that the suffrage provision in the constitution of that state (which is substantially the same as section 1, art. 1, in the constitution of this state), prescribing the qualifications of electors at all elections under it, does not apply to elections for municipal officers, but such elections are subject to statutory regulation; and, further, that it is competent for the legislature to prescribe the qualifications of voters at the same. It is only at elections which the constitution itself requires to be held, or which the legislature, under the mandate of the constitution, makes provision for, that persons having the qualifications set forth in said section 1, art. 1, are by the constitution of the state declared to be qualified electors. Nowhere in the constitution are the governments of municipalities in this state, or their officials, either clothed with power or designated as any part of our state government, but their very creation, together with all the powers and attributes which attach to their management, are lodged by the constitution with the legislative department of our state government, save, in some respects, the city of Baltimore. The same question now under consideration here arose in the case of *McMahon v. Mayor, etc.*, 66 Ga. 217. The suffrage clause in the constitution of the state of Georgia is almost *totidem verbis* the same as that in the constitution of this state. The statute sought to be declared unconstitutional was assailed upon the ground that it imposed upon the electors of the city of Savannah the payment of a poll tax as a condition essential to their qualification as voters at any municipal election. The court held the statute to be a valid exercise of legislative power; and further held that: "All legislative acts in violation of the constitution are void, and it is the duty of the judiciary so to declare. But in considering and passing upon the question of the constitutionality of the law the rule is too well established and settled to be departed from that it must be made to appear that the statute, before it is declared inoperative for that cause, must be 'plainly and palpably' in violation of the constitution." *Beall v. Beall*, 8 Ga. 210. The solemn act of the government will not be set aside by the courts in a doubtful case. "The incompatibility or repugnancy between the statute and the constitution must be 'clear and palpable.'" *Parham v. Justices*, 9 Ga. 341. We also refer to the cases of *Buckner v. Gordon*, 81 Ky. 666, and *Mayor, etc., v. Shattuck*, 19 Colo. 104, 34 Pac. 947, as sustaining the views expressed in this opinion. The last-mentioned case was a special proceeding under a statute of the state of Colorado praying for the dissolution of the town of Valverde, and its annexation to the city of Denver. In such proceeding the county

court made an order requiring the mayor and trustees of the town to call an election for the purpose of determining the question of dissolution and annexation. This order required the question to be submitted to a vote of the qualified electors of said town at such election. The mayor and trustees of the town sought to vacate the order on the ground of the unconstitutionality of the statute under which it was obtained. The statute required that the question of dissolution and annexation be submitted "to a vote of such of the qualified electors of such town or city (to be annexed) as have in the year next preceding paid a property tax therein." The suffrage clause (section 1 of article 7) of the constitution of the state of Colorado is substantially the same (in so far as it involves the question under consideration in this case) as that of the Maryland constitution. Mr. Justice Elliott, delivering the opinion of the court, observes: "It is manifest that some restriction must be placed upon the phrase 'all elections,' as used in section 1 [of the constitution], else every person having the qualifications therein prescribed might insist upon voting at every election, private as well as public, and thus interfere with the affairs of others in which he has no interest. In our opinion, the word 'elections,' thus used, does not have its general or comprehensive signification, including all acts of voting, choice, or selection without limitation, but is used in a more restricted political sense,—as elections of public officers." Without extending the discussion of this question, we are clearly of opinion, both upon reason and authority, that the appellee's contention is not sustained. For the reasons stated, the order of the court below directing the writ of mandamus to issue is reversed. Order reversed, with costs.

STORER v. HARRISON.

(Supreme Court of Rhode Island. Oct. 27, 1896.)

EQUITY—DECREE—PRAYER FOR RELIEF—AMENDMENT.

1. Where a bill alleges a partnership, and prays for a dissolution, the appointment of a receiver, and an accounting, and the court finds that there is no partnership, but only an incomplete state of negotiations, it cannot award complainant damages for the wrong alleged to be done to him, under the prayer for general relief.

2. Where a bill alleges a partnership, and prays for a dissolution, an accounting, and for general relief, and the court finds only an incomplete state of negotiations, complainant cannot then amend the bill so as to make it one to recover damages for the wrong alleged to be done to him.

Bill by Charles Storer against Richard Harrison, alleging a partnership, and praying for a dissolution, the appointment of a receiver, an accounting, and for general relief. Bill dismissed, without prejudice.

The court found that there was no partnership existing between complainant and defendant, but only an incomplete state of negotiations. Complainant then claimed that the court, having obtained jurisdiction over the parties, should go on and award damages to him for the wrong alleged to have been done to him, and that the court had power so to do under the prayer for general relief.

James, Wm. R. & T. F. Tillinghast, for complainant. Arnold Green and James L. Jenks, for respondent.

PER CURIAM. Assuming that the complainant, if no partnership was formed, is entitled to such relief as he now claims, which is a different kind of relief from that specially prayed for, we think that he is not entitled to such relief under the prayer for general relief, on the allegations of the present bill. To permit the bill to be amended so as to make it a bill for the relief which the complainant suggests, would be, in effect, to make a new case, which is not permissible under the rules of equity practice. 1 Daniel, Ch. Prac. (6th Am. Ed.) *378, *379, *383, *384, and notes. The decree presented by the respondent may be modified to the extent that the dismissal of the bill shall be without prejudice to the right of the complainant to sue at law, or to file another bill, based on allegations other than those of a partnership between himself and the respondent, if so advised, and, as so modified, may be entered.

In re GEORGE.

(Supreme Court of Rhode Island. Oct. 27, 1896.)

INSOLVENCY OF TRUSTEE—REMEDY OF BENEFICIARY—BILL TO DECLARE TRUST—PARTIES.

1. A mortgage to secure a debt due to a national bank was made to the president, in order to comply with the law forbidding national banks to take mortgages, and he afterwards became insolvent. *Held*, that the bank could not, by petition, obtain an order for his assignee to assign the mortgage to it, but its remedy was by bill to declare a trust.

2. The creditors of the insolvent need not be made parties to a bill by the bank against the assignee to declare a trust as to such mortgage.

Petition by the Roger Williams National Bank that the assignee of Charles H. George, insolvent, be authorized to assign to it a mortgage executed to George, which in fact belongs to the bank. George was president of such bank, and the mortgage in question was made to him, in order to comply with the law forbidding national banks to take mortgages, according to the usual custom. Petition denied.

John T. Blodgett, for the bank. Walter H. Barney, for other parties.

PER CURIAM. We are of the opinion that the petitioner's remedy is by a bill to

declare a trust, and not by a petition like the present, in the insolvency proceeding. We are also of the opinion that the assignee so far represents the rights of creditors of the insolvent that it will not be necessary to make them parties to the bill.

(19 R. I. 617)

WILLIS v. ANGELL, Town Treasurer.
(Supreme Court of Rhode Island. Oct. 19, 1896.)

**TOWNS—POLICE—APPOINTMENT—COMPENSATION—
AUTHORITY OF COUNCIL—PLEADING.**

1. One elected by a town council to the office of police constable, and also complainant under the town ordinances, under Gen. Laws, c. 40, §§ 31, 34, which authorize town councils to appoint all necessary officers for the execution of their ordinances, and to elect such number of police constables for their respective towns as they may deem expedient, is entitled to compensation for services required of him, and rendered by him, in his official capacity.

2. By virtue of the statutory authority conferred on town councils to appoint all necessary officers for the execution of their ordinances and fix their compensation, a vote of the town to abolish Saturday night and Sunday police is not binding on the town council, and cannot control their action in the appointment and compensation of an officer.

3. In an action by a police officer against a town for compensation for services rendered by him in his official capacity, the common counts should not be joined.

Action by George P. Willis against Frank C. Angell, town treasurer, for compensation for services as town constable and complainant. Judgment for plaintiff, and defendant moves for a new trial. Denied.

P. H. Quinn, for plaintiff. W. B. Tanner and J. C. Collins, Jr., for defendant.

PER CURIAM. Gen. Laws R. I. c. 40, § 31, authorizes town councils to appoint all necessary officers for the execution of their ordinances, by-laws, and regulations, and to define their duties and fix their compensation, where provision shall not be made by law. Section 34 of the same chapter further authorizes town councils to elect such number of police constables for their respective towns as they may deem expedient. The plaintiff was elected by the town council of North Providence to the office of police constable, and also as complainant under the town ordinances, for the year ensuing the first Monday in June, 1895. Authority for his election having been given to the town council of North Providence by the statute, and he having been elected in pursuance of it, we are of the opinion that he is entitled to compensation for the services required of him, and rendered by him, in the capacity mentioned. We cannot say that it was not a part of the duty of the plaintiff, as an officer to make complaint for the violation of the town ordinances, to patrol the streets for the purpose of informing himself in relation to infraction of the ordinances, and securing evidence to be used in the prosecution for such infractions.

The statute having conferred authority on town councils to appoint all necessary officers for the execution of their ordinances, and to fix their compensation, the vote of the town to abolish Saturday night and Sunday police did not bind the town council, and could not control or prevent its action in the election of the plaintiff and the allowance of his compensation. The defendant's petition for a new trial is denied and dismissed, with costs. We are of the opinion that the demurrer to the declaration on the ground of a misjoinder of counts should have been sustained by the common pleas division. The case is remitted to the common pleas division, with direction to permit the plaintiff, on motion, to strike out the common counts in the declaration, and, when this has been done, to enter judgment on the verdict.

(177 Pa. St. 503)

WILSON v. PENNSYLVANIA R. CO. et al.
(Supreme Court of Pennsylvania. Oct. 5, 1896.)
CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.

The fact that deceased was sitting on a brake wheel at the time of the derailment of the train, and was for that reason guilty of contributory negligence, is not so conclusively shown as to authorize the court to direct a verdict for defendant railroad company by testimony that witness saw deceased on the wheel five minutes before the accident, such testimony being discredited by a contradictory statement; and by testimony of a person who was on the engine that at the time of the derailment he looked back for an instant, and saw deceased on the wheel, his testimony being discredited by evidence that, on account of the curvature of the track and the intervening cars, he could not have seen deceased.

Appeal from court of common pleas, Clearfield county; A. V. Barker, Judge.

Action by Jennie Wilson against the Pennsylvania Railroad Company and another. There was a judgment for plaintiff, and defendants appeal. Affirmed.

The opinion of the trial court was as follows:

"On the trial of this case the plaintiff based her right to recover on the allegation that the derailing of the train whereby her husband lost his life was caused by a defective roadbed, defective ties, and a broken rail. The defendants denied this, and the question was submitted to the jury, and determined in favor of the plaintiff. The train on which the deceased was employed consisted of an engine, a box car, a car loaded with bark, three stone cars, and a caboose, in the order mentioned. Wilson's place, when not employed in the performance of his duty as flagman and rear brakeman, was in the caboose. He was not there at the time of the derailing of the train, but was either on the rear end of the last stone car, or on the front end of the caboose. Defendants claimed on the trial that he was sitting on the brake wheel on the rear end

of the last stone car, and we sustained their contention that if this fact was established he had unnecessarily exposed himself to a place of danger, thereby contributing to the cause of his death and preventing a recovery in this case; but we submitted to the jury the question of fact as to whether he was in the position claimed by defendants, and whether, if they found he was not, he was outside the caboose, in the performance of any duty. At the same time, in order that we might, with more opportunity for deliberation, consider whether the evidence had come up to the degree of proof necessary to require us to give binding instructions in favor of the defendants, we reserved that question, in the following language: 'We reserve the question as to whether the alleged fact that the deceased was sitting on the wheel of the brake on the rear of the car next the caboose (thus rendering him guilty of contributory negligence) was established as an undoubted fact, by testimony of such character as makes it our duty to withdraw the case from the jury.' We were of the opinion at the time we submitted the case to the jury, as suggested in our charge, that the existence of the only fact relied upon to establish contributory negligence had not been established by such evidence as warranted us in withdrawing the question from the jury, but, out of an abundance of caution, we reserved the question for further consideration; and after opportunity for deliberation, and full argument on both sides, we still think it was proper to submit that question to the jury. It is true, one witness testified that, five or six minutes before the wreck occurred, he saw the deceased, at a point further up the road, sitting on the brake wheel, and another witness testified that he saw him there at the time the cars went over. But, if the testimony of the first witness stood alone, it would not be sufficient to establish it as a fact that he was on the wheel at the time the cars went over, the burden being on the defendants to prove that he remained there until that time, and the presumption of the exercise of care on his part being in his favor; and, aside from that, the credibility of the witness who testified that he saw him there five minutes before was somewhat shaken by the conversation he had with decedent's wife when he accompanied the remains to her residence on the evening after the wreck.

"On cross-examination of Mr. Carr, the witness just referred to, the following occurred: 'Q. Didn't you say to Mrs. Wilson, on the night that you brought his body down, that John had gone out to put on the brake, and that you had called to him, "Here, John, is your brake stick," and handed it to him? A. No, sir. Q. You didn't say that? A. No, sir; let me explain myself. I told her the last I saw him was when we were passing the stone quarry coming into Garway, and he was going out to help hold the train there,

and I asked him if he wanted his club. Q. Then that wasn't true,—that was not the last time you saw him? A. This was before we came to Westover. Q. Then it wasn't the last time that you saw him? A. The last time I saw him after we left Westover. This is south of Westover. Q. That is where you had the conversation you say about the brake stick? A. Yes. Q. That wasn't the last time you saw him,—you saw him at Westover which was north of that? A. You asked me where I saw him last, and I said, "Sitting on the brake wheel." Q. I asked you the next question whether, on the night you brought his body down, you didn't say to Mrs. Wilson, his wife, that the last time you had seen him before the accident that he had gone out to the brake, and you had called him back to give him the brake stick? A. The last I spoke to him; that is the last I spoke to him. Q. Didn't she ask you what were the last words he had said? A. I don't know that she did. She might have. Q. And whether he had said anything about her, or asked about her? A. She probably might have asked me that question; yes.' It will be observed that in the witness' answer to the second question of Judge Krebs, quoted above, he said that he told Mrs. Wilson that the last time he saw Wilson was some miles above Westover, whereas his subsequent explanation was that he meant to say that that was the last time he spoke to him; and the testimony of Mrs. Wilson is not inconsistent with this explanation, yet some slight doubt is thrown on his testimony thereby.

"The other witness, Bloom, who was on the engine, testified as follows: 'Q. Where were you riding at the time of the wreck? A. On the engine. Q. What notice did you have on the engine that something was wrong? A. A sudden jerk. Q. What did you do then? A. I looked out of the window, and looked back along the train. Q. What could you see? A. I saw the cars going into the ditch. Q. Describe what you saw as nearly as you can. A. Well, as I looked out of the window I saw the cars leading into the ditch. Q. Running kind of quartered? A. Yes. Q. Which one toppled over into the ditch first? A. The bark car. Q. What next? The stone cars. Q. Did you see Wilson? A. Yes. Q. Where was he? A. He was sitting on the brake wheel of the rear car. Q. Was this all in one look,—just in one look? A. Yes.' Cross-examination: 'Q. You felt this jerk, and how quickly did you turn and look out of the window? A. Just as quickly as I felt the jerk.' Q. It was all the work of an instant, wasn't it? A. Yes. Q. And the cars were going out over on the track then? A. Yes.' No witness contradicted Bloom as to his statement above quoted, by testifying that Wilson was not on the brake wheel; and therefore, in one sense, he stands uncontradicted. But having before us, by the testimony of other witnesses, the curvature of the

road at that point; the distance the train ran on the track and ties after the car was derailed, as evidenced by the marks thereon; the length of the cars; the height of the box car and bark car; the fact that they were between the engine and the stone cars in the train; the fact that this all occurred 'in an instant,' and 'in a look,' as the cars were going over, and as Bloom turned to look back, —it seems to us that the allegation of Bloom was so far controverted by all the other circumstances in the case as to throw sufficient doubt on the correctness of his testimony, and his ability to see Wilson, under the circumstances referred to above, to make it our duty to submit the question to the jury. All these matters seem to us to furnish a substantial basis for a difference of opinion as to the existence of the one fact relied upon by the defendants, and to furnish reasonable grounds of dispute in regard to it; and the testimony, taken as a whole, having failed to satisfy us, as an established fact in the case, that Wilson was sitting on the brake wheel at the time of the wreck, we cannot see how we could say to the jury that that fact had been established by such a degree of proof that it required us to withdraw the case from their consideration. It is unnecessary for the purposes of this case to cite or review the many authorities, or quote from the text-books, as to when it becomes the duty of the court to determine, as a question of law, that there can be no recovery in an action for personal injuries because the injured person has contributed to the cause of the injury. We select, however, a few citations or expressions from the supreme court of this state which seem to fully warrant us, under the facts of this particular case, in submitting the question of fact involved to the jury: In *Railroad Co. v. White*, 88 Pa. St. 333, Justice Sterrett, delivering the opinion, says: 'Negligence has been defined to be the absence of care according to the circumstances, and is always a question for the jury when there is reasonable doubt as to the facts, or as to the inferences to be drawn from them.' In *Railroad Co. v. Werner*, 89 Pa. St. 64, Justice Sterrett, delivering the opinion, says: 'When the facts are admitted, or so clearly and conclusively proved as to admit of no reasonable doubt, it is the duty of the court to declare the law applicable to them; but when material facts are disputed, or inferences of fact are to be drawn from the testimony, it is the exclusive province of the jury to determine what they are. The line of demarkation, in this respect, between the duty of the court and that of the jury, should be carefully guarded. While, on the one hand, the court should not permit the jury to disregard or evade its instructions as to matters of law, it should be equally careful not to invade the province of the jury, and take upon itself the determination of facts about which there is any dispute.' In *McNeal v. Railroad Co.*, 131 Pa. St. 188, 18 Atl.

1026, Justice Mitchell, delivering the opinion, says: '*Carroll v. Railroad Co.*, 12 Wkly. Notes, 348, and the decisions which have followed it, are sound in principle, and experience has confirmed the wisdom of the rule there adopted. It will not be relaxed, nor pared down by exceptions. But it is a rule which, in its nature, is applicable only to clear cases. If, on the evidence, there is any doubt of the plaintiff's negligence, the case must go to the jury.' In *McGill v. Railway*, 152 Pa. St. 334, 25 Atl. 540, Justice Sterrett, delivering the opinion, says: 'When the facts are either admitted, or established by undisputed evidence, it is, of course, the duty of the court to declare the law applicable to them.' In *Vannatta v. Railroad*, 154 Pa. St. 273, 26 Atl. 384, Justice Thompson, delivering the opinion, says: 'Where there is a reasonable doubt as to the facts, or the inferences from them, the question of negligence is a question for the jury.' In *Smith v. Railroad Co.*, 158 Pa. St. 87, 27 Atl. 847, Justice Sterrett quotes as follows, 'Negligence is always a question for the jury, where there are any doubts as to the facts, or as to the inferences to be drawn from them,' and cites *Railroad Co. v. Barnett*, 59 Pa. St. 264; *McGill v. Railroad Co.*, supra; *Whitman v. Railroad*, 156 Pa. St. 175, 27 Atl. 290. In *Ely v. Railway*, 158 Pa. St. 236, 27 Atl. 970, Justice Mitchell, delivering the opinion, says: 'All that this court can do is to lay down the general rules, and to see that where the facts are uncontested, or the inference of negligence the only one that can be drawn, the court must pronounce the result as matter of law; but where the facts are in dispute, or the inferences from them open to debate, they must go to the jury.' In these cases it is settled that the question of negligence must go to the jury unless the facts are 'so clearly and conclusively proved as to admit of no reasonable doubt,' or 'established by undisputed evidence,' or 'where the facts are uncontested.' Where there are any doubts as to the facts (*Smith v. Railroad Co.*, supra), 'or there is any doubt of the plaintiff's negligence' (*McNeil v. Railroad Co.*, supra), or 'where there is a reasonable doubt as to the facts' (*Vannatta v. Railroad Co.*, supra), the question of negligence must go to the jury. We also quote from *Field, Dam. § 519*: 'To justify a nonsuit on the ground of contributory negligence, the evidence against the plaintiff should be so clear as to leave no room for doubt, and all material facts must be conceded, or established beyond controversy.' The same principle would apply to the duty of the court as to giving binding instructions for the defendant on account of the contributory negligence of plaintiff.

"We have endeavored to make plain, without going into the details, the matters in evidence that seemed to us to throw disregard on the testimony of Carr and Bloom. The witnesses were before us, we saw their man-

ner of testifying, we had the aid of photographs and drafts illustrating every feature of the scene of the accident, but we did not take into consideration the fact that the only testimony on this important point came from two employés of the defendants, which Chief Justice Paxson, in the case of *Frick v. Mercer Co.*, 138 Pa. St. 535, 21 Atl. 6, said 'was proper matter to call the attention of the jury to, as affecting the credibility of witnesses.' We found enough in all of the circumstances of the case to give rise to a very substantial doubt in our mind as to the sufficiency of the testimony offered to locate Wilson, as an undoubted fact, on the brake wheel; and, our mind being in doubt, it was not only our clear right, but our duty, to have the jury dispose of the question, and judge as to the credibility of the witnesses. And now, February 21, 1896, it is ordered and directed that judgment be entered for plaintiff on the reserved point."

M. E. Olmstead, S. R. Peale, Thos. H. Murray, and Allison O. Smith, for appellants. David L. Krebs, William Paterson, and W. A. Hagerty, for appellee.

STERRETT, C. J. One of the questions presented by the testimony in this case was whether the injuries resulting in the death of plaintiff's husband were caused by the negligence of the defendant companies. The other was whether any negligence of the deceased contributed to the fatal result. An examination of the evidence has convinced us that both were controlling questions of fact, which, under the well-settled rules of law, the learned trial judge was bound to submit to the jury for their determination. That was accordingly done, in a clear, substantially correct, and adequate charge; and a verdict was rendered in favor of the plaintiff, subject to the opinion of the court on the question of law reserved. Plaintiff's averment of negligence, etc., was thus impliedly affirmed by the verdict; and the counter averment of contributory negligence, upon which the defendants relied, was in like manner negatived. Upon due consideration of the point reserved, it was rightly decided in favor of the plaintiff, and judgment was accordingly entered for the amount found by the jury.

It is unnecessary to notice the specifications of error in detail. With the single exception of those relating to the question of law reserved, there is nothing in either of them that is sufficient to suggest even a reasonable doubt as to the accuracy of the general charge, or any of the rulings complained of, and they are therefore dismissed without further comment.

It was claimed by the defendants, as a conclusively established fact, that at the time of the accident plaintiff's husband was sitting on the wheel of the brake in the rear of the car next the caboose, and was thus guilty of negligence that contributed to his injury. On that ground the learned judge was re-

quested to direct a verdict for the defendants, but, instead of doing so, he submitted all the testimony bearing on the question of the alleged contributory negligence of the deceased to the jury, with proper instructions, and reserved for future consideration "the question as to whether the alleged fact that the deceased was sitting on the wheel of the brake," etc., "was established as an undoubted fact, by testimony of such character as makes it our duty to withdraw the case from the jury." In thus reserving the question, and afterwards deciding it in favor of the plaintiff, he committed no error of which the defendants have any just reason to complain. If any regard is to be had to the hitherto well-recognized line of demarkation between the duties of the court, as the expounder of the law, and those of the jury, as the constitutional triors of fact, he could not have decided otherwise than he did. It has been repeatedly said that negligence is the absence of care according to the circumstances, and is always a question for the jury when there is a reasonable doubt as to the facts, or as to the inferences to be drawn from them. When the facts are either admitted, or established by undisputed evidence, it is the duty of the court to declare the law applicable to them; but when material facts are disputed, or inferences of fact are to be drawn from the testimony, it is the exclusive province of the jury to determine what they are. *Field, Dam.* § 519; *Railroad Co. v. White*, 88 Pa. St. 333; *Railroad Co. v. Werner*, 89 Pa. St. 64; *McGill v. Railway Co.*, 152 Pa. St. 334, 25 Atl. 540; *Vannatta v. Railroad*, 154 Pa. St. 273, 26 Atl. 334; *Smith v. Railroad*, 158 Pa. St. 87, 27 Atl. 847. Tested by the principles recognized in these and many other authorities, the learned judge was clearly right in disposing of the reserved question as he did. His action in that regard is fully vindicated in his opinion sent up with the record. Judgment affirmed.

(177 Pa. St. 437)

IN RE SMITH'S ESTATE.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

PAYMENT—REVIEW OF EVIDENCE—PRESUMPTION.

S. sold land to A., agreeing to give deed "clear of all incumbrances." The legal title thereto was still in C. and R., as security for any balance due on the contracts by which they had sold it. In proceedings in the orphans' court, after the death of A., to have the title to the land conveyed to the heirs of A., claim for balances due on the contracts of sale of C. and R. was established, and the court decreed that, on payment thereof to the representative of the heirs of C. and R., deed on behalf of C. and R. be executed to the heirs of A. S., who was not a party to such proceeding, presented his claim against the estate of A. for balance due on his contract, and resisted deduction therefrom of the payments made under such decree, relying on the presumption, arising from the lapse of time, that C. and R. had previously been paid. He did not allege, however, that all the purchase money called for by the contracts of C. and R. had been paid by the predecessors in title of A., or directly question the existence or accuracy

of the balances on said contracts that were paid by the estate of A. *Held*, that this presumption was overcome by the testimony of B. before the auditor on the claim of S. that, as attorney in fact for the heirs of C. and R., he had a claim for balance of purchase money due on such land, and that the amount due on the contracts of C. and R. was paid by the estate of A.; by the finding of the auditor that such amount due on the contracts of C. and R. had never been paid by the predecessors in title of A.; and by the decree confirming the auditor's report. Mitchell, J., dissenting.

Appeal from orphans' court, Clearfield county; Martin Bell, Judge.

The claim of James S. Smith against the estate of Andrew Smith was disallowed in part by the auditor, and from the decree confirming the auditor's report he appeals. *Affirmed*.

The testimony of W. D. Bigler before the auditor was as follows: "I was attorney in fact for the heirs of James Chestnut and Esther Reed, and as such I had a claim for the balance of purchase money due on land now owned by the Andrew Smith estate, and which was originally sold by two articles of agreement by James Chestnut and Esther Reed, by their attorney in fact, to John Beightol, and the other to John Fye. This purchase money was paid to me by L. S. Hay, administrator of Andrew Smith, deceased. The amount of this purchase money on the John Beightol agreement was \$166.54; and the amount due on the John Fye agreement was \$173.44. This was paid to me by L. S. Hay, on the 1st of July, 1892, \$149.30; on 15th April, 1893, \$190.24."

A. L. Cole, for appellant. W. C. Pentz, for appellee.

MCCOLLUM, J. James S. Smith, by articles of agreement dated the 25th of January, 1865, sold to Andrew Smith, Jr., 100 acres of land for \$1,400, and agreed to execute and deliver to the latter a good and sufficient deed of it, "clear of all incumbrances." In 1841, James Chestnut and Esther Reed owned this land, and George Cadwalader, their attorney in fact, sold one half of it, by articles of agreement, to John Beightol, and the other half of it, by like articles, to John Fye. The interests thus acquired by Beightol and Fye were vested in James S. Smith at the time of his sale of the land to Andrew Smith, Jr. The latter, therefore, obtained, by his purchase from the former, the right to have a clear title to the land on payment of the sum he agreed to give for it. The legal title to the land was then in James Chestnut and Esther Reed, or their heirs, as security for whatever balances were due on the contracts with Beightol and Fye; and it was the plain duty of James S. Smith, under his agreement with Andrew Smith, Jr., to pay these balances. Andrew Smith, Jr., paid, on his contract with James S. Smith, \$502.75 on the 1st of June, 1865, and \$310 on the 27th of October, 1866. These payments were duly indorsed on his contract, and are undisputed. It does not appear that the balance was demanded by James S. Smith, or that it was paid to him during the lifetime of Andrew

Smith, Jr.; and it seems to be conceded that the former never tendered a deed to the latter in accordance with the agreement between them. After the death of Andrew Smith, Jr., his legal representatives desired to have the title to the land which James S. Smith had agreed to convey to him; but they discovered that the heirs of James Chestnut and Esther Reed claimed that there were balances due to them on the Beightol and Fye contracts. An investigation in regard to this claim resulted in the establishment of it; and, upon an ascertainment of the amount of the balances, it was decreed by the orphans' court that upon payment of them to W. D. Bigler, attorney in fact for the claimants, he should make, execute, and deliver a good and sufficient deed in fee simple for the land to A. T. McClure, in trust for the widow and heirs of Andrew Smith, Jr. Under and in pursuance of this decree, the administrator of Andrew Smith's estate paid the balances due on the Beightol and Fye contracts.

The question raised by the above-stated facts is whether the amount paid by the Andrew Smith estate on the Beightol and Fye contracts may be deducted from the balances due James S. Smith on his contract with the decedent. The appellant rests his denial of a right to make such deduction upon the presumption of payment arising from lapse of time. But this contention ignores the decree of the court, the finding of the auditor, and the testimony of Bigler. These are, *prima facie* at least, sufficient to rebut the presumption relied on, and to cast upon the party who alleges payment the burden of showing it. In this case the party objecting to the deduction claimed does not allege that all the purchase money called for by the Beightol and Fye contracts was paid by Andrew Smith's predecessors in title, nor directly question the existence or accuracy of the balances on said contracts that were paid by his estate. The fact that the appellant was not a party to or notified of the proceeding for specific performance becomes unimportant in view of his failure to allege actual payment of the purchase money by the parties primarily liable for it.

The contention in the court below that Andrew Smith, Jr., had a valid title to the land under and by force of the statute of limitations, was sufficiently answered there, and was not renewed here. It was untenable, because it was clear that neither his possession nor that of his predecessors was adverse to the title of the Chestnut and Reed heirs, and that the possession maintained by them was subordinate to it. No attempt was made on this appeal to controvert the view of the learned court below respecting the title James S. Smith was bound to make to his vendee, and the effect upon that title of the outstanding claim for purchase money. We need not, therefore, discuss these matters. Decree affirmed, and appeal dismissed, at the costs of the appellant.

MITCHELL, J. (dissenting). The Chestnut heirs had been out of possession for 50 years,

and any claim of theirs for a balance of purchase money was prima facie barred more than twice over. As against appellant, they would have had to establish their claim affirmatively, but the administrator of Andrew paid it over appellant's head, without notice to him, and now is permitted to defalk it out of purchase money due to appellant from Andrew. Appellant is thus charged with a debt which prima facie he does not owe; not only without proof, but without a hearing.

(177 Pa. St. 481)

COMMONWEALTH v. HURD.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

**COUNTY COMMISSIONERS—MISDEMEANOR IN OFFICE
—INDICTMENT—TIME OF TRIAL.**

1. A prosecution against a county commissioner for being concerned in public contracts may be instituted by the court, of its own motion, directing the grand jury to investigate the matter, and, after a presentment by them, directing the district attorney to submit an indictment.

2. An indorsement by the grand jury on an indictment as founded upon "presentment" is not erroneous because not founded on their own knowledge, but on testimony heard by them.

3. Under Act April 15, 1834, § 48 (Purd. Dig. 1894, p. 449), making any county commissioner concerned in any contract made under the "authority of the commissioners of said county" guilty of a misdemeanor, a conviction may be had though the contract was made by two of the commissioners, and therefore not legally binding on the county, because not made by the commissioners as a board.

4. A prosecution against a county commissioner for being concerned in a public contract may be tried pending an appeal by the commissioner from a report of the county auditors surcharging him with the amount averred in the indictment to have been fraudulently obtained by him through the contract.

Appeal from court of quarter sessions, Blair county; Martin Bell, Judge.

John Hurd was convicted of a crime, and appeals. Affirmed.

The opinion of the trial court on motion to quash the indictment was as follows:

"In a report of the county auditors, filed in the court of common pleas, it was charged that at least one of the commissioners of Blair county had been concerned in public contracts. Deeming this charge, if true, to be of such a nature as to warrant investigation by the grand jury, this court called the attention of that body to the subject at June sessions, and directed them to investigate the matter. The grand jury made return in the form of a presentment against defendants, whereupon the district attorney was directed to prepare and submit an indictment, which was returned 'a true bill.' One of the main reasons urged for quashing the indictment is that the action so taken was in violation of the constitutional bill of rights, inasmuch as a prosecutor is wanting, and, by the method pursued, defendants were denied a preliminary hearing, and were not proceeded against according to due process of law. It

seems to be a significant circumstance, as showing the intent of the framers of the constitution, that persons charged with misdemeanor in office—and the offense charged in the present indictment is misdemeanor in office—by the language of section 10 of the bill of rights, are deprived of certain rights accorded to other accused persons. 'No person shall for any indictable offense be proceeded against criminally by information except for oppression or misdemeanor in office.'

Criminal proceedings by information were odious to our forefathers, and were oppressive to the citizens, but the framers of the constitution seemed to recognize the fact that the nature of the crime of 'misdemeanor in office' was such as to warrant the allowance of an information. Possibly the motive actuating them in such allowance was twofold—First, that the offense concerned and affected the public at large; second, the offense might be of such a character as to affect no individual as an individual, hence it was unlikely that any single individual would be at the trouble of bringing a prosecution. But it is unnecessary to pursue this inquiry based on the same exception further, or to attempt to sustain the indictment now in question by attributing any force to the language quoted, as the present case seems to fall within the first exception stated by Judge King in the Case of Lloyd and Carpenter, 3 Clark (Pa.) 188. After laying down the general rule that an alleged offender should be proceeded against by affidavit before a committing magistrate, preliminary hearing, and binding over to court, Judge King proceeds to state the exception to said general rule: 'The first of these is where criminal courts, of their own motion, may call the attention of grand juries to, and direct the investigation of, matters of general public import, which, from their nature and operation on the entire community, justify such intervention. In such cases the court may properly, in aid of the inquiries directed by them, summon, swear, and send before the grand jury, such witnesses as they may deem necessary to a full investigation of the evils intimated, in order to enable the grand jury to present the offense and the offenders.' It is true that Judge King instances the case of a great riot, but his reasoning is equally applicable to any case where the public, as a public, in contradistinction from individuals who can do their own prosecuting are concerned; and this court deemed the present case one 'of general public import,' justifying investigation by the grand jury. A precedent for the course pursued in the present case is found in *Com. v. Taylor*, 2 Pa. Dist. R. 743. In that case, as in the present, there was a report of county auditors, charging frauds and peculations committed. Judge Green directed the district attorney to submit an indictment to the grand jury, and refused to quash the same. It is true that in the present case, instead of commencing pro-

ceedings by directing the district attorney to submit an indictment, the grand jury were directed to investigate, and an indictment was only ordered to be submitted after the said grand jury had reported that there was evidence to support the charge adduced before them. But, if the court had a right to order the submission by the district attorney of an indictment, why should the defendants complain that such right was not exercised until the grand jury had investigated the matter and made a presentment? Or how could the defendants be prejudiced by the action of the court in directing an investigation before any indictment was submitted, or any steps prejudicial to the defendants taken?

"The further objection urged, that the indictment is indorsed as founded 'upon presentment of the grand jury,' and such presentment can only be made on the knowledge of the grand jurors, is without merit. The term 'presentment' has come to mean a report of the grand jury of an offense, whether founded on their own knowledge, or on testimony heard by them. It has been so used in this court in a number of instances,—principally in reports of offenses against the liquor laws. It was so used by Judge King in the portions of his opinion before quoted. In Whart. Cr. Pl. & Prac. (9th Ed.) § 86, it is said: 'A presentment, properly speaking, is an accusation made ex mero motu by a grand jury of an offense, upon their own observation and knowledge, or upon evidence before them, and without any bill of indictment laid before them at the suit of the government.

* * * Upon a presentment the proper officer of the court must frame an indictment before the party accused can be put to answer to it.' The indictment is framed under the act of the 15th of April, 1834, § 43 (Purd. Dig., Ed. 1894, p. 449), which provides that 'if any county commissioner shall be concerned in any contract or shall be directly or individually interested in the construction of any public work or any improvement, made or undertaken under the authority of the commissioners of the said county, the same shall be deemed a misdemeanor in office, and such commissioner shall be fined in a sum not exceeding five hundred dollars, and shall be adjudged by the court to be removed from office.' We are asked to quash the indictment because it avers that the public contracts in question were made, not under the authority of the commissioners as a board, but under the authority of the two defendants acting as county commissioners. The authorities cited by the very able counsel of defendants do undoubtedly establish the rule that, to bind the county, the contracts should be made by the board of commissioners, not by two of the commissioners. But suppose two of the commissioners do undertake to make a contract, and draw orders on the treasury for the money to pay for same, and do corruptly and fraudulently receive part of said money; are they to be allowed to take

advantage of their own wrong, and allege that the contract they made was illegal, and therefore was no contract? The act of assembly in question does not say by authority of the 'board' of commissioners. There is no language employed limiting the operation of the law to cases of contracts legally binding the county. The contract averred might have been voidable, in the sense that it would have been declared void on application of an aggrieved taxpayer; but if it was carried into execution as averred, and was consummated by the payment of the consideration, it was at least a de facto contract. And if a de facto commissioner would be liable to the penalties of the act, by analogy its penalties would also be applicable to the case of a de facto contract. And in Whart. Cr. Law, § 1572, it is said, 'It follows from this that an officer de facto cannot set up want of title to an indictment for misconduct.'

"We are asked to quash the indictment, or to continue the trial, because of the pending of an appeal by the said defendants from the report of the county auditors surcharging them with the amount averred in the indictment to have been fraudulently obtained by them. Indictments for perjury are not to be tried until the civil suit out of which they arise is disposed of. *Com. v. Dickinson*, 3 Clark (Pa.) 265. But in general a criminal suit and a civil suit arising from the same source may be carried on simultaneously. 'Neither will affect the other.' *Bish. Cr. Law*, § 264. 'There is no compulsion to try the civil suit first. It is entirely within the discretion of the court.' *Opinion of Mitchell, J., in Com. v. Dickerson*, 7 Wkly. Notes Cas. 433. To allow indictments for perjury growing out of affidavits made or testimony given in the course of a civil proceeding to be tried before the disposal of said civil proceeding might lead to numerous cross suits for perjury, which would be oppressive to court and suitors alike, and might tend to intimidate both parties and witnesses, as is well explained by *Parsons, J.*, in his opinion in *Com. v. Dickerson*, supra; but 'the reason ceasing the rule ceases,' and we see no good reason why a prosecution for misdemeanor in office should be held in abeyance pending an appeal by the defendants in a civil court from a surcharge for the amount alleged to be appropriated. The measure of proof beyond a reasonable doubt is higher in a criminal than in a civil proceeding, and it is scarcely conceivable that a defendant would be convicted in a criminal court, and afterwards obtain a verdict in his favor in the civil court. Moreover, delay in a proceeding, where the chief penalty is removal from office, it seems to us should be avoided as far as possible, consistent with the rights of the accused, because such delay might render the law nugatory, by reason of the expiration of the term of office pending such delay.

"We have endeavored to carefully consider all that has been urged on behalf of the de-

fendants, but after such consideration we fail to see any sufficient reason for either quashing the indictment in this case, or continuing the cause. It is therefore ordered and decreed that the motion to quash indictment No. 77, June sessions, 1895, be overruled, and that said cause be called for trial on Monday morning, October 14, 1895, at 9 o'clock."

Aug. S. Landis and Thos. H. Greevy, for appellant. Wm. S. Hammond, Dist. Atty., and A. V. Dively, for the Commonwealth.

PER CURIAM. This case came here under a special allocatur granted by one of the justices of this court. No question was raised as to whether, within the meaning of section 7, cl. a, of the superior court act of 1895, the case is one "involving the right to a public office," and it was accordingly argued and submitted to us on its supposed merits. Unfortunately for the appellant, the record discloses no ground on which the judgment of the court of quarter sessions can be reversed. The first three specifications are to the action of the court in denying defendant's motion to quash the indictment, and in overruling his reasons in support thereof. There appears to be nothing in either of these specifications that would have justified any other course of action. This is so clearly shown in the opinion of the learned judge that further discussion is unnecessary. The indictment is framed under the act of April 15, 1834, which declares, "If any county commissioner shall be concerned in any contract or shall be directly or individually interested in the construction of any public work or any improvement, made or undertaken under the authority of the commissioners of the said county, the same shall be deemed a misdemeanor in office, and such commissioner shall be fined * * * and shall be adjudged by the court to be removed from office." It is sufficient both in form and substance. It "charges the crime substantially in the language of the act of assembly prohibiting the" same, etc. Nothing more than that is required. *Purd. Dig.* 1894, p. 549, pl. 19. For reasons given at length by the learned judge in his opinion denying the motion for a new trial, there is no merit in the fourth specification. The case was correctly tried, and the verdict of the jury, upon which judgment was entered, was fully warranted by the evidence before them. The judgment of the court below is therefore affirmed, and, to the end that the same may be fully executed, it is ordered that it be remitted to the court below.

(177 Pa. St. 238)

BENNETT v. EASTERN BUILDING & LOAN ASS'N OF SYRACUSE, N. Y.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

CONFLICT OF LAWS—CONTRACT—USURY.

A resident of Pennsylvania, on application made in that state to an agent of a New York

building and loan association, became a member thereof, and obtained a loan from it, giving notes and bond therefor, secured by mortgage on Pennsylvania lands; all of the instruments describing the association as of "Syracuse, N. Y." and declaring the notes payable at its office there. *Held*, that the contract was not governed by the usury laws of Pennsylvania.

Appeal from court of common pleas, Lycoming county; John J. Metzger, Judge.

Action by Joseph C. Bennett against the Eastern Building & Loan Association of Syracuse, N. Y. Judgment for defendant. Plaintiff appeals. Affirmed.

T. M. B. Hicks and W. H. Spencer, for appellant. W. C. Gilmore, for appellee.

GREEN, J. The defendant is an incorporated building and loan association, duly incorporated by the laws of New York, and located and transacting its business, at Syracuse, in that state. The plaintiff, in October, 1891, made application to become a member of the association, by purchasing two shares of its stock, and, in November following, received a certificate for the shares. In May, 1892, he made application for a loan of \$200, which was granted in December of the same year. As security for the loan, he gave a bond and mortgage on some land in Lycoming county, Pa., for the sum of \$207.89, which included the premium paid for the loan. The actual money paid to the plaintiff was \$180. At the same time, he gave to the defendant 67 promissory notes, for \$3.17 each, except three for \$1.67 each, the aggregate amount of which was secured by the mortgage, and represented the monthly payments to be made by the plaintiff as a member of the association. On August 31, 1893, the plaintiff paid the mortgage debt in full, the amount being \$181.07, after deducting the withdrawal value of his stock and a rebate premium. He now claims that the premium retained by the defendant and the fines charged against him in the settlement were usury, and seeks to recover in this action \$50.95, alleging that this amount was the excess over legal interest on the amount of money actually loaned to him by the defendant. He contends that his contract with the defendant was a Pennsylvania contract, and to be governed by the law of that state. The defendant had an agency at Williamsport, in Pennsylvania, and the transaction was conducted between the plaintiff and the defendant's agent at that place. That circumstance, however, is of no account if the contract was to be performed in the state of New York. The appellant does not at all dispute the proposition that contracts are to be governed by the law of the place where the contract is to be performed, nor does he contend that he would have any right of recovery under the law of New York, which permits building and loan associations to charge usurious rates of interest on loans. The learned court below decided that the place of performance was the state of New York, and the contract was there-

fore to be governed by the law of that state. In this opinion we concur.

A point was also made that, if the contract was made for the purpose and with the intent of evading the usury laws of Pennsylvania, it must be governed by the law of Pennsylvania, and not of New York. As to this the court below held that there was not a scintilla of evidence of any such intent, and therefore the doctrine could not apply to this case; and in that ruling also we fully concur.

It is only necessary to examine briefly the contract of the parties in order to determine at what place it was to be performed. The defendant's place of business was at Syracuse, in the state of New York. The plaintiff's application for membership was in the following words: "I, Joseph Bennett, of Williamsport, county of Lycoming, state of Pennsylvania, hereby apply for membership in the Eastern Building and Loan Association of Syracuse, Onondaga county, New York, and subscribe for two shares of installment stock. I hereby agree to abide by all the terms, conditions, and by-laws contained or referred to in the certificate of shares, and will also comply with all the rules and regulations of said association." The plaintiff's application was accepted, and he thereupon became a member, consciously and intentionally, of an association of the state of New York, and contracted that he would abide by their by-laws, and comply with all their rules and regulations. His subsequent application for a loan was entitled "Application for Loan from the Eastern Building & Loan Association of Syracuse, N. Y." He afterwards signed an application for an advance, addressed as follows: "To the Board of Directors of the Eastern Building and Loan Association of Syracuse, N. Y.," requesting the advance to be made, and again agreeing to comply with the charter and by-laws of the association, and all requirements defined by the committee of the board of directors. Thereupon 67 notes were prepared, sent to him for signature, and signed by him, in the following words: "On or before the last Saturday of March, 1893. I promise to pay three and 17/100 dollars to the order of the Eastern Building & Loan Association of Syracuse, N. Y., at its office in Syracuse, N. Y. Value received. Williamsport, Jan. 2, 1893. Joseph C. Bennett." When he gave his bond for the money loaned, he obligated himself as follows: "I, Joseph C. Bennett, am held and firmly bound unto the Eastern Building and Loan Association of Syracuse, N. Y., in the sum of four hundred dollars, lawful money of the United States of America, to be paid to said Eastern Building & Loan Association of Syracuse, N. Y.," etc. In the condition of the bond it is provided that if he pays to the association, repeating its name and place, \$207.89 in 67 equal payments, of \$3.17 each, except three of \$1.67 each, "payable monthly to said association, at its office in Syracuse, N. Y., on or before the last Saturday of this and each and every month," etc. The mortgage also

executed by the plaintiff repeats the name and designation of the defendant, and its place; recites the bond, with its condition for making all the payments at the office of the company, at Syracuse, N. Y.; and then grants to the defendant, repeating its name and place, certain described land of the plaintiff, situate in Lycoming county, Pa., with the usual proviso that, if the payments are all made to the defendant, the bond and mortgage should become void.

Thus, it will be seen that in every possible way in which the English language could express it the plaintiff entered into a written contract with the defendant to pay it, in sixty-seven different payments, every one of which was to be made at the office of the defendant in Syracuse, N. Y., a designated aggregate sum of money. What is the use of discussing the question whether this was a contract to pay money in the state of New York? What is there to discuss? Nothing. No other place of payment is mentioned or can possibly be implied. This one place is positively expressed over and over again, and many times over, in solemn instruments, signed and sealed by the plaintiff himself, and in 67 different notes, also signed by the plaintiff. It is a waste of time to discuss so plain a matter. The fact that the plaintiff lived in Pennsylvania, and negotiated there with an agent of the defendant either for the membership or for the loan, is not of the slightest significance. The contract must be adjudged by its express terms, no matter where the parties were when it was made. And, when those terms are clear, explicit, involved in no doubt whatever, they must prevail; and it is the duty of the courts to enforce them according to their literal meaning. Nor is there the slightest ground for an allegation that the contract was made for the purpose of evading the usury laws of Pennsylvania. Who had such a purpose, and what is the evidence of it? Did the plaintiff have it, and, if so, did he communicate it to the defendant? If so, where is the evidence of it? There is none whatever. The defendant's business was transacted at its proper place of business in the state of New York. This business was a part of its regular business, done in its usual way; and, as a matter of course, the mere fact that this loan was made to a citizen of Pennsylvania cannot justify an inference that it was done with an intent to evade the laws of Pennsylvania. This business was done just as all its other business was done. The defendant had a lawful right to loan money wherever it pleased, and it would be most absurd to say that, because it lent money to a Pennsylvanian, it therefore intended to evade the laws of Pennsylvania. The Pennsylvanian had a right to borrow money in the state of New York if he chose to do so, and, if he contracted to pay it in the state of New York, he must be conclusively presumed to know that his contract would be governed by the law of that state. In all this there is not a shadow of an unlawful intent to evade the law of

Pennsylvania. There was therefore nothing to submit to the jury on that question. Judgment affirmed.

(177 Pa. St. 267)

REYNOLDS v. CREVELING et al.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

REFERENCE.

When a reference is had under Act June 16, 1836, the trial court has no power to make a different award than that of the referee, based on a different view of the facts, thus substituting the judgment of the court for that of the referee, but has only such power as the court would have over a verdict, to sustain it or set it aside as a whole.

Appeal from court of common pleas, Philadelphia county.

Action by Charles H. Reynolds, executor, etc., of A. H. Reynolds, against Alfred Creveling and others. From a judgment for plaintiff, he appeals. Reversed.

John Marshall Gest, Edmund G. Butler, and Richard C. Dale, for appellant. Geo. Frederick Keene, Charles C. Lister, and John G. Johnson, for appellees.

STERRETT, C. J. Plaintiff's contention that the court below erred in reducing the amount ascertained and awarded to him by the learned referee appears to be well grounded. The reference was under the provisions of the act of June 16, 1836, according to which the report of the referee is final and conclusive, except as to clerical or manifest and unquestionable mistake, so obvious as to be plain to the referee at once on being pointed out. It is of no consequence that another referee or the judge reviewing the award might have reached a different conclusion. The decision, as corrected, must still stand as the award of the original referee. These well-settled principles do not appear to be seriously questioned by the defendants. *Gunn v. Bowers*, 126 Pa. St. 552, 17 Atl. 893. The only part of plaintiff's claim involved in this appeal is that for coal sold and delivered. As to that, the learned referee found as a fact that "the plaintiff, Reynolds, delivered the coal, as claimed, to Creveling, Miles & Co., Limited, at the times and for the prices named." The effect of this finding would be an award in favor of plaintiff for the amount of the claim, unless it was satisfactorily shown that the same was partially or wholly paid. It was alleged that payment had been made by notes of the Glendower Iron Works accepted by plaintiff in full satisfaction of his claim against defendants, but the referee reported that "there was no sufficient evidence to satisfy him that these notes were accepted as payment by Reynolds; on the contrary, the weight of the evidence is the other way." Plaintiff's claim was for \$21,911.23 and interest. The referee awarded him only \$11,540 thereof, with interest.

This was the amount of a judgment note given by defendants on June 5, 1885, which, as appears from plaintiff's ledger, was, in effect, a settlement of accounts between them. The accounts appear to have been carelessly kept, and the referee reported that it was difficult to state precisely how the account stood. In this he is clearly sustained by the record. We think the learned judge of the common pleas erred in construing the finding of the referee as an award for the amount of an account stated by the parties, and in striking out items of which the statement referred to is in part composed. The sale and delivery of the coal in question was proved by defendants' books. That made a clear prima facie case for the plaintiff. The admission, appearing by plaintiff's ledger account, of the balance found by the referee, was a matter for his consideration; and neither the court below nor this court can with any propriety undertake to revise his conclusion in that regard. Whether we should have concurred with the learned referee as to the value of the expert testimony submitted to him, or have reached the same conclusions that he did, are not matters upon which it is necessary for us to express any opinion. It is sufficient to say that we find nothing in the record to justify the court below in reducing the amount ascertained and awarded to the plaintiff by the referee. We are not convinced that there is any such mistake in the referee's conclusions as warranted the interference of the court below; on the contrary, we think the conclusions of the learned referee are substantially correct. As was said in *Gunn v. Bowers*, supra, the uniform construction of the act "has been that it gives the court no power to make a new or different award, based on a different view of the law or the facts, thus substituting the judgment of the court for that of the chosen arbitrator; but only such power as the court has over a verdict, —to sustain it, or set it aside as a whole." The assignments of error are sustained. The judgment of the court below is reversed, and judgment is now entered on the report of the referee in favor of plaintiff and against the defendants for \$18,106.23, with interest from January 3, 1895.

(177 Pa. St. 589)

OYSTER v. SHORT et al.

Appeal of SMITH.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

SET-OFF—INSOLVENCY OF BANK—CERTIFICATES OF DEPOSIT.

On the insolvency of a bank, and assignment for the benefit of creditors, a debtor cannot set off against his debt certificates of deposit assigned to him after the bank closed its doors, but before the appointment of receivers for the bank, in consideration of the payment to the depositor of the amount of the credit on his debt obtained by the use of the certificates.

Appeal from court of common pleas, Elk county; C. A. Mayer, Judge.

Appeal by Perry R. Smith from a decree in a suit by D. C. Oyster against Alfred Short and another, overruling exceptions to the report of the master. Affirmed.

W. S. Hamblen, for appellant. Geo. A. Rathbun, C. B. Earley, S. W. Smith, Geo. A. Allen, L. Rosenzweig, and Geo. R. Dixon, for appellees.

GREEN, J. The Ridgway Bank closed its doors on June 22, 1893, and, by notice posted on its windows, gave public information of its suspension. Four days later, on June 26, 1893, the court of common pleas of Elk county appointed receivers to take possession of, and administer the assets of, the bank. In the meantime the appellant, who was indebted to the bank upon several notes, amounting to \$2,400, which had been discounted by the bank, obtained from one W. S. Hamblen two certificates of deposit—one for \$1,500 and one for \$1,000—issued by the bank to him for money deposited with the bank. These certificates were obtained by a written agreement made between Smith and Hamblen on June 24, 1893, which recites the ownership by Hamblen of the certificates, and also as follows: "And whereas, the said Perry R. Smith has certain notes, payable at the Ridgway Bank to the order of W. W. Mattison; and whereas, it is contemplated that an assignment will be made by said Ridgway Bank,"—and then provides: "Now, therefore, it is agreed by the parties hereto that, if the said Perry R. Smith may be able to apply the said certificates of deposit in payment of said notes, that at the time of said payment the said Perry R. Smith will pay to the said W. S. Hamblen the value of said certificates; but if said certificates cannot be applied in payment of said notes, but that a pro rata of the assets of the said bank are applied in payment of said certificates, that then the said Perry R. Smith will pay to the said W. S. Hamblen the amount of said payment made on said certificates." The purpose of this agreement is so absolutely transparent that there is no possibility of misunderstanding it. It does not purport to be a sale of the certificates at any price. Smith is merely to use the certificates in payment of the notes he owes to the bank, and if he can do so he is to pay the value of them, thus received, to Hamblen. If he cannot use them to pay the notes in full, but only to the extent of a pro rata share of the assets of the bank, then he is to pay to Hamblen the amount of the payment he thus receives. If he cannot do either of these things, there is nothing for him to pay by way of an equivalent for the certificates. He is not required to pay any money for them, and under the terms of the agreement he is only required to pay to Hamblen the amount of the credit he obtains on his notes by reason of his use of the certificates. The paper does not con-

tain any assignment of the certificates, but recites at the commencement that one has been made. It follows, therefore, that the only use that was to be made of the certificates was that Smith was to pay off his notes with them, if he could, and if not he was to pay nothing to Hamblen. That such a transaction cannot confer any right of set-off upon the debtor to the bank has been so often and so positively decided that there can be no question about it. In 22 Am. & Eng. Enc. Law, 283, the rule is thus stated: "The claim sought to be set off must be owned absolutely by the defendant. A person holding a chose in action assigned to him conditionally has no right to set it off. A claim which the defendant has borrowed for the occasion cannot be set off. So, where the defendant has obtained possession of the demand from a third person upon the understanding that it shall be his property, or that he shall be liable to the owner only in the event of his being able to set it off, it cannot be so employed by the defendant." Many cases are cited in the notes. In McGowan v. Budlong, 79 Pa. St. 470, Paxson, J., said in the opinion, "It is true, if the defendant had obtained the note as a mere experiment, with an agreement to return it in case he failed to get it in as a set-off, its rejection would have been proper." In Shryock v. Basehore, 82 Pa. St. 159, the action was brought by the assignees of an insolvent bank against the defendant, who was a maker of a note for \$2,500 held by the bank. Before suit brought, the defendant obtained a dishonored draft drawn by the insolvent bank for \$2,620.94, in favor of the cashier of another bank, for which he (the defendant) gave his own note, upon which a memorandum was written that it was given for the dishonored draft, and was only good for so much as the defendant should realize either by collection, payment, or credit obtained upon the obligation. Any excess received was to be paid to the bank holding the dishonored draft. We held that this draft could not be used for the purpose of set-off, and said: "The draft in favor of Gressman, cashier, was clearly not the subject of set-off in this suit. The defendant has no title to it. The indorsement on the back of the note of Abram and Emanuel Basehore shows that there was not an absolute transfer of the draft. The excess of the draft over the note, if recovered, was to be returned to the First National Bank of Shippensburg." We also held that the cashier had no authority to transfer the draft, but that was only an additional reason. In Tinsly v. Martin, 80 Ky. 463, it was held that a note having been assigned to enable the assignee to use it as a set-off, with the agreement that he should account for only so much as he should get the benefit of in the suit, he could not avail himself of it as a set-off in equity in case the rights of other than the maker were involved. In Chipman v. Bank, 120 Pa. St. 86, 13 Atl. 707, it was held that in an action by an assignee for the benefit of

creditors to recover from a bank a balance to the credit, and subject to the check, of the assignor at the date of the assignment, the bank cannot set off notes or drafts indorsed by and discounted for the assignor before, but maturing after, the assignment. The present chief justice, delivering the opinion, and speaking of the status of assignees, said: "Their creditors can neither attach nor levy on any of the assigned assets; nor can their debtors buy up claims against them, and set off the same against their indebtedness to the assigned estate." Many more cases to the same effect might be cited, but it is unnecessary. The principle is so manifestly right and just that it does not need the citation of authorities in its support. That it is fully applicable to the facts of this case has been already shown. In addition to this, the appellant's personal testimony proves conclusively the purpose of the transaction. He was asked: "Q. For what purpose did you take the assignment of these securities? A. I had notes in the bank here and I wanted to get something to pay them with. Q. You were not to pay him for the certificates unless you could make use of them in payment of your notes held by the bank, were you? A. No, sir; I was to pay what I did receive on the certificates. * * * Q. When you took the assignment of these certificates, you knew that the bank had failed and closed its doors, did you not? A. I knew it had closed its doors, but that there was a notice posted in the window that they would pay in full, or something to that effect. Q. You knew they had ceased to transact business? A. Yes, sir. Q. Did you think at the time that they would pay in full? A. I did not think they would pay in full." Further discussion is not necessary. The whole transaction was nothing but an attempt to make a set-off against the undoubted debt due by the appellant to the bank, by means which the law does not permit. The assignments of error are all dismissed. Decree affirmed and appeal dismissed, at the costs of the appellant.

(177 Pa. St. 33)

PHILADELPHIA TRUST, SAFE-DEPOSIT & INSURANCE CO. v. PHILADELPHIA & E. R. CO.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

OWNERSHIP OF BONDS—EVIDENCE—DECLARATIONS—INSTRUCTION—REMARKS OF COUNSEL.

1. While the possession of bonds of defendant by plaintiff's testate raises a presumption of ownership, yet there is no presumption against the contention of defendant that testate was merely bailee thereof, from the mere fact that it is not shown by entries on defendant's books or by written contract.

2. Declarations of plaintiff's testate to a stranger are not admissible to prove his ownership of bonds found in his possession.

3. As evidence that bonds of defendant found in the possession of plaintiff's testate were merely bailed to him, as claimed by defendant,

it may be shown that defendant's president, in the course of negotiations for redemption of the bonds of the issue to which they belonged, said to one with whom he was dealing in reference thereto that the bonds in question would never be presented; at least, where the statements and reports of defendant company showing an outstanding bonded indebtedness, with no minutes to show that those in question were intrusted to testate as bailee, are admitted as evidence that he held them as owner.

4. A charge unduly magnifying certain matters as evidence for plaintiff, and belittling the evidence of defendant, is ground for reversal.

5. Counsel should not be permitted on a second trial to state to the jury that there was want of unanimity in the appellate court in its decision on appeal from the former judgment.

Appeal from court of common pleas, Philadelphia county.

Action by the Philadelphia Trust, Safe-Deposit & Insurance Company against the Philadelphia & Erie Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

A. H. Wintersteen, Geo. Tucker Bispham, and John G. Johnson, for appellant. Boyd C. Barrington, R. L. Ashhurst, and W. H. Armstrong, for appellee.

DEAN, J. This case was here before, and is fully reported in 160 Pa. St. 590, 28 Atl. 930. In the first trial the court below, peremptorily, directed a verdict for plaintiff, on the ground that there was no evidence to rebut the presumption of ownership of the bonds sued on, raised by the fact of possession. We thought differently, and sent the case back, that the evidence might be submitted to the jury. On retrial the jury has found for plaintiff, and we have this appeal. In reviewing this case, what we said when it was here before as to the significance of the evidence should, without repetition, be kept in mind. In that case we attempted to show that there was ample evidence to overcome the presumption of ownership raised by the single fact of possession. No fact testified to in the case was the subject of dispute. What inference the undisputed facts warranted was alone disputed. Although the learned judge of the court below formally carried out the direction to submit the evidence to the jury on a retrial, he manifestly did so with great reluctance. While his right to adhere to his individual opinion is not doubted, his duty to officially carry out the instructions of this court, by not alone a submission, but by a fair and impartial submission of the evidence, is also undoubted. He is not responsible for our errors, however plain they may appear to him; we are for him, when they appear to be so to us. We are led to these remarks because we think any unprejudiced mind, on a comparison of this charge with the evidence, must conclude that it is not such a charge as the importance of the cause and the evidence demanded.

The proposition involved in the issue was whether A. Boyd Cummings was the abso-

lute owner of the bonds sued on, or merely the bailee of defendant. The learned judge said to the jury: "The executor has presented these bonds, and their execution is not denied. Consequently, he has made out his case, and he is entitled to receive his money, unless the defendant can satisfy you there is some reason why he should not." This is a correct statement of the question at issue. The only fact in favor of the plaintiff was that he was in possession of the bonds, which on their face disclosed no restriction on the title. Therefore arose the presumption of ownership from the fact of possession. The defendant did not deny that Cummings' possession was originally rightful, but alleged that he was a mere bailee of the bonds; that, at the time they went into his possession as bailee, he was a manager of the company, and the contract of bailment, through his neglect and that of other officers of the company, had not been reduced to writing. There was no written receipt, nor was there any written entry on the books. But then, to show the bailment, the defendant proved circumstances occurring through many years, even to what was almost an express written disclaimer of ownership, every one of which circumstances, without explanation, was inconsistent with the absolute ownership of the bonds by Cummings, and one of them, the writing on the envelope, reconcilable on no reasonable theory other than that of ownership by defendant. As already stated, not one of the significant facts proven by defendant was contradicted, nor, so far as we can see, disputed by plaintiff; the inference warranted by them alone was disputed. The defendant was then in this attitude: It says: "True, the possession is in the plaintiff, and that shows prima facie title in him. We admit that his possession at first was not wrongful, and that the company put in him this possession for a specific purpose, which, however, was accomplished, and then he should have at once returned the bonds to the company. Owing to his own neglect and that of other servants of the company, the transaction was not reduced to writing, but we prove, indisputably, facts from which it can be clearly inferred, and which warrant no other inference."

Now, the learned judge, instead of stating this situation to the jury, and calling their attention to the facts which tended to establish a bailment, thus rebutting the inference warranted by the single fact of possession, takes up the fact of the absence of a written contract, and earnestly argues to the jury that this rebuts the inference claimed to be warranted from the undisputed and significant facts. His argument, in effect, is—and the jury must have so understood him—that, because defendant had proven no written contract of bailment, it was highly improbable there was any contract. He thus speaks: "Now, you would suppose in a case of this sort that the defendant, to establish the fact which he alleges, would produce

for that purpose the books of the Philadelphia and Erie Railroad Company, and would point out to you on the books of that company that \$24,000 worth of bonds, numbered consecutively from one date to the other, had been transferred to Mr. A. Boyd Cummings, for the purpose of using it as collateral to raise money for the benefit of the company. No such thing appears upon the books of the company. No such fact is stated on any book or in any memorandum. You would suppose, also, that the whole history of the issue of these bonds would then be made so clear, inasmuch as these books are the defendant's books, as would enable him to satisfy you of the truthfulness of his claim. Strange to say, there is nothing on the books, according to the present treasurer, which shows that these bonds were not issued for a valuable consideration. Therefore, as far as these books are concerned, on both these points they fail to establish the claim of the defendant." The meaning of this argument, as we understand it, is that the defense is incredible, because defendant has not supported it by irrefutable evidence from its own books. If such evidence had existed, neither the court below, nor we, in all probability, would have been troubled by trying the issue. It is the absence of absolutely incontrovertible evidence on both sides on questions of fact that gives rise to the controversy raised by the issue. The theory on which the court put the case to the jury may be fairly stated thus: Important contracts of corporations ought to be written in the corporation's books. This is an important contract. It is not written in the books. Therefore it is highly improbable there was such a contract. This is not a fair presentation of the fact. The conclusion is not warranted, either by our observation or consciousness. As concerns written evidence of a contract, neither side had any advantage. There was not a written word on or in the bonds indicating that Cummings was the owner. They were payable to John Lindsey, treasurer, and by him transferred in blank. There was nothing written in the books evidencing a bailment. The law, however, raised the presumption of fact that he who was in possession of the bonds was the owner. This gave the vantage ground to plaintiff. But the presumption stopped just at that point. It did not go further, and the absence of a written contract of bailment on the books also raises the presumption there was no such contract. The contract, as alleged by defendant, was then the very thing to be proved, and the fact of no written contract being shown was a simple fact to be viewed by the jury in connection with the other facts in evidence. We all know that important contracts very often, either from pure neglect, indifference, the subject of them, or a relation of confidence between the parties, are not reduced to writing, and that about half the lawsuits we try have their source in this very neglect. If we were conscious, from a common knowledge of men's business habits, that all important contracts were reduced to writing, it would be

probable, from the absence of a writing, that this particular contract had no existence. But, our knowledge being just the contrary, there is neither a presumption of law nor fact raised in plaintiff's favor by the failure to put the contract in writing. Yet, as the court put the case to the jury, there was really imposed on defendant the burden of rebutting two presumptions,—one raised by the possession, and the other by the nonproduction of a written contract. But, even assuming that this fact was entitled to the significance the learned judge gave it; that, from our knowledge of men's ordinary conduct in business affairs, it was highly improbable such a contract was made, because not in writing,—surely, on the same theory of arriving at the truth from common knowledge of men's business habits, he should have directed the attention of the jury to the facts proven by defendant. Three facts were undisputed: The written indorsement on the envelope, the borrowing of cash on overdue coupons, equivalent to cash, and the scheduling by Cummings of his securities, leaving out these bonds. Each one of these acts, from our knowledge of men, was more significant of his nonownership of the bonds than the absence of a written contract was of such ownership. Take the first named. A business man, capable of accumulating a large estate, having in his possession \$24,000 of bonds, incloses them in an envelope, and indorses on the envelope what is, in substance, a written disclaimer of ownership in himself, and an averment of ownership in another, seals the envelope, and puts upon it the proper stamps, as if for delivery to the true owner. What is the inevitable conclusion from this fact? Not that it is "strange" or merely "peculiar," but that it is highly probable that the possessor of the bonds is not the owner, and that the one indicated by him in writing is. It seems to us that impartiality demanded that the improbability theory of defendant should have been presented to the jury as conspicuously as that of plaintiff; but, in the charge proper, it is scarcely adverted to.

But the learned judge proceeds to lay further stress on the absence of book entries, as follows: "This company was presided over by one of the most distinguished men of business in Philadelphia, Mr. Moorehead, whom you probably all know as a partner in the house of Jay Cooke. No man was more competent or fitted for the transaction of business than he was. He was the president of this company. It appears that for nineteen years he knew that \$24,000 of this company made no appearance. No demand was made for the interest, and you would suppose it would be impossible that a man should not say: 'Why, where are these bonds? Where are these \$24,000 of bonds? If they are not issued in the regular course of business, where are they?' You would suppose that that was made apparent every six months. There was no demand for these \$24,000 of bonds, and you would suppose that the president of the company would

say: 'But what is the meaning of this, that there is no memorandum of this?' If it had been explained to Mr. Moorehead, 'Why, those are collateral given to Mr. Cummings, who was a director of the company,' you would think he would have said: 'Well, that must be made apparent on the books. Mr. Cummings is alive; I am alive; and the people who have the whole knowledge of this subject are alive. That must be put on the books. Why, you have got outstanding against your company these obligations payable to order. I cannot permit that the records of this company should not show if that is not true; if they are not payable to order, and they belong to us, that that fact does not appear.' I say it is strange to us that during all that term of years Mr. Cummings was never called upon to return these. He was not borrowing money then, at all events. He had long since, if he ever did, ceased to borrow money for them; and therefore it would be perfectly proper, not even uncourteous, to say to him: 'Will you be kind enough to return these bonds which were handed over to you as collateral?' Strange to say, there was no evidence of such a thing having been said to this gentleman in his lifetime; and he died, as you have heard, in the possession of these bonds, and they are presented here after his death by his executors." There are here the statements, although probably not so intended, that Moorehead was president of the road for 19 years,—that is, from 1858 to 1877,—accompanied with the personal opinion of the judge that no man was more competent for the transaction of business, and then the suggestion is made of the utter improbability of Mr. Moorehead's permitting this transaction to rest entirely in parol for this long time. Mr. Moorehead was elected president in 1857, and acted as such until 1864,—a period of 7 years, instead of 19. His supervision as president over the books was considered important by the learned judge, and especially did he impress upon the jury the fact of the neglect of a thoroughly competent officer to enter the contract in the books for 19 years, as showing that it was incredible that a contract of bailment could have existed. The mistake in time was not in itself a very material fact, but the court treated it as material. The mistake, then, became material error only because deemed by the court a material fact.

The court then proceeds further, on the same subject and to the same effect. From the beginning of a very brief charge, almost to the end, is presented, most prominently, an argument to the jury that the fact of no entry in the books is contradictory of any theory deducible from defendant's evidence. Then, in a brief paragraph, defendant's evidence is thus referred to: "They set up a number of circumstances which are certainly of a peculiar character, and they ask you, from these circumstances,—from the fact of

the way in which they were kept, from the fact of their not having been presented, from the fact of the indorsement on the package which contained these bonds, and a number of points which I will refer to directly,—they ask you to infer that these bonds belong to them; not that they belong to anybody else, but that they did not belong to Mr. Cummings, and did belong to them.” This language wholly fails to notice the significance of the facts proven, all pointing to the ownership of the bonds in defendant. They were more than peculiar. They were such facts as were inconsistent with the business sagacity of Cummings or any other business man, and seemingly explicable only on the theory of his insanity, or eccentricity equivalent to insanity.

Up to this point the jury could scarcely have failed to regard the charge in any other light than as a direction to find for the plaintiff. At least, they must have concluded that it was the decided opinion of the judge that the defendant had presented no case worthy of more than a perfunctory slighting notice. Such a charge on this evidence was not impartial. It unduly magnified the absence of written entries in the books, and belittled the evidence of defendant, which was of that character that it ill deserved such treatment. We would hesitate to express so decided an opinion if conviction in any degree rested on the credibility of witnesses seen and heard by the court below, but neither seen nor heard by us; but not a single fact is in dispute. A charge plainly calculated to mislead the jury is error. This principle is fully discussed in *Railroad Co. v. Berry*, 68 Pa. St. 272, where Agnew, J., cites, to sustain it, not less than 18 cases, decided up to that date, commencing with *Bailey v. Fairplay*, 6 Bin. 449, decided in 1814, where the court says: “The jury are to receive instructions from the court. If this instruction is given in such a manner as to mislead them, there is an error which ought to be corrected.” In the latest case (*Heydrick v. Hutchinson*, 165 Pa. St. 208, 30 Atl. 819, 820), decided last year, in an opinion by our Brother Fell, it is said: “A charge whose tendency as a whole is to belittle and prejudice one side, and which is not in expression and tone a judicial presentation of the case, is error.” Such as this last was substantially the charge of the court before us, in an issue involving a very large sum of money, and depending for its proper determination on correct inferences to be drawn from many facts; and that the jury, at the end of the charge proper, believed they were then in full possession of the case is altogether probable from this instruction, which immediately followed this last quotation from the charge: “Now, those are the facts which are submitted for your consideration, and it is for you to say, and for you alone to say, whether those facts which they have proved, that the true

ownership of those bonds is in the company, and not in Mr. Cummings; that is the question which you will have to decide in this case.” True, the court then takes up the written points on both sides, and answers them by the words “Affirmed” and “Refused,” and prefaces this with the remark to the jury that probably he will thus better state his views on the evidence than if he should state them in his own language in the charge. We are not prepared to say that an adequate and impartial charge could not, under any circumstances, have been given with these written points as the groundwork. The independent thoughts and language of counsel may be worked into a charge so as to form a symmetrical whole, and thus convey to the jury a correct statement of the law and facts. But we have had some observation and experience in jury trials, and our belief is that seldom do the formal answers to points enlighten or influence the jury. They are aware that the point is the language and thought of counsel, and, while they may not wholly disregard the instruction indicated by the answer, they give no such heed to it as they do to the charge proper. We think the method here adopted was wholly inadequate as a presentation of this important issue. Clearly, it did not cure the one-sidedness of the charge as first delivered, and which was the judge’s own language and thought. We therefore sustain appellant’s eighth assignment of error, so far as embraced in the second proposition of the argument, as follows: “(2) The trial judge erred in partially and inadequately submitting the case to the jury, to defendant’s prejudice.”

We now take up the first proposition of appellant, that, under the evidence, the defendant was entitled to binding instructions in its favor. The burden was on plaintiff to prove that defendant owed the amount claimed. This was shown by the obligation or face of the bonds. The burden was on plaintiff further to show that the amount was owing to him. This was proved *prima facie* by the presumption of fact which the law warrants from possession of the bonds. Thus far the burden of proof was on plaintiff. He assumed or carried it to a point which, in the absence of other evidence, entitled him to a verdict. The defendant then took it up, to show that, notwithstanding plaintiff’s evidence, in equity and good conscience he ought not to recover; and this burden, thus taken up, cannot be shifted back to plaintiff, except by such evidence as, did defendant rest, would entitle it in law, without more, to a verdict. While the evidence adduced by defendant was very strong in support of its plea, we cannot say that it was decisive. That was for the jury. The implied written disclaimer of ownership on the envelope was still retained in possession of Cummings,—neither delivered by him to defendant, nor to any one

for it; and while all his other acts in connection with the bonds were consistent with this written disclaimer of ownership in himself, and acknowledgment of ownership on defendant, the retention of the disclaimer and the bonds in his physical possession left the case to turn on the weight of this evidence, as opposed to the presumption arising from the possession. If a formal written declaration, duly executed and delivered by Cummings, setting forth that the bonds were not his, but belonged to the company, had been produced by defendant, that would have rebutted the presumption arising from the possession of the bonds, and the burden of proof would have been shifted. Plaintiff would have then been bound to show that the writing was obtained either by fraud or mistake. But, as the case stood when the evidence closed, the question was still for the jury, notwithstanding the weight of the testimony in defendant's favor. The failure of plaintiff to give any satisfactory explanation of the writing on the envelope only added to its significance as a disclaimer of right to the bonds. Therefore this assignment is overruled.

The admission of the declarations of Cummings to Miss Ubil was clearly error. The case of plaintiff could not be made out by his ex parte declarations. It was pure hearsay so far as concerned this defendant. We do not, however, consider it of much importance, or as having prejudiced defendant before the jury; but, as the case must go back for retrial, we consider it our duty to pass upon this assignment, and pronounce it sustained, that the case may be relieved from the same technical error in the future.

The ninth and tenth assignments of error are to the rejection of the testimony of Mr. Roberts. The defendant offered to prove by the witness that shortly before the maturity of the bonds, in 1877, he called upon Robert Thompson, then president of the defendant company, in reference to taking up the outstanding bonds, and inquiry was made as to this \$24,000 of bonds. In response to this inquiry, President Thompson told him that these bonds would never be presented. It seems very clear that this testimony was admissible, in view of the theory of plaintiff embodied in his fifth, sixth, seventh, and eighth points. In each of these the court was asked to instruct the jury that the reports and statements of the company, showing these bonds to be an outstanding existing indebtedness, were evidence that Cummings held them, not as bailee, but for a valuable consideration. If this effect was to be given the official statements made with no qualification, certainly the official statement of the president, made in reference to the business of redeeming the bonds, was evidence tending to show that this \$24,000 was not an existing indebtedness, and no provision need be made for it. All these statements are by officers having no per-

sonal interest in declaring a falsehood or in concealing the truth. The official statements of officers, who had access to the books, and knew the indebtedness, are some evidence of the actual indebtedness of the company at the time they were made. The correctness of these statements would depend altogether on the honesty, system, and order in which the business was done in the early history of the road, the accuracy of the books, and the candor of the officers. What effect they should have in inducing belief or disbelief as to the issue of these 24 bonds to Cummings, for value, is another question altogether. The statement showed an outstanding indebtedness by bond in round numbers, with no minutes evidencing that these were intrusted to Cummings as bailee. Therefore, plaintiff argued, the inference is that he held them as a purchaser for value. But no such inference necessarily follows. If pledged for loans by Cummings for the company, technically they were an outstanding indebtedness, and continued so to be until restored to the possession of the company, or until his possession was determined a wrongful one. In its very best aspect, the statements were only evidence to be considered in connection with all the other evidence bearing on the issue. Of themselves, they were wholly without significance. They were not, in law, necessarily "material and persuasive evidence," as affirmed in the fifth point; nor evidence "from which the jury would be justified in drawing a conclusion," as affirmed in the sixth point; nor "presumptive evidence of the truth," as affirmed in the seventh point; nor such evidence as "would justify the jury in finding that the theory of their having been a bailment or trust in these bonds was an afterthought." What effect the testimony should have was wholly for the jury, in view of its character.

The logical conclusion from the unqualified affirmation of each one of these points should have been a peremptory instruction for plaintiff; for, if the evidence was entitled to the effect asked for, that effect was that Cummings was absolute owner of the bonds for value. As framed, each point might properly have been unqualifiedly refused. It was error to unqualifiedly affirm them. But, if the statement were used merely as evidence tending to establish these 24 bonds as an existing indebtedness, then the counter statement of President Thompson to Mr. Roberts, in effect, that they were not part of such indebtedness, was clearly admissible. The case was not tried in a manner calculated to draw from the court a clear and distinct enunciation of the law applicable to the facts, nor to present to the jury clearly the prominent facts on which the issue turned. Counsel on each side, instead of presenting clear legal propositions to the court for decision, seem to have embodied in many of their points conclusions

of fact, so adroitly blended with the law that the result is both technical and substantial error.

The statement of counsel for plaintiff to the jury as to want of unanimity in this court in entering the former judgment, to use the mildest term, was unseemly. The record of a court of record, as every lawyer is presumed to know, is the only evidence of its proceedings. No statement dehors the record is permitted to impeach its verity. But the total disregard of this rule is only equalled by the novelty of the proceedings in this trial. It would appear that the judgment of this court was being submitted for review to the jury, to be passed on by them; its weight to be determined by the unanimity, or want of it, in the court which pronounced it. And this method of trial was adopted by counsel without rebuke from the court, in determining the rights of parties to the sum of \$70,000. We think it better to adhere to the constitutional mode of trial, which certainly does not recognize the jury as a court of appeals from our judgments.

For the reason given, the judgment is reversed, and a v. f. d. n. awarded.

(177 Pa. St. 412)

P. C. WEIST CO. v. WEEKS et al.
LAFEAN et al. v. SAME.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

TRADE-MARK—INFRINGEMENT—INJUNCTION.

Plaintiff, a manufacturer of candies, had a trade-mark thus described in the patent office: "Our trade-mark consists of the letters 'P. C. W.' These letters have generally been arranged as shown in the accompanying fac simile, in which they appear as script, printed in a horizontal line, upon a background of any suitable color; but other forms of letters may be employed, or they may be differently arranged, without materially altering the character of our trade-mark, the essential features of which are the letters 'P. C. W.'" Defendants, engaged in the same business, had a trade-mark described in its registered statement as consisting of the letters "W. H. W., made in script, in white, on a dark ground." These letters were in each case the initials of the founder of the respective business establishments. Defendants used boxes and packages quite similar to plaintiff's, which were made by box manufacturers for the trade, and sold to the trade without discrimination. Defendants also labeled their boxes with the same names for varieties of candies that plaintiff had previously used, and perhaps devised. *Held*, that it was error to grant an injunction against the use of the letters "W. H. W., printed in script, in white, in a horizontal line upon a dark background, the way in which plaintiff's trade-mark was used; the bill being for infringement of trade-mark, and there being no infringement, and the remedy, if any, being by bill charging, as ground of relief, fraud of defendants in attempting to sell their own confectionery by representing it to the public as the production of plaintiff. Mitchell, Dean, and Fell, JJ., dissenting.

Appeal from court of common pleas, Luzerne county.

Suit by Daniel L. Lafean and another, trading and doing business as the P. C. Weist Company, against W. H. Weeks and the W. H. Weeks Company, Limited. Decree for plaintiffs. Defendants appeal. Reversed.

G. L. Halsey and Strawbridge & Taylor, for appellants. H. W. Palmer and Stewart, Niles & Neff, for appellees.

WILLIAMS, J. Monopolies of any sort have never been favorites with the law. They were held by the common law to be against public policy, because against common right. The grants, charters, letters patent, or other form of device or assurance by the sovereign for their creation were declared by the act of parliament of 21 Jac. I. c. 3, to be "utterly void and of none effect, and in no wise to be put in use and operation." Nothing short of the "omnipotence of parliament" is able to exclude a subject from trade in England. 7 Bac. Abr. p. 23. Two exceptions to this general rule were given by the early text writers: First, "It seemeth clear that the king may, for a reasonable time, make a good grant to any one of the sole use of any art invented or first brought into the realm by the grantee." Second, The king may grant to particular persons the sole use of some particular employments, as "of printing the Holy Scriptures and law books," etc. The somewhat curious reason given for the second exception is that an unrestrained liberty to print the books to which it relates might be "of dangerous consequences to the public." To these exceptions a third must now be added, viz. the right of a tradesman to the exclusive use of such signs, words, or symbols as he may have adopted and used in his business to distinguish articles of his own production from all similar articles produced by other persons. These exceptions do not impair the force of the general rule, "Exceptio probat regulam de rebus non exceptis." The rule is unrestricted liberty in the practice of all arts and trades, and in the use of the methods by which they are conducted. He who asserts the right to an exclusive privilege in any department of business must bring himself under the protection of some recognized exception to the rule. The plaintiffs in this case claim an exclusive privilege under the third exception, viz. the right to the sole use of a certain trade-mark adopted, used, and registered by them; and they allege that the defendants have adopted and are now using a trade-mark which is an imitation of, and an infringement upon, their own. It becomes important, therefore, to learn just what the plaintiffs' trade-mark is, and then to determine whether it has been improperly imitated by the defendants.

In the bill filed in this case, the plaintiffs' trade-mark is fully described, and the precise form in which it is registered in the United States patent office is given as fol-

lows: "Our trade-mark consists of the letters 'P. C. W.' These letters have generally been arranged as shown in the accompanying fac simile, in which they appear as script, printed in a horizontal line, upon a background of any suitable color; but other forms of letters may be employed, or they may be differently arranged, without materially altering the character of our trade-mark, the essential features of which are the letters 'P. C. W.'" The business of the plaintiffs was the manufacture of confectionery goods, and particularly of that kind of confectionery known as "caramels." The caramels, when finished, were put up in boxes of various sizes and forms, which are manufactured by box makers and sold to the public generally. The plaintiffs had no exclusive right to their use. They were what is known as "stock boxes." When the boxes were filled, the particular kind of caramel they contained was indicated by printed slips or labels pasted upon them in some suitable position, and another slip or label was placed on each box, having the trade-mark "P. C. W.," which indicated that the caramels were the genuine production of the plaintiffs' factory. These letters were the initials of the name of P. C. Weist, and no one but the owner of the name could rightfully use them without authority from him. The trade-mark of the defendants consisted also of the initials of the founder of the business done by it, W. H. Weeks; and it is described in the answer and in the statement registered in the United States patent office as consisting of the letters "'W. H. W.," made in script, in white, on a dark ground." The defendants are engaged in the manufacture of confectionery, and state in answer that their goods include stick candies, toy forms, caramels, and plain confections, candied fruits, leaves, nuts, and the like. These, when prepared for use, are packed in boxes of various sizes and forms, each of which bears a slip or label indicating the variety of confectionery it contains, and another slip or label displaying the trade-mark, which affords an assurance that the goods one is about to buy are the genuine product of the defendants' establishment.

As a general proposition, the right of W. H. Weeks to the use of his name or initials as a trade-mark is as clear as that of P. C. Weist to the use of his name or initials. *Hoyt v. Hoyt*, 143 Pa. St. 623, 22 Atl. 755. They are not the same. They do not even bear a close resemblance to each other. And the master reached the correct conclusion that there was neither imitation nor infringement shown by the evidence. If the initials had been the same, we do not see how the defendants could have been restrained from using their own; although in that case, we think, there should have been something in the manner of use to distinguish, and enable the public to distinguish, the product of the rival establishments from each other; and it is probable that without it a court of

equity would have restrained the second comer. But in a recent case in New York (*Chas. S. Higgins Co. v. Higgins Soap Co.*, 39 N. E. 490), it was held that the prior use of one's name by other persons in the same business does not destroy the right of him whose name it is to use it. The right to use one's own name seems to have been held to be a personal right, as clear in business as in personal correspondence. We have, however, no such question here. The master has recommended, and the court below has issued, an injunction against the defendants, restraining them from the use of the letters "'W. H. W.," printed in script, in white, in a horizontal line, upon a red background." This decree says to the defendants, "You have a right to your trade-mark, and may lawfully use it;" but, going beyond the claim of the plaintiffs as stated in the bill, it adds, "You must not use the same kind of letters or mode of arrangement or colors used by the plaintiffs." Now, these accessions constitute no part of the plaintiffs' trade-mark. The description filed in the United States patent office states that the letters are generally used in script, but may be used in any other way. They are put upon a background of "any suitable color," no color whatever being named. If this injunction can be sustained on the ground on which it was put in the court below, there is no style of letter, no mode of arrangement, no color in the solar spectrum, to which the plaintiffs cannot lay equal claim. But, as the plaintiffs themselves say in the description from which we have quoted, "the essential characteristic of our trade-mark is the letters 'P. C. W.'" Those are what indicate the ownership and origin of the goods, and they carry their assurance to the public without regard to their own shape, arrangement, or color. A tradesman can have no exclusive right to mathematical lines, to styles of printing, or colors.

The master finds that the defendants have adopted boxes and packages quite like those used by the plaintiffs. The same is no doubt true of most of the confectioners in the commonwealth. The boxes and packages are made by box manufacturers to contain an even number of pounds, or fractions of a pound, and are necessarily uniform in size and general appearance. They are made for the trade, and are sold to the trade, without discrimination. The plaintiffs and the defendants have an equal right to buy from the manufacturers; and they must buy boxes of the sizes and shapes made for, and in use by, confectioners generally. The similarity in size and shape of the boxes does not, therefore, justify the master in finding that they were selected for an improper or fraudulent purpose; for the size and shape of the boxes are determined by the makers, and fixed upon with a view to the accommodation of the largest number of purchasers.

The other circumstance to which the master refers as justifying his decree is the use

of the same names for varieties of candies that the plaintiffs had previously used, and perhaps devised. But one who invents a machine or a new combination, or devises a new article, contributes the result of his skill and his inventive powers to the public if he does not take the necessary step to secure himself an exclusive right to use and vend his invention. If he does not do this, he must not complain if his neighbor appropriates his invention or device to his own use, and enters into competition with him in its production and sale. The ground on which the courts will interfere in such cases is to protect the inventor from the attempt of his neighbor to sell his own work as and for the work of the inventor. This would be enjoined as a fraud upon both the inventor and the public; but, so long as he sells his own work as his own, any man may imitate the unprotected work of any other man as closely as he is able. We think the injunction awarded in this case cannot be sustained upon the findings of the learned master, and should be set aside. If the defendants are really attempting to sell their own confectionery by representing it to the public as the production of the plaintiffs, this, and not an imitation or infringement of the trademark, should be charged in the bill as the ground of relief. The decree is reversed. No order is made in relation to costs.

MITCHELL, J. (dissenting). This is a perfectly clear case of fraudulent effort of appellants to get a part of plaintiff's trade, by such imitation of his boxes, labels, lettering, coloring, etc., as will deceive and mislead intending purchasers. It is an effort which equity ought to, and usually does, enjoin, without reference to the strict doctrine of trademarks. For this reason I would affirm the decree.

DEAN and FELL, JJ., concur.

(177 Pa. St. 643)

WHITE et al. v. CITY OF MEADVILLE et al.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

MUNICIPAL CORPORATIONS—POWERS—WATER SUPPLY.

Corporation Act April 29, 1874, authorized water companies to supply cities with water, and provided for the purchase by the cities so supplied, at their option, after 20 years, of the plant of the company, at a price regulated by its net cost, and gave the court jurisdiction to compel such companies to furnish water at reasonable rates. Act May 23, 1874, gave cities of the third class the exclusive right to supply themselves with water, or to contract with any company for the erection of a water plant, and give it the exclusive right to furnish water to the city. *Held*, that a city, after having contracted for the erection of waterworks by a company, to supply the city with water, had no power to build waterworks of its own.

Bill by J. F. White and others against the city of Meadville and others. Heard on exceptions to the report of a referee. Sustained.

Carl I. Heydrick and C. Heydrick, for plaintiffs. Arthur L. Bates, Thomas Roddy, Geo. W. Haskins, and John O. McClintock, for defendants.

DEAN, J. The city of Meadville was incorporated by act of February 15, 1866, and supplements of 28th March and 6th April, 1870. Its municipal powers and privileges are also regulated by the general act of May 23, 1874, for government of cities of the third class. Before the adoption of the present constitution, its debt exceeded 2 per cent. of the assessed value of its taxable property. On 16th of December, 1873, an election was held to determine whether the city should construct municipal waterworks to supply the inhabitants with water. The vote was 177 for, and 519 against, the proposition. Then, August 5, 1874, the mayor was authorized by councils to appoint a committee to confer with citizens on the subject of a supply of water, and the committee was appointed. No written report seems to have been made, but on 12th of August, following, it was resolved by councils that the proposition of Dick & Gill and others be accepted. Then, on October 23, 1874, a committee of councils and the mayor were authorized to contract for the construction of such works with the Meadville Water Company as soon as the company was duly incorporated. Articles of association were then entered into by 100 citizens and taxpayers for the formation of the company, which was duly chartered 30th of October, 1874; and on 7th of November a contract was signed by the mayor, for the city, attested by the clerk and by the proper officers of the company. This contract provided for a supply of water for all city purposes, in pursuance of the authority conferred by their charter to supply the public, and, further, that connections with the water mains should be made on all the streets, for hydrants, public buildings, markets, fountains, etc.; such connections to be designated by the city. The grades of all streets, lanes, and alleys where water mains should be laid were to be furnished by the city, which should grant the right of way through all such streets, lanes, and alleys. For furnishing water for city purposes, the company was to be paid \$6,000 annually. The contract was to continue 10 years, and then for another 10 years, with some change of compensation for fire hydrants. The company then proceeded with the construction of its works, and completed the same at a cost of about \$185,000. The city made annual appropriations to pay for the water furnished for city purposes up until 1893, when further payment was refused on the ground that the original contract was invalid for want of proper ordinance authorizing the same.

On September 21, 1894, city councils passed an ordinance that \$75,000 of city bonds should

be issued for purpose of constructing new municipal waterworks. Notice was then given of an election for the proposed increase of debt, in which it was stated that the assessed valuation of the city was \$2,030,000, and the existing debt \$81,500; that the proposed increase of debt for the construction of the waterworks was 3.7 per cent. The majority of the voters favored the increase of debt. Councils then, on March 11, 1895, adopted this ordinance: "That a system of waterworks be built and erected for the use of the city of Meadville for the purpose of supplying said city with water, and such persons and corporations as may desire the same; to be made and completed in accordance with the plans to be provided by the civil engineer of the city." The city engineer prepared plans for the new works, embracing about 22 miles of mains to be put down on the streets and alleys of the city, reaching for the most part all the consumers of water supplied by the old company. Further, the city entered into a contract with Chandley Bros. & Co. for the construction of the works in accordance with the plans of the city engineer; the price to be paid being \$104,723, not including cost of land for pumping station, water wells, reservoir, or right of way through private land. These plaintiffs then filed this bill to restrain the city from carrying out the contract, they averring in said bill (1) illegality and irregularity of the election for increase of debt; (2) that the proposed increase of debt exceeded the constitutional limit of municipal indebtedness; (3) that the construction of municipal works, in view of the contract obligations of the city with the Meadville Water Company, was without authority of law, and, even if the power existed, the proposed exercise of it was a gross abuse of the power. The city filed an answer denying all the material averments of plaintiffs' bill, and conclusions of law therefrom, and further affirmatively alleging that the original contract was invalid, not being authorized by proper ordinance, and therefore was not binding upon the city. By agreement of the parties, Theodore Lamb, Esq., was appointed referee, to report facts and conclusions of law. He made a report, and on the facts concludes (1) that, although there was no formal ordinance authorizing the contract, the city, by subsequent distinct, unequivocal acts, running through years, had ratified it, and was legally bound by its terms; (2) the irregularities attending the election on the question of increase of indebtedness were not sufficiently grave to invalidate it; (3) that the proposed increase of indebtedness by the contract with Chandley Bros. & Co. for construction, added to the existing bonded indebtedness of the city, did exceed 7 per cent. of the taxable property, and was therefore void, being in violation of the constitution; (4) that the city has full power to make the contract, if the debt had not exceeded the constitutional limit. It is therefore suggested that an injunction issue to restrain the city from further proceeding with the construction of the municipal works. Both par-

ties have filed exceptions to this decree. We fully concur in the referee's findings of fact, and approve all his conclusions of law, except the tenth. This disposes of all the exceptions on both sides but the plaintiffs' fifth exception, which is to the referee's conclusion that the city had power to make the new contract, notwithstanding its liability on the old one. It is perhaps needless to say that the question raised is not altogether free from difficulty, and we might avoid passing upon it in this particular case; but the same question is already before us in one other case, and like circumstances existing in perhaps a hundred others, involving millions of property, may raise it in the future. Therefore our plain duty is to pass upon it here. We have had the aid of full and able argument on each side. The full bench has given it prolonged and complete consideration in all its aspects, and as a result this judgment is fully concurred in by every member of the court.

As before noted, the question is raised by the referee's tenth conclusion of law, as follows: "(10) In the opinion of the referee, the right of the city of Meadville to build waterworks is one governed by legal considerations alone. Has the city power to do so? If so, the works may be constructed, and no equitable considerations can stay her hands. When the Meadville Water Company constructed its plant, it did so with knowledge that the city had the right to construct waterworks at any time, and it was bound to know that the city had the right to reconsider its determination not to do so at any time. The building of other works may, and undoubtedly will, seriously affect the present company, but the loss that may occur is one for which the law allows no compensation. It seems to me that the cases of *Lehigh Water Co.'s Appeal*, 102 Pa. St. 515, and *In re Millvale Borough*, 182 Pa. St. 374, 29 Atl. 641, 644, fully settle this doctrine."

The general borough act of 1851, under which Meadville first became a municipality, gave authority to boroughs to "light the streets, to provide a supply of water for the use of the inhabitants, * * * to make all needful regulations for the protection of pipes, lamps, reservoirs, and other construction or apparatus, and to prevent the waste of water so supplied." This clause was reenacted in the city's special charter of 1866, with the addition of authority to supply itself with water for fire purposes. And so the authority continued, as the referee finds, down to August 13, 1891, when, by proper official action, it accepted the provisions of the act of assembly of May 23, 1874, providing for the organization and government of cities of the third class, in which class it took its appropriate place. That act authorizes cities of this class, in their corporate capacity, to "supply with water the city and such persons, partnerships and corporations therein as may desire the same, at such prices as may be agreed upon, and for that purpose have at all times the unrestricted right to

make, erect and maintain all proper water works, machinery, buildings, cisterns, reservoirs, pipes and conduits for the raising, reception, conveyance and distribution of water, or to make contracts with, and authorize, any person, company or association to erect all proper water works, machinery, buildings, cisterns, reservoirs, pipes and conduits for the raising, reception, conveyance and distribution of water, and give such persons, company or association the exclusive privilege of furnishing water as aforesaid for any length of time not exceeding ten years." The fiftieth section of the same act, in order to effect the powers thus given more fully, authorizes the purchase by the city, at such price as may be agreed upon, of the rights, privileges, and franchises of any water company then in operation, and thereafter to exercise all the powers of the company so purchased. The fifty-third section confers on the city the right of eminent domain, and authorizes it to appropriate such land and property as may be required in the construction of waterworks. The corporation act of 29th April, 1874, gives to water companies the right to introduce into boroughs and cities, wherever they may be located, a sufficient supply of pure water; and, when completed, its right in the locality by its works is exclusive, until, during a period of five years, the company has divided among its stockholders a dividend equal to 8 per cent. upon its capital stock. Then it is made lawful, after 20 years from the introduction of the water, for the municipality to become the owner of the waterworks, by paying the net cost of erecting and maintaining the same, with interest thereon at the rate of 10 per cent. per annum, deducting from such interest, however, any dividends theretofore declared. Both acts were passed at the same session of the legislature, within four weeks of each other. They are very elaborate, apparently making provision for every contingency that occurred to the legislative mind at the date of their passage; and clearly, from the proximity in dates of their discussion and enactment, no provision in the later act was intended to repeal the first directly or by repugnancy. In *Smith v. People*, 47 N. Y. 330, is this apt language, applicable to such facts: "Statutes enacted at the same session of the legislature should receive a construction, if possible, which will give effect to each. They are within the reason of the rule governing the construction of statutes in *pari materia*. Each is supposed to speak the mind of the same legislature, and the words used in each should be qualified and restricted, if necessary, in their construction and effect, so as to give validity and effect to every other act passed at the same session."

Here, then, plainly, were two distinct methods by which the municipality could supply its citizens with water. By putting either method in operation the same end was accomplished; that is, the supplying of the citizens with water. There is no repugnancy in the provi-

sions of the two acts, on the assumption that one or the other alone will be adopted to effect the purpose. There will be a decided repugnancy in their operation if both be put at work at the same time to effect that purpose. If anything be manifest, it is that if two water mains be laid side by side on the same street, equally accessible to the householder on each side, conveying double the quantity needed, with double sets of hydrants, pumping stations, offices, salaries, and expenses, one or the other must be abandoned. No community will pay double for any article of necessity or luxury. If the property holder must, by compulsory taxation, support the municipal system, he will not voluntarily support the private corporation system. Such a conflict of interests will inevitably bankrupt the system which depends on the voluntary patronage of the public. We hesitate to assume—every court is bound to hesitate long before assuming—that the legislature intends, by grants to distinct corporations for public purposes, that there shall arise such conflict in the exercise of the franchises as will result in the practical destruction of property of any citizen without compensation. It is a cardinal rule of construction, between older and younger grants of franchises, that the sovereign does not intend that the younger shall infringe on the older; but to assume that these franchises can be in existence and in operation at the same time is to assume that the commonwealth has granted precisely the same thing to the municipality that it had already granted to the water company, for, in a business view, the contemporaneous exercise of the franchises is impossible. Therefore, in approaching the consideration of the words of the acts, the judicial mind, at the start, must incline against the conclusion of the learned referee. Consider, then, the words of clause 9 of the twentieth section of the act of 23d May, 1874. The city is "to have at all times the exclusive right to supply itself with water, and such persons, partnerships and corporations at such prices as may be agreed upon." This is the grant by the commonwealth of the power or authority to its creature, the municipality, which without the grant was helpless, in this purely commercial matter. It was not an exercise of governmental power, which would be implied from the mere creation of a municipality. In *Western Savings Fund Soc. v. City of Philadelphia*, 31 Pa. St. 185, this court, in discussing this question, adopted this language: "As a local sovereign, it [the city] had no authority to enter into the business of manufacturing and selling gas; for its sovereignty did not extend to such subjects, any more than it did to almost any other manufacture. It is true, a municipal corporation is not bound by any engagement which prevents a discharge of the duties imposed upon it by its organic law, for the plain reason that such engagements are contrary to law. But, when such a corporation engages in things not pub-

lic in their nature, it acts as a private individual,—no longer legislates, but contracts,—and is as much bound by its engagements as is a natural person. The distinction between public duties and private business is wide and obvious.” Therefore the grant specifically of the means by which the power may be executed is given. It shall have the unrestricted right to erect and maintain proper waterworks, machinery, buildings, and reservoirs to convey and distribute the water. First is the exclusive power to supply itself, and then the powers incident to and necessary to make the first power effective. To have granted the right only to supply itself would have left a doubtful implication, as to whether it might erect its own works, or should buy its supply from corporation dealers in water. But after the grant of the right to supply, and the one method of exercising the right, it occurs to the legislative mind, as all such grants are strictly construed, and this prescribes but one method, that the city may be shut up to that one. The legislature, only 24 days before, had enacted that water companies might be authorized to supply water, and should have power to erect and maintain all works and machinery necessary and proper for raising and introducing into the town, borough, city, or district where they may be located a sufficient supply of pure water. Here was another kind of corporation than municipal, empowered to convey and distribute water to cities and towns. The city may not desire to erect and manage its own waterworks; may prefer to purchase water. Then comes the grant of a second method of supplying itself with water: “Or to make contracts with and authorize any persons, company or association” to convey and distribute the water for any length of time not exceeding 10 years. The primary grant was the power to supply; the secondary one, the grant of two distinct methods of exercising the power, either of which might be adopted. There was no grant of power to put both methods in operation at the same time; for once the power has been exercised to supply the city, by contract, through another creature of the same sovereign, then the municipal function has passed from the city, and must be performed by the other contracting party, which last has rights and obligations imposed upon it by law, as clearly defined and as capable of enforcement as those of the city. As long as the city keeps within the scope of its powers to bargain, it must stand by the bargain, the same as an individual. We do not doubt that the legislature could, by the act of 23d May, 1874, have granted to the city the right to change back and forth from one method of supply to the other, as whim or interest might dictate. It is sufficient to say that it did not do so. This view of the scope of legislation on this subject accords with the known facts. A municipality, in its beginnings, is perhaps not financially strong, or its debt may approach the constitutional limit so closely that it cannot borrow. Nevertheless the low state

of its financial condition does not render less urgent the necessity of a water supply. It can obtain it in but one way,—by contract with those who have the money, and are willing to invest their private capital in the construction of waterworks. The legislature knew that capital would not be invested in such an enterprise if in the future it were liable to confiscation by competition with a public enterprise operated from a municipal treasury capable of replenishment from the pocket of the taxpayer. That fact suggested clause 7 of the corporation act. The municipality will not be forever poor. The time will come when it will be of financial ability to own and operate its own works. The very fact of having a supply of water on an investment of private capital has tended to stimulate its growth, and to largely appreciate the value of taxable property. Therefore, says the legislature: “It shall be lawful at any time after twenty years from the introduction of water or gas, as the case may be, into any place as aforesaid, for the town, borough, city or district in which the said company shall be located, to become the owners of said works, and the property of said company, by paying therefor the net cost of erecting and maintaining the same, with interest thereon, at the rate of ten per centum per annum, deducting from said interest all dividends theretofore declared: provided, that nothing in this section contained shall authorize a company incorporated under the provisions of this act to construct gas or water works within the limits of any municipality, when gas or water works shall have been constructed by said municipality, without the lawful consent of the corporate authorities thereof: and provided further, that the court of common pleas of the proper county shall have jurisdiction and power upon the bill or petition of any citizen using the gas or water of any of said companies to hear, inquire and determine as to the charges thereof for gas or water so furnished, and to decree that the said bill be dismissed, or that the charges shall be decreased, as to the said court may seem just and equitable, and to enforce obedience to their decrees by the usual process.”

It is correct, as argued by defendants, that this clause is repealed by the act of May 23, 1889; but as between these contracting parties, whose rights vested at the date of the contract, the subsequent act could not divest them. If the act of 1874 had provided that the works should be taken at their actual value, and then had enacted a merely different form of procedure to ascertain the value, the contract right would not, perhaps, have been affected by the act of 1889. But here the value is a fixed one,—the net cost, with interest at 10 per cent. per annum, deducting dividends. The result is one of computation. There is no room for discretion or judgment, which may be exercised under one form of proceeding as well as another. Both the contracting parties must be conclusively presumed to have had in

view the law which empowered them to contract, and which became part of the contract. At the end of 20 years the defendants have a right to take the works at a price fixed by the law, and that is one of computation. True, as to the city, the taking of the works is only permissive. It is not bound to take them; while, if the city demands, plaintiffs are bound to surrender them. But, if the city does not choose to become the owner of the works in the mode pointed out in the act, it has no power to destroy their value by duplicating them at the expense of the taxpayers.

As to the question raised by clause 3, we decline to discuss it, as it has no bearing on the one before us. It will be time enough for that when two private corporations seek to exercise their franchises in the city at the same time.

The argument that by this construction the citizens are in the power of a private corporation, having the sole authority to determine the price, quantity, and quality of the water supply, is completely answered by the second proviso to clause 7, and subsequent legislation regulating the conduct of water companies. *Brymer v. Water Co.*, 172 Pa. St. 489, 33 Atl. 707; *Com. v. Russell*, 172 Pa. St. 506, 33 Atl. 709. The two cases cited by the referee as sustaining his decision (*Lehigh Water Co.'s Appeal*, 102 Pa. St. 515, and *In re Millvale Borough*, 162 Pa. St. 374, 29 Atl. 641) are in apparent conflict with this judgment; and the language of the court, to some extent, in both cases, would lead to a different conclusion from the one to which we have come. The first case, on its facts, however, is not the same as this. By a supplement to the act incorporating the borough of Easton, March 12, 1867, the town council was authorized to construct and provide waterworks, and elect water commissioners. Then, by another supplement, April 15th of same year, the borough was authorized to construct or purchase waterworks. In this case the municipality had, by these special acts, with the consent of the majority of voters, the authority to erect its own waterworks; and this special legislation constituted part of its corporate power, antedating the present constitution and the acts of 1874. By the schedule to the constitution it is declared: "All laws in force in this commonwealth at the time of the adoption of this constitution, not inconsistent therewith, and all rights, actions, prosecutions and contracts shall continue as if this constitution had not been adopted." It was held that the authority conferred by the special acts of 1867 was not taken away by the act of 1874 giving the exclusive right to the water company. When it is noticed that the controversy turned on the repeal or nonrepeal of the special acts, and whether the borough had, by inaction under the special law, lost its right to construct municipal waterworks, the distinction between that

case and the one before us is obvious. Without adverting to what was said by Justice Paxson in delivering the opinion, and considering only what was decided, there is no conflict between that case and this. In *Re Millvale Borough*, supra, it was assumed by all parties in the court below, and by the learned judge of that court, that the authority of the municipality to violate its contract existed. On the appeal the point pressed in this case was scarcely touched upon in the argument. With the greatest reluctance on the part of every member of this court, the decree of the court below was affirmed. That reluctance is expressed in no doubtful language by our Brother Green, who delivered the opinion. In fact, it was assumed by all counsel and both courts that *Lehigh Water Co.'s Appeal*, supra, was decisive of the contention on that point, and the case went against the water company on other grounds. It was a mistake. We now are glad of the opportunity for correction,—especially so because the example of Millvale borough seems to have misled other municipal corporations to adopt the same course of action. *Luzerne Water Co. v. Toby Creek Water Co.*, 148 Pa. St. 568, 24 Atl. 117, also cited by defendants, was a controversy between two rival companies, and the power of the municipality did not come in question. Therefore in this case we are of opinion, for the reasons given, that the fifth exception to the learned referee's tenth conclusion of law should be sustained, and it is decreed accordingly. Further, it is directed that the said defendants, and each and every of them, be restrained by a permanent injunction from entering into contract for the construction of waterworks in accordance with the plans prepared by the city civil engineer as aforesaid. It is further ordered that defendants pay the costs of this proceeding.

(177 Pa. St. 306)

WOOD v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

NEGLIGENCE—PROXIMATE CAUSE—INJURY RESULTING FROM COLLISION AT RAILROAD CROSSING—PRESUMPTION.

1. Negligence in failing to give a signal at a railroad crossing, resulting in the killing of a person on the crossing, cannot be held the proximate cause of the injury resulting from the body being thrown against one standing on a depot platform, 50 feet from the crossing.

2. Negligence in failing to give a signal at a railroad crossing does not in any way contribute to the injury of a person on a depot platform near by, resulting from there being thrown against him the body of a person struck by a train at the crossing, the latter person having, notwithstanding the absence of signals, seen the train, and attempted to cross in front of it.

3. One killed while attempting to cross a railroad will be presumed to have made the attempt with knowledge of the train's approach, though it gave no signal, where all the witnesses with like opportunity saw or heard the train approaching.

Appeal from court of common pleas, Philadelphia county.

Action by Joseph Wood against the Pennsylvania Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Frederick J. Knaus and Thomas Leaming, for appellant. John Hampton Barnes and Geo. Tucker Blapham, for appellee.

DEAN, J. We take the facts as stated by the court below, as follows: "On the 26th of October, 1893, the plaintiff, having bought a return ticket, went as a passenger upon the railroad of the defendant company from Frankford to Holmesburg. After spending the day there, attending to some matters of business, he concluded to come back upon a way train, due at Holmesburg at 5 minutes after 6 in the evening. While waiting for this train, the plaintiff stood on the platform of the station, which was on the north side of the tracks, at the eastern end of the platform, with his back against the wall at the corner. To the eastward of the station, a street crosses the railroad at grade. How far this crossing is from the station does not appear from the evidence. It was not so far away, however, but that persons on the platform could see objects at the crossing. For at least 150 yards to the eastward of the crossing the railroad is straight, and then curves to the right. About 6 o'clock an express train coming from the east upon the north track passed the station, and the plaintiff, while standing in the position described, was struck upon the leg by what proved to be the dead body of a woman, and was injured. The headlight of the approaching locomotive disclosed to one of the witnesses who stood on the platform two women in front of the train at the street crossing, going from the south to the north side of the tracks. One succeeded in getting across in safety, and the other was struck just about as she reached the north rail. How the woman came to be upon the track there is nothing in the evidence to show. There was evidence that no bell was rung or whistle blown upon the train which struck the woman before it came to the crossing, and some evidence that it was running at the rate of from 50 to 60 miles an hour. Upon this state of facts, the trial judge entered a nonsuit." The court in banc having afterwards refused to take off the nonsuit, we have this appeal.

Was the negligence of defendant the proximate cause of plaintiff's injury? Judge Pennypacker, delivering the opinion of a majority of the court below, concluded it was not, and refused to take off the nonsuit. Applying the rule in *Hoag v. Railroad Co.*, 85 Pa. St. 293, to these facts, the question on which the case turns is: "Was the injury the natural and probable consequence of the negligence,—such a consequence as, under the surrounding circumstances, might and ought to

have been foreseen by the wrongdoer as likely to flow from his act?" As concerns the situation of plaintiff at the time of his injury, and the relation of that fact to the cause, whether near or remote, we do not consider it important. He was where he had a right to be,—on the platform of the station. That he had purchased a ticket for passage on defendant's road, and was waiting on its platform for his train, has no particular bearing on the question. The duty of defendant to him at that time was to provide a platform and station, safe structures, for him and others who desired to travel. In this particular its duty was performed. The injury is not in the remotest degree attributable to the platform or the station. It is sufficient to say, when there, he was not a trespasser on defendant's property, and therefore his action does not fail for that reason; but he is in no more favorable situation as a suitor than if he had been walking alongside the railroad, on the public highway, or at any other place where he had a right to be. The rule quoted in *Hoag v. Railroad Co.*, supra, is, in substance, the conclusion of Lord Bacon, and the one given in *Brown's Legal Maxims*. It is not only the well-settled rule of this state, but is, generally, that of the United States. Prof. Jagard, in his valuable work on Torts, after a reference to very many of the cases decided in a large number of the states, among them *Hoag v. Railroad Co.*, comes to this conclusion: "It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is a proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." Jag. Torts, c. 5. Judge Cooley states the rule thus: "If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some others, and result, and does actually result, in injury, through the intervention of other causes not wrongful, the injury shall be referred to the wrongful cause, passing through those which were innocent." Cooley, Torts, 69. This, also, is in substance the rule of *Hoag v. Railroad Co.* All the speculations and refinements of the philosophers on the exact relations of cause and effect help us very little in the determination of rules of social conduct. The juridical cause, in such a case, as we have held over and over, is best ascertained in the practical affairs of life by the application to the facts of the rule in *Hoag v. Railroad Co.* Adopting that rule as the test of defendant's liability, how do we determine the natural and probable consequences, which must be foreseen, of this act? We answer in this and all like cases: from common experience and observation.

The probable consequence of crossing a railroad in front of a near and approaching train is death, or serious injury. Therefore, acting from an impulse to self-preservation, or on the reflection that prompts to self-preservation, we are deterred from crossing. Our conduct is controlled by the natural and probable consequence of what our experience enables us to foresee. True, a small number of those who have occasion to cross railroads are reckless, and, either blind to or disregardful of consequences, cross, and are injured, killed, or barely escape. But this recklessness of the very few in no degree disproves the foreseeableness of the consequences by mankind generally. Again, the competent railroad engineer knows from his own experience and that of others in like employment that to approach a grade highway crossing with a rapidly moving train without warning is dangerous to the lives and limbs of the public using the crossing. He knows death and injury are the probable consequences of his neglect of duty; therefore he gives warning. But does any one believe the natural and probable consequence of standing 50 feet from a crossing, to the one side of a railroad, when a train is approaching, either with or without warning, is death or injury? Do not the most prudent, as well as the public generally, all over the land, do just this thing every day, without fear of danger? The crowded platforms and grounds of railroad stations, generally located at crossings, alongside of approaching, departing, and swiftly passing trains, prove that the public, from experience and observation, do not, in that situation, foresee any danger from trains. They are there because, in their judgment, although it is possible a train may strike an object, animate or inanimate, on the track, and hurl it against them, such a consequence is so highly improbable that it suggests no sense of danger. They feel as secure as if in their homes. To them it is no more probable than that a train at that point will jump the track and run over them. If such a consequence as here resulted was not natural, probable, or foreseeable to anybody else, should defendant, under the rule laid down in *Hoag v. Railroad Co.*, be chargeable with the consequence? Clearly, it was not the natural and probable consequence of its neglect to give warning, and therefore was not one which it was bound to foresee. The injury, at most, was remotely possible, as distinguished from the natural and probable consequences of the neglect to give warning. As is said in *Railroad Co. v. Trich*, 117 Pa. St. 399, 11 Atl. 627: "Responsibility does not extend to every consequence which may possibly result from negligence." What we have said thus far is on the assumption the accident was caused solely by the negligence of defendant, or by the concurring negligence of defendant and the one killed going upon the track with a locomotive in full

view. This being an action by an innocent third person, he cannot be deprived of his remedy because his injury resulted from the concurrent negligence of two others. He falls because his injury was a consequence so remote that defendant could not reasonably foresee it.

But there is another view which may be taken of this evidence. Assuming defendant was negligent, did that negligence contribute in any degree to the result? The uncontradicted evidence showed the train could be seen from 150 to 200 yards distant. Plaintiff himself testifies he heard it coming, although he heard no whistle or bell; and all his witnesses had notice of it. Even those sitting in the waiting room got up to go out, supposing it was their train. Some heard the rumbling; some saw the headlight. Assume, then, the fact to be that no warning was given by bell or whistle, and in that particular defendant, in its general duty to the public, was negligent, was this the cause of the injury? To so find, we must presume the deceased and her companion failed to hear or see what all the others saw or heard. There is no reason for such presumption. While, in the absence of any evidence on the question, the presumption would be that the two women, before crossing, stopped, looked, and listened, and then, because no warning was given, they, without apprehension of danger, attempted to cross, still, when all the other witnesses with like opportunity either saw the headlight or heard the rumbling of the approaching train, the reasonable presumption is they saw and heard it too. If this be so, they attempted to cross with the same knowledge of the same peril they would have had if the bell had been rung and whistle blown. Therefore the sole cause of the injury was not the negligence of defendant, but the negligence of deceased. In such case there could have been no recovery by the representatives of the deceased woman, for, whatever might have been the negligence of defendant, it was no more the cause of the accident than if it had neglected to give warning at some other crossing. The case could not have reached the jury unless they had been permitted to infer she had neither seen nor heard the same warnings that all plaintiff's witnesses saw and heard. If the companion of deceased, or other witnesses, had testified they neither saw nor heard the approaching train, the case would have been altogether different; but, as it stood, there was no proof that the alleged negligence of defendant contributed to the death of the woman. In this view the negligence was not even concurrent. True, there was negligence, but the same result followed as if defendant had exercised care. Therefore the injury was attributable to her sole negligence. While the proper warning on approaching a crossing is the sound of a whistle or the ringing of a bell, no accident can be properly said to

be the consequence of the neglect to give such warning if the public be apprised of the danger by other sounds or signals. The injury then is caused solely by the neglect of the injured person to heed the danger.

On both grounds we think the nonsuit was properly entered. The judgment is affirmed.

(177 Pa. St. 168)

In re MILLER'S ESTATE et al.

Appeal of REYNOLDS.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

MECHANICS' LIENS—MORTGAGES—PRIORITY.

1. Where a mortgagee, at the time of taking his mortgage, has notice of the commencement of a building on the land, from its visible erection, the mortgage will be held inferior to mechanics' liens subsequently filed.

2. Where a mortgage shows on its face that a building was erected upon land before the mortgage was given, and mechanics' liens are subsequently filed against the building, the mechanics' liens are prior to the mortgage; and therefore, on a sale of the land by the assignee of the mortgagor for the benefit of creditors, under order of the court, the mortgage is divested.

Appeal from court of common pleas, Wyoming county.

Appeal by William M. Reynolds in the matter of the assigned estate of A. P. Miller and another, from a decree of distribution. Reversed.

The history of the case was as follows:

"A. P. Miller and Mrs. A. M. Mack (wife of H. A. Mack) entered into co-partnership, under the title or firm name of the Tunkhannock Manufacturing Company, for the purpose of erecting a factory building, and prosecuting the business of manufacturing 'spools.' To this end, they purchased a tract of land, comprising about three acres, situate in the borough of Tunkhannock, being the same property from the sale of which the real estate fund for distribution is derived. On the 9th day of March, 1893, the title to the said land was conveyed by deed to the said A. P. Miller and A. M. Mack individually, or as tenants in common, and not as partners. On the next day, March 10, 1893, the work of erecting a factory building was commenced upon the ground. In the prosecution of this enterprise a large indebtedness was incurred by the said parties, both separately and jointly, as individuals as well as in the name of the Tunkhannock Manufacturing Company. On the 13th day of June, 1893 (when the building was nearly completed, and being furnished with steam power and machinery requisite for the operation of the factory), the said A. P. Miller and A. M. Mack gave a mortgage upon the premises to Peter A. Miller (father of A. P. Miller) for the sum of \$4,000. The next lien is a judgment in favor of Peter A. Miller for \$465.00 against A. P. Miller, A. M. Mack, and H. A. Mack, entered November 1, 1893. Same day, judgment (Peter A. Miller against A. P. Miller) for the sum of \$2,500 was entered. Other

judgments were entered later. Some were entered after the assignment, which, of course, are only evidences of indebtedness, and not liens upon the spool factory. The Tunkhannock Manufacturing Company failed in business; and on the 22d day of November, 1893, the said A. P. Miller and A. M. Mack made a general assignment of their individual, as well as partnership, property, for the benefit of their creditors, to C. O. Dersheimer. There were no mechanics' liens on record at this time, but shortly afterwards a large number of claims were filed against the factory building. In none of them was the date of the commencement of work on the building stated, but nearly all of the items shown by the bills of particulars antedated the mortgage. It may be well to explain that most of these liens are on record in three forms or separate entries. In all of these forms the names of A. P. Miller and A. M. Mack are given as owners, but, as a precaution against misnomer, a different name is used as contractor in each of the forms. *Scifas* were issued on all these mechanics' liens, but no judgments have been taken, and the suits are still pending. These claims were all filed within six months after their last items, are made up in the form prescribed by law, and are admitted by all parties to be good and valid liens as against the defendants therein and the property for the amounts claimed by them, except a small deduction agreed upon, and that costs should only be taxed on one 'form' in each lien. A full abstract of the records of the deeds, mortgage, judgments, and mechanics' liens hereinbefore referred to was made up, admitted to be correct, and received as evidence by the agreement of all parties. This abstract is hereto attached (or filed herewith), and reference is made to it, if more particularity is desired in relation to matters shown therein. It was also admitted that the judgments recited in said abstract were all correct, and that the amounts were due upon them as shown by the record. It was further agreed in reference to the mechanics' liens that the assignee might at once pay 80 per cent. of the principal due upon each of them. The assignee has made such payments, and presented to the auditor receipts for the same, which are hereunto attached. The spool factory was sold by the assignee under an order of court, and the sale was confirmed finally on the 9th day of May, 1894.

"There are two separate funds here for distribution, as follows:

Amount received on sale of real estate	\$7,949 10
Amount received as interest after the sale	129 15
Total real estate fund.....	\$8,078 25
Amount received from personal property	\$620 73
Amount received, interest on same...	8 05
Total personal fund.....	\$628 78

"While the real estate was the individual property of A. P. Miller and A. M. Mack, and therefore must be first appropriated to their personal indebtedness, it was admitted and agreed that the personal fund was derived from the property of the Tunkhannock Manufacturing Company, and, being partnership assets, should be first applied to the payment of claims against that firm.

"As all the parol evidence and some record and documentary evidence was admitted by the auditor, against objections, at the suggestion of all the counsel engaged, the final decision of all such questions was reserved until final argument and making this report. One of these questions, as will be seen hereafter, is the vital and important one in the case. Without stopping here to discuss or even to refer particularly to each of the questions separately, the auditor, upon careful consideration, disposes of them all in this way: 'All objections to evidence, as shown by the auditor's notes, are overruled, and the testimony allowed to stand, except as to the objection to the records and files offered by Mr. Jorden in proceedings on the part of purchasers to set aside the assignee's sale. That testimony, to the mind of the auditor, is so clearly irrelevant, immaterial, and incompetent that he now sustains the objections, and excludes the evidence. Were it retained and considered, there is nothing in the facts proven which would affect or change the auditor's opinion upon the whole case.'

"At the first meeting of the audit, Mr. Terry presented the mortgage, and also the judgments owned by Peter A. Miller, as claims against the fund for distribution arising from real estate. Messrs. Little, representing one of the mechanics' liens and some other claims, made the same claim. Mr. Jorden, representing the interests of A. P. Miller, one of the assignors, as well as some judgment and other claims, and Messrs. Platt, representing all the mechanic's lien claimants and some other interests, objected to the allowance of the mortgage as a claim upon the fund, contending that its lien was not divested by the sale, but still remained upon the land. Before the second meeting, however, Mr. Miller sold and assigned his mortgage to William N. Reynolds, 'without prejudice to Miller's rights as a judgment creditor.' So at that meeting Mr. Terry changed his ground, and objected to the payment of the mortgage out of the fund. Mr. Platt now also shifts his position, and, withdrawing his objection to the allowance of the mortgage as a claim upon the fund, claims that it was divested and should be allowed. Messrs. Little now, as attorneys for William N. Reynolds, represented the mortgage, and still maintained the same claim they made at first, that the mortgage was divested. They and Mr. Platt now acted in conjunction on one side of the case, while Mr. Terry, Mr. Jorden, and Mr. Dewitt (who now appeared in the case, representing the interests of A. P. Miller, one of the assignors)

acted together or in conjunction on the other side. (This explanation is made for the purpose of showing the reasons for what might otherwise seem a strange and unusual proceeding on the part of some of the counsel, and also the position of all the attorneys in the final proceedings.) The admissions heretofore referred to as to the validity of the mechanics' liens, and especially the one as to the time work was commenced upon the building, were made by Mr. Dewitt and counsel associated with him (after objections to the admission of parol evidence), for the purpose of saving time and expediting the proceedings; and it was understood that such admissions were not to be considered in any way as a waiver of the objection to these facts being received in evidence.

"It was argued with much force and conspicuous ability by Mr. Dewitt, and also by Mr. Terry and Mr. Jorden, that while it has been proven and admitted that the mechanics' liens are legal and valid, and that work on the building was commenced before the mortgage was entered, yet they cannot take priority over the mortgage, so as to cause its lien to be divested by the assignee's sale, because, they say, it is necessary to such a result, not only that the commencement of the work should antedate the mortgage, but also that this fact should appear upon the record, and cannot be shown by parol or other evidence dehors the record; and that as in this case such fact does not appear anywhere in the record of the mechanics' liens, and is only offered to be proven by parol, the mechanics' liens have no priority, so as to divest the mortgage. On the other hand, it was contended with equal earnestness and ability by Messrs. Little and Platt that the law prescribes how a mechanic's lien shall be entered, and what the claim shall set forth; that in no case is it necessary to state the time when work on the building was commenced, and that this fact can always be proved by parol; that, when a mechanic's lien is entered so as to be valid, the law at once gives it priority over all mortgages or judgments entered after the commencement of the building; that the mortgage, therefore, under the facts as shown in this case, was divested by the assignee's sale; and that it not only can, but must, seek payment out of the fund."

W. E. & C. A. Little, James W. Platt, and James E. Frear, for appellant. John A. Sittser, D. C. Dewitt, E. J. Jorden, and Chas. E. Terry, for appellees.

GREEN, J. If the mechanic's lien claims in this case had been entered of record before the mortgage was entered, as a matter of course the mortgage would not have been the first lien, and it would have been divested by the sale. It seems to be conceded in the several cases that have been before us that, if the liens had disclosed on their face the date of the commencement of

the building in question, they would, in legal contemplation, have been prior liens, although not filed until after the mortgage was recorded, and the mortgage would have been discharged. If the mortgagee had received distinct notice of the commencement of the building before he took or entered his mortgage, it is difficult to understand why he would not be bound by such notice, just as much as he would have been bound by notice of a prior unrecorded mortgage by such a notice. As to the latter class of liens the law is so thoroughly well settled by an unbroken line of decisions that it is not necessary to cite them. A mere reference to a few of them is sufficient. *Britton's Appeal*, 45 Pa. St. 172; *Lahr's Appeal*, 90 Pa. St. 507; *Phillipsburg Sav. Bank's Appeal*, 10 Wkly. Notes Cas. 285.

Now, in the present case it happens that the mortgage which was taken by Peter A. Miller, and which is claimed to be the first lien, contains a distinct recital of the buildings on the land bound by the mortgage, including the factory building in question. The words of the mortgage are: "The improvements on said land are as follows, to wit, two dwelling houses and one barn and one factory building, including all the machinery therein, engine, and boiler attached thereto." As there is no pretense that there was more than one factory building on the premises, the mortgagee had distinct notice of its existence prior to the date of his mortgage. If there were any question upon this subject, it would have to be left to the jury to determine. So far, then, as the mortgagee is concerned, he had distinct notice by his mortgage that the building had been, at least, commenced, before he took his mortgage. He also had notice because of the visible erection of the building which was proceeding on the ground. In *Reading v. Hopson*, 90 Pa. St. 494, we said (*Sharswood, C. J.*): "It did not appear on the face of the claim when the building was commenced. The question, then, is whether the purchaser at the sheriff's sale can give parol evidence of this fact, so as to show that the lien of the mortgage was divested. As between the claimant and the mortgagee, this, undoubtedly, might have been done, for the reason that, if the fact were so, the mortgagee was bound to take notice of it. He is affected by the actual state of things on the ground. If, when he takes his mortgage, a building has been commenced, he knows, or ought to know, that the liens of mechanics and material men for work done or materials furnished subsequently will relate back to the commencement of the building. But an entirely different case is presented when the question arises between the mortgagee and the purchaser at sheriff's sale. As the bidder at sheriff's sale is not bound to look beyond the record in determining what he shall bid, and it cannot be shown as against him that a prior lien has been

paid or is not subsisting, so neither can he take advantage of any fact dehors the record to discharge the land from the lien of the mortgage. It is very important that all parties at a sheriff's sale should have a plain, simple rule to go by. * * * At the sheriff's sale the same rule must apply equally to all the bidders, the mortgagee, as well as others, without regard to what their private information may be of facts dehors the record. This puts them all upon an equal footing, as the bidder is not bound to look beyond the record, neither has he any right to affect his relation to others by any such evidence." Upon the foregoing reasoning, we held that the purchaser at the sheriff's sale was not bound by the constructive knowledge of the mortgagee; and he could not show by parol testimony the fact of the commencement of the building before the mortgage was taken, in order to charge the lien of the mortgage by proving a prior lien. Following this ruling, we held the same doctrine in *Wilson's Appeal*, 172 Pa. St. 354, 33 Atl. 574. But the whole force of the ruling is based upon the proposition that the prior commencement of the building did not appear upon the record at the time of the sheriff's sale, and therefore the bidder was not bound to regard the fact, and his title must be adjudged by the state of the record as he found it. In the present case, however, this reasoning is inapplicable. The face of the record did show affirmatively and positively that the building, or a building of the character described in the claims, was erected on the ground before the mortgage was given; and it is the record of the mortgage itself which contains this information. An intending bidder, therefore, upon examining the record before his bid was made, would find precisely the facts which would or might discharge the lien of the mortgage by the sale. Having this knowledge apparent upon the record before the sale, he would have a right to presume that the law would apply; and, if there were liens filed before the sale which antedated the mortgage, the lien of the mortgage would be discharged.

Now, the property was not sold by the assignee until the 9th of May, 1894, but the mechanics' liens were filed as early as November, 1893, and shortly thereafter; so that there was ample time for the bidder and all other persons to examine the records, and learn the precise facts, long before the sale. The lien claims were all spread upon the record, and they disclosed the character of the building, and all the particulars of materials, machinery, and labor furnished in and about the erection of the building. Some of the liens showed that materials and labor were furnished before the date of the mortgage. In these particulars the case differs from *Reading v. Hopson* and *Wilson's Appeal*, and is brought within the operation of *Hahn's Appeal*, 39 Pa.

St. 408, when, the question being one of distribution, just as here, it was held that the lien of the mortgage was discharged, though the claims of lien were not filed until after it was recorded. It also appears that no distribution was allowed upon the bond which was secured by the mortgage, which also was erroneous. We are of opinion that the decree of the learned court below should be reversed, and that the fund should be distributed in accordance with the first report of the auditor. The decree of the court below is reversed, at the cost of the appellees, and the record is remitted, with direction to distribute the fund in accordance with the first report of the auditor.

(177 Pa. St. 128)

BAKER v. HAGEY et al.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

NEGLIGENCE—INSTRUCTIONS—EVIDENCE—DAMAGES.

1. In an action for personal injuries received from being struck by a piece of steel thrown out by a blast, by which defendant was breaking steel into pieces, the court, after instructing that defendant was not liable unless he was negligent, again instructed that, no matter what precautions defendant took to prevent the steel from flying, he was liable if plaintiff was struck by a flying missile. *Held*, that a judgment for plaintiff should be reversed.

2. In an action for injuries received from a piece of flying steel, thrown out by a blast from a plant for breaking steel by explosives, evidence of previous emissions of pieces of steel from the plant is admissible.

3. The fact that plaintiff, prior to the accident which resulted in a severe injury to his arm, had lost his other arm, may be proven to show necessary expenses in the employment of a nurse to dress the injured arm.

4. A letter written upon defendant's letter-head paper, in answer to a letter to defendant, though signed in defendant's name by his son, is admissible against defendant, without further proof of the agency of the son, where his agency is not denied by defendant.

5. Joint owners in the operation of a steel blasting plant are each liable for injuries caused by the negligent manner in which the work was done.

Appeal from court of common pleas, Montgomery county.

Action by Charles Baker against George Hagey and another for personal injuries alleged to have been due to the negligence of defendants in the operation of a plant for breaking steel by explosives. There was a judgment for plaintiff, and defendants appeal. Reversed.

Defendants' assignments of error were as follows:

"First. The learned judge erred in overruling defendant's objection to the admission of the testimony of witnesses called by plaintiff to show alleged acts of negligence prior to the time of the happening of the accident to plaintiff, and the alleged negligent manner in which the steel blasting operations had been conducted prior thereto, the objection being that, under the pleadings in the cause, testimony as to antecedent acts of alleged negligence was ir-

relevant and inadmissible. The testimony objected to is as follows:

"Charles Baker, plaintiff: That steel plant had been in operation there before I was hit. I couldn't say how long, but not very long; not more than a couple or three months. Q. During that time was there much steel thrown out and around on the highway and the quarry in which you worked up to the time you were injured? (Objected to as immaterial and incompetent. Objection overruled. Defendants except. Bill sealed.) A. They blasted every day. When they blasted, there was pieces of steel all around there. Every day small pieces came around over into the quarry everywhere, and dropped alongside of our boiler house. A great many pieces flew over to Graver's. * * * I couldn't say how often I saw steel flying into the road or in the quarry, but I saw pieces fly in the quarry when we were running. They were bigger than a walnut with the hull on it."

"Lewis K. Graver, a witness for plaintiff. 'I lived there during the time this blasting was going on. Q. When the blasts were put off before the accident, and down to the time of the accident, what was the result? (Objected to. Objection overruled. Defendants except. Bill sealed.) A. Very often the steel would fly outside of their inclosure, and go sometimes a great distance. We could only tell about the steel flying when the pieces lit upon the ground. * * * There were pieces went clean over my house. I could hear them. They would sound a noise similar to a bullet, and, the only time I really saw a piece fall, that landed on a stone wall in front of my house, running alone the road. That was the only time I saw a piece with my own eyes, with the exception of one that dropped down on the railroad, right close to the works.'

"Joseph Lovett, a witness for plaintiff: 'During the time of its operation, before this injury to Baker, I used to take a walk around to this blasting place every day. I saw how the house was constructed in which they carried it on. They had cut a lot of trees out of the woods somewhere, and fetched them there, and made a kind of log shanty, and then they laid logs across of the same description. The logs were naturally crooked, and they would lay there, and there might be a hole there that you might jump through. I went down through it myself. They would fix it all over, and then the very first blow that would come would make it loose again, and they wouldn't stop to fix it. (Counsel for defendants renew their objection heretofore made to all specific acts of negligence antecedent to the accident. The court admits evidence of the manner in which the business was carried on by the defendants at and immediately preceding the day of the accident, and overruled the objection. Defendants except. Bill sealed.) A. * * * You could hear pieces whizzing through there, and go "whiz." There were times that I saw pieces that were large enough to see. Small pieces you couldn't see. There was one piece that dropped right in where we were crushing

stone. * * * It dropped right down past George Corson's, right into the quarry, and I picked it up. * * * I heard several pieces drop. There is one piece that I went over and got off Graver's shed.' The testimony of William Spielhofer, John Shallow, Matt Fogarty, Edward Hunter, and Ellwood Livezey, witnesses for the plaintiff, was of similar character, and was admitted after objection thereto by defendants, on the same ground, and exception granted to defendants.

"Second. The learned judge erred in overruling defendants' objection to testimony that plaintiff would require for the remainder of his life the attention and services of a nurse, and the cost of such an attendant, to wit: Dr. C. H. Mann, a witness for plaintiff, after having described the character of plaintiff's injuries and his present condition, and stated that he would be a helpless cripple for life, testified, under objection, as follows: 'Q. Is there any attention required relative to his arm outside of what the physician gives him? A. Yes, sir; the arm requires to be cleansed every day; it requires to be bound up and cleansed, or else it becomes very pernicious. Q. What sort of a person would it require, therefore, as an attendant to perform such duties. (Objected to, on the ground that plaintiff's statement does not set forth or contain any averment of the necessity of such services and attendant, or any claim for the cost and expense thereof.) The Court: I will admit the evidence for the present, reserving the right to strike it out upon further consideration. (Defendants except. Bill sealed.) A. It would require some one with judgment in those matters. By that I mean not just any child to do it; it would have to be somebody with experience. I have been a physician for twenty years, and I have had occasion to employ nurses and attendants for sick and helpless people, and am acquainted with the market prices in this locality for services rendered by such persons. In my judgment, the services that would be requisite to give the proper attention to the physical wants and this lame arm of this man would require a dollar a day, or at the rate of \$7 a week.'

"Third. Because the learned judge erred in overruling the question asked by defendants on the cross-examination of Alexander Petry, superintendent of the Midvale Steel Company, a witness for plaintiff, as to the nature of the report made to him by Peter McNally, superintendent of the melting department, whom he had directed, on the day preceding, to obtain some suitable person to take a contract for blasting the steel ingots for the company, of his interview and conference on that day and on that subject with George Hagey, the witness having already testified that, in consequence of that report, he, on the next day, when they called at his office, pursuant to the suggestion of Mr. McNally of the day before, designated George Hagey as the suitable person to take the contract; the testimony of the witness on this point being as follows, to wit: 'McNally is in charge of our open hearth. He is in the em-

ployment of the company, and was employed and directed by me as superintendent to go out and secure some one to take the contract for breaking up this steel. It was in consequence of that direction that he returned and reported to me what I was about to detail,—part of it. This was the interview between me and George and Samuel that the letter refers to [the letter of the witness dated January 25, 1894, in relation to the interview and the contract]. * * * It was in consequence of the report that McNally made to me that I designated George Hagey to take this contract. McNally was acting in the interest of the company at this time, and for this special purpose at that time, and any report that he made to me would be accepted by me as my guide for my conduct in making a contract subsequently. Mr. Harkins: I now propose to ask the witness what that information which he derived from McNally was. (Objected to by plaintiff, on the ground that it was inquiring as to conversations between third parties in the absence of plaintiff. Defendants, in reply, contended that it was part of the res gestæ of the contract, and therefore admissible. Objection sustained, and offer overruled. Defendants except, and exception granted. Bill sealed.)'

"Fourth. The learned judge erred in admitting in evidence a certain letter purporting to have been written by George Hagey to the Norristown Steel Company, dated April 12, 1894, the admission of the same being objected to by defendants on the ground that there was not any evidence that he had either written or signed the same, or authorized any one to do so in his name. The letter and the testimony on this point are as follows:

"George J. Humbert, a witness for plaintiff: 'In April, 1894, I was general manager of the Norristown Steel Company. Its operations are manufacturing steel castings of all descriptions. I wrote a letter to George Hagey, as superintendent of the steel company. (Counsel for plaintiff call for the production of the letter referred to. Counsel for defendants reply that they do not know whether they have such a letter or not, but, if they have it, they will produce it.) Q. You wrote a letter to George Hagey? A. Yes, sir. (Letter dated April 12, 1894, shown witness.) I received this in reply. (Counsel for plaintiff offer in evidence the letter referred to. Objected to.) Mr. Larzelere: It is to show who was carrying on the business there at that time. (Objection overruled. Defendants except. Bill sealed. Counsel for plaintiff offers in evidence the said letter, together with the envelope, the same being marked, respectively, "C" and "D.")'

"The letter is as follows:

"Wayne Junction, April 12, 1894. Norristown Steel Co.—Gents: Your letter received in reference to breaking steel scrap. In reply, we say we are prepared to break any amount of scrap that you may have in pieces not to exceed twenty inches square. We have a derrick and machinery to hoist pieces

containing fifteen tons. We have a large contract with the Midvale Steel Company, and are giving entire satisfaction to them; and, having facilities for doing a large business, we will contract with you to break your scrap at six dollars a ton, you paying freight both ways. Yours respectfully, George Hagey. Wayne Junction, Germantown, or Plymouth Meeting, Montgomery County, Pa.

"P. S. Our plant is at Tyrol Station, on Plymouth branch of P. & R. Railroad, three miles east of Conshohocken."

"The envelope is headed as follows: 'George Hagey, Lime and Coal,' etc. Addressed: 'Norristown Steel Co., Norristown, Montgomery Co.'"

"Q. You say the letter to which this is a reply you sent to George Hagey? A. Yes, sir; and he received it, unquestionably, from the reply. This is in reply to the letter I wrote him with reference to breaking steel scrap for us. There must be a copy of that letter somewhere. The books were all turned over to the American Steel Casting Company, and I do not know what has become of those. (Counsel for defendants desire now to make an additional objection to the introduction of this letter, on the ground that the whole correspondence should be exhibited, and also that this letter, as has been expressly testified, was written by Samuel Hagey. Objection overruled. Defendants except. Bill sealed.)"

"Fifth. The learned judge erred in charging the jury as follows: 'You have heard from the various witnesses in this case what was done as a matter of protection. On the part of the plaintiff it has been testified that these logs were so placed on the top of this plant as to leave openings between the logs sufficiently large to allow pieces of steel to escape. This has been testified to you by a number of persons, and you will therefore have no difficulty in deciding upon the question as to whether that was negligence or not, if you believe that statement to be true, because if they did thus construct their plant so that openings were left, through which flying missiles could come, it would of itself establish that they had not taken that due precaution which the law requires. On the part of the defendants it has been testified that there were two or three layers of these logs, and that they had used all reasonable precautions to protect the public. But I instruct you, as a matter of law, that no matter what precautions they took, if, notwithstanding these precautions, these missiles did fly from that place, and did cause this injury, then, in the law, they would be liable in this action. So far as that branch of the case, therefore, is concerned, I apprehend you will have no difficulty in arriving at a conclusion.'"

"Sixth. The learned judge erred in charging the jury as follows: 'He [plaintiff] is entitled to any expenses that he has incurred or that are likely to be incurred as a natural result of this injury. * * * He is not only

entitled to what took place in the past, but he is entitled, under the law, to what will compensate him for all the expenses which may be reasonable and necessary as a consequence of this injury. You can look into the future, and make an estimate of what would be his probable expenses, if you believe that, as a natural result of this injury, he will hereafter always require medical attendance and nursing; and whatever may be a fair compensation upon that score you will be entitled to give him.'

"Seventh. The learned judge erred in refusing to affirm the defendants' first point, the said point and the answer of the learned judge thereto being as follows, to wit: '(1) That as the present action is brought against the defendants as joint trespassers, and the statement of plaintiff's claim alleges that on the 21st day of April, 1894, they were engaged in blasting with dynamite large masses of steel, which blasting was done negligently and wrongfully and carelessly, so that in consequence thereof plaintiff was hurt and injured in the manner described, the burden of proof is on him to show these alleged facts affirmatively by positive evidence that the defendants were on that day jointly engaged in such blasting, and that the work was done in the negligent and careless manner complained of, and that plaintiff was injured in consequence thereof, or the verdict must be for the defendants. And if the evidence shows that only one of them was so engaged in blasting on that day, and in such negligent and careless manner, the verdict can only be rendered against that one, as the actual wrongdoer, and must be in favor of the other defendant.' Answer of the court: 'In order to recover in this case, the plaintiff must convince the jury by the weight of the testimony that his injuries were the result of the negligence of the defendants, or one of them, or because of the negligence of the servants of the defendants, or one of them, in the operation of blasting steel, causing the accident. If both defendants were interested in the operation, in the sense that they were joint owners thereof, or that it was carried on for their joint benefit, then they would both be liable for any acts or negligence contributing thereto, and neither would be excused from the fact that he was not present on the day of the accident. If the jury find that either defendant was not interested in the operation of blasting in the sense that he was not an owner, or that it was not carried on for his benefit on the day of the accident, then the verdict should be in favor of such defendant. If George Hagey merely loaned money to Samuel, that fact alone would not make him liable in this action; but, if he was interested in the operation, the mere fact that he was not present on that particular day would not excuse him.'

"Eighth. The learned judge erred in refusing to affirm the defendant's second point, the said point and the answer of the learned

judge thereto being as follows, to wit: '(2) That under the pleadings and evidence in this case, if the jury believe that the work of blasting steel was done negligently and carelessly, and that the plaintiff was injured in consequence thereof, the verdict can only be rendered against the defendant who the evidence shows was, at the time of the happening of such injuries, present and engaged in said work, and must be in favor of the other defendant.' Answer of the court: 'I cannot affirm this point. As I have already stated to you, the mere fact that one of the defendants was not present would not excuse him if the jury find that he was interested in this operation in the manner that I have detailed.'

"Ninth. Because the learned judge erred in not charging the jury that, if they believed the testimony of Alexander Petry, Peter McNally, Henry Freedly, John J. Corson, and J. C. Goade in reference to the contract with the Midvale Steel Company, the leasing of the property for the construction of the plant, and the purchase of materials for the carrying on of the blasting operations, and of defendants themselves, that George Hagey had no interest whatever therein, it would be their duty to find a verdict in his favor.

"Tenth. Because the learned judge erred in not charging the jury that there was not any evidence in the cause to show joint ownership of, or joint interest in, or joint management or conduct by, defendants, in the business of steel blasting, carried on at that plant.

"Eleventh. Because the evidence in the cause does not justify and is not sufficient to sustain the verdict rendered by the jury."

Edward E. Long, R. O. Moon, and Geo. W. Harkins, for appellants. Larzalere & Gibson and Holland & Dettra, for appellee.

GREEN, J. We do not see how we can avoid reversing this judgment on the fifth assignment of error. The learned court below charged the jury thus: "But I instruct you as a matter of law that no matter what precautions they took, if, notwithstanding these precautions, these missiles did fly from that place, and did cause this injury, then, in the law, they would be liable in this action. So far as that branch of the case, therefore, is concerned, I apprehend you will have no difficulty in arriving at a conclusion." The plain meaning of this language is that the defendants were absolutely liable if the missiles did fly from the place of blasting, and did cause the injury. As there was no dispute about either of these facts, the instruction was a practical direction to find for the plaintiff, without any reference to the question of negligence. Of course, this is not the law, and the learned court had previously instructed the jury that the defendants were not liable unless they were guilty of negligence. But in the above-quoted extract from

the charge the learned judge told the jury that, no matter what precautions were used to prevent the discharge of the missiles, the defendants were liable if the missiles escaped and caused the injury. In other words, the mere fact of the accident established the right of recovery, without proof of negligence. As this is in direct hostility with the earlier part of the charge, there would necessarily be much confusion in the minds of the jurymen as to what the law really was. Thus, the learned court, at the opening of the charge, said to the jury: "It is undisputed that he [the plaintiff] sustained an injury. This in itself would not sustain his action, unless he shows to your satisfaction that it was caused by negligence; and therefore, in considering this case, our first duty is to inquire as to whether the evidence convinces you that there was negligence in the case." According to the part of the charge covered by the fifth assignment, no inquiry as to negligence was necessary, because, no matter what precautions were taken by the defendants, they were absolutely liable if the plaintiff sustained his injury by missiles thrown from the quarry. As these conflicting instructions would materially tend to mislead the jury, and as the part of the charge excepted to is clearly erroneous, the fifth assignment must be sustained.

We do not think the first assignment can be sustained. The evidence offered, and admitted under exception, tended strongly to show a negligent condition of the structure within which the blasts were discharged, as well as specific resulting acts of discharge. These latter were manifested by the emission and scattering of both large and small pieces of the steel, which had been shattered by the blasts; and in this regard the testimony is quite similar to that which is always admitted in cases of fires caused by the emission of sparks from locomotive engines. If the engine is known, all the authorities concur that previous emissions of sparks by that engine may be shown. This whole subject is so thoroughly discussed in an elaborate opinion by our late Brother Clark in the case of *Henderson v. Railroad Co.*, 144 Pa. St. 461, 22 Atl. 851, that a mere reference to it is sufficient. Here the discharges took place from a known building or structure, and certainly evidence of its condition before and at the time of the discharge in question was competent; and, as the testimony showed frequent discharges through and from it, the proof tended to show its condition.

The second and sixth assignments cannot be sustained, as the testimony offered and received was clearly competent and germane to the plaintiff's cause of action. Of course, the previous loss of the other arm could not be considered as a cause of damage in this case, and there was no such instruction in the charge. The testimony as to the plaintiff's actual condition could not be excluded.

The third assignment is without merit.

The conversations testified to by the witness Petry were between third persons so far as the plaintiff was concerned, and the proposed inquiry would develop that which was mere hearsay. But the whole of the evidence as to this conversation was subsequently admitted, and no harm was done to the defendants by its exclusion at this stage.

It is not correct to say that the letter of April 12, 1894, from George Hagey to the steel company, was admitted without any proof of its being written or authorized by George Hagey. It was written as a direct reply to a letter received by him from the Norristown Steel Company, and it was written on a letter-head sheet of George Hagey's; and both he and his son Samuel testified substantially that it was written or signed by George Hagey's son Percy. It was one of a series of letters all on the same subject, and formed part of a quantity of correspondence which was material to the case. George Hagey, being examined as a witness in regard to it, did not deny his son's authority to sign such a letter in his name. We think the testimony was sufficient to justify its admission in evidence. The fourth assignment is therefore dismissed.

Seventh and eighth assignments: The answer to the eighth point of the defendant was certainly correct. The actual presence of the defendant at the moment of the accident was not necessary to make him liable, if the other facts and circumstances were sufficient to show liability. The answer to the seventh point of defendant seems to us to be entirely correct. The plaintiff's statement of claim does not charge the defendants as partners, nor as joint tortfeasors, in the sense that they were subject to a joint obligation, or had a joint interest in the business. They were charged rather as two independent persons, both of whom were liable for a permanent injury inflicted by them both. Of course, if both were liable under the evidence, the verdict should be against both. If one only was liable in accordance with the testimony, and the other was not, the verdict should be against the one who was, and in favor of the one who was not. If neither was liable, the verdict should be for the defendants. This is precisely what the court charged, and we fail to discover any error in it. These assignments are dismissed.

Ninth, tenth, and eleventh assignments: There is no merit in these assignments, and they are not sustained. The court below was not asked to charge the jury that, if they believed the testimony of the witnesses named in the ninth assignment, George Hagey, had no interest in the business, and therefore there was no error in not so charging. The court could not possibly instruct the jury that there was no evidence that there was any joint ownership, interest, or management in the business of steel blasting at the place in question, because there was much testimony showing the participation of both in the con-

duct of the business. This evidence was necessarily for the jury, and could not be withdrawn from them. It must be confessed that the explanatory testimony of the fact that George Hagey's name appears in the papers as the party contracting and otherwise participating, and the positive testimony of both defendants that George Hagey had no interest in the business, seem to be sufficient to establish that fact; yet it is a question of fact, and the credibility of the witnesses, and the effect of the various facts and circumstances in evidence as they bear upon that subject, were for the jury to determine, and could not be taken from them. We think the court below was not in error in submitting the case to the jury, although it is quite possible that we would have reached a different conclusion if we were disposing of the facts. Judgment reversed, and new venire awarded.

(178 Pa. St. 90)

MUSSEY v. STAUFFER.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

EVIDENCE—PRESUMPTIONS—FOREIGN LAW—CONTRACTS—DEFENSE—PAROL EVIDENCE.

1. Since the law of another state is presumed to be the same as it is in Pennsylvania, an affidavit of defense, in an action on contracts executed in Virginia, which presents matters constituting a defense in Pennsylvania, is sufficient.

2. It is a defense to an action on a written contract for the payment of money that defendant executed the same on the faith of a contemporaneous parol agreement with plaintiff, performance of which by the latter was a condition precedent to payment of the money, and that plaintiff failed to perform.

Appeal from court of common pleas, Lancaster county; H. O. Brubaker, Judge.

Assumpsit by Henry C. Mussey against Samuel D. Stauffer on notes and a written agreement. From an order discharging a rule for judgment for want of a sufficient affidavit for defense, plaintiff appeals. Affirmed.

L. N. Spencer and E. D. North, for appellant. W. U. Hensel and J. Hay Brown, for appellee.

McCULLUM, J. The question presented by this appeal is whether the affidavits interposed as a defense to the plaintiff's claim are sufficient to prevent judgment upon it. In deciding the question, we, like the learned court below, are limited to a consideration of the averments in the statement of claim and in the affidavits filed in answer to it. Matters of fact which are not included in these cannot be appealed to in aid of the contention of either party. Testimony for or against a motion or rule for judgment for want of a sufficient affidavit of defense is not admissible. On the hearing of a rule for judgment for want of a sufficient affidavit of defense the court may not go outside of the case as presented by the

claim and affidavit to consider extraneous facts either in support of or against the line of defense disclosed. *Allegheny City v. McCaffrey*, 131 Pa. St. 137, 18 Atl. 1001. With this familiar principle in view, we must consider and dispose of the question raised by the appeal in the case before us. The laws of another state of the Union are to be proved as those of a foreign country. *Ripple v. Ripple*, 1 Rawle, 386. The law of another state will be presumed to be the same as that of the former in the absence of evidence to the contrary. *Bennett v. Caldwell*, 70 Pa. St. 253, and *Van Auken v. Dunning*, 81 Pa. St. 464. There is nothing in the claim or the affidavits we are considering which affects this presumption, and it therefore logically follows that the party who asserts that matters which constitute a valid defense to the action under the laws of Pennsylvania are not available as a defense to it under the laws of Virginia must sustain his assertion by evidence adjudged to be competent. The time and place for the introduction of such evidence in a case like the one before us is on the trial of it. As we have already seen, no extraneous facts or evidence of them can be considered on a motion or rule for judgment for want of a sufficient affidavit of defense.

The notes and agreement on which the plaintiff's claim is based were made in Virginia, and the parties to them are the parties to the suit. The defendant admits that he executed the notes and entered into the agreement as claimed, but says, in substance, that he did so on the faith of a contemporaneous parol agreement with the plaintiff, the performance of which by the latter was a condition precedent to the payment of the notes, and the nonperformance of which relieved the defendant from all liability upon them. This agreement appears in the affidavits of defense, together with the averments of the defendant that he was induced by it to sign the notes, and that the plaintiff has failed to perform it. We think these affidavits fully justified the learned court below in discharging the rule for judgment. Judgment affirmed.

(177 Pa. St. 594)

OYSTER v. SHORT et al.

Appeal of HORTON.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

PARTNERSHIP—DISTRIBUTION—RIGHTS OF DECEASED PARTNER.

1. On the settlement of a partnership, the administrator of a deceased partner is not entitled to share pro rata with the creditors of the firm where, at the time of the distribution, the assets of the firm are less than the aggregate indebtedness which existed at the death of the partner, and which yet remained at the time of the distribution.

2. An agreement between partners for the settlement of the partnership in the event of the

death of a partner cannot give, as against creditors of the firm, a deceased partner's estate the right to share pro rata in the firm assets.

Appeal from court of common pleas, Elk county; C. A. Mayer, Judge.

Suit by D. C. Oyster against Alfred Short and another for the settlement of a partnership. From a decree overruling exceptions to the master's report, the administrator of H. Horton appeals. Affirmed.

George A. Jenks and W. S. Hamblen, for appellant. Geo. A. Rathbun, C. B. Earley, S. W. Smith, Geo. R. Dixon, Geo. A. Allen, and L. Rosenzweig, for appellees.

GREEN, J. As a matter of course, the agreement of January 15, 1892, not having been signed by all the members of the firm before the death of H. Horton, never became an operative agreement, and may be entirely dismissed from consideration.

It is a fact found by the master that at the death of H. Horton, on November 4, 1892, there was an aggregate of indebtedness of the firm, which yet remained at the time of distribution, of \$81,316.64, and the total assets at the time of distribution were but \$73,525.31. There was no controversy as to this state of facts, and it is therefore entirely correct to say that the assets of the firm were not enough to pay the debts of the firm which existed at the time of H. Horton's death, and still existed at the time of distribution. That being so, how can it be held that one of the firm, who was then a creditor of the firm, can participate in the distribution when there was not enough of assets to pay the other creditors of the firm? It is not disputed that, under the general rule applicable in such cases, this could not be done; and it is not contended that an administrator of a partner who is dead has any other or higher rights in this respect than his intestate would have had if he were living. On the other hand, it is conceded by the learned counsel that "were it not for the agreement of December 1, 1882, the estate of H. Horton would be postponed as to its claim against the assets of the Ridgway Bank as it existed before November 4, 1892, till the creditors of the bank as it then existed were paid." But how can such an agreement as that, which is a mere convention between the partners themselves, have the effect of changing the law as to the rights of creditors upon the fund? The agreement does not purport to do anything of the kind. It is nothing more than an agreement among the partners themselves providing a method of settlement of their affairs in the event of the death of one of their number. It makes no provision for the case of insolvency, nor for interfering in any manner whatever with the rights of creditors in that event. Even if such an attempt were made, it would be utterly abortive. We are referred to no authorities nor are any principles stated in the argument, upon which we could

for a moment justify ourselves in holding that the rights of the creditors of the bank in the event of insolvency are abridged or changed in any degree. In our latest utterance upon this general subject we have adhered strictly to the rule as it has always been understood and expressed in such exigencies as this. In *McCrudden v. Jonas*, 173 Pa. St. 507, 34 Atl. 224, 225, our Brother McCollum, delivering the opinion, said: "The learned court below, in awarding to Mrs. Greenbaum the balance of the fund remaining after paying thereout the claims of the other creditors in full, gave her all that she was entitled to, and all that the parties to whose rights she succeeded could possibly have received from it. As they were liable for all the claims of the other creditors, they could not have participated in the distribution until those claims were satisfied. This is a proposition in accordance with equity, and well sustained by the decisions of this court." The assignments of error are not sustained. Decree affirmed, and appeal dismissed, at the cost of the appellant.

(177 Pa. St. 601)

OYSTER v. SHORT et al.

Appeal of AMERICAN EXCH. NAT. BANK.
(Supreme Court of Pennsylvania. Oct. 5, 1896.)

INSOLVENCY OF BANK—RECEIVERS—DIVIDENDS—PAYMENT OF CONTINGENT CLAIMS.

1. After receivers of a bank were appointed, certain notes, which were indorsed by such bank and discounted by another bank, matured and were protested. Some of the notes were paid by the makers before, and some after, the first distribution. *Held*, that the latter bank was not entitled to participate in the distribution of the assets of the insolvent bank. *Miller's Appeal*, 35 Pa. St. 481, distinguished.

2. Where the indorser of notes becomes insolvent, and a receiver is appointed, before their maturity, the indorsee is entitled to dividends only on the amount unpaid on the notes at the time of distribution, and not on the full amount of the notes.

Appeal from court of common pleas, Elk county; C. A. Mayer, Judge.

Bill by D. C. Oyster against Alfred Short and others for the appointment of a receiver of the partnership doing business under the firm name of the Ridgway Bank, composed of plaintiff and defendants, and dissolution of the partnership. A receiver was appointed, and also a master and examiner to take testimony and report on distribution of the funds in the receivers' hands. From an order dismissing exceptions to and confirming the report of the master and examiner, and directing payment of the funds in accordance with the distribution made by him, the American Exchange National Bank appeals. Affirmed.

The opinion of the court below is as follows (Mayer, P. J.):

"The exceptions filed by Perry R. Smith and W. H. Horton, administrator of H. Horton, involve the same questions that were presented to E. P. Geary, Esq., the former au-

ditor, and were passed upon, determined, and adjudicated by him, and his report was confirmed by the court. We have given further consideration to these exceptions, as they were pressed upon our attention so zealously by the counsel for these exceptants; but our views remain unchanged, and these exceptions are accordingly dismissed.

"At the former audit the American Exchange National Bank presented their claim for distribution. It consisted of an overdraft of \$9,254.54, and the balance upon the indorsements by the Ridgway Bank of a number of negotiable notes which had been discounted by the American Exchange National Bank for the Ridgway Bank. When the Ridgway Bank became insolvent, and receivers were appointed, none of these notes had matured. They became due and were protested after the appointment of the receivers. These notes were not an existing liability of the Ridgway Bank at the time of the appointment of the receivers, and their liability only attached after protest and due notice to the Ridgway Bank as indorsers. Some of these notes were paid before, and some after, the first distribution, by the makers. The principle invoked by the counsel for the American Exchange National Bank, that 'a creditor is entitled to a dividend under an assignment, not merely as a creditor, but as an equitable owner of the assigned estate, and the extent of his ownership is fixed by the amount of his claim when the assignment is made' (*Miller's Appeal*, 35 Pa. St. 481), has no application. At the time of the appointment of the receivers the American Exchange National Bank had no claim against the Ridgway Bank on these discounted notes, as they were not due. The American Exchange National Bank did not become creditors of the Ridgway Bank until after the notes fell due and were protested, which was after the appointment of the receivers. Consequently the American Exchange National Bank did not become equitable owners of the insolvent estate when the receivers were appointed, to the amount of these notes, as they were not an existing liability at that time, and have only become claims against the estate since the appointment of the receivers. 'The rights of creditors of an insolvent corporation become fixed by a decree of the court ordering the dissolution thereof. No rights can be subsequently acquired by a creditor which will entitle him to a larger participation in the estate of such insolvent corporation.' *Dean & Son's Appeal*, 98 Pa. St. 101. We think the auditor was clearly right in refusing distribution upon all notes which had been paid by the makers to the bank before distribution. These notes were presented separately to the first auditor, a dividend declared upon each of them where they were not paid by the makers, which dividends have been accepted and paid. To aggregate the claim of the exceptants, including notes already paid, as well as the former dividends already declared and paid, cannot be allowed in any court exercising equi-

table powers. The language of the supreme court of Illinois in the case of *First Nat. Bank of Peoria v. Commercial Nat. Bank of Peoria*, 37 N. E. 1020, as quoted, is expressive of our views: 'Here appellant has two classes of debts,—one a note secured by collateral, * * * the other a debt evidenced by several notes, * * * as filed in the county court, as a claim against the insolvent estate. These are consolidated, and it is urged that they constitute one claim. In the administration of insolvent estates the county court may exercise equitable powers, and may examine into and segregate claims made up of different items, and make a distribution thereon that will avoid preferences and unjust advantages. By payment of the debt of \$5,338.10, it was extinguished as a debt.' Such is our case of the notes paid. 'It had no existence as a claim after such payment, and could not enter into any claim, as a part thereof, and be a basis for adding to the distributive amount of another claim, or another item going to make up the whole claim. To do so would be to give such other part of a claim an advantage by way of preference. Because of its being proven as a part of a claim, one of the several items going to make up the whole claim does not destroy its character in equity as a separate debt. It cannot be held, after its payment, that it has any existence to receive a proportionate dividend, or add to the dividends to be paid on the other items of the claim.' Exceptions are dismissed, and the report of the master confirmed absolute, and it is ordered and decreed that the fund for distribution be paid over to the respective claimants in accordance with the distribution made by the auditor."

Fred H. Ely, for appellant. Geo. A. Rathbun, C. B. Earley, S. W. Smith, Geo. R. Dixon, Geo. A. Allen, and L. Rosenzweig, for appellees.

GREEN, J. We agree entirely with the learned court below in the disposition of this case. It is perfectly clear that, so far as the rediscounted notes which were paid at maturity by the makers are concerned, there was not, and could not be, any liability to the appellant on the part of the Ridgway Bank. The indorsement by the latter was at the best a mere contingent liability, which could never become absolute if the paper was paid at maturity by the makers, as was in fact done. Hence it follows that the Ridgway Bank was never a debtor to the appellant, either when the receivers were appointed, or at any time thereafter. It is not possible to apply the doctrine of *Miller's Appeal*, 35 Pa. St. 481, to such a case, because the fundamental facts upon which that decision was founded are absent. It was there held that the creditors of a voluntary assignor are the equitable owners of the assigned estate at the time of the assignment, and their rights are vested as of that date. Being the owner of a

vested interest in the assigned estate, the creditor is entitled to a distribution of the proceeds of the estate in the proportion which his claim bears to the aggregate of all the claims. Having the interest in the case cited, he was entitled to its fruits in any event, and was not to be deprived of them because he was able to secure partial payment of his claim by the subsequent attachment of a legacy which fell to the assignor after the assignment, and therefore was no part of the assigned estate. It will be seen at once that no one who was not an actual creditor of the assignor at the time of the assignment could claim the benefit of the decision in that case, because he had no interest in the estate assigned. In this case the appellant, so far as the notes now in question are concerned, not only was not a creditor of the Ridgway Bank at the time the receivers were appointed, but never became a creditor for any amount at any time after. How, then, can the appellant claim the benefit of a relation which it never sustained to the Ridgway Bank? It is impossible. The cases of *Graff's Estate*, 139 Pa. St. 69, 21 Atl. 233; *Jamison & Co.'s Estate*, 163 Pa. St. 143, 29 Atl. 1001; *Appeal of Jordan & Porter*, 107 Pa. St. 75,—cited by appellant, have no application, as they do not raise the present question, but only questions between persons who were actual creditors, having different rights. In *Dean & Son's Appeal*, 98 Pa. St. 101, the doctrine of *Miller's Appeal* was applied to cases in which receivers were appointed for insolvent corporations. We there held that the rights of creditors of an insolvent corporation become fixed by a decree of the court ordering the dissolution thereof. No rights can be subsequently acquired by a creditor which will entitle him to a larger participation in the estate of such insolvent corporation. This ruling was made in reference to the distribution of the estate of an insolvent insurance company. The appellants held a policy upon which a loss occurred after the decree of dissolution was made, and claimed a dividend upon the whole amount of insurance. But we held that the rights of all creditors were fixed as of the time of the dissolution, and must be adjudged as of that date, and a claim arising subsequently could not be considered. We therefore held that a dividend could only be awarded upon the amount of the premium paid, and not upon the loss.

As we understand the contentions of the parties, the foregoing ruling disposes of the only real controversy now left. Upon the notes rediscounted after the indorsement by the Ridgway Bank, and which, falling due after the receivers were appointed, were either not paid at all, or only partially paid, dividends have been allowed so far as payments were not made. This we regard as correct. The assignments of error are all dismissed. Decree affirmed and appeal dismissed, at the costs of the appellant.

478 Pa. St. 50)

STROHL v. BOROUGH OF EPHRATA.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—DRAINS.

A borough changed a natural water course into a closed drain, and changed its course. It afterwards abandoned it, and, for a consideration, permitted the owner of the property through which it ran to fill it up. *Held*, that the borough could not thereafter restore it to its ancient course and character, except by proceedings de novo, as prescribed by Act May 16, 1891 (P. L. 75), relating to the opening of streets and the creation of sewers and drains.

Appeal from court of common pleas, Lancaster county; J. B. Livingston, Judge.

Bill by Susan Strohl against the borough of Ephrata for an injunction to restrain defendant from going on plaintiff's premises in such borough for the purpose of opening and changing a water course. From a decree dissolving a preliminary injunction and dismissing the bill, plaintiff appeals. Reversed.

Mr. Hassler, for appellant. Brown & Hensel, for appellee.

MITCHELL, J. The learned judge below found as a fact that the borough had abandoned the drain or ditch which ran through plaintiff's property, and, for a consideration, permitted her to fill in and cover it. It is contended by the borough that this finding was erroneous, but as the borough took no appeal, and the appellant makes no complaint of the finding, it must be accepted as an established fact for the purposes of this case. The attempt of the borough, therefore, to reopen the ditch, must be considered as an entry upon appellant's land for the purpose of making a new drain or water course. For this, legislative authority must be shown, and the court below was of opinion that such authority was found both in the act of May 22, 1883 (P. L. 39), and the act of May 16, 1891 (P. L. 75). We do not find the authority in the act of 1883. That is a supplement to the borough act of 1851, and its main purpose, as expressed in section 1, was to grant power to the borough to lay out and ordain footwalks, pavements, gutters, culverts, and drains over and upon lands abutting on turnpike roads within the borough limits,—in brief, to extend the ordinary jurisdiction and authority over its streets for the purposes enumerated to the turnpike roads. The general power to regulate the streets, gutters, culverts, drains, etc., contained in the section is a mere re-enactment of the section of the borough act which it was intended to amend and enlarge. It does not contain any grant of power to condemn and take private property for the construction of drains or sewers, except upon the line of turnpike roads. The rest of the act is devoted to the procedure, and the remedy of the parties aggrieved, which is to be by like proceedings as provided for the case of public roads. The act of 1891 is of a much

more comprehensive scope. It is a supplementary act passed to supply omissions, and to enlarge inadequate powers and confirm doubtful ones, on the whole subject of municipal control over the laying out, opening, and regulation of streets. Hanover Borough's Appeal, 150 Pa. St. 202, 24 Atl. 689. By its express terms, the subjects of sewers and water courses are included. It is objected by the appellant that, the changing of water courses not being mentioned in the title, so much at least of the act as relates to that subject is unconstitutional. Whatever might be the force of this objection, if a case should arise relating to the change of a water course simply as such, it is not worth while to discuss it now, as the present is clearly a case of sewer. The drain or ditch, as it is variously called, that formerly ran through appellant's property, was a natural water course, but adopted and used and its area of drainage enlarged by the borough, as a channel for carrying off surface water. The borough changed not only its course, but its character as an open into a closed drain or iron pipe. It seeks now to restore it to its ancient course, and also to its open character. After an abandonment and permission to appellant for consideration to fill it up, the right to the old drain, as already said, was at an end; and whatever the borough does now it must do de novo, by virtue of its municipal powers. But drains or ditches, open or covered, are, in this connection, included in the term "sewers"; and, when the act of 1891 put that subject within the authority of the borough, it necessarily included in the grant all the subordinate questions of kind, size, etc. We are of opinion, therefore, that the borough had authority, under the act of 1891, to construct a sewer or drain, open or closed, through appellant's property. But appellant is nevertheless entitled to the injunction prayed for, as it is clear that the borough is not exercising its authority in the appointed way. It appears to have proceeded on the supposition that it might at any time, by mere resolution, resume its right to the former mode of drainage, and has not taken any of the necessary steps for the acquisition of a new right under the statute. This it must do. It must proceed to condemn and appropriate the appellant's property to the desired public use, in the regular and lawful way, as prescribed by the act of 1891 and the general road laws. Section 5 of the act of 1891 provides that, when the parties have not agreed upon the amount of damages, the municipal corporation may tender sufficient security, then it shall be presented to the court of common pleas, "and upon the approval of said security said municipal corporation may proceed with the improvement." This, it will be observed, is a condition precedent to entry, which it is not claimed has been performed in this case. Until it has been, the borough is a trespasser, and must be enjoined. The act of June 8, 1891 (P. L. 210), has no bearing upon the

case. That refers to streams and water courses. The finding of the court below that the water course through appellant's land had been abandoned takes the case out of the purview of that act. There is no longer any water course there, and, as already said, if the borough wishes to make one, whether a sewer or a drain or a ditch,—whatever it may be called,—it must proceed *de novo*. Decree reversed, and injunction directed to be awarded on the basis indicated in this opinion.

(177 Pa. St. 197)

LERCH v. BARD et al.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

PARTNERSHIP—LIABILITY FOR MONEY BORROWED BY MANAGER—REVOCATION OF POWER—ONE-SIDED CHARGE.

1. For the court, in its charge, to take up the various items of evidence adduced by defendant, and prominently present them to the jury, without referring to any of plaintiff's evidence, which tended directly to contradict that of defendant, is ground for reversal.

2. Partnership articles provided that no debts should be contracted in the firm name without written consent of all the partners, but authorized the manager, who was not a partner, to sign notes and checks, and execute all papers necessary for the business. For years he had sole charge of the business, and borrowed money without written consent of the partners. *Held*, that notice then given to the manager by one of the partners, acting independently of the others, that he was not willing longer to be under obligations for money borrowed for the firm, did not revoke the manager's authority, or relieve any partner from liability for money thereafter borrowed by the manager for the firm.

3. The liability of a firm for money borrowed by its manager is not affected by the fact that he had been attorney for the lender in the adjudication of her father's estate.

Appeal from court of common pleas, Berks county; G. A. Endlich, Judge.

Action by Annetta K. Lerch against George W. Bard and others, trading as the American Plumbago Company. Judgment for defendants. Plaintiff appeals. Reversed.

For former reports, see 26 Atl. 236, 153 Pa. St. 573; 29 Atl. 890, 162 Pa. St. 307.

Daniel H. Wingerd and Cyrus G. Derr, for appellant. George J. Gross, Jr., and Isaac Heister, for appellees.

DEAN, J. We regret the necessity of sending this case back for retrial. In the late case of *Relchenbach v. Ruddach*, 127 Pa. St. 599, 18 Atl. 440, some of the cases on the subject of one-sided charges are cited, and our Brother Green, speaking for the court, uses this language: "We have so frequently held that giving undue prominence to the testimony of one side of a case is error, that a reference to the cases is unnecessary." Here the learned judge of the court below took up and referred to no less than six items of evidence adduced by defendants, and prominently presented them to the jury for their consideration in determining the main fact on which the case turned. There

was no error in this if the evidence on the other side in contradiction, had been placed before the jury with the same care, but it was not. Notice the method of this presentation. The learned judge says: "In determining whether or not William P. Bard intended to borrow the plaintiff's money in good faith for the defendants, and whether he regarded the note as delivered to the plaintiff, the jury may consider the evidence." Then follows the substance of defendants' testimony, relating to the six material facts tending to establish defendants' side of the issue. First is stated the proposition on which the case turns; then all the facts tending to establish defendants' side of it, in the exact language of defendants' counsel, as he doubtless argued the case to the jury, without indicating that it was other than the language and thought of the court. The plaintiff had given competent evidence, tending directly to contradict the evidence of defendants to establish four of the six alleged facts. Besides, the inferences reasonably to be drawn from the established facts were stoutly and fairly disputed by plaintiff. The learned judge had indicated to the jury, in the beginning of the charge, the course he intended to pursue, thus: "The evidence adduced in this trial has been explained and discussed to you by counsel in all its bearings, and I shall not attempt to rehearse it to you. * * * I shall confine myself to stating to you the legal rules which it is your duty to apply in your investigations." But, as the conclusion of the charge, he most carefully rehearsed the substance of defendants' testimony, without even adverting to plaintiff's, which antagonized it. Not to rehearse the evidence on either side, which had been fully explained and discussed by counsel, would have been one mode of impartial instruction; and he had a right to change his mind before the conclusion of the charge, and impartially rehearse the testimony on both sides. But it cannot be said that it was impartial to half change his mind, and rehearse it only on one side. The frequent declaration to the jury that all the evidence was for their consideration does not cure such instruction. We know, the learned judge of the court below and every lawyer know, how unfavorable may be the impression made upon, generally, untrained thinkers, who must deliberate and form conclusions within a very few hours, by prominently presenting, as the last word to them, only one side of a disputed cause, and this, too, by a judge eminent because of his judicial integrity and ability. Under such circumstances, the probability is that they will assume that there is but one side to the case, and that the one to which the court has called their attention specially and at length. We therefore sustain appellant's first assignment of error, which practically disposes of the second.

The third assignment is as follows: "Even though William P. Bard had originally possessed authority to borrow money for the partnership, without consulting the partners, yet if the jury believe that, in the summer of 1890,

George W. Bard, one of the partners, informed William P. Bard that he was not willing to be under any liability any longer for money borrowed for the firm, and took up all the outstanding loans, then the defendants would not be liable for money borrowed afterwards from the plaintiff through William P. Bard, as her attorney, without the knowledge of George W. Bard, and in violation of his instructions." "Answer: Affirmed." We think that the unqualified affirmation of this point was probably inadvertent error, but error it clearly is. In the first place, there was no evidence tending to show that George W. Bard, one of the co-partners, was not willing longer to be liable for money borrowed by the manager for the partnership, while the point assumes there was. According to his own testimony, he was averse to renewing notes in bank with his indorsement, and he took them up. But this displayed only the usual sagacity of business men who are watchful of their credit. There is nothing tending to show that George W. intended to take from the manager the authority to borrow money elsewhere. Nor, even if he had attempted to expressly revoke the manager's authority, would such attempt have been effective, in view of the agreement and the course of business theretofore pursued, which had been ratified by the partnership. Mere notice by one partner, acting independently of the others, was not sufficient to revoke the long-exercised power of the manager. Partnership action in some form was indispensable to resolve upon and execute such radical change in conducting the business. This assignment is sustained. The point should have been denied.

The evidence complained of in the fourth assignment should have been rejected for irrelevancy. The defendant was permitted to offer evidence to prove that William P. Bard was counsel for plaintiff in the adjudication of her father's estate in the orphans' court. It was utterly immaterial whether he was or not, and it could have no legitimate bearing on the question at issue.

For the reasons given, the judgment is reversed, and a v. f. d. n. awarded.

(177 Pa. St. 212)

BITTING v. MAXATAWNY TP.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

DEFECTIVE BRIDGE—FRIGHTENED HORSE—PROXIMATE CAUSE OF INJURY.

1. Whether the absence of guard rails from a bridge 19 feet wide, 26 feet long, and $4\frac{1}{2}$ feet above the bottom of the stream, was negligence, and the proximate cause of injury to one whose horse, after being driven over it, took fright when the hind wheels of the wagon were 6 feet beyond the bridge, and backed onto the bridge, and then off the side of it, is a question for the jury.

2. Recovery for injury to the driver of a horse by its backing onto an unguarded bridge, and off its side, cannot be had if he, knowing the horse has an aggravated propensity to take fright, negligently incumbers himself with a

lantern in one hand, so that he cannot control the horse, or frightens it by a negligent use of the lantern.

Appeal from court of common pleas, Berks county; G. A. Endlich, Judge.

Action by Lydia Bitting against the township of Maxatawny. Judgment for defendant. Plaintiff appeals. Reversed.

J. H. Jacobs and H. P. Kelsner, for appellant. Ermentrout & Ruhl and D. Nicholas Schaeffer, for appellee.

DEAN, J. The facts of this case are stated by the learned judge of the court below thus: "This is a suit by a widow to recover damages for the death of her husband, alleged to have been caused by the negligence of the defendant. Forming part of one of the highways of Maxatawny township, a stone bridge, about 19 feet in width and 26 feet in length, crosses a mill race 16 feet wide, the distance between the top of the bridge and the bottom of the stream being 4 feet 6 inches. There are no guard rails at the side of the bridge. On the evening of November 22, 1894, plaintiff's husband drove over said bridge at a trot, holding the reins in the right and a lighted lantern in the left hand, slightly above the dasher. When the hind wheels of his wagon were about 6 feet beyond the bridge, he extended his left hand, with the lantern, over the side of the wagon, and immediately the horse stopped and backed, forcing the wagon back upon the bridge. When in this way the middle of the bridge had been reached, the horse turned, so as to put itself and the team in a position transverse to the length of the bridge, and, continuing to back and rear, threw plaintiff's husband, the wagon, and itself backward, over the right side of the bridge, into the stream. Plaintiff's husband fell under the wagon and the horse, and was killed." On this state of facts, the court below, being of opinion that the proximate cause of the accident was the exceptional and impossible to be foreseen conduct of deceased's horse, and not the absence of suitable guard rails on the bridge, directed a nonsuit, and, afterwards refusing to take it off, we have this appeal.

The case was tried before the decision in *Yoders v. Amwell Tp.*, 172 Pa. St. 447, 83 Atl. 1017, was handed down; and, while the difference in the facts of the two cases may and perhaps ought to make a difference in the event of the issues, the course of the trial must, from the law as laid down in that case, be the same. The rule for determination of whether the alleged negligence of defendant was the proximate or remote cause of the injury in that case, as in all the adjudicated cases,—and there are many of them,—is the same. Whether, in the application of the rule to a particular case, there be a legal liability, must necessarily depend on the facts of that case. This rule is: "The injury must be the natural and probable consequence of the negligence, such a consequence as, under the

surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer, and likely to flow from his act." The mere facts that a horse has passed safely over, and a very few feet beyond, a dangerous and negligently guarded bridge, and then, without fault of the driver, backs on and off it, do not of themselves warrant the court in declaring, as matter of law, that the negligence of defendant was the remote cause of the injury. The negligence may be the proximate cause. Was it such a consequence as under the circumstances ought to have been foreseen and provided against? That the ordinary horse will at times take fright is well known. That his movements when frightened are wholly unreasonable and unforeseeable is well known. What provision shall reasonably be made for the safety of travelers on the highway, in view of these facts, is for the jury. The size of the stream bridged, the elevation above the water, the width of the bridge, the surroundings where located, these are all to be considered in determining whether there was negligence, and whether the consequence might and ought to have been foreseen. The mistake made in the argument is in treating the unexpected movements of the horse when frightened as something that could not have been foreseen, and therefore something that defendant ought not to be answerable for. But the fright could be foreseen, and that the horse, acting under fright, would jump to one side, back, turn short around, or run away, was also foreseeable; and this is really foreseen by those having in charge the public highways. Who doubts that if this bridge had been 20 feet high, instead of 4½ feet, there would have been guard rails? Yet, so far as jumping over and backing off are concerned, there is no more reason why they should be on one than on the other. The consequences of going over would be more serious in the one case than in the other, but the probability of going over would be the same. The authorities, foreseeing that horses may take fright, plunge over or back off the bridge 20 feet high, and knowing that the consequences of a fall from such a height must be disastrous, properly guard against it; but if the consequences of a fall 4½ feet would also probably be serious, although in a less degree, the duty is just as plain to guard against them in the one case as the other. All the evidence as to the character of this structure and its surrounding was for the jury in determining whether it was dangerous by the usual modes of travel, and whether the township ought to have foreseen it was so.

Some parts of plaintiff's evidence tended to show that deceased was driving an exceptionally dangerous horse,—dangerous because of an aggravated propensity to take fright,—and that this was known to the driver; yet, notwithstanding, he undertook to drive him at a rapid gait, on a dark or foggy evening, holding the lines only with one hand, embar-

assed in his efforts by a lantern in the other, thus greatly reducing his power to control the horse. If the jury find these to be the facts, clearly he was guilty of negligence which contributed to the accident; and, there being two efficient proximate causes of the accident,—one independent of the township, and for which it was not answerable, and deceased was,—there could be no recovery. The duty of the township is to provide a reasonably safe highway for ordinary travel by the ordinary horse, and as was said in *Trexler v. Greenwich Tp.*, 168 Pa. St. 218, 81 Atl. 1090, there is no duty on the township to provide for travel by exceptionally vicious, untrained, and unmanageable animals. No roads, unless there were barriers on each side for the whole length of them, would make travel reasonably safe with such animals. Or if this driver, by a negligent use of his lantern, frightened his own horse, or negligently incumbered himself with the lantern, so that he could not control his horse, the township should not be held answerable. But the case was for the jury, as we have already stated. Therefore the judgment is reversed, and a procedendo is awarded.

(177 Pa. St. 364)

PHILADELPHIA & D. C. R. CO. v.
CONWAY.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

RAILROAD COMPANIES—STOCK SUBSCRIPTIONS—
PAROL AGREEMENTS—WRITTEN CONTRACTS
—REVOCATION OF SUBSCRIPTION.

1. Where it is sought to supplement a written contract by terms alleged to have been made in parol, and the party's case is supported only by his own oath, while against it are the written contract and the positive denial of the person with whom the party testifies that the parol terms were agreed upon, the written contract prevails.

2. In an action upon a written subscription contract for stock in a railroad company, it is not competent to defeat it by setting up agreements made in parol with the agents who procured the subscription.

3. It is no defense to a subscription for railroad stock to aid in grading and completing the road, the subscription to become binding when \$100,000 had been subscribed by others than the owner, and parties in interest other than the owner to secure the additional right of way free of cost, that the owner furnished money for rights of way; no part of the \$100,000 being used for that purpose.

4. A conditional subscription to railroad stock, to become binding when a certain amount has been subscribed, cannot be revoked after the full amount has been subscribed.

Appeal from court of common pleas, Philadelphia county.

Action by the Philadelphia & Delaware County Railroad Company against Thomas Conway to recover the sum of \$1,600 on a conditional subscription of its stock made by defendant. The subscription was solicited to aid in grading and completing the road, the subscription to become binding when \$100,000 had been subscribed by others than

the Pennsylvania Railroad Company (who had purchased the road at sheriff's sale), the parties in interest other than the Pennsylvania Railroad Company to secure the right of way free of cost. The road ran through defendant's land, and he was induced to sign the subscription paper on the promise of the location of a railroad station on his or the adjoining property, and that the money raised on the subscription was to be used "to grade and complete the road, and not to pay land damages for the rights of way." From a judgment in favor of plaintiff, defendant appeals. Affirmed.

V. Gilpin Robinson, for appellant. John Hampton Barnes and Geo. Tucker Bispham, for appellee.

GREEN, J. The contract upon which this action was brought is in writing, and signed by the defendant and many others. It is a contract of subscription to the stock of the plaintiff company. It contains certain express stipulations, definitely stated, as to the meaning of which there is no controversy. But the defendant alleges, and so testified himself, that there were certain oral terms stated and agreed upon between him and Mr. Stewart Wood, who procured the defendant's subscription, and claims that these terms were not performed, and that he was therefore released from his subscription contract, and was at liberty to withdraw from it, and refuse to pay, which he did. The material question in the case is whether these oral terms can be treated as a part of the subscription contract, so that their nonperformance by the defendant will constitute a defense. We think not. Substantially the oral terms were, according to the allegation of the defendant, that there should be a station upon the property adjoining the property of the defendant; and that his subscription was made and taken "with a view of the old road being adopted as far as practicable." The defendant, in his testimony, states these two matters in this way: "There was a further agreement took place at the time I made the request for the paper, that there should be a station upon the property adjoining mine. * * * Q. What else was said to you? A. It was stipulated that my subscription should be made and taken with a view of the old road being adopted as far as practicable." It must be confessed that the latter of these alleged stipulations was quite indefinite, and the subsequent testimony of the defendant indicated that but little consequence was attached to it. He testified that, when he discovered that the station was not to be built upon the property adjoining his land, he notified the plaintiff that he would not pay his subscription; thus indicating that the inducing cause of his refusal to pay was that the station was not to be built at the place where he testified it was agreed to be built. It will be observed that it is

not claimed by the defendant that these oral terms were to be inserted in the contract of subscription as a part thereof, and then left out either by fraud, accident, or mistake. It is simply alleged that they were additional terms of the contract, made in parol. He also said that they induced him to sign the written contract. It will at once be seen that the defendant's case is subject to the fatal objection that it is supported only by his own oath, while against it are the written contract, and the flat and positive denial of Mr. Wood, the person with whom, as the defendant testifies, the parol terms were agreed upon. All the authorities concur in holding that in such circumstances the written contract prevails. There must be more than an equilibrium of verbal testimony to destroy a written contract. The principle is so familiar, and the authorities are so numerous, that it is unnecessary to cite them.

Independently of that consideration, there is another principle and another line of decisions which of their own force defeat the contention of the defendant. It has been many times decided in these cases of actions upon subscription contracts that it is not competent to defeat such a written contract by setting up agreements made in parol with the agents who procure the subscriptions. Thus, in *Guarantee Co. v. Mayer*, 141 Pa. St. 511, 21 Atl. 665, it was held that in an action to collect a subscription defendant alleged in his affidavit of defense that one of the promoters of the company called upon him, and he was induced to become a subscriber to four shares of the capital stock of the company, at \$50 per share, under the promise and agreement that such company would furnish him, for \$200, eight shares of the capital, and also that the company would establish offices in New York and Chicago; and that, upon the faith of these representations, he was induced to sign the paper subscribing to the stock. Upon a rule for judgment for want of a sufficient affidavit of defense, judgment was entered for the plaintiff, and this judgment was affirmed. In the case of *Miller v. Railroad Co.*, 87 Pa. St. 95, which was an action to recover the amount of a subscription to the stock of a railroad company, the defendant offered to prove on the trial that he was induced to subscribe by reason of certain parol representations made to him by officers of the company, that the road should be built, not as stated in the subscription book, but along defendant's house, and upon the east side of the river, and that he would not be obliged to pay until the road was built. We held that this evidence was properly rejected. Mr. Justice Gordon, delivering the opinion, said: "Now, as we have already shown, this subscription was especially designed to carry out a common adventure, in which the company was but a means used for its accomplishment, and the interests of which were but secondary; hence it follows that, if Miller succeed in avoiding

his obligation, he does so at the expense of his co-subscribers, and in fraud of their rights. Every one who signed after him did so on the faith of his signature, as he did upon the faith of the signatures of those who preceded him; and to permit him now to set up a secret parol arrangement, by which he may be released, whilst his fellows continue to be bound, would be anything but just. As was said in the case of *Graff v. Railroad Co.*, 31 Pa. St. 489 (per Woodward, J.): 'A subscription to a joint stock is not only an undertaking to the company, but with all other subscribers. Such contracts are tri-lateral, and, even if fraudulent as between two of the parties, they are to be enforced for the benefit of the third.' This quotation expresses a principle applicable to the case in hand, and aptly illustrates the reason why the defendant should be estopped from setting up the secret parol agreement between himself and the agents of the company." Precisely the same considerations are applicable to the present case. Here 's a contract purporting to be signed, and actually signed, by a considerable number of persons who were jointly interested in the building of a railroad in their vicinity, by which they all agree to subscribe the sums set opposite their names; the subscriptions to become binding when \$100,000 have been subscribed by others than the Pennsylvania Railroad Company. All the other signers are interested in the defendant's subscription. If he is to be released from his subscription because of a secret parol agreement made with the agent who procured the subscriptions, and which is not expressed in the written contract signed by all, it would be a clear fraud upon the others, and therefore, under the decision in *Miller v. Railroad Co.*, last cited, he is estopped from setting up such an agreement. In *McClure v. Railway Co.*, 90 Pa. St. 269, which was an action on a railroad subscription contract, the covenant was to pay money on call. On the trial the defendant offered to prove an oral agreement that he might pay in labor and materials, without offering to show that he attempted to ascertain when and where he could do so. Mr. Justice Trunkley, delivering the opinion, said: "When the call was made, it was his business to pay according to his contract, and, instead of that, he did nothing. Under the alleged oral agreement, he may not have been bound to tender materials and labor, but the call was enough to put him on inquiry when and how they would be received. The court was right in holding that, if the offers set out in the first and second assignments were received, they would not amount to a defense. It is not admissible to contradict or materially change a written contract, save for fraud, accident, or mistake, of which no evidence was offered. *Martin v. Berens*, 67 Pa. St. 459." So in the present case there was neither fraud, accident, nor mistake in omitting this alleged oral agreement, as to

the place where the station was to be built, or how the road should conform to the old roadbed. According to the defendant's own testimony, it was the mere representation of the agent who procured the subscription, that he (the defendant) acted upon in making his subscription. Under the decisions just cited, such representations would not constitute a defense, even if they were actually made. But they are denied by the positive testimony of the agent, and therefore they cannot be permitted to overcome the plain terms of the written contract, for want of sufficient evidence to support them. The cases of *Caley v. Railroad Co.*, 80 Pa. St. 368, *Plank-Road Co. v. Arndt*, 31 Pa. St. 319, and *Turnpike Co. v. Phillips*, 2 Pen. & W. 196, are inapplicable, as they were cases in which the written terms of the contract were violated, so as to prevent recovery.

It was also contended for the defendant that the contract was violated to his prejudice, because rights of way were purchased by the company contrary to the provisions of the contract. It is a complete answer to this contention that the proviso was for the benefit of the Pennsylvania Railroad Company, who were not to be called upon to supply funds to complete the road unless the parties in interest, other than that company, should secure the right of way free of cost to the company. But the Pennsylvania Railroad Company actually did furnish the money to complete the road, including \$27,000 for rights of way, notwithstanding this provision, taking stock and bonds of the plaintiff for their advancements, and the plaintiff was not obliged to use any part of the \$100,000 subscriptions to pay for rights of way. The defendant, therefore, has nothing to complain of in this respect. The defendant was not at liberty to revoke his subscription by his letter of June 12, 1893, because, by the 30th of May preceding, the full amount of \$100,000 had been subscribed. The assignments of error are not sustained. Judgment affirmed.

(177 Pa. St. 371)

CITY OF PHILADELPHIA v. HESTONVILLE, M. & F. R. CO.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

STREET RAILWAYS — CHARTER — CONSTRUCTION — LIABILITY FOR STREET PAVING.

1. A provision in the charter of a street-railway company that it shall be subject to such regulations as might be made by the city "in regard to paving, repairing, grading," etc., of the streets on which its tracks are located, does not authorize the city to impose upon the company the cost of paving such streets.

2. A provision in the charter of a street-railway company that it shall "keep" in "perpetual good repair," at its own expense, the streets on which its tracks are located, does not render it liable for the cost of repaving such streets with a new, different, and more costly material.

Appeal from court of common pleas, Philadelphia county.

Action by the city of Philadelphia against the Hestonville, Mantua & Fairmount Railroad Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

Russell Duane and J. Bayard Henry, for appellant. John L. Kinsey, City Sol., and E. Spencer Miller and James Alcorn, Asst. City Sols., for appellee.

WILLIAMS, J. The defendant company was incorporated by a special act of assembly, approved on the 6th day of April, 1859. There was at that time no system of general laws regulating the creation, and defining the duties and obligations, of such corporations. We must look, therefore, to the legislative action by which the new corporation was created for a statement of its powers and privileges, and for the extent to which it was subjected to municipal burdens in excess of those that fall upon all taxpayers alike. Turning to this act, we find that the company was required to obtain the consent of councils to the use of the bridge on Bridge street, which was in the line of its prospective railway; to conform to the established grade of the streets it should occupy; to keep the said streets in "perpetual good repair," at its own expense; and to be subject to such ordinances as councils might from time to time adopt for the establishment of regulations "in regard to paving, repairing, grading, culverting of, and laying gas and water pipes in and along said streets, and to prevent obstructions thereon." It was not subjected to existing ordinances regulating the terms upon which the street railways were permitted to occupy the streets of the city, but the legislature laid out its route, named the streets to be occupied, and, by virtue of its paramount authority, gave to its creature permission to enter upon these streets, and construct its line of railway, upon terms named by it in the act of incorporation.

The city seeks to recover for the cost of repaving portions of certain streets which the defendant was required to keep in good repair. The defendant denies its liability for new paving, while admitting its obligation to repair. The question thus raised depends upon the proper construction of the act of 1859, creating, and defining the powers and duties of, the defendant company. We are referred by the city, in support of its position, to that clause of the act subjecting the company to such regulations as might be made by city councils in regard to paving, repairing, grading, culverting, and laying gas and water pipe in the streets over which the tracks of the company might extend, as affording the authority for charging the cost of repaving to the defendant. But this provision does not mean that the railway company may be required to pave, to repair, or grade, or lay, water or gas pipes along all the streets it traverses with its railway, but that it shall not get in the way of the city, and obstruct it, in the prosecution of municipal improvements upon the city streets.

It requires the railway company to conform to all regulations made by the city council having for their object the protection and facilitation of the work of the city in improving its streets, extending its system of water supply, or improving its system of drainage. When, in any such direction, the control of the city over its streets conflicts with the exercise of the franchise of the railway company on and over the same streets, the latter must give way. The superior right of the city over its streets, as between it and any person or corporation doing business upon them, is thus recognized, and the corporation created by the act is by express words made subject to it. This precaution may not have been necessary, but it was wise. In 1859 the relations of the municipality and the street railway were not as well settled as they now are, and without this provision there was, at least, room for controversy over the right of the city to interrupt the exercise of a corporate franchise in its streets, without liability to a claim for compensation. This provision removes all doubt. The street railway, like the drayman, occupies the street subject to municipal control so far as this may become necessary for the public safety or the prosecution of municipal improvements.

The other ground on which a recovery is sought is that the railway was required by the law incorporating it to keep the streets occupied by it in good repair. The phrase "to keep the streets in good repair" means to uphold, to maintain, or preserve them in good condition. It presupposes that they are in some fair degree of repair when the obligation to keep them so begins to operate. In this connection it should be noted that the requirement is not that the defendant shall put the streets in good repair, but that it shall "keep them" in good repair. Whatever the style of paving might be at the time, the mode of repair must conform to it; and under the recent case of *City of Philadelphia v. Ridge Ave. Pass. Ry. Co.*, 143 Pa. St. 444, 22 Atl. 695, it may be said that, when the city repairs a street with a new and improved pavement, the duty to repair relates to the pavement so put in place, and requires that the repairs shall be adapted to the style of pavement which the city has placed, or causes to be placed, upon the particular street upon which repairs are necessary. The duty to repair is a continuous one. It is for all time. It is not intended to perpetuate in each street of the city the style of pavement in use upon it when the railway company entered upon it with its tracks. On the contrary, the general supervisory control of the city over its streets is recognized, and its right to make such regulations in regard to paving, repairing, grading, culverting, and laying gas and water pipes along them, as may be desirable to facilitate its work, and to require obedience thereto by passenger railway companies, as well as the cartman and footman, is clearly written into the charter of this company. The right of the city is to determine

what pavement shall be used, and, when it shall go down upon a given street, the duty to repair is upon the company wherever its tracks extend. A covenant to repair in a lease makes it the duty of the lessee to keep the building to which it relates in substantial repair, having regard to their age and condition at the time the covenant became operative. It may sometimes require the restoration of an inclosure or other structure taken down or removed by the maker of the covenant, but in every case it refers to a previously existing condition, the restoration or preservation of which is the purpose of the covenant. This was substantially said as early as *McClenachan v. Curwin*, 3 Yeates, 362. It is the doctrine of all our cases. What is now asserted is that the duty to repair includes the duty to replace with a new, an improved, and more expensive style of pavement whenever the city shall so direct; and *City of Philadelphia v. Ridge Ave. Pass. Ry. Co.*, 143 Pa. St. 444, 22 Atl. 695, and *City of Philadelphia v. Thirteenth & Fifteenth Sts. Pass. Ry. Co.*, 169 Pa. St. 269, 33 Atl. 126, are cited in support of this proposition. In neither of these cases was the question involved. In the latter case the company was subject to the ordinance of 1857, which expressly required it "to be at the cost and expense of maintaining, paving, and repairing" the streets occupied by it. The same is true of the former or Ridge Avenue Case. The Girard College Passenger Railway Company was by the act of April 15, 1858, made subject to the ordinance of 1857. It was merged into the Ridge Avenue Company, and this provision became a part of the law of the consolidated company, and was held to be binding upon it. The question was presented in *Norristown v. Norristown Pass. Ry. Co.*, 148 Pa. St. 87, 23 Atl. 1060, and decided in favor of the position of the appellant, by the affirmance of the judgment appealed from, in a short per curiam. The error of the learned judge of the court below in this case was in holding that the duty to repair was imposed by the provision in the defendant's charter that recognized the right of the city to establish regulations in regard to paving, repairing, grading, culverting, and laying gas and water pipe in the streets. In so doing, he followed what he believed to be the fair effect of the Ridge Avenue and Thirteenth & Fifteenth Streets Cases, above referred to; but in this he was mistaken.

The first assignment of error is sustained. For the same reason, the answer made to the first, second, and third points of the defendant was erroneous. The law of this case is fairly stated in defendant's fourth point. The extent of the liability of the defendant under its charter of incorporation is for the cost of repairs, properly made, to such style of pavement as may have been upon the several streets along which its railways ran when the notice to repair was given. The duty to repave was not imposed by the act of 1859. The judgment is reversed, and a venire facias de novo awarded.

(177 Pa. St. 379)

CITY OF PHILADELPHIA v. PHILADELPHIA CITY PASS. RY. CO.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

STREET-RAILWAY COMPANIES—LIABILITY FOR STREET PAVING.

1. Where the charter of a street-railway company fixes the company's liability for street paving, the city cannot enlarge it.

2. A city determined to repave with asphaltum a street which intersected defendant's street-railway tracks, and which was already paved with Belgian block. The contract for paving the street was let as a whole, without reference to intersecting streets, and the blocks removed were used for paving elsewhere. *Held*, that a provision in defendant's charter requiring it to keep in repair the street between its tracks did not render it liable for the cost of the paving at the intersection of its tracks with the street paved.

Appeal from court of common pleas, Philadelphia county.

Action by the city of Philadelphia against the Philadelphia City Passenger Railway Company. There was a judgment for defendant, and plaintiff appeals. Affirmed.

John L. Kinsey, City Sol., and E. Spencer Miller and James Alcorn, Asst. City Sols., for appellant. Ellis Ames Ballard, Rufus E. Shapley, and John G. Johnson, for appellee.

WILLIAMS, J. The plaintiff's claim in this case is made up of two items. The larger of these is for the cost of paving done by the city upon Lancaster avenue. The other is for repairing done at the intersection of Chestnut and Broad streets, and at the intersection of Walnut and Broad streets. Distinct defenses are made to each of these items. To the claim for paving done on Lancaster avenue, the defendant replies that the line of railway built upon that avenue was constructed by it as the lessee of the Philadelphia & Darby Railway Company, and under the authority of its lessor's charter, granted by the legislature in 1857, and a supplementary act passed in 1863. The supplementary act fixed the extent of the liability of the company for the repair of the streets in these words: "The Philadelphia and Darby Passenger Railway Company shall be required to keep in repair only so much of said street as may be within their tracks." A further supplement, authorizing an extension of the railway of the Philadelphia & Darby Company, was passed in 1868. In January, 1870, this company was authorized to lease its road, property, corporate rights, and franchises; and in the following month it executed a lease to the defendant, covering its line then in operation, together with its personal property, its corporate rights, and franchises. The several statutes now referred to, and the lease to the defendant, were prior to the adoption of the constitution of 1874. The legislature, by authorizing the lease, enabled the lessee, by necessary implication, to acquire and exer-

cise all the rights and powers possessed by the lessor. *Railway Co. v. Sly*, 65 Pa. St. 206. It took as its lessor, and held them subject to the conditions and burdens imposed by law. We do not doubt that a simple grant of power to a corporation to conduct business in a city leaves the grantee subject, as an individual or a partnership would be, to all reasonable municipal regulations affecting the conduct of the business so authorized. *Frankford & P. Pass. Ry. Co. v. City of Philadelphia*, 58 Pa. St. 119. A reasonable regulation of manner in which the privilege must be exercised is not a denial of the privilege itself; but, when the extent of the liability of the corporation to the municipality for the taxes or street repairs has been fixed by the legislature, the city has no power to enlarge it. The attempt to do so would not be regulation of the manner of the exercise of the privilege, but the imposition of a condition which would operate as a denial. In this case the liability of the Philadelphia & Darby Company was fixed by the legislature. Its duty was to repair so much of the street as lay between its tracks, and no more. The duty of the defendant, its lessee, is to bear the burden imposed by law on its lessor; and the city can no more add to the burden of the one than of the other.

The second item in the plaintiff's claim stands on wholly different ground. The city decided to pave a portion of Broad street with sheet asphaltum. An ordinance was passed in due form authorizing and directing this work to be done. The street was already paved with stone, but the city determined to remove the stone, and repave the street with an improved and a comparatively noiseless pavement. It entered upon this work in accordance with the ordinance, and made a contract for it as a whole, without regard to street intersections. The Belgian blocks from these intersections were used in paving elsewhere by the city, and the repairing on Broad street went forward, according to the testimony of the chief commissioner of highways, because there was a desire on the part of the public, as well as on the part of the city officers, to make of Broad street an avenue paved with the most improved sort of pavement throughout its entire length. No portion of Chestnut street or of Walnut street was referred to in the ordinance. They were not found to be out of good repair, or directed to be repaired or repaved at their intersection with Broad street, or at any other point, but Broad street was dealt with as a whole by the city. Our question is not whether the defendant could have been made liable for the repairing now claimed for, under a different ordinance and a different course of conduct on the part of the city, but whether, under the ordinance for the improvement of Broad street, now before us, and the line of municipal conduct entered upon in obe-

dience to it, the defendant is liable. Upon this question we agree with the learned court whose judgment is before us. The ordinance did not contemplate or provide for the improvement of Chestnut street or of Walnut street. It did not impose, or profess to impose, any duty upon the defendant in regard to either. It provided for the repaving of Broad street with an improved pavement, in obedience to public opinion, and with a view to making it a great public thoroughfare or driveway. The contract treated the subject in the same manner. It made no provision for work at the intersection to be done by others, but required the contractor to proceed with the work as one continuous undertaking.

The effort to charge the defendant with a portion of the cost seems to have been made after the ordinance was passed and the contract made, and upon a point not contemplated by either. The judgment is now affirmed.

(177 Pa. St. 332)

CITY OF PHILADELPHIA v. EMPIRE PASS. RY. CO.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

STREET-RAILWAY COMPANIES—LIABILITY FOR STREET PAVING.

A provision in the charter of a street-railway company that, on completion of the road, the company should be subject to city ordinances "regulating the running of passenger railway cars," does not enable the city to impose on the company the cost of street paving.

Appeal from court of common pleas, Philadelphia county.

Action by the city of Philadelphia against the Empire Passenger Railway Company to recover the cost of street paving. There was a judgment for defendant, and plaintiff appeals. Affirmed.

John L. Kinsey, City Sol., and E. Spencer Miller and James Alcorn, Asst. City Sols., for appellant. Ellis Ames Ballard, Rufus E. Shapley, and John G. Johnson, for appellee.

WILLIAMS, J. The defendant was incorporated by a special act of legislature approved on the 10th day of February, 1869. By the provisions of this act it was authorized to enter upon the streets of the city of Philadelphia, and construct its line of railway over the route described in its charter, "without obtaining the consent of the city councils of the city of Philadelphia." The right of eminent domain was not only conferred, but the place and manner of its exercise were determined by the state as the sovereign, regardless of the will of the municipality. If the consent of the city to the occupation of its streets had been necessary, the terms and conditions upon which that consent should be granted would have been for the city to determine. Acceptance of the permission to enter upon the streets would

then have involved an assent on the part of the company to all the terms and conditions imposed, which the courts would have enforced. *Allegheny City v. Millville, E. & S. Ry. Co.*, 159 Pa. St. 411, 28 Atl. 202. But the consent of the city was not made necessary. The company was authorized to construct its railway without it. The city was in no position to impose terms. It had no power to do so. We must look, therefore, to the special legislation incorporating and defining the powers and privileges of the railway company for the terms of the grant to the defendant, and the extent of its obligations to the city. Examining this special legislation for this purpose, we find that the company was required in the construction of its railway to conform to the established grade of the streets it should occupy; to lay crossings on those streets not oftener than one in each 250 feet; and to do such repairing as became necessary on account of the laying of its tracks, to its own cost, and without cost to the city. These were all the terms imposed relating to the location and construction of the track of the railway company; but, "whenever the said railway shall be laid and used by running passenger cars thereon," an additional obligation arose, which was expressed by the legislature in these words: "The said company shall be subject to the ordinances of the city of Philadelphia, regulating the running of passenger railway cars." Our question is, what is the extent of the obligation imposed by this provision? It is clear that it does not relate to the right to enter the streets of the city, and construct its railway thereon, for it is limited by its terms to take effect only when the track was laid, and in actual use by the running of cars over it. The railway was to be built under the authority of the state, not of the city. But, after this was done, it was to enjoy no immunity from municipal control. It must, as to the operation of its railway, be subject to the ordinances of the city regulating the "running of passenger cars." The distinction is plainly drawn between the building of a line of street railway and the operation of a completed line. The ordinances to which it is made subject are those that "regulate the running of cars" upon a completed road rightfully upon the streets, and nothing more. The frequency with which cars shall be run, the rate of speed, the protection of the public at crossings, and similar subjects, are those that are within the purview of the act. As to all such subjects which are within municipal control, the defendant stands on the same ground as do other street railways of the city, and is subject to the ordinances "regulating the running of passenger railway cars" in the same manner and to the same extent. This is the extent of the obligation imposed by the statute on the defendant company, and the power of the city over it. It follows that the assignments of error must be overruled. The judgment is affirmed.

(177 Pa. St. 359)

In re MISSELOWITZ.

Appeal of SEDDINGER et al.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

LUNACY COMMISSION—APPOINTMENT OF RECEIVER PENDENTE LITE—JUDICIAL DISCRETION—PROPERTY INVOLVED—CERTIFICATE OF AMOUNT—APPEAL.

1. The appointment of a receiver pendente lite under a commission de lunatico inquirendo, to prevent mismanagement or waste of the alleged lunatic's property, is within the sound discretion of the court in which the inquiry is pending.

2. The exercise of judicial discretion in the appointment of a receiver will not be reviewed except for its palpable abuse.

3. Where the only issue under a commission de lunatico inquirendo is the sanity of a person, and the record does not show the amount of property incidentally involved, and the court cannot certify thereto to determine the appellate jurisdiction in such cases, as required by Act June 24, 1895, before taking their appeal, appellants should present to the court below such evidence as will enable it to make the certificate.

Appeal from court of common pleas, Philadelphia county.

Petition by Bertha Misselwitz for a commission de lunatico inquirendo, to inquire whether Oscar Misselwitz has, by reason of lunacy, become incapable of managing his estate. From a decree appointing a receiver pendente lite, Matthias Seddinger and C. Wesley Ruffell, attorneys in fact of Oscar Misselwitz, appeal. Affirmed.

Joseph L. Tull, for appellants. Henry C. Terry, for appellee.

STERRETT, C. J. Assuming for purposes of this case that these appellants were the duly-constituted attorneys in fact of the alleged lunatic, it does not follow that either they or their principal had any just reason to complain of the appointment of a receiver of his estate pending the inquiry as to his alleged lunacy, etc., or of the refusal of the court to vacate the decree. An examination of the record has convinced us that they had not. The regularity of the proceedings in lunacy—including appointment of commissioner, order as to notice of the execution of the commission, etc.—is not questioned; nor can it be doubted that the averments contained in the supplemental petition, praying the court "to appoint a receiver to prevent the further wasting of the estate of said Oscar Misselwitz," were sufficient to justify the action of the court in making the decree thus prayed for, and afterwards refusing to vacate the same. The main purpose of a commission de lunatico inquirendo is to determine, in the first place, whether the subject of the inquiry is a lunatic or not, and, if he is found to be a lunatic, then to provide for the safeguarding of both his person and his property. Pending the inquiry, it sometimes becomes necessary to make temporary provision for the custody

and safe-keeping of one or both. The appointment of such temporary custodian or receiver pendente lite, to prevent mismanagement or waste of the alleged lunatic's property, etc., rests in the sound discretion of the court in which the inquiry is pending; and it requires a clear case of abuse of that discretion to justify the interposition of an appellate court. Nothing of that kind has been shown in this case. On the contrary, the discretion vested in the court below appears to have been wisely exercised. We find nothing in the record to justify the obstructive intervention of the appellants. If protecting, rather than wasting, the remnant of their principal's estate, was their object, it could have been much better accomplished by co-operating with his wife in promoting the inquiry into his alleged lunacy, and thus securing a speedy determination of that question, involving, as it did, the validity of their authority to act as attorneys in fact of the alleged lunatic. It is alleged by appellee, and appears in her "corrected copy of docket entries," that, in less than three weeks after this appeal was taken, the commissioners' report was filed, finding Oscar Misselwitz a lunatic for five years and upward prior to June 12, 1895, with lucid intervals during that period, but that since said date he has been a lunatic, with no lucid intervals whatever. If that finding is sustained, the power of attorney executed by the lunatic in September, 1895, is of no avail.

It is scarcely necessary to say that Meurer's Appeal, 119 Pa. St. 115, 12 Atl. 870, cited and relied on by appellants, has no application to the facts of this case. In that case the question was whether a bill in equity could be resorted to as an available substitute for our special statutory mode of proceeding to determine the fact of insanity, etc. It was held that the court had no jurisdiction of the subject of insanity in the form of proceeding that was adopted in that case; that, "whatever may have been the jurisdiction and power of a chancellor prior to the act of 1856 to inquire of and determine the fact of insanity, it is very clear that since its passage such inquiries must be conducted in the mode prescribed by the act and its supplements, and not otherwise." In the case before us the statutory mode of proceeding was pursued, and the only question is whether, pending the inquiry, the court had the power to prevent waste of the alleged lunatic's property. It requires neither argument nor citation of authorities to show that the court has inherent power to do what was done.

When this appeal was taken, the record did not show, nor was there anything thereon by which the court could determine, whether the value "of the property really in controversy" was "greater or less than one thousand"; and hence the learned judge was unable to certify, as required by Act June 24, 1895. Before taking their appeal, the

appellants should have presented to the court below such evidence as would have enabled it to comply with the requirement of the act. If that had been done, no delay would have been occasioned by first appealing to the superior court, and then being sent here. The report of the commissioner afterwards filed shows that the value of the property really in controversy exceeded \$1,000, and thus the case appears to be within our jurisdiction. But on the merits, as we have already seen, the appellants have no case. The decree is therefore affirmed, and appeal dismissed, at their costs.

(177 Pa. St. 183)

ROBERTS v. DELAWARE & H.
CANAL CO.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

RAILROAD CROSSING — COLLISION — OPEN SAFETY GATE.

While the fact that safety gates at a railroad crossing, which should be closed in case of danger, are standing open, does not relieve a traveler of the duty of exercising care, it can be considered in determining whether he exercised care according to the circumstances.

Appeal from court of common pleas, Lackawanna county; H. M. Edwards, Judge.

Action by Mary Roberts against the Delaware & Hudson Canal Company for death of plaintiff's husband, killed by defendant's train at a railroad crossing. Judgment for plaintiff. Defendant appeals. Affirmed.

W. H. Jessup, Horace E. Hand, and W. H. Jessup, Jr., for appellant. J. Alton Davis, John R. Edwards, Everett Warren, and Henry A. Knapp, for appellee.

STERRETT, C. J. In any view that can be reasonably taken of the testimony that was properly before the jury, this was clearly a case for them on questions of fact, involving the defendant company's negligence, and also the alleged contributory negligence of plaintiff's husband, since deceased. The testimony, covering over 350 pages in all, is too voluminous to admit of anything more than a general reference to its character and effect. A careful examination of it as a whole has convinced us that any attempt to do more would subserve no useful purpose. Without, therefore, referring even to its salient points, relating to said questions of negligence and contributory negligence, it is sufficient to say that it was of such a character that it became the manifest duty of the learned trial judge to submit it to the jury, with proper instructions as to the law applicable to the facts that might be found by them therefrom. That was accordingly done, in a clear, well-guarded, and adequate charge, in which we find no substantial error. The controlling questions of fact, on which plaintiff's right to recover depended, were definitely settled by the verdict in her favor. It necessarily implies a finding to the effect that t-

defendant company was guilty of negligence which was the proximate cause of the death of plaintiff's husband, and that no negligent act of his contributed thereto. That such a finding was fully warranted by the testimony cannot be doubted.

It follows from what has been said that the judgment should not be disturbed. A careful consideration of the record with reference to each of the specifications of error has satisfied us that neither of them should be sustained. The first challenges the correctness of the court's answer to defendant's fifth point. In view of the evidence before the jury, there was no error in saying that it was for them to ascertain whether the decedent in this case could not have a proper view of the track without getting out of the wagon. An unqualified affirmance of the point would have been error.

The next five specifications complain of the refusal of the court to affirm defendant's points recited therein respectively. We find no error in the learned judge's answers to either of these points, nor do we think there is anything in them that requires discussion.

The subject of complaint in the seventh specification is the affirmance of plaintiff's second point, viz.: "Safety gates which should be closed in case of danger, if standing open, are an invitation to the traveler on the highway to cross; and, while this fact does not relieve him from the duty of exercising care, it is a fact for the consideration of the jury in determining whether he exercised care according to the circumstances." It requires no argument to show that this proposition is correct, especially in view of the evidence in this case, and hence there was no error in affirming it.

Considered in connection with other portions of the general charge, we fail to discover any error in the excerpts recited in the ninth and tenth specifications; nor are we convinced that there was any error in overruling defendant's motion to strike out the evidence of Thomas Gordon, referred to in the eleventh specification. Judgment affirmed.

(177 Pa. St. 190)

IN RE BOIES' ESTATE.

Appeal of MILLS.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

WILLS—CONSTRUCTION—ESTATE GIVEN.

A will giving "all the rest, residue, and remainder" of testator's estate to his four children, "to be equally divided between them on the following conditions: The shares going to my son H. and my daughters, A. & E., shall be held * * * in trust for their children [they, however, as explained by codicil, to have the right to the income for life]; and the share going to my son M. shall be held in trust by my son H. My son H. shall pay to my son M. the income for his share, in quarterly payments, each and every year during his natural life; and my son H. may, in his discretion, in case my said son M. shall reform and abstain from * * * intoxicating drinks for two years, pay to him, my son M., from \$3,000 to \$5,000 to enable him to engage in business."

Held, that M. took more than an equitable life estate, and could dispose of the corpus of his share by will.

Appeal from orphans' court, Lackawanna county; John B. McPherson, Judge.

Accounting by Henry M. Boies, executor of Joseph M. Boies, deceased. From a decree overruling exceptions to his distributive account, Luther Lafin Mills, executor and trustee under the will of Matthew L. Boies, appeals. Reversed.

Jas. H. Torrey (Peter Cantine, of counsel), for appellant. Alfred Hand and Wm. J. Hand, for appellee.

STERRETT, C. J. This case hinges on the proper construction of the residuary clause of Joseph M. Boies' will, which is in the following words: "Sixth. All the rest, residue, and remainder of both my real and personal estate I give, devise, and bequeath to my son Henry M. Boies, to my daughter Mari L. Brainard, wife of Thomas O. Brainard, to my daughter Ella B. Mills, wife of Luther Lafin Mills, and my son Matthew L. Boies, to be equally divided between them, on the following conditions: The shares going to my son Henry M. Boies and my daughters, Mari and Ella B., shall be held, each of them, in trust for their children; and the share going to my son Matthew L. Boies shall be held in trust by my son Henry M. Boies. My son Henry M. Boies shall pay to my son Matthew L. Boies the income from his share, in quarterly payments, each and every year during his natural life; and my son Henry M. Boies may, in his discretion, in case my said son Matthew L. Boies shall reform and abstain from the use of all intoxicating drinks for two years, pay to him, my said son Matthew L., from three thousand to five thousand dollars, to enable him to engage in business." At the date of his will (November 15, 1880), the testator owned the mansion house, but in 1883 he sold it. On March 17, 1891, he made the following codicil to his will, declaring therein that it was sealed in the city of Chicago, Ill.: "I desire to have it known and understood by all interested in my last will and testament, and I so will, that it is my intention that my children surviving me, to whom I have left property in trust for their children, shall have the free use and benefit during their lives of the income of such trust, without the necessity of accounting to their children for such income, and that they shall have power to sell and reinvest the principal at their discretion, in such manner as shall, in their judgment, best preserve the principal sum for their heirs. Nothing herein, however, is to affect the original provisions of my will concerning my youngest son, Matthew." None of the remaining provisions of the will appear to afford any assistance in construing the residuary clause above quoted. On April 22, 1891, the testator died, at the home of his daughter Mrs. Mills, in Chicago; and on January 17, 1894, his son Matthew

died, at Middletown, N. Y., unmarried, and leaving no issue. By his last will, executed at Chicago, November 27, 1891, Matthew made a specific bequest to the appellant, Luther Lafin Mills, in trust for Matthew Mills, son of said trustee, and left the residue of his estate to his sisters, Mrs. Mills and Mrs. Brainard. This will was duly probated, and, as executor and trustee therein named, appellant claims the corpus bequeathed to Matthew L. Boies, in trust, etc., by the will of his father, Joseph M. Boies.

The first specification of error involves the construction claimed by appellant of the residuary clause above quoted. The second and fourth specifications, depending on the construction thus claimed, present the question of distribution under the will of Matthew L. Boies. The third specification may be dismissed with the remark that there appears to be no error in the finding of fact therein recited. There is no question as to the amount of the estate involved; nor is it doubted that, if the corpus of Matthew's share did not pass to and vest in him under his father's will, it remained undisposed of, and to that extent the testator died intestate. The validity of Matthew's will is not denied, nor can it be doubted that if he had any right or title, beyond an equitable life interest, in or to the share given him by his father, the same passed to appellant by Matthew's will. There is no dispute as to who are the legal heirs of Joseph M. Boies; so that, if he died intestate as to the corpus of Matthew's one-fourth, the distribution confirmed by the court is correct. The case therefore appears to resolve itself into the question whether Matthew took more than an equitable interest for life, only, in the share given him by his father's will; and that, of course, depends on the proper construction of the residuary clause above quoted.

In construing a will, regard must, of course, be had to the established rules of construction, one of which requires that all the parts thereof must be considered with reference to each other, or, as it is sometimes expressed, the testator's intention (the ascertainment of which is generally the purpose of construction) must be gathered from the four corners of the instrument. Another rule requires that (so far as is consistent with the will as a whole) effect must be given to the words, and, if possible, all the words of the testator used in their ordinary and natural signification, etc. Other rules are that the presumption is always against intestacy; that the law regards with favor the heir or the first taker; and that an estate will always be construed to be a fee, rather than a less estate. But, as was well said by the learned judge who specially presided in this case, these rules "are to be applied when the meaning of the words is doubtful; for no rule, except a hard and fast one adopted for some reason of policy, or a rule upon which titles have come to depend, can override the clear expression of a

testator's will. If that be also lawful, it must be carried out without regard to the fact that another testator has used the same words with a different meaning."

If that part of the residuary clause preceding the words "on the following conditions" stood alone, it would, under our wills act of 1833, constitute an absolute devise and bequest in fee and in perpetuity of the one-fourth of the testator's real and personal estate to his son Matthew, expressed in apt words. Standing, as we find it, however, in immediate connection with those words and the provisions which follow, it is qualified by them, but not, as we think, to the extent claimed by the appellee, and sanctioned by the court below. It is conceded by them that, in using the four words above quoted, the testator did not mean "conditions," in the legal sense of that word. It is very evident to us that he employed the phrase only in the sense of "on the following terms," or "subject to the following trusts." As to "the shares going to" his son Henry and his daughters, Mari and Ella B., he directs that they "shall be held by each of them in trust for their children." What he intended by this is explained in the codicil. As to "the share going to" his son Matthew, he provides that it "shall be held in trust by" his son Henry, and that Henry shall pay to Matthew "the income from his share, in quarterly payments, each and every year during" Matthew's natural life. As to the corpus of Matthew's share, the only other provision that is made by the testator is that, "in case Matthew shall reform and abstain from the use of all intoxicating drinks for two years," the trustee for Matthew's life of the corpus shall pay Matthew "from three thousand to five thousand dollars, to enable him to engage in business." In his codicil he is careful to say: "Nothing herein * * * is to affect the original provisions of my will concerning my youngest son, Matthew." We cannot assent to the proposition that the qualifying language employed in relation to "the share going" to Matthew should have the effect of practically revoking or nullifying the preceding absolute gift of that share to him, and, in lieu thereof, giving him an equitable interest therein for life only; nor do we think any such result was intended by the testator. On the contrary, what he doubtless did intend, and all that the language employed by him fairly means, was to protect his son Matthew from the probable consequences of his unfortunate habit, and secure to him the use and enjoyment of the income of his share, in quarterly payments, during his life, without stripping him of authority to dispose of the corpus, by will or otherwise, to take effect at his death. With that object in view, he directed the share "going to" Matthew to be held in trust by Henry, etc., during Matthew's natural life. He thus created an active trust for Matthew's protection and benefit, limited in duration to the period of

his natural life, without making any further disposition whatever of the corpus, or otherwise restricting Matthew's authority to dispose of it as he did. In some respects, the case, in principle, resembles *Snyder v. Baer*, 144 Pa. St. 278, 22 Atl. 897; *Silkknitter's Appeal*, 45 Pa. St. 365; *Sproul's Appeal*, 105 Pa. St. 438; and other cases cited by appellant.

In the clause under consideration, the testator's intention to dispose of "all the rest, residue, and remainder of" his estate, both real and personal, is clearly and emphatically expressed, and we find nothing in his will to indicate any intention to the contrary. It is a long and well settled rule "that a will must be so construed as to avoid partial intestacy, unless the contrary is unavoidable." *Board of Missions' Appeal*, 91 Pa. St. 513; *Scofield v. Olcott*, 120 Ill. 374, 11 N. E. 351. In this case, however, the intent to die testate is so clear that it is unnecessary to invoke the aid of the rule. It was not impossible, or even improbable, that Matthew might marry during his father's lifetime or afterwards, and die leaving children. In view of the provision made by the testator for his other grandchildren, it is scarcely possible to conceive that he intended to so dispose of Matthew's share that his children, if he should leave any, would receive nothing. If he had intended to thus virtually disinherit them, he, doubtless, would have done so in terms that could not be misunderstood; but, as we have seen, there is nothing in the will to indicate any intention to restrict Matthew's share to an equitable interest for his life only. Further consideration of the questions involved is unnecessary. Enough has been said to show that the share given to Matthew was not cut down to an equitable life estate, but was vested in him, subject to the trust created for his protection and benefit, and that he had a right to dispose of the corpus as he did.

Decree reversed, with costs to be paid by the appellee, and record remitted to the court below, with instructions to distribute the fund in controversy to the person or persons entitled thereto under the will of Matthew L. Boles.

(177 Pa. St. 262)

HELLER v. ROYAL INS. CO. OF LIVERPOOL.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

INSURANCE—OF TENANT—RENTS.

Plaintiff, a tenant paying \$8,500 yearly rent, was insured by defendant for \$6,000, by a policy reciting: "It being understood that this policy is to indemnify the assured for any loss accruing to her by reason of having to pay rent for the within-described building * * * [while] untenable by reason of fire; * * * it being understood that the sum insured is the annual rental of the property, and the amount of loss is to be computed on that basis." *Held*,

that plaintiff, having paid rent for a year during which the premises were untenable by reason of fire, could recover of defendant the full \$6,000, though six months after the fire the landlord went into possession of the lot to put up a larger building, extending onto other land, under an agreement with plaintiff that he might do so without affecting plaintiff's liability for rent under the old lease till completion of the new building, which plaintiff agreed to rent, and though an insurance company in which the landlord had his rents insured, while denying liability, paid \$2,000 to him for the benefit of plaintiff. *Mitchell, J.*, dissenting.

Appeal from court of common pleas, Philadelphia county; *Arnold, Judge*.

Action by Marietta Heller against the Royal Insurance Company of Liverpool. Judgment for plaintiff. Defendant appeals. *Affirmed*.

F. H. Bohlen and M. P. Henry, for appellant. M. Hampton Todd, for appellee.

DEAN, J. Five adjoining buildings, forming a single store, at corner of Arch and Eighth streets, Philadelphia, were destroyed by fire, 23d January, 1888. They were owned by Thomas K. Peterson, trustee, etc., who, by lease dated 15th June, 1887, rented them to Marietta Heller, this plaintiff, for the term of three years from the 1st of January, 1888, at an annual rental of \$8,500, payable monthly, and she was in possession at the date of the fire. The Royal Insurance Company, this defendant, on the 26th of January, 1887, issued to plaintiff a policy of indemnity against damage to her interest as lessee of the buildings, by fire, in sum of \$6,000. In the policy is this stipulation: "It being understood that this policy is to indemnify the assured for any loss accruing to her by reason of having to pay rent for the within-described building [during] such time or times as the building may be untenable by reason of fire or fires occurring during the continuance of this policy; loss not to be limited by date of expiration of the policy; it being understood that the sum insured is the annual rental of the property, and the amount of loss is to be computed on that basis." Peterson, the landlord, also took out in the Pennsylvania Fire Insurance Company a policy covering the term of the lease, indemnifying him against loss of rents by fire in the sum of \$8,500, in which was this clause: "It is understood and agreed that in case the above-named building, or any part thereof, shall be rendered untenable by fire, this company shall be liable to the assured for the actual loss of rent ensuing therefrom, not exceeding the sum insured, which shall be taken as the yearly rent of the premises, and this company shall be liable only for such proportion of any loss as the sum hereby insured bears to the annual rent of the building: the assured agreeing to rebuild or repair said premises in as short a time as the nature of the case will permit. Loss to be computed from the date of the occurrence of said fire, and cease on said building being rendered tenable. Note. In case the assured shall

elect not to rebuild or repair said premises in as short a time as the nature of the case will admit, then the loss of rent shall be determined by the time which would have been required for such purpose. Pennsylvania Fire Insurance Company." After the fire the property was unoccupied for any purpose until the 24th of July following, a period of six months, when plaintiff entered into an agreement with her landlord that he would within seven months erect a new and better building on the lots covered by the old buildings, and make it larger, by extending it over three adjoining lots. Further, plaintiff agreed that she would accept a lease of the new building for a term of five years at an annual rental of \$17,000, payable monthly. There were further stipulations that nothing in the agreement was to affect plaintiff's liability for rent under the old lease until the completion of the new building, and that the entry of the landlord for the purpose of rebuilding was not to be deemed an eviction by him or a surrender by her. It was further stipulated that nothing in the agreement was to affect the right of either on policies of insurance which each held for rent. After the fire this defendant denied any liability, except a proportionate one on loss of rent under both policies, which was, with interest, \$3,096.50, and which it paid to plaintiff without prejudice to her alleged right to claim her entire loss. The Pennsylvania Company, although disclaiming all liability, paid the landlord \$2,000 for benefit of Mrs. Heller. The plaintiff paid the landlord the rent for one year, the time the premises were untenable, and claimed that defendant was liable on its policy to her for a balance of \$3,000, with interest, payment of which being refused, she brought suit. The defendant filed an affidavit of defense averring that the agreement to rebuild was a collusive arrangement between the parties at the suggestion of the landlord's insurance company, by which that company was to escape any payment on account of the loss. The court below entered judgment for want of a sufficient affidavit of defense. On appeal this judgment was reversed, this court holding that the facts tending to show collusion would, if proven, not relieve the landlord's insurance company from payment of its proportion of the loss, and the evidence tending to show fraud was for the jury. The case is reported in 133 Pa. St. 152, 19 Atl. 349. When the record was remitted the defendant, instead of pleading and going to trial, filed a demurrer to plaintiff's statement of facts, as not being sufficient in law to warrant judgment. The court below sustained the demurrer, and plaintiff appealed. This court, in an opinion by the chief justice (see 151 Pa. St. 101, 25 Atl. 83), held that under the circumstances as averred by plaintiff, the averment of fraud in the affidavit having dropped out of the case, she was entitled to recover on her claim set out of record; that the facts neither con-

stituted an eviction by the landlord, nor a rescission of the contract under which the plaintiff was answerable for rent, and for aught that appeared the transaction was a perfectly honest one. So the judgment was reversed and a procedendo awarded. On the trial of the case in the court below, considerable evidence was given tending to show correspondence and negotiations between the parties and the insurance companies, principally with a view to adjustment without suit of their respective rights; but the court, being of opinion that no available defense had been proven, at the close of the evidence directed a verdict for the plaintiff for \$3,000 and interest. We now have this appeal, assigning six errors. It is unnecessary to discuss them in detail. When the case was last here, Chief Justice Sterrett says, with this agreement before him, "It neither constituted an eviction by the landlord, nor a rescission of the lease under which plaintiff was liable for the rent as to which she was insured by defendant company." There is nothing new in the case now to affect the correctness of this conclusion. The parties in open court abandoned any averment of fraud in the making of this agreement. That being the case, defendant's liability remains according to its contract. That stipulates that it was to "indemnify the assured for any loss accruing to her by reason of having to pay rent for the within-described building during such time or times as the building may be untenable by reason of fire." It was untenable during the entire period covered by her claim, by reason of the fire. The occupation of the lot by the landlord for seven months, in rebuilding, in no reasonable construction of this clause rendered the premises tenable, while the agreement with the landlord expressly stipulated her liability for rent was to continue during this period. Therefore what rent she paid was her loss, and this the defendant contracted should be made good. Nor does the fact that the landlord paid over to her \$2,000 received by him from the Pennsylvania Company affect her contract right against this defendant. She received that from a source outside of, and independent of, her contract for indemnity, just as she might have received a gift of that amount from any friend who desired to aid her. Defendant lost nothing, and the \$2,000 did not even reimburse her in full for her loss. She paid rent for unoccupied premises, \$8,500. She claims from this defendant \$6,000, less the \$3,000 already paid her. She has received from her landlord \$2,000, leaving her still a loser for the year the building was not tenable \$500. As is well said by the learned judge of the court below: "Its [defendant's] burden has not been increased, nor has it been deprived of any right it possessed. * * * The landlord and tenant had a lawful right to make the agreement they did make, and, the risk and loss of the defendant company not having been in-

creased thereby, it is liable for the amount due on its policy." The judgment is affirmed.

MITCHELL, J., dissents.

(177 Pa. St. 566)

HIGHLANDS v. LURGAN MUT. FIRE INS. CO.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

INSURABLE INTEREST—ESTOPPEL TO DENY.

An assignee for benefit of creditors of one whose property was insured in a mutual fire company informed the agent of the company of the assignment, and proposed to have a transfer made. The agent told him that it was not necessary, and the policy was not transferred. Afterwards the company demanded an assessment from the assignee, and it was paid. The assignee sold the property, and the sale was confirmed, but before a deed was made it was burned. *Held*, that the company was estopped to deny that the insured had an insurable interest in the property.

Appeal from court of common pleas, Cumberland county; E. W. Biddle, Judge.

Action by Hiram Highlands, for the use of Cora Highlands, against the Lurgan Mutual Fire Insurance Company, on a fire insurance policy. From a judgment of compulsory nonsuit, and from an order refusing to set aside such judgment, plaintiff appeals. Reversed.

H. M. Leidich, S. M. Leidich, and F. E. Beltzhoover, for appellant. J. W. Wetzel, for appellee.

GREEN, J. There is but one question in this case that needs consideration. It is the question of estoppel. Can the defendant be permitted to set up the defense it has made against the plaintiff's claim? We are clearly of opinion that it cannot. There is no controversy as to the facts. The learned court below granted a compulsory nonsuit at the end of the plaintiff's testimony, upon a theory to which we cannot possibly assent. The question of waiver is of no consequence, in view of the facts given in evidence by the plaintiff. The legal plaintiff, Hiram Highlands, held a fire insurance policy issued by the defendant, covering a barn and its contents, and a dwelling house and furniture. This policy was executed on May 28, 1891, to continue for five years. On August 2, 1892, Mr. Highlands made an assignment for the benefit of creditors to Charles B. Baker, who accepted and executed the trust. Mr. Baker testified on the trial that, within a few days after the assignment was made, he went to the agent of the defendant, Meredith, for the purpose of having the policy transferred to him as assignee, but was assured by the agent that the policy was good as it was, and did not require any transfer until after deeds were made to the purchaser of the property from

the assignee. Later on, at another conversation on the same subject, he said the agent told him "there was no occasion to have that policy transferred until after the deed was made; otherwise, he said, if it was transferred before the deed was made, it would be just about in the same shape as it was before; that it would leave it stand in my hands." In consequence of this he retained the policy, and the transfer was not made. During the following year, 1893, the same agent of the defendant, Meredith, made a demand upon the assignee for an assessment for a loss which had occurred after the assignment. The witness took the advice of his counsel as to whether he should pay the assessment, and upon being advised to make the payment he did so, and took a company receipt for it, signed by Meredith as collector. That assessment was made on October 14, 1892, and the receipt was given on March 18, 1893, for an assessment of \$7.50 due the defendant company. The assignee made a sale of the farm on which the barn in question was situated, in October, 1892, under an order of the court of common pleas; but the sale was not perfected at that time, and no deed was made to the purchaser until April 21, 1894. In the meantime, on April 3, 1894, the barn and its contents were entirely destroyed by fire, and the company refused to pay because the property had been sold by the assignee; and the court was of opinion that the confirmation of the sale avoided the policy, although no deed was made to the purchaser. The assignee having been assured by the defendant, through its authorized agent, that the policy was good as it was until a deed was made to the purchaser, and the defendant having claimed an assessment for a loss which occurred, not only after the assignment, but also after the sale was made by the assignee, and that assessment having been paid, the case comes clearly within the operation of at least three of our decisions, the last of which was made only one year ago. These cases are *Mentz v. Insurance Co.*, 79 Pa. St. 475; *Wachter v. Assurance Co.*, 132 Pa. St. 428, 19 Atl. 289; and *Light v. Insurance Co.*, 169 Pa. St. 310, 32 Atl. 439. In all of these we held the company estopped by declarations of their agent of a character precisely similar to those made in this case. In the *Mentz* Case, because the agent told the policy holder that the proper indorsement had been made on the policy, we held the company estopped by his declaration. The *Wachter* Case was almost precisely similar to this, and the company was estopped because the agent assured the policy holder that the policy was properly transferred to the mortgagee, and that nothing more need be done. In the *Light* Case we expressly held that there was no insurable interest in the policy holder after the sale of the property, but we refused to permit that defense to be made. There, as here,

the policy holder informed the agent of the sale, and wanted to know what was to be done in regard to the policy. The agent told him he had better hold the policy and have the assessments sent to him, which was done; and they were paid by the insured, who delivered the deed to the purchaser without transferring the policy, in pursuance of the advice of the agent. Although the defense of want of insurable interest at the time of the fire was a perfectly good defense, and although there actually was no insurable interest in the plaintiff when the fire occurred, we refused to allow such a defense to be made, solely because of the declaration of the agent, and the subsequent acceptance of assessments by the company from the insured. We can see no difference between that case and this. Here the assignee of the insured went to the agent of the company shortly after the assignment, and informed him of the assignment, and proposed to have a transfer made. But the agent told him that it was not necessary, and therefore it was not done. Subsequently the company demanded an assessment from the assignee, and it was paid. These were the exact facts upon which the *Light Case* was ruled, and they rule this. The company treated the policy as an active, subsisting policy, after the assignment, and after the sale by the assignee, and they shall not now be permitted to escape liability by asserting the want of a transfer which was not made because its omission was induced by their own declarations and acts. We cannot understand why the testimony of Hiram Highlands was stricken out, or why the amendment asked for was refused; but, as no assignments of error on that account were made, those questions are not before us. Judgment reversed and new venire awarded.

(177 Pa. St. 239)

**COLEMAN v. NEW YORK BOWERY
FIRE INS. CO.**

(Supreme Court of Pennsylvania. Oct. 5,
1896.)

INSURANCE—ACTION ON POLICY—VOUCHERS—EVIDENCE.

In an action on a fire policy, where the defense was plaintiff's alleged refusal to furnish bills and vouchers of the goods alleged to have been destroyed, it appeared that the original papers and all plaintiff's books were burned; that he expressed a willingness to procure duplicate copies of the vouchers, but did not know to whom to apply, as the goods were purchased by R., a former partner; that he wrote R., who replied that he did not know the names of all the persons from whom the goods were purchased, but, for a stated consideration, promised to procure the duplicates; and that afterwards R. positively refused to do anything in the matter, because it would involve a journey of several thousand miles, and the neglect of his own business. *Held*, that it was for the jury to say whether plaintiff made a reasonable effort to furnish the desired papers.

Appeal from court of common pleas, Lycoming county.

Action by John Coleman against the New York Bowery Fire Insurance Company to recover on a policy of insurance. Judgment for plaintiff, and defendant appeals. Affirmed.

Ames & Hammond and Russell Duane, for appellant. John J. Reardon and H. C. & S. T. McCormick, for appellee.

GREEN, J. The learned court below carefully instructed the jury that the plaintiff was bound, upon the demand of the defendant, to produce to the defendant his bills and vouchers for the goods claimed to be lost, or certified copies thereof, if it was in his power to do so. The court distinctly said to the jury, "If he could produce those bills or those copies and vouchers that they demanded, and did not do so, then he could not recover anything on that item." The matter left to the jury was that if they were satisfied from all the evidence in the case that the plaintiff used every reasonable means in his power, and was unable to comply with the request, he could recover. As the charge was strictly correct in this respect, the only assignments of error in relation to this subject are, in substance, that the court was in error in submitting the question to the jury at all, on the ground that there was not sufficient evidence to warrant the submission. The first three assignments raise this question only. The fourth and fifth are unimportant, and are not sustained, because there never was any insurance effected by Weddigan, and such insurance could not become an element in prorating the loss. The only question in the cause is therefore whether there was sufficient evidence to justify the court in leaving to the jury the question whether it was in the power of the plaintiff to furnish the bills and vouchers demanded of him, by any reasonable effort which it was competent for him to make. In the case of *Langan v. Insurance Co.*, 162 Pa. St. 357, 29 Atl. 710, much relied upon for the appellant, the decision was put upon the ground that the plaintiff's personal testimony proved that he had made no effort to get duplicates of his bills, and in point of fact he never did get them, or try to get them. In stating the rule in relation to the subject the present chief justice, delivering the opinion, said: "The clause above quoted is manifestly reasonable, and it was the duty of the plaintiff to comply with the demand. If he was unable to produce duplicates of the bills, the burden was on him to show at least that he made a reasonable effort to do so, and was unsuccessful. *Mispelhorn v. Insurance Co.*, 53 Md. 473; *O'Brien v. Insurance Co.*, 63 N. Y. 108." In the former it is said: "Whether it was possible or impossible for the plaintiff to produce duplicate bills of purchase was purely

a question of fact, to be determined by the jury from all the evidence before them; and, although it might be found that it was impossible to produce duplicate bills of purchase of a certain class, that fact did not excuse the nonproduction of those that could have been obtained by a bona fide effort on his part." It will thus be seen that the question is one for the jury to decide, and the rule becomes applicable that if there is evidence, more than a scintilla, in support of the disputed fact, it must be submitted to the jury. This consideration makes it necessary to examine the testimony, and see whether it is of the required standard.

There is no testimony that the plaintiff ever refused to produce the bills and vouchers, or to make effort to produce them. One witness (Grover) testified that the plaintiff, in reply to a suggestion of his "that it would be necessary for him to verify his inventory, and that the companies looked to him [the plaintiff] for some data wherein they could arrive at some figures in relation to his loss," said, "It would take him too long, and he didn't have to." This was neither a demand on the part of the defendant for the production of the bills or their duplicates, nor was it a refusal on the part of the plaintiff. The same witness testified later that he had written a few letters to the plaintiff, making some demand upon him, which he does not describe, but in reply to which he says of the plaintiff: "He did not refuse. He didn't promise. He said he would try. But later on in the interview he said it would take too long, and he didn't have to." The same witness also testified to a subsequent interview on March 31st, as follows: "Well, the same ground was gone over that we went over previously. Mr. Little was present at that time. Mr. Coleman finally came to the conclusion that we were right, and said we didn't ask anything that was unfair, and that he would get the bills and vouchers for us." Instead of there being a refusal on the part of the plaintiff to furnish bills and vouchers, the plaintiff expressed his willingness to furnish them. The plaintiff, on cross-examination by defendant's counsel, testified: "I had a conversation with both gentlemen [Little and Grover] at Philadelphia the latter part of March, in which they claimed they wanted the bills, and everything that was bought and sold. I said that I would get them all I could, which I did." Being further cross-examined, he was asked, "Q. You say you promised to furnish these bills and vouchers? A. I told him I would try and get them; but Reutter had gone away, and I couldn't get them. The books are all burned up, and I didn't know where to get them. Q. Did you send to Reutter for a list of the addresses? A. I did. Q. Did you get any? A. I heard from Reutter, telling me he didn't know the names of all the parties, and he would have to go himself." The witness further testified that he wrote several letters to Reutter to go and collect the bills, or get duplicates of them, and offering to pay his expenses

to go, but that Reutter, having removed to a distant part of the country, and engaged in other business, was unwilling to go, but in two of his letters he expressed a willingness to go if his expenses were paid, and in one of his letters if he was paid \$3 per day, and in another \$5 per day, in addition. At last this correspondence between plaintiff and Reutter closed with a letter written by Reutter from a point in the state of Washington on April 27, 1894, as follows: "John Coleman, Esq., Williamsport, Pa.—Dear Sir: In reply to yours of recent date, will say it is impossible for me to get those bills of the cane business, as I would have to make a trip East to get them for you; and I will not neglect my business, and ruin it, for a few months' salary and expenses, no odds how well you would pay me for my services. I cannot afford to ruin my business for a few months' salary. Respectfully, yours, S. E. Reutter." The witness had previously testified that Reutter was originally associated with him in the business at Worcester, Mass.; that, after he removed his plant to Williamsport, Pa., Reutter continued to purchase in the East all the parts of the cane, from about 20 different parties; that he (the witness) had no knowledge who these parties were; that Reutter paid for them with money furnished by plaintiff; that his books and papers were all destroyed by the fire; that he had no knowledge himself as to who the parties were from whom the purchases were made; that Reutter was the only person who had such knowledge; and that he had repeatedly tried to get Reutter to get the bills, without success. He was asked: "Q. State whether or not you had offered to pay him a salary. A. When they refused to accept the adjustment of Mr. Dubois, I wrote him that I would have to send him there, no matter what it cost. Q. And these were the replies you got? A. That is the reply to the last letter I wrote him. Q. Is he the only person who has knowledge of the parties from whom these various items going to make up these canes were purchased, so far as you know? A. Well, I don't think he has the knowledge himself, unless he would go there and inquire. Q. Do you know anybody else that has? A. No, I don't. Q. State whether or not many of these goods that were in that building on January 4th had been purchased a long time prior to that. A. Yes, sir, they had. Q. And were they shipped here from Worcester? A. Yes, sir." He then stated that some of them had been purchased a year before the fire, and others for several months. He also testified that he furnished all the bills he could find to the adjusters, though most of them related to the cost of the buildings and machinery; that he had several times demanded an appraisal of the property burned, which was not granted. In this state of the testimony, the question arises, was it the duty of the learned court below to withdraw the case from the jury, and give a binding instruction to find for the defendant? It must be remembered that the plaintiff had testified that all the original bills

and papers had been burned at the fire, and therefore it was impossible to furnish them; also that his books had all been burnt, and hence he could not refer to them. There was no way, therefore, left in which to meet the demands of the adjusters, except to procure duplicates. But he testified he did not know the parties from whom the goods had been purchased, and therefore he could not know to whom to apply for the duplicates. In this situation of the matter, he says, he made repeated applications to the person who did make the purchase, and urged him to get the duplicates, offering at one time to pay his expenses, and at another to pay him no matter what it cost. To all of this he received replies from Reutter, who at one time said he would go for \$3 per day and expenses, and at another time that he must have \$5 per day and expenses, and at last said he would not go at all. Was all this a reasonable effort to comply with the request of the adjusters for the bills? Can we say, as a matter of law, that there was no evidence, more than a scintilla, of such an effort? We think not. The whole subject was for the jury. If the efforts made, in view of all the circumstances, were reasonable in the opinion of the jury, they were so in legal contemplation. We do not see how the court below could undertake to withdraw from the jury the function of deciding this question. If the plaintiff's testimony was believed,—and that was exclusively for the jury,—he never refused to furnish the bills or the duplicates. He could not possibly furnish the bills, as they were destroyed. He did not know the persons who sold the goods, and therefore could not apply to them directly. He did make repeated efforts to induce the person who did buy the goods to get the duplicates, but was at last flatly refused by that person, who only refused because he would have been obliged to make a journey of several thousand miles, and to be absent from his own business for a long time, in order to comply with the plaintiff's requests. It is really difficult to see what more the plaintiff could have done. Certainly we cannot say that what he did do was not a reasonable effort to furnish the desired papers. Hence it follows that the learned court below was not in error in submitting the question to the jury. The cases cited for the appellant do not disclose facts and circumstances such as are present in this case, upon this subject, and therefore they are inapplicable. The assignments of error are not sustained. Judgment affirmed.

(177 Pa. St. 406)

SHOEMAKER v. MT. LOOKOUT COAL CO.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

MINING LEASE—ROYALTY.

A coal-mining lease provided as royalty 25 cents per ton when the coal sold at a certain amount or less "at the breaker." By universal usage the meaning of "selling price at the breaker" was the actual selling price at the place of

delivery less the cost of selling and the freight. The lessee made a contract for a term of years with an agent to sell his coal on the usual commission. *Held*, that the lessee, having himself sold all his coal to one party, for a year covered by the agent's contract, thereby securing a better price, was entitled, in determining the selling price for purposes of royalty, to deduct the part of the agent's commission which he still demanded.

Appeal from court of common pleas, Luzerne county; S. Woodward, Judge.

Action by Jacob I. Shoemaker against the Mt. Lookout Coal Company. Judgment for defendant. Plaintiff appeals. Affirmed.

William S. McLean, for appellant. Everett Warren and Thos. H. Atherton, for appellee.

GREEN, J. The parties litigant in this case are in controversy over a single question of very narrow limits arising upon the construction of a coal-mining lease. The question is whether a commission of 8 cents per ton is to be allowed as part of the expenses to be charged in determining the selling price of coal at the breaker. It is perfectly manifest that the literal meaning of the words employed in the lease is not the meaning of the parties. The subject of contention is the amount of royalty to be paid to the lessor for coal mined under the lease. The words of the lease on this subject are: "For all coal mined, taken out, and disposed of, above the size of pea coal, twenty-five cents per ton shall be paid when such coal sells at an average of two dollars per ton or less at the breaker." The coal in large quantities is not sold literally "at the breaker," but at distant points of delivery; and the custom of the trade is, in determining what is the selling price "at the breaker," to deduct from the price received by the shipper the cost of selling and transporting the coal to the point of delivery. The cost of selling is represented by the commissions paid to selling agents, who conduct a business of selling coal at tide water and other points, for the producers, otherwise called "operators." The selling agents are paid by a commission, varying from 25 to 10 cents per ton, according to the size and quality of the coal sold. In the present case the defendant was in the habit of selling the coal produced from their leased mines through a firm name, Williams & Peters, under a contract in writing, made with them, dated January 15, 1889, at a commission of 15 cents for all sizes above pea, and 10 cents for pea and smaller sizes. In the settlements for royalty between the plaintiff and defendant, these commissions were always deducted from the selling price of the coal, together with the cost of transportation, in order to determine the selling price at the breaker; and that was the uniform habit of doing the business up until March, 1892. At that time a new arrangement in the coal trade was made by which many producers agreed with the Philadelphia & Reading Coal & Iron Com-

pany to sell them all their coal upon certain terms agreed upon. For the year now in question, from March, 1892, to March, 1893, the defendant company sold its coal to the Reading Coal & Iron Company under a written contract for that purpose. The purchase price was to be paid directly to the defendant company, and the agency of Williams & Peters was suspended during that time. But Williams & Peters held a written contract for the sale of all the output of coal from these mines which covered the year in question, and they declined to surrender their contract. Finally they were induced to agree with the defendant company that they would suspend their rights under the original contract upon receiving from the defendant a commission of eight cents per ton on all coal sold to the Philadelphia & Reading Coal & Iron Company. This agreement was to continue for seven years from March 1, 1892, unless the defendant made default in the payments, and at the expiration of the term, or in the event of a default in the payments, the original contract was to be restored and remain in full force and effect. It was on this state of the facts that the present question arose. Prior to the making of this new contract the original commissions of 15 and 10 cents per ton were always deducted from the selling price of the coal without objection on the part of the plaintiff. The freights were also deducted, and the resulting price was treated as the selling price at the breaker. Considerable testimony was taken to show that this was the uniform custom in all such contracts throughout the anthracite coal region, and not a word of opposing testimony was taken. The plaintiff fared much better under the new arrangement than under the old, because the royalty which he received was increased by the difference between the new and the old rates. A better price, also, was obtained for the coal sold than under the old system, and in that way also the royalty was increased. But the plaintiff desires also the eight cents commission which the defendant was obliged to pay, and did pay, in order to obtain the privilege of selling. We know of no reason why this ungracious and unreasonable demand should be allowed. In strict construction of the words of the contract, if the deduction of commissions was allowed as part of the cost of selling the coal beyond the breaker, before the change was made, it was just as certainly a proper charge after that event. It still remained as a commission which had to be paid, and actually was paid, in order that the coal should be sold to the new purchaser. Williams & Peters were under no obligation to give up their contract, and if they chose not to do so, except upon condition that a part of what they had originally received they should still receive, the part which they continued to receive was as much a lawful burden upon the selling price of the coal after, as before, the contract with them was made. Independently of that con-

sideration the undisputed testimony showed that the meaning of the phrase "selling price at the breaker" was, by universal usage, in which this plaintiff participated, the actual selling price at the place of delivery less the cost of selling and the freight. We are of opinion that the referee and the court below were entirely correct in their disposition of the case. Judgment affirmed.

(178 Pa. St. 106)

TAYLOR v. HASKELL et al.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

WILLS—CONSTRUCTION—CONVERSION—PURCHASE BY EXECUTOR.

1. A will providing: "The balance of my property [land on which was a gristmill, operated by testator's husband] to remain as it is, under the care of my husband, he to carry on his business the same as if I was here, and to reap all benefits so long as he lives; my husband to have power to sell it at any time, and when sold, and all debts on property paid, he to receive \$2,000 of my money, and balance to be put out on interest, under his care, for my son,"—does not work a conversion of the realty.

2. The husband having sold the property to one buying for him, who then conveyed to him, no money passing in either transaction, and having then continued to use the property for himself, without paying the wife's debts, or investing any money for the son, the son is entitled to the land at the death of his father.

Appeal from court of common pleas, Lancaster county; Livingston, Judge.

Ejectment by Herbert A. Taylor, by his guardian, Menno M. Fry, against William Haskell and another. Judgment for defendants. Plaintiff appeals. Reversed.

John H. Fry and A. F. Hostetter, for appellant. J. W. Denlinger, Wm. Aug. Atlee, and Brown & Hensel, for appellees.

DEAN, J. Percie A. Taylor, a married woman, died in February, 1880, leaving her husband, George A. Taylor, and an infant son, this plaintiff, to survive her. She was owner at her death of 23 acres of improved land, on which was a gristmill. Her husband, at her death, was operating the mill and managing the property. There was no other property, except her clothing and some personal jewelry. She left a will, in which, after bequeathing her small quantity of personal property to her husband, son, and near friends, she thus disposed of her real estate: "The balance of my property to remain as it is, under the care of my husband, he to carry on his business the same as if I was here, and to reap all benefits so long as he lives; my husband to have power to sell it at any time, and when sold, and all debts on property paid, he to receive \$2,000 of my money, and balance to be put on interest, under his care, for my son, Herbert. This is my will, and to be carried out by my husband." The will was duly proven October 9, 1882, and letters testamentary issued to the husband, who, on October 26th following, sold the property at public sale to Urias K. Goodman, for

\$10,500. This sale, it is undisputed, was merely colorable, the purchase being for the husband and executor, who had instructed the auctioneer to knock the property down to Goodman, as, no matter what it brought, he wanted it for himself. Taylor, then, as executor, on April 1, 1883, executed to Goodman a deed, who on same day, for same consideration, \$10,500, reconveyed to Taylor; and both deeds were recorded same day. So far as appears, no purchase money passed between them. Taylor continued in possession of the property as before, until his death, in August, 1893. He filed no account either as executor of the will or as trustee for the son. After the death of the father, his administrators, assuming the title to be in him, under an order of the orphans' court, sold the property at public sale to these defendants, at a bid of \$9,000, which sale was confirmed September 17, 1894. The purchasers went into possession, and have so remained since; but, on account of doubts being cast on the title by the claim of the son, they declined to accept a deed or pay any part of the purchase money. On July 6, 1895, the guardian of the son brought this ejectment. At the trial in the court below, the learned judge being of opinion that there was a conversion of the land into money by the will, and, therefore, that Taylor, the husband, notwithstanding the sale to himself, had a good title to the property, directed the jury to find for defendant, and we have this appeal by plaintiff, assigning as error the instruction of the court.

If the defendants, on the faith of a judicial sale under the order of the orphans' court for payment of debts, had, after confirmation, accepted the administrator's deed, and paid their purchase money, it is possible quite a different question would have been presented than the one now before us; but they do not stand in the attitude of innocent purchasers, who, without notice, have paid their purchase money, nor even in the attitude of purchasers who, forgetful of the doctrine of caveat emptor, have been misled by a judicial decree into impliedly assuming a good title in the husband. The extent of their venture is a formal bid, by which they are as yet not seriously hurt. The orphans' court, which is a court of equity, is still open to them for such equitable relief as a chancellor, in view of all the facts, adjudges them entitled to.

The question, then, is, solely, what was the intent of Mrs. Taylor by the devise in the will already quoted? There were two distinct alternative gifts to the husband: (1) He could have the property, and carry on his business of milling, the same as if she were alive, so long as he lived; or (2) he could sell the property, and receive absolutely of the purchase money \$2,000, and the balance, after payment of her debts, there being then a mortgage upon it, he could put at interest for her son. Apparently, the husband long hesitated as to which of these gifts he would accept, for he kept the will in his possession, without proving it, for two years

and seven months, when he took out letters testamentary. The first gift expresses the primary intention of the testatrix, or, rather, it gives to the husband a life estate, with an implied wish or expectation that he will accept it; but, if he do not accept, then he shall have power to sell the property, keep for himself \$2,000 of the money, pay the debts, evidently the mortgage of \$3,000, and "put out" the balance of the purchase money as trustee for the son. There is not the least indication of an intention that the husband should have the entire estate in the land, on payment of the debts and investing any part of its value for the son. If that had been her intention, she would not have so plainly said it should be sold. She had no thought of other than a bona fide sale to a third party, who should pay the price in cash, that the husband might appropriate it as she directed. Now, what did the husband do? Apparently, he did not, under the will, accept the life estate. Then devolved on him the one duty, as executor, to actually and fairly sell. He did ostensibly sell, and at a fair price, but to whom? To himself. As to this feature of the case, perhaps, after this lapse of time, if his duty as executor had been faithfully performed, the regularity of the sale could not have been successfully questioned, or, rather, the irregularity would not of itself have avoided it. If the intention of testatrix had been effected even by an irregular method,—that is, if the debt had been paid, and the balance put out for the son, a fair price having been obtained,—no good purpose could have been reached by declaring the sale void on grounds of public policy. But, on the undisputed facts, the purpose of the executor was to defeat the intention of the testatrix by an ostensible sale, and, so far as his conduct could carry out his purpose, it was successful. That purpose, as shown by his conduct, was to get the fee of the land, unincumbered by any claim of the son. So he sold, really, to himself. Under this sale, he enjoyed the property during his life, as if the owner in fee, and neither paid his wife's debt, nor put out the balance, after deducting his \$2,000, for her son. The defendant having paid nothing, the contest here is the same as if the father's devisee under a will were defending possession on the Goodwin deed against the claim of the son under his mother's will. In *Chronister v. Bushey*, 7 Watts & S. 153, where administrators bought through another, and then took a reconveyance to themselves, it was held that equity would avoid the transaction at the election of the cestui que trust, without regard to the fairness of it, and even although the administrators had paid out the purchase money to the creditors of their intestate. In *Shuman's Appeal*, 27 Pa. St. 64, it was said: "It is certainly not necessary to decide now that an executor who buys at his own sale, or, what is the same thing, gets another to

buy for him, holds the land on the same trusts it was subject to before the sale." The authorities to the same effect are very many, and, if there were none, this transaction would impel us to make one.

But it is argued by appellees that the will, by a direction to sell, worked a conversion; that there was an express power to sell, and direction to distribute the proceeds as money; therefore the son has no interest in the land, but must look to the purchase money. There was not here, as in many of the cases cited by appellees, a blending of real and personal estate to raise money for distribution. The estate was land exclusively. Specific bequests of the personal property had passed all she had to other legatees. Nor was there any positive direction to sell the land. The words, "The balance of the property to remain as it is, under the care of my husband," indicate, as before noticed, a desire that its character should not be changed. Then follow the words, "My husband to have power to sell at any time," if he chooses to take the \$2,000 in money. This language falls to express any positive direction to sell; at most, confers a power to be exercised at the option of the executor. To establish a conversion of land into money under a will, the sale must be absolutely directed, irrespective of contingencies, and independent of discretion. *Anewalt's Appeal*, 42 Pa. St. 414; *Peterson's Appeal*, 88 Pa. St. 397. We do not see that this will conferred more than a power to be exercised upon a contingency. Until the exercise of the power in accordance with the terms of the will, the estate remained land. And there never was a valid exercise of the power, as against the plaintiff. There was the semblance of it, which turns out to have been a mere subterfuge for purpose of divesting the son's title, and vesting the whole estate in the father. Such sale is void as against the son, and, being so, the son's right to the land remains as before. The father being now dead, and having enjoyed the life estate to the full, the son is entitled to the remainder devised to him by his mother's will.

For these reasons, the judgment is reversed, and a v. f. d. n. is awarded.

(177 Pa. St. 443)

ALTOONA & P. CONNECTING R. CO. v.
BEECH CREEK R. CO. et al.

(Supreme Court of Pennsylvania. Oct. 5,
1896.)

RAILROADS—CONNECTION—FIXING TERMS.

Under Act April 4, 1868, giving railroad companies the right to "connect their roads with roads of a similar character" on terms agreed on by the companies, and, in case of their failure to agree, providing for appointment of a jury to determine and fix said terms, the jury can determine only matters relating solely to the physical connection of the roads, and cannot order transferred to the petitioning road part of the other company's road, station management, lands, water, or privileges.

Certiorari to court of common pleas, Clearfield county; D. L. Krebs, Judge.

Proceeding by the Altoona & Phillipsburg Connecting Railroad Company and the New York Central & Hudson River Railroad Company for connection of plaintiff's railroad. The report of the jurors to determine and fix the terms therefor was approved, and defendants seek review by certiorari. Reversed.

Murray & Smith and M. E. Olmsted, for appellants. J. B. McEnally and D. W. McCurdy, for appellee.

DEAN, J. The plaintiff desired to connect its railroad with that of the Beech Creek, the latter being leased to and operated by the New York Central, the connection to be made under the provisions of the eleventh section of the act of April 4, 1868, as follows: "Companies whose roads shall be constructed under the provisions of this act shall have the right to connect their roads with roads of a similar character, within this commonwealth or at a line thereof, upon such terms as may be agreed upon by those who have the management of said roads; and in case of failure of an agreement on the part of those having the management of said roads, then and in that case either of said parties may apply to the court of common pleas within the jurisdiction in which said connection is proposed to be made, whose duty it shall be to appoint a jury of three disinterested men, who shall determine and fix said terms, which, when approved by said court, shall be conclusive." As terms for the connection could not be agreed upon, the plaintiff petitioned the court on the 4th of November, 1893, for the appointment of three disinterested men to determine and fix the terms. Thereupon, the same day, the court made the appointment as prayed for. The jurors met, viewed the premises in presence of representatives of both railroads, heard evidence, and reported that they had fixed the point of connection for the roads opposite Wigton's Fire-Brick Works. They then further reported: (1) That plaintiff should have, as part of its property, a strip of defendant's land for a distance of 1,600 feet by 66 feet, extending south from point of connection, and should pay defendant therefor the sum of \$16,600, within three years, with interest, and on full payment defendant should by deed convey the land to plaintiff. (2) The jurors further directed that, from the point of connection for a distance of 2,300 feet north, the plaintiff should have the right to use defendant's road for purpose of reaching Phillipsburg station with its freight and passengers, and should further have needed terminal facilities, subject, however, to the prior right of defendant. Further, plaintiff was awarded the right to construct on defendant's right of way such further sidings as it might need. Further, plaintiff was to have the joint use with

defendant of its station, yards, and water-tanks. (3) For these rights thus awarded plaintiff was directed to pay defendant annually the sum of \$930. (4) These terms to continue for 99 years, unless sooner ended by the parties. The costs of the proceedings to be paid by plaintiff. This report was approved by the court below the 25th of November, 1893, and defendants took this writ of certiorari, assigning three errors, only one of which calls for notice.

It is argued the jurors exceeded the jurisdiction and powers conferred on them by the act of assembly heretofore quoted in determining matters wholly unrelated to the connection of roads of a similar character. The act is very indefinite as to the extent of the powers of the jurors. Although we have no authority in our own state directly in point, the late case of *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 4 Sup. Ct. 185, has weight in determining what is meant by a right to "connect." The constitution of Colorado provides "that every railroad company shall have the right * * * to connect * * * with any other railroad." Art. 15, § 4. It was held by the court this only implies a mechanical union of the tracks of the roads, so as to admit of the convenient passage of cars from one to another. It was further held that, to constitute such connection, the road with which the connection was made, in the absence of statutory provision, was not bound to go further and construct stations for the accommodation of the new business. In the case of *Philadelphia & E. R. Co. v. Catawissa R. Co.*, 53 Pa. St. 20, the plaintiff denied the right of defendant to build a 4 feet 8½ inch gauge railroad to connect with the Atlantic & Great Western Railroad of 6 feet gauge. The act of 1861 directed "that the roads of the companies, so constructing or leasing, shall be directly or by means of intervening railroads, connected with each other." It was argued there could be no connection, within the meaning of the act, of roads of different gauges, for there could be no transfer of cars from one to the other. But this court held: "We conform ourselves to Pennsylvania legislation when we define a railroad connection to mean, where no supplementary terms are used, either such a union of tracks as to admit the passage of cars from one road to the other, or such intersection of roads as to admit the convenient interchange of freight and passengers at the point of connection." Therefore it was decided that, under the act of 1861, the broad could connect with the narrower gauge by an intersection merely, for interchange of freight and passengers. But the act before us, under which this connection is sought, gives the right to connect with roads of a "similar character." The obvious meaning of this is a mechanical connection with a road of similar gauge, so as to permit the running of cars from one road to the other. If the parties could not agree then

the jurors were to fix the terms for such connection as would make possible an interchange of traffic without transfer of goods from the cars of one road to the cars of the other. This would naturally be to the advantage of both roads, and to the general public as well. In most cases, the road seeking a connection would be a new one with an older, as here. The defendant's road had been located and in operation for years. The plaintiff was seeking to exercise its franchise under a much later grant. Now, it is a cardinal rule of interpretation, where there is an apparent antagonism, that every grant by the sovereign is upon the implied condition that it is not to be exercised to the injury of an older one. Unless there were a plain legislative mandate here, authorizing the transfer to plaintiff of part of defendant's road, station, management, lands, water, and privileges, the jurors could not award such transfer. Not only is nothing of this kind expressly authorized, but it is not even remotely implied. The general act of 1849 contemplated the use of the railroad by transporters with their own cars, just as canals had been previously used, and provided that the kind of cars used should be specified by the railroad managers, and their transportation should be wholly under the control and direction of the same managers, to whom authority was given to fix rates of toll for such transportation. This method of carrying met with but little favor from the public. Except to a limited extent, the railroad companies became the transporters, owning the cars and motive power, and fixing rates for shippers instead of tolls for transporters. With the increase of railroads, to all engaged in the business of maintaining a public highway, and in transporting freight and passengers, connections became desirable, not only to avoid the transfer of freight from one car to another, but to facilitate an interchange of passenger traffic at points convenient to the public. And while the act of 1868 antedates our present constitution six years, and leaves the purpose of such connection wholly to implication, the constitution, having the same purpose clearly in view, definitely expresses it thus (section 1, art. 17, on "Railroads"): "Every railroad company shall have the right with its road, to intersect, connect with, or cross any other railroad; and shall receive and transport each the other's passengers, tonnage and cars, loaded or empty, without delay or discrimination." This not only established as a constitutional right,—a connection which had been given by the acts of 1849, 1861, and 1868,—but the object of the connection was not left to implication. The constitution went further, and expressly defined it. The purpose was to enable the companies to transport each the other's cars, loaded or empty, without delay or discrimination. While transfer of traffic was to the interests of the connecting roads, the larger interests of the public demanded such connection.

As this was the manifest purpose, what, so far as concerns the immediate connection, will effect the purpose? The act has nothing to do with the duties enjoined upon the railroad companies after the connection is made. What methods they shall adopt to facilitate the receipt and transportation of each other's cars without delay or discrimination is peculiarly within the domain of railroad management. It may be fairly presumed trained railroad officers will be able to perform a plain legal duty, such as here enjoined, and which can only be intelligently performed after the connection is made, more effectively than jurors or courts. If they neglect or refuse, the courts are open to compel them. But, to perform the duty, there must be first a physical or mechanical connection. The plaintiff asks it, and defendants either refuse, or the two cannot agree upon the terms. Before there can be a physical connection, what terms must be agreed upon or fixed by the jurors? The track of the older must be broken. At what point? This is a matter of judgment, in view of the surroundings and relative location of the two roads. What switches and sidings shall be constructed by the road seeking a connection, so as to render the transfer of traffic speedy and safe? What watchman or other employes shall be appointed to guard against danger, and which road shall appoint and pay them? These and like matters, relating solely to the physical connection of the two roads, are the terms to be fixed by the jurors. They have nothing to do with carrying out the purpose of the connection. It is clearly beyond their power to order defendants to transfer to plaintiff, whether with or without compensation, its lands, right of way, station, yards, water, joint control of part of its road, or other valuable property or franchise. Such power as this to appropriate one corporation's property for the benefit of another, has not been granted. It cannot, on any principle of justice, be implied. Therefore, the decree of the court below is reversed, and report of jurors set aside, at costs of plaintiff.

(177 Pa. St. 453)

HOUSEMAN v. GROSSMAN et al.
(Supreme Court of Pennsylvania. Oct. 5, 1896.)

FRAUDULENT CONVEYANCES—RIGHTS OF GRANTOR'S WIFE—EQUITY JURISDICTION.

1. A bill in equity may be maintained to reach property of a debtor, since deceased, conveyed in fraud of creditors, even though such property might be reached by legal remedy, especially where objection is not raised in limine by demurrer or answer.

2. A wife, as a creditor of her husband, is entitled to relief against a conveyance of his property, though she joined in the conveyance to release dower, especially where it is not only constructively fraudulent, because an agreement for support of the grantor by the grantees furnishes a substantial part of the consideration, but there is also a fraudulent purpose on the

part of the husband and the grantees to put the property beyond her reach, and she receives no part of the consideration.

Appeal from court of common pleas, Center county; R. W. Archbald, Judge.

Suit by J. S. Houseman, administrator of Elizabeth Grossman, deceased, against Ira Grossman and others. Bill dismissed, and complainant appeals. Affirmed, and appeal dismissed.

The opinion of the court below is as follows:

"This is nothing more nor less than a creditors' bill, unfamiliar to us in Pennsylvania, but familiar enough elsewhere, and a well-recognized subject of equity jurisdiction. 'Creditors' Bills,' 4 Am. & Eng. Enc. Law, p. 573 et seq.; 'Fraudulent Conveyances,' 8 Am. & Eng. Enc. Law, p. 771 et seq. The purpose of this particular character of creditors' bill is to subject the land of the debtor which has been conveyed away in fraud of creditors to the claims of the latter, by setting aside and avoiding the fraudulent conveyance. In Pennsylvania, in ordinary cases, this is accomplished by proceedings not in equity, but at law, by obtaining judgment, levying upon the property, and selling it at sheriff's sale, and then contesting the title of the fraudulent vendee in an action of ejectment. A creditors' bill, it has been held, cannot be maintained. Girard Nat. Bank's Appeal, 13 Wkly. Notes Cas. 101. But the case with which we have to deal is not an ordinary one. The debtor is dead, and the case is complicated by all which that circumstance entails. A judgment against his personal representatives would give no independent lien upon his lands, on which a levy and sale could be effected, so that the cumbrous process of a sci. fa. against his heirs would have to first be resorted to, if, indeed, that even would yield any profitable result. The heirs of a fraudulent grantor have no lands of their ancestor. The title is not in them, but in the fraudulent vendee, and it is there that it must be seized and subjected to the creditors' claim. In the meantime there is nothing to prevent the vendee from selling and disposing of the property, and thus bringing to naught the creditors' attempt to reach it. As is said in Appeal of Fowler, 87 Pa. St. 449, equity furnishes the appropriate remedy for such a case. The decision there made is direct authority for maintaining this bill. No material distinction is to be drawn between the two cases. The fact that the deceased vendor in that instance was a resident of Ohio does not seem to me to seriously enter into the question. It was, no doubt, a circumstance, but not a controlling one. It was not sufficient in itself to give jurisdiction, if not otherwise obtained, and no great stress is laid upon it. The objection to the jurisdiction which prevailed in the court below was that the creditor had not reduced his claim to judgment, but this was disposed of by show-

ing that, as a debt of the decedent, it was a lien by virtue of the statute. That objection is obviated here, where judgment has been already obtained, and the argument based upon that circumstance that the complainant should proceed at law has been disposed of. It does not seem to me, therefore, that the bill ought to be dismissed upon the ground that the remedy is at law, and not in equity. Even assuming that there may be a legal remedy, the jurisdiction in equity is at least available, as well as much more effective; and the objection, not having been raised in limine, either by demurrer or answer, ought not to prevail at this late stage. *Adams' Appeal*, 113 Pa. St. 449, 6 Atl. 100; *Mortland v. Mortland*, 151 Pa. St. 593, 25 Atl. 150.

"It is well settled that a wife, if a creditor of her husband, is within the protection of the statutes against fraudulent conveyances, and entitled to invoke their benefit in case of a conveyance by her husband in fraud of her rights. 2 *Bigelow, Fraud*, p. 154; 8 *Am. & Eng. Enc. Law*, p. 750, note; *Chase v. Chase*, 105 Mass. 385. The right of Mrs. Grossman, therefore, and of the complainant as her executor, to follow up the fraud, if any was perpetrated upon her, cannot well be questioned. Does the case disclose any fraud of this character? Aside from the fact that she joined in the deed which conveyed the land of her husband to the three sons, Ira, Joseph, and George W., there is no doubt that the conveyance was constructively, at least, in fraud of the rights of Mrs. Grossman as a creditor of her husband. This plainly appears by reference to the line of cases which hold that a debtor cannot strip himself of his property by a conveyance to a third party, reserving at the same time a benefit therein to himself, or to members of his family. The act is fraudulent on its face, so as to affect, not only the grantee, but, where the reservation appears in the deed, third parties also claiming under him. *McAllister v. Marshall*, 6 Bin. 338; *Johnson's Heirs v. Harvey*, 2 Pen. & W. 82; *McClurg v. Lecky*, 3 Pen. & W. 83; *Sanders v. Wagoner*, 19 Pa. St. 248; *Mackason's Appeal*, 42 Pa. St. 330; *Hennon v. McCane*, 88 Pa. St. 219; *Kirker v. Johnson*, 13 Wkly. Notes Cas. 385; *Albee v. Webster*, 16 N. H. 362; *Morrison v. Morrison*, 49 N. H. 69. The case of *Sanders v. Wagoner*, 19 Pa. St. 248, is very close to the one in hand. There a father conveyed his property to his three daughters, to whom it was claimed that he was indebted, and they, by an agreement in writing of the same date, in consideration of the conveyance, and in addition to the consideration money there mentioned, agreed to support and maintain him for life; and it was held that this was fraudulent *per se*, as to existing creditors. In *Johnson's Heirs v. Harvey*, 2 Pen. & W. 82, this rule was enforced against a party who had purchased from the fraudulent grantee; the suggestion

of existing indebtedness and the agreement for maintenance appearing on the face of the deed. And in *Kirker v. Johnson*, 13 Wkly. Notes Cas. 385, the knowledge by the grantee of any existing indebtedness of the grantor was held immaterial. In the present instance the conveyance was of all the grantor's property, except a few acres of timber land, which were subsequently sold for payment of debts by his administrator for \$125. Divested of the farms which he conveyed to his sons, he had practically nothing. But it may be claimed that the consideration expressed in the deeds, outside of the agreement for maintenance, was the full value of the land, and therefore there could be no fraudulent purpose in the transaction. This is upon the principle asserted in *Preston v. Jones*, 50 Pa. St. 54, where it was held that a conveyance by a father to his sons in consideration of the payment of his debts, where the debts amount to the full worth of the property, is not voluntary and fraudulent, but for a complete and valuable consideration. It is still better exemplified for our present purpose in *Albee v. Webster*, 16 N. H. 362, where the rule we are considering is thus stated: A conveyance on consideration in part that the grantee will support the grantor, or members of his family, is fraudulent and void as to existing creditors, if the agreement for support furnishes a substantial part of the consideration; but if it be shown that the grantee has paid or secured the full value of the land, apart from the agreement for maintenance, the obligation to maintain will not avoid the conveyance. To the same effect is *Morrison v. Morrison*, 49 N. H. 69. This calls upon us to inquire into the consideration of the conveyance in question. The sum expressed in each of the deeds is \$3,000, or an aggregate of \$9,000 in all for the land. This, under the evidence, was the full value of the property. Without dwelling, however, upon the fact that it was neither paid nor secured to be paid to Grossman by the boys, was the agreement for maintenance apart or outside of this? The provision in the several deeds upon this subject is by no means clear, but without resorting to the rule that, as a condition of the conveyance, it is to be taken most strongly against the granting party, there is sufficient to warrant us in holding that the agreement to maintain was a part of the expressed consideration of \$9,000, and not in addition to it. That seems to have been the understanding at the time, as we gather from the testimony of Mr. Reifsnnyder. The parties themselves also so treated it, if we are to look to their actions; for there is no evidence that, except the payment of the one thousand dollar mortgage held by the Thomas estate, and the note of Mrs. Rhone of about one hundred dollars, anything was ever done towards recognizing the rest of the \$9,000 as a subsisting debt or obligation. This, moreover, is the only reasonable con-

struction to be drawn from the deeds themselves. After providing that the conveyance shall be subject in each case to one-third the maintenance of Grossman and his wife for life, they severally go on to provide that 'upon failure [to] pay or cause to be paid one-third of the cost of the keeping and maintenance of them, the said George Grossman and Elizabeth Grossman, his wife, during their natural lives, one thousand dollars of the purchase money aforesaid, shall remain in the premises for five years, or at the option of the said George Grossman at the end of the five years, it still living[;] and at the end of said time the principal sum of said one thousand dollars shall be paid to Elvira Showers, wife of Jacob Showers, Jane Neese, wife of Thomas Neese, and Mary Grossman, daughters of the said George Grossman, or their heirs, share and share alike.' It is a good deal of a guess to say just what this all means, but one thing seems plain, and that is that one-third of the consideration of three thousand dollars represents the maintenance of Grossman and his wife. It is that which, in default of their support, is to remain in the premises for five years,—whatever that may mean,—and is then to be at the option of Grossman, if living, and which is appointed to go to his three daughters at his death, if not already appropriated (if I may so conjecture) by himself. The maintenance, being thus made an equivalent of the one-third of the consideration, is an integral part of it, and the whole conveyance is affected thereby, and made subject to the rule by which such transactions are declared fraudulent as to creditors. If, therefore, Mrs. Grossman had taken no part in the transaction, there could be no question of her right to maintain this bill.

"This brings us to the inquiry what part she took in the transfer of the property to the defendants, and how far she is bound thereby. This is not to be answered, it may be premised, by deciding whether or not there was a valid acknowledgment of the deeds which she executed. That only goes to the sufficiency of the deeds to bar her dower. The real question is whether, having knowledge of any participating in the transaction to the extent that she admittedly did, she can now allege that it was fraudulent. If Mrs. Grossman were *sui juris*, there could be no doubt of the answer. Leaving out the question of actual fraud, an ordinary person cannot assent to the transfer of property, and then be heard to say that it is *per se* fraudulent. '*Volenti non fit injuria*' is the maxim, and it applies to such a transaction. But Mrs. Grossman was not *sui juris*. On the contrary, she was a married woman, with all the disabilities of coverture upon her. What effect, then, should be given to the fact of her joining in the conveyance of this property? I must confess that this is not an altogether easy question to answer. On the one hand, even prior to the married woman's act of

1887, the courts have gone a long way in holding a married woman bound by her acts when dealing with her personal property or choses in action. Thus, in *Bond v. Bunting*, 73 Pa. St. 210, a married woman, holding an insurance policy upon the life of her husband, executed, during his lifetime, in conjunction with him, an assignment of it to a trustee for the benefit of his children. After his death she attempted to repudiate the assignment, but it was sustained against her. In *Fryer v. Rishell*, 84 Pa. St. 521, a married woman, who had sold her land by articles duly executed, subsequently assigned her interest in the articles to a third party, receiving a conveyance of other land in payment therefor. She did not acknowledge the assignment, but, having sold the land conveyed to her in payment, it was held that she could not repudiate the assignment, however defective. In *Brown's Appeal*, 94 Pa. St. 362, a married woman, who had a judgment against her husband, which was a lien upon his real estate, agreed to the postponement of her lien in favor of a third party, from whom the husband borrowed money on the strength of such release, and she was held bound thereby. So, in *Powell's Appeal*, 98 Pa. St. 403, it was held that a release by a married woman to her husband of a legacy charged on land, even though defectively acknowledged, could not be repudiated as to creditors of the husband who had acted thereon. In *Appeal of Grim*, 105 Pa. St. 375, where certain heirs, who were married women, had expressed their approval of the course of the executor of the estate with regard to the purchase by him individually of a certain part of it, it was held that they were bound to the observance of good faith in the matter, and precluded from subsequently excepting thereto. But it is to be observed in all these cases that there was some direct act on her part to which she was held, and by which she was equitably, if not legally, obligated. There was an actual assignment of her policy and of her articles, a specific release of her lien and of her legacy, and a positive indorsement of the sale to himself by the executor. In neither case was it a matter of implication or indirection, but rested on positive and affirmative acts. On the other hand, in *Klein v. Caldwell*, 91 Pa. St. 140, where a married woman joined in a deed of land belonging to her husband she was held not prevented thereby from enforcing a mortgage which she held against the property. 'The deed, on its face,' says *Mercur, J.*, 'did not profess to discharge the lien of the mortgage. The fact that Mrs. Barnhart united with her husband in the deed whereby he conveyed his land did not operate as an extinguishment of the mortgage thereon held in trust for her.' It was further held that her verbal declaration at the time that she was satisfied with the sale did not work an estoppel; it was no more than what she asserted by uniting in the deed with her husband, and could not

enlarge the effect of that act. So, in *Hughes v. Torrence*, 111 Pa. St. 611, 4 Atl. 825, a married woman joined with her husband in a conveyance of land, and subsequently took an assignment of a judgment which was at the time a lien upon it; and it was held that she was not affected by her husband's warranty against incumbrances, and was not estopped from enforcing the judgment. *Fellbush v. Fellbush*, 15 Wkly. Notes Cas. 237 (per Morrow, P. J.), is in line with both these cases, and decides that a married woman who holds a judgment against her husband, and joins with him in a conveyance, does not thereby release the lien of her judgment, nor preclude herself from enforcing it against the land conveyed. To substantially the same effect is *Trullinger v. Charles*, 129 Pa. St. 289, 18 Atl. 127. It seems to me that the principle exemplified in this latter line of cases is the one which should prevail here. There is nothing on which to predicate an estoppel, or from which to say, in equity and good conscience, that Mrs. Grossman ought to be precluded from asserting the inherent fraud in the transaction, and the manifest detriment to her rights as a creditor of her husband. She was not there as a grantor, nor as a contracting party. The only thing she was asked to do, and the only thing she did, was to join in the conveyance with her husband so as to bar her dower. The land was his, and she received no part of the consideration for it then or afterwards,—not even of the support agreed to be given. We cannot assume from the transaction that there was any intent on her part to relieve her husband's property from the claim which she had upon it as a creditor, and, considering her disabilities, we have no right to carry what she did one step further than it actually goes. While it is true that this is a proceeding in equity, and that the equities rather than the strict legal rights of the parties are to be regarded, yet equity follows the law; and if, as it seems, she could have recovered judgment against her husband's administrator after his death, levied upon the property and sold it, and then, in an action of ejectment, contested the title of the defendants as fraudulent vendees, there is no good reason why she or her executor should not now have equivalent relief here. The fraud which is the substantial basis of the proceeding is the same in either case, and the disability of the married woman who is affected as creditor preserves her right to take advantage of it, even though she joined with her husband in the deed in release of her dower. Her position as wife and her rights as creditor are severable.

"But there is even stronger ground, if possible, for annulling the deeds to the defendants than what has thus far been advanced. They are not only constructively but positively fraudulent. The master has not so found, but it seems to me that he ought, under the evidence, to have done so. The defendants,

not being within the exception of the act of 1891 (P. L. 287), were clearly incompetent to testify in their own behalf as to anything which happened in the lifetime of Mrs. Grossman. Their denial of any knowledge of their stepmother's claim goes, therefore, for naught, and should have been disregarded. They were competent, however, to testify in contradiction of the testimony of Esquire Houseman and Henry Shadow, and their denial there must, of course, be given due weight. But, in view of their manifest interest, it ought not to prevail, as it seems to me, over the precise and particular story of these indifferent parties, strengthened and confirmed as they are by other competent testimony. While the master possessed the advantage of seeing and hearing the various witnesses at the time, yet it is difficult to say how far he has been influenced in his conclusions by that part of the defendants' testimony which he accepted, though incompetent, and on which, from his tenth finding, it would appear that he placed considerable reliance. He also appears to think that, because Mrs. Grossman knew of the transaction and assented to it, there could be no fraud or collusion; and yet it is manifest that, even though she should be regarded as having assented to what was done, she could only be held to it upon the basis that it was squarely and honestly intended. If the purpose was really fraudulent, her assent would not prevent her avoidance of the transaction. It would be one thing for her to agree to a bona fide sale of the farms to the sons for full value, with a provision for the maintenance for life of herself and husband, and quite another to that which was such in name only, and was a mere cover to get the property of her husband, who was her debtor, out of her reach. I feel at liberty, therefore, to disregard the findings of the master upon this question, and to draw my own conclusions from the evidence.

"The first thing to be noted with regard to the transfer of this property is that the consideration for it was, in large part, merely nominal. This, at least, is the conclusion to which we must come if we look to what was actually done towards the satisfaction of it. The only substantial thing to which the defendants can point is the payment of the Thomas mortgage, \$1,063, and the debt to Mrs. Rhone, about \$100. But the Thomas mortgage was paid a week before the deeds were executed, the satisfaction of record being April 4, 1888, and the date of the deeds, as well as the date of their acknowledgment, April 11, so that this was a past consideration at the time they were executed. Assuming, however, that the defendants paid this mortgage in anticipation and upon the promise of a conveyance, what else did they do in consideration of it? The two debts so paid amount together to less than \$1,200. This leaves \$7,800 of the \$9,000, the supposed consideration, unsatisfied. If \$3,000 more be

taken out of this to represent the value of the support and maintenance agreed upon, to be turned over eventually to the sisters, there is still \$4,800, or over one-half of the consideration, unprovided for. If, with the master, we assume from the acknowledged receipt of the purchase money in the deeds that between the father and the sons the matter was regarded as fully settled, we reach the conclusion that to this extent, at least, the consideration named in the deeds was never intended to be called for, and the transfer of the property was so far without value,—a gift fraudulent as to creditors. But we really are compelled to go much further than this by the evidence. The agreement for support was never insisted on, and it is difficult to resist the conclusion that it never was intended to be. Why it was inserted, unless as a mere cover, and because that was the one thing at the time which Mrs. Grossman seems to have been concerned about, we can hardly conjecture. Mr. Grossman lived for over three years, and his wife for four years and a half, after the deeds were delivered; and in that whole time, by the defendants' own statement, they only gave them a little corn and grain and a few vegetables, assisted their father a little in the meager farming which he did on his wife's property, and hauled some wood for their stepmother after his death. On the other hand, immediately upon the execution of the deeds they went into possession of the property conveyed to them, while their father and his wife occupied, and received their subsistence out of, the house and lot and the few acres which she personally owned. It might be added that at their father's death they did not even bury him, but directed the undertaker to try to get the burial expenses out of their stepmother, 'Old Betsy,' as they called her. Neither do we find that, before they were stopped by the filing of this bill, they had taken any steps towards paying off that part of the consideration which was to go to their sisters. These circumstances are anything but suggestive of a transfer in good faith, and for a consideration of value received, and they afford a fit introduction for the declarations of the defendants and their father in further evidence of the character of the transaction.

"Looking to these declarations, they disclose a clear intent to defraud Mrs. Grossman out of her claim. She was at the time, as it is indisputably proven, the holder of the bond of her husband, dated January 20, 1874, for \$1,700 for borrowed money, payable without interest at his death, or at her death to her personal representatives, and his note of \$200, dated June 13, 1876, due one day after date. It appears that some time in 1888 or 1889, after the property had been transferred to the defendants, Mrs. Grossman was informed that by signing the deeds she had relinquished her right to collect her claim from her husband, and came to the plaintiff, a justice of the peace of the neighborhood, to consult him.

He took counsel of an attorney here at Bellefonte, who wrote a letter to Grossman to go to 'Squire Houseman and make satisfactory arrangements for the payment of the debt. In response to this he came to the plaintiff's office. When there his attention was called to the papers in plaintiff's hands, but, while he acknowledged the debt, he claimed that it was cut out by the statute of limitations, and further added: 'We have that all fixed. I will never pay that.' 'He said he didn't own anything; he had conveyed his property all away.' This was the substance of Mr. Houseman's evidence in chief, and on cross-examination he repeats it as follows: 'Q. Now, just give his own language as you remember,—what he said when he told you that those papers were fixed and he would never pay that. A. His attention was called by this letter from this attorney, and he appeared and acknowledged the indebtedness. He said he got this money, but he said he would not pay it, as the statute of limitations had cut it out, and further said that he had arranged his property so that he was not worth anything; he had deeded his property all away; he wasn't worth anything. I then told him that his deeds were fraudulent, and told him I wouldn't give the worth of the paper for it. He sat there awhile, and commenced to sweat a little about it. Q. Did he say anything? A. He said he wouldn't pay it unless the law would compel him. When I told him the deeds were fraudulent he made no reply. He said afterwards that he wouldn't pay the claim.' So, also, to John Mitterling, a neighbor, in speaking of getting his debts off his shoulders by the transfer of the property, he said that 'the boys would never have to pay the debts to her' (Mrs. Grossman). It is somewhat significant that before this, in speaking to the same witness, he had always said that his wife should be paid. Henry Shadow also had a conversation with Mr. Grossman after the conveyance which he characterizes as of the same effect as that which he had with the defendant Ira Grossman, the son. His interview with Ira is detailed as follows: 'Q. Mr. Shadow, state whether you had a conversation some time after April, 1888, with Ira Grossman, with regard to a deed for his property that he got from his father. A. Yes, sir. Q. What did he say? A. I was out there, and he told me after they had bought the farm that they had them in such a shape that they had their stepmother where the hairs were short. Q. What did he refer to? A. To the money that she had in the farms. Q. What did he say, if anything, with regard to having "signed off," or did he use such an expression? A. He said this way: "We have been trapping her for a long time, but we caught her at last, and we have her just where the hairs are short." Q. Well, Mr. Shadow, did he refer to the collection of a debt, or to the transfer of the real estate from George Grossman to his sons? A. He meant the money that

she was wanting back again. * * * Q. Did he tell you how they had caught or trapped her? A. Yes, sir; by getting her to sign off on the deeds from George Grossman to his sons, so he could sell the farm to the boys.' Again we have an interview between 'Squire Houseman and Joseph Grossman: 'Q. State whether or not you had an interview with one of these defendants a short time after the interview with George Grossman. A. I had with Joseph. He came to my place there, and in the course of our conversation I called his attention to this point. He was building a house, and he came to buy hair from me, and when I called his attention to it he spoke ungentlemanly of his father, and he said his father told him that he had fixed everything so that they would never need to pay out that money; and I told him what my counsel had told me, and he said, "Sue the old bugger at once."

'Now, at the time the deeds were executed. It is undisputed that Mrs. Grossman, at first, objected to signing them. 'Squire Reifsnnyder, who was there to take her acknowledgment, says that she said if she did she would have nothing to live on (referring to parting with her dower interest in the land). But that was not the only thing in her mind, as is evident, because he further says that in the course of the discussion there about the deeds she inquired where she was to get the money that her husband owed her, to which the latter responded, 'You have a paper for what I owe you.' The explanation given to Mrs. Grossman by her husband at the time as to the reason for the transfer was that he had to do this on account of his indebtedness, not having any way by which he could raise any money, and that the boys would have to pay his debts and keep them as long as they lived. The defendant Joseph Grossman was present at this conversation, although the others were not. It is true that Mr. Kerr, an old gentleman then about 85, a neighbor in whom she had confidence, was sent for to advise with Mrs. Grossman with regard to the transaction. But his attention was directed solely, so far as we are informed, to the question of her support or living, and as that, on the face of things, was provided for, he could not, as a layman, say otherwise than that it was sufficiently secure to her. It needs no argument to show that the highest good faith was due to Mrs. Grossman from the parties who were effecting this arrangement. On the one side was her husband and her step-children, and the magistrate whom they had there to see to the execution of the papers. On the other, except for the friendly counsel of an aged neighbor, she stood unaided and alone. Her husband was about to strip himself of the substance of his property, and dispose of the only security which she had for the money she had lent him years before without interest. And yet the explanation afforded her for the transfer was that he could not, with property worth several thousand dollars, take care of debts against it to the amount of \$1,200, and

the assurance given with regard to her own debt, that she had the worthless paper on which it was written. When we take the character of the transaction, the parties to it, the manner in which its effect upon her interest was obscured, and the subsequent declaration of three at least of those who were engaged in it as to what they had succeeded in accomplishing, how can we fail to conclude that, however fair on the surface, the real purpose and intent of the transfer was to relieve the property of the husband of the debt of the wife, in favor of the defendants, his children? This may not have been the only purpose of it. There may have been part of it which was honest and legitimate. It is sufficient, however, that this fraudulent scheme was unquestionably involved in it. Notwithstanding the denial in the answer, and the contradiction by the defendants under oath of the testimony which bears against them, this is the result which I reach from a careful consideration of the whole case. It follows that the conveyances to the defendants were fraudulent and void as to the plaintiff's testatrix (*Fleming v. Ogden*, 152 Pa. St. 419, 25 Atl. 639; *In re Hummel's Estate*, 161 Pa. St. 215, 28 Atl. 1113), and the plaintiff is entitled to the substance of the relief asked for. The 2d, 5th, 7th, 8th, and 11th exceptions are sustained. Let a decree be drawn making the preliminary injunction perpetual; declaring null and void as against the complainant the several deeds bearing date April 11, 1888, from George Grossman and wife, to the defendants Joseph Ira, and George W. Grossman; subjecting the land therein conveyed to the payment of the complainant's judgment, No. 331, August term, 1891, in the common pleas of this county, debt, interest, and costs, together with the costs of this proceeding; and directing that, unless payment thereof be made within 60 days thereafter, the said land be sold by a trustee to be appointed by the court for that purpose; and further directing that the defendants Joseph, Ira, and George W. Grossman pay the costs, unless the same be paid from the sale aforesaid."

Ellis L. Orvis and Calvin M. Bower, for appellants. Charles P. Hewes, for appellee.

STERRETT, C. J. We find nothing in this record that requires either a reversal or a modification of the decree, except as hereafter mentioned. The questions involved, so far as they are material, have been fully considered and correctly decided by the learned judge who presided at the hearing. There appears to be nothing in either of them that requires further discussion. The period of 60 days named in the decree has expired, and should be so extended as to commence and take effect from the filing of this opinion. With this modification as to extension of the time within which the defendants may pay, etc., the decree is affirmed on the opinion of the learned president of the Forty-Fifth judicial district, and the appeal is dismissed at the defendants' costs.

(59 N. J. L. 71)

WAIT v. KREWSON.

(Supreme Court of New Jersey. June 4, 1896.)

REVIEW—EVIDENCE—BOOK ACCOUNT—CERTIORARI—TRIAL.

1. Where a rule to show cause why a new trial should not be granted on the ground of the refusal of the court to continue the cause on account of the absence of a material witness was entered and extended to allow the applicant to take the testimony of such witness before a master, which was not done, it will be presumed on appeal that the testimony was not material.

2. A book account is not competent evidence to establish demands which are in reality based on a written lease.

3. On certiorari a case will not be retried on the merits, and the record will be examined only to see whether the trial has been so conducted as to do injustice.

4. After a case has been submitted to a jury, it is error, in answer to questions asked by the jury, to permit a party to introduce further evidence.

Certiorari to court of common pleas, Middlesex county; Rice, Judge.

Action by Isaac H. Krewson against James Wait. Judgment for plaintiff, and defendant brings certiorari. Reversed.

Argued June term, 1896, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Theodore Strong, for plaintiff. James Parker, for defendant.

DEPUE, J. This suit was brought originally before a justice of the peace, and appealed to the court of common pleas, and resulted in a judgment in favor of the plaintiff on the verdict of a jury; whereupon the defendant sued out a writ of certiorari. The reasons relied on for a reversal of this judgment are:

1. That the court refused to postpone the trial, on account of the absence of a material witness for the defendant. The case was regularly set down for trial on the 3d day of May, 1894. The defendant, who is the plaintiff in certiorari, appeared by counsel. The defendant's counsel applied for an adjournment on account of the absence of Isaac C. Acken, a material witness for the defendant, in consequence of sickness. He laid before the court an affidavit made by the defendant setting out facts showing the materiality of the testimony of the witness, and stating that the witness was confined to his home, and in bed, by reason of his illness, and also the certificate of a physician that the witness was suffering from the effects of a recent illness, and incapacitated thereby from going to New Brunswick and giving evidence. The court refused to postpone the trial, and the jury was sworn. The defendant's counsel then asked that the jury stand over for one week for the trial of the cause. This motion was denied, and the case was tried in the absence of the defendant and his witnesses, and resulted in a verdict for the plaintiff for \$148.15. The defendant's counsel then applied for a rule to show cause why a new trial should not be granted. This

application was adjourned from time to time until May 14, 1894, and was then argued, and extended until the condition of the witness Acken would permit him to give his testimony before a master. The testimony of the witness not having been taken, the plaintiff's attorney on the 29th of August took a rule upon the defendant to close his testimony by the 10th of September following. This rule was served on the defendant's attorney, and, not having been followed up by taking the testimony, the rule to show cause was discharged, with leave for the plaintiff to proceed and collect his judgment. The application for adjournment on account of the absence of a material witness is addressed to the discretion of the court, and the discretion of the trial court will not be interfered with unless it appears that injustice was done. *Ogden v. Gibbons*, 5 N. J. Law, 518-531. As was said by Mr. Justice Southard in the case just cited: "The inquiry in all cases is whether injustice has been done. Has the party been injured? If he has not, no good reason can be given why he should receive the favor of trying his case over again." The rule entered the 14th of May was made by consent. It indicated the purpose of the court to grant a new trial if Acken's testimony should be material for the defendant. His testimony was not taken, although there was opportunity to take it for nearly four months. No explanation has been given of the defendant's failure to take this testimony. There was laches in the failure to follow up this rule, and it must be assumed at this time that Acken could not give any testimony material to the defendant's case.

2. That the court denied the motion of the defendant's counsel that the jury be directed to find a verdict for the defendant. It appears that by a lease under seal, executed by both the parties, Wait leased his farm to Krewson for the term of one year and three months, viz. from January 1, 1892, to April 1, 1893, to be farmed by him on shares. The plaintiff's suit is upon a book account. The lease was in evidence before the justice, and is sent up by the pleas as part of the record of that court. For damages arising upon breaches of covenants and agreements contained in the lease, the suit should have been upon the lease. The plaintiff's statement of demand sets out simply items of book account, but it appears on the face of the demand that part of the items in the account are such as are referable to the defendant's failure to comply with the terms of the lease. The only evidence touching these items was the plaintiff's books of account, and his testimony that they were his original books of entries. The remedy for a breach of covenant involves two propositions,—the fact that the covenant was broken, and damages resulting therefrom. Of these facts, books of account are not competent evidence. *Swing v. Sparks*, 7 N. J. Law, 59-61. The testimony at the trial was quite meager. It consisted entirely in the

production of two books purporting to be books of account, and the testimony of the plaintiff. The plaintiff's testimony was confined to proof that the books produced were the books of original entry, in which he put the items down as they were transacted. The plaintiff then rested, and the defendant's counsel moved the court to direct a verdict for the defendant on the ground that the plaintiff had not shown any contract between him and the defendant; that he simply showed a book account, without showing what the account arose on, or what the subject-matter of it was. The plaintiff was then recalled, and, being asked by the court on what the account arose, testified that some of it was for milk, and for a horse the defendant took away, and for two shoats that belonged to him, that defendant took out of the place. "Q. You charged him for these? A. Yes, sir. Q. It was your property? A. Yes, sir. Q. And that is what your account is made up from? A. Yes, sir; and the balance he owed me from the 16th of February." The charge of February 16, 1893, appears in the plaintiff's statement of demand as follows: "Feb. 16. Mr. Wait gave me a duebill to the amount of \$25.92 in settlement." The shoats and horses are charged as follows: "I claim the sum of \$20.00 for two shoats he valued at \$20.00. Mr. Wait took the horses away from me March 10, which I claim damage of \$30." Of these three items the books of account were not competent evidence. They amount to \$75.92. The charges after February 16th consist of several items, in the aggregate amounting to \$16.50. In what manner these items arose does not appear. After the examination of the plaintiff was concluded, the counsel of the defendant renewed his motion for a direction that the jury find for the defendant, which motion was denied and an exception taken. The court then charged the jury as follows: "You take the books of account and the statement of account that is filed here, and go over them, and see if they are all correct; and if they are the plaintiff is entitled to the amount of his claim, with interest. The amount of the account is \$138.70, with interest from March 16, 1893." The trial court should have overruled the books of account as proof of the three charges above mentioned. To this the plaintiff's counsel answers that the objection and exception thereon were too large, and therefore unavailing in his suit. The statute relating to bills of exceptions is contained in the practice act, and the provisions of that act are inapplicable to any proceedings by virtue of the act constituting courts for the trial of small causes, except the sections relating to variances and amendments of pleadings, which sections are extended to the court of common pleas on appeals. Revision, p. 895, § 301. The rules of practice and procedure relating to bills of exceptions that control on writs of error do not apply to certiorari on proceedings in suits under the small-cause act. The court, on certiorari, will not retry the case upon the merits, but will examine the record to see whether the trial of the suit has not been so conducted as

to do injustice. The remarks of Chief Justice Hornblower in *Nicholson v. Wood*, 15 N. J. Law, 463, 464, and the cases collected in the notes to Revision, pp. 553-557, indicate the extent to which this court will review such proceedings on writ of certiorari. The attention of the trial court was called to the insufficiency of the plaintiff's books of account as evidence to sustain his cause of action without proof as to the manner in which the book account arose, or what the subject-matter of it was. And the examination of the plaintiff, when recalled and examined by the court on its own motion, disclosed that for the greater part of plaintiff's demand the books of account were not competent evidence. Nor did it appear that the items subsequent to February 16th, which amounted to the inconsiderable sum of \$16.50, as compared with the verdict, were such as were susceptible of proof by books of account. The court should have overruled the books as evidence of the three items referred to, and should have required further explanation of the residue of the account, or should have given the direction of a verdict as requested by the defendant's counsel.

3. That after the case had been submitted to the jury under the charge of the court, and the jury had retired to consider their verdict, the court permitted them to return into the court, and the plaintiff to give further testimony, against the objection of the defendant's counsel. The facts upon which this reason for reversal is based are certified to as follows: "The jury then retired, and afterwards sent in a communication to the court, and, being recalled from the jury room, and having resumed their seats in the jury box: The Court: Gentlemen of the jury, you have sent me in a communication as follows: 'Has the check account in this book any bearing on this case?' What do you mean by the 'check account'? A Juror: There is an account in that book that is checked off. We would like to know whether that has anything to do with this case? The Court: Let me see what it is, so that I can submit it to counsel, and take the testimony of the witness in the matter. Mr. Hommann (the defendant's counsel): I desire to enter a formal objection now, before the witness comes back. (Which objection was overruled and exception taken.) The Court: The jury having asked the question of the court, 'Does the check account in this book have any bearing on this case?' the witness is recalled in presence of both counsel, and asked, 'What do the checks mean?' The Witness: Those are charges as I took them when a settlement was arranged on the 16th day of February. The Court: Those are not included in that account? The Witness: No, sir. The Court: Any other questions that the jury want to ask? A Juror: I would like to know whether the molasses and flour and other goods come in that account? The Witness: That is what I owed him for, and settled with him for. I settled with him. Mr. Strong: If there is any account anywhere, we would not want this man to lose by it. The Court: Any questions,

Mr. Hommann? Mr. Hommann: No. (The jury retired, and returned and rendered a verdict for the plaintiff in the sum of \$133.70, with interest to date, amounting to \$9.45, making a total of \$148.15.) The court, in its discretion, may permit a case to be opened for the admission of additional testimony at any time before it is submitted to the jury, or the jury may be permitted to return into court, or be called back, for further instructions, or for information as to the evidence which has been regularly put in during the trial. But to permit the introduction of evidence on a new subject after the case has been closed and put in the hands of the jury is irregular. The party against which such evidence is introduced is entitled to the opportunity of meeting it with counter proof, and also to the discussion by counsel as to the applicability and effect of the new case presented. The jury was instructed to find a verdict on comparison of the books of account, and the statement of account filed. The jury found an account on the books that was "checked off." Whether that account was of items on the defendant's side does not appear. It may be inferred from the answer of the witness that such was the case. But, if the account "checked off" was on plaintiff's side of the account, it would have been material for the jury to consider whether they were not included in the settlement of February 16th. The account on the books for molasses, flour, and other goods was manifestly for goods for which the plaintiff was once indebted to defendant, and on the books appeared to be due to him. The plaintiff in this irregular way was permitted to testify to the effect that the account "checked off" had nothing to do with the case, and that he had settled with the defendant for the goods that by the books appeared to be due to the defendant. The introduction of this testimony at the stage of the case at which it was admitted was erroneous. It is said, in the first place, that the evidence so given was immaterial. It appears that the jury thought otherwise, for the jury was not prepared to give the plaintiff a verdict for the full amount claimed without the explanation and additional evidence given by him, and which seems to have been material. In the second place, it is contended that the defendant's counsel did not cross-examine. The counsel was in court without his client and his witnesses, and it is not presumed that he was aware of any fact to be brought out by a cross-examination that was pertinent to the case. He promptly objected to the course that was taken, and that was all he was required to do. The judgment should be reversed.

KASTENDIEK v. KASTENDIEK.

(Court of Chancery of New Jersey. Oct. 24, 1896.)

DIVORCE—ADULTERY—EVIDENCE.

In an action for divorce on the ground of adultery, where the proofs show a disposition on

the part of the defendant to perpetrate the offense, and a planning by him for that object, and also show an opportunity afforded him to accomplish his purpose, and all the surrounding circumstances indicate that he did commit the crime, the denial being limited solely to his own unsupported oath, the inferences to be drawn are sufficiently strong to justify a decree.

Petition by Ella Kastendiek against John C. Kastendiek for divorce. Decree for plaintiff.

William D. Daly, for petitioner. James F. Minturn, for defendant.

GREY, V. C. The petition in this cause is filed by Ella Kastendiek against her husband, John C. Kastendiek, for divorce a vinculo matrimonii, alleging as a cause for divorce the adultery of her husband, at the Palace Hotel, in the city of New York, on the 29th day of November, 1895, with a woman whose name is unknown to the petitioner. The jurisdictional facts were sufficiently proved, and were not controverted. The only matter in dispute was the act of adultery. The petitioner proved by the testimony of two witnesses, who were not shown to be in any way interested, that on the day and at the place named in the petition (the Palace Hotel) the defendant was present with one of the two witnesses and two women, one of whom he had previously several times seen, though her name was not disclosed. The defendant's presence at the hotel was the result of a prearrangement made by him with one of the witnesses that he and the witness should meet these two women, and go over to New York, with the purpose and expectation on the part of the defendant that he would commit adultery with one of them before they separated. In accordance with this preconcerted plan the parties met, and proceeded to the hotel. They registered at the hotel, the defendant registering under a false name,—as "Mr. Kerker and wife." Of the two women, the defendant associated himself with that one whom he had previously several times seen. These two went into a separate bedchamber, and the defendant took off his coat and vest. Up to this point there is no contradiction in the testimony whatever, the defendant himself going upon the stand and admitting the truth of the facts above stated. The defendant, however, claimed that, although he did all of the acts above narrated, and took his coat and vest off while in the bedroom with this woman, because he "had an intention of staying," yet that he was in the room with this woman for only 12 or 15 minutes, and that during that time he committed no act of adultery. The man with whom he went to the hotel states that a period of half an hour intervened after the defendant and the woman went into the bedroom and before they came out, and the testimony of another witness would indicate that a period of half an hour or more passed while the defendant and his associate were in the bedchamber.

Evidence of a character to prove adultery must, in most cases, be inferential; but where the proofs show a disposition on the part of

the defendant to perpetrate the offense, and a planning by him for that object, and also show an opportunity afforded him to accomplish his purpose, and all the surrounding circumstances indicate that he did commit the crime, the denial being limited solely to his own unsupported oath, the inferences to be drawn are sufficiently strong to justify a decree. I am unable to believe the uncorroborated testimony of the defendant, Kastendiek, in denial only of the very act of adultery, when the evidence shows that he had an adulterous purpose, and a prearranged plan, an opportunity and time enough to consummate that purpose, and surrounding circumstances which compel the inference that he did perpetrate the crime. By the petition he was notified of the day and the place when and where the offense is alleged to have been committed. By his answer he expressly denies the commission of this offense, and he personally appears in court with full knowledge of the grounds upon which a decree in this case would be claimed. He had, therefore, every opportunity to prepare his defense, and I am bound to believe that he was advised that his unsupported oath, in a matter where corroboration would be easy, would carry little weight with the court. He admitted that he knew who the woman was with whom he associated himself, as above stated, and that he had made no effort to produce her as a witness before the court. Had she been produced, her denial might have supported his testimony. He admitted that he had familiarly visited the hotel in question, and he said that one of the waiters came to the door of the room, offering wine, at the critical moment when the crime must have been committed, and that he went to the door of the room, and opened it for this waiter; so that the waiter was a material witness to show what was the condition of things as they appeared at that moment, but he made no effort to produce this witness before the court in support of his account of the transactions there passing. For these reasons I feel constrained to hold that the petitioner has maintained her cause, and I shall therefore advise that a decree *vinculo* be made in accordance with the prayer of the petition, with costs.

(54 N. J. E. 600)

NEW JERSEY BUILDING, LOAN & INVESTMENT CO. v. BACHELOR et al.

(Court of Chancery of New Jersey. Oct. 15, 1896.)

CONTRACTS—VALIDITY—MECHANIC'S LIENS—MORTGAGES—PRIORITIES—VALIDITY.

1. An agreement between two mortgagees that the mortgage which is prior in date shall be postponed to the other is valid.

2. A vendee of land, simultaneously with the delivery of his deed, gave a mortgage to secure borrowed money, a part of which was used to pay for the land. *Held*, that as to such part the lien of such mortgage was prior to a mechanic's lien for improvements made in part before delivery of the deed to the vendee, and under a contract with the vendee made before such deliv-

ery, but as to the balance of the mortgage the mechanic's lien was prior.

3. The lien of a mortgage given to a building association was valid as to the premium allowed the company and included in the mortgage, as against subsequent incumbrancers, and this though the loan was made without bidding.

Bill by the New Jersey Building, Loan & Investment Company against Ida M. L. Bachelor and others to foreclose a mortgage.

Barton B. Hutchinson, for complainant. Thomas J. Kennedy, for defendant McFarlan. Benny Bros., for defendant Walters.

STEVENS, V. O. The complainant's mortgage for \$3,800 is dated July 27, 1893, acknowledged July 28, 1893, and recorded September 21, 1893. The defendant McFarlan's mortgage for \$1,500 is dated May 31, 1893, acknowledged July 27, 1893, and recorded August 1, 1893. The defendant Walters recovered judgment on his lien claim for \$2,323.96. The claim was filed June 18, 1894, and was made by him as contractor for work done and materials furnished in the making of additions to a dwelling house upon the mortgaged premises. The work was begun about June 20, 1893, and completed about November 15, 1893. The questions raised by the pleadings and proofs relate to the priorities of these three incumbrances. So far as the mortgages are concerned, the evidence satisfies me that, while the mortgage of McFarlan is prior in date, the agreement between the parties was that it was to be postponed to the complainant's mortgage. That such an agreement may lawfully be made is unquestionable. *Hopler v. Outler* (N. J. Ch.) 84 Atl. 746. The complainant is therefore, as against the defendant McFarlan, entitled to be first paid. The mortgage of the defendant McFarlan, being a purchase-money mortgage, is entitled to priority over the lien claim of the defendant Walters. This is admitted. The important question is whether the lien of the complainant's mortgage is prior to the mechanic's lien, either in whole or in part. The pertinent facts are these: The defendant Ida Bachelor was desirous of purchasing a house and lot belonging to the defendant McFarlan. Not having the money to make the purchase, her husband applied to the complainant, a building and loan association, for a loan. The association having agreed to make it, Mrs. Bachelor was allowed by the vendor to take possession before she took title. After doing so, she contracted with the defendant Walters to make certain additions to the house. Walters began work on or about June 20th, and did a considerable portion of it before the deed was delivered. On the evening of July 27th, at Bayonne, McFarlan, the vendor, signed and acknowledged his deed to Mrs. Bachelor, and formally delivered it to her; and she signed and acknowledged her mortgage to McFarlan, and formally delivered it to him. No money was then paid, and the deed was immediately redelivered to Mc-

Farlan; it being understood that he would on the next morning take the mortgage to be given to the building and loan association to its office in Trenton, and there receive the whole amount of the loan. Of this loan he was to retain \$2,000, and the balance he was to hand over to Mrs. Bachelor. Accordingly on the next morning (July 28th) Mrs. Bachelor signed the bond and mortgage, to the building association, and acknowledged the latter before its local attorney. They bore date on July 27th. After they were acknowledged they were taken by the attorney to McFarlan, who on receiving them went to Trenton, and delivered them, and also the deed, to the company's secretary, at its office. He received a check for \$2,970, \$2,000 of which he retained, and the balance of which he gave to Mrs. Bachelor. The deed, bond, and mortgage were immediately sent by the company, for record, to the clerk's office in Hudson county, instead of to the register's; and, the clerk not handing them to the register, they were not in fact recorded until the 21st day of September following.

On this state of facts, which has the prior lien,—the building association or Walters? There are several decisions on the general question. In the first place, it is settled that a purchase-money mortgage given by a vendee to a vendor simultaneously with the delivery of the deed will take precedence of a mechanic's lien claim for work done for the vendee before he acquires the legal title. *Mackintosh v. Thurston*, 25 N. J. Eq. 248; *Lamb v. Cannon*, 38 N. J. Law, 362; *Wallace v. Silsby*, 42 N. J. Law, 1. In the second place, it is also settled that if the purchase money, or a part of the purchase money, be advanced by a third person, a mortgage given by the vendee to him simultaneously with the delivery of the deed by the vendor will have like precedence. *Bradley v. Bryan*, 43 N. J. Eq. 396, 13 Atl. 806; *Hopler v. Cutler*, *supra*. In the case in hand a part of the sum lent went to pay the purchase money, and a part of it was paid to Mrs. Bachelor. What she did with it does not appear. Is this mortgage, under the circumstances, entitled to priority over the mechanic's lien, and if so, to what extent? Although the delivery of the deed and the McFarlan mortgage took place on the evening of the 27th, and the delivery of the mortgage to the building association took place on the following day, I still think that the transaction was a single one, and that it was the intention of the parties that it should be so considered. This is apparent from the fact that McFarlan kept possession of the deed conveying the title until he delivered it to the association. At the trial it appears to have been conceded by all parties that McFarlan contemplated making no final delivery of it until then. See colloquy at conclusion of McFarlan's evidence. On this assumption it is plain, under the rules of law I have stated, that the lien of the building and loan association is prior to the Walters lien, so far as

the money advanced was used to pay purchase money.

It is, however, argued by Walters' counsel that as to the rest of the money secured the Walters lien is prior. The contention is that, to the extent that the land vests in the grantee beneficially, the lien of the mechanic must prevail. I am of opinion that this contention is well founded. The claim of the vendor of property who takes a mortgage to secure purchase money rests on the most satisfactory grounds. Looking at the substance of the transaction, all that the grantor really parts with, and all that the grantee justly gets, is the equity of redemption, and it is this equity alone which should become subject to the claim of the vendee's creditors. By an extension of the rule, a third person who advances purchase money, if he take a mortgage simultaneously with the passing of the title, is permitted to stand in the shoes of the vendor, and to have the same protection that the vendor has. In this case, too, equity declares that all that the grantee really acquires is the equity of redemption. It would seem, on principle, clear that this ought to be the limit of the extension, and that whatever interest does vest in the grantee beneficially should become subject to such liens and interests as the law imposes upon land in the hands of an owner. The test of momentary seisin cannot be the only one applicable to a case of this kind. If the grantor should convey to the grantee in satisfaction of a prior debt due from the grantor to the grantee, would the grantee be permitted to mortgage to a third person with such effect that his mortgage would be allowed to prevail over the widow's dower and the claims of prior judgment and lien creditors? If so, on what principle? Simply because he mortgaged the instant he got the conveyance, and not some appreciable period of time, be it a minute or an hour, afterwards? If the court were to hold the test of momentary seisin to be the only one in such cases, it would not only violate legal rules, but it would defeat the plainly-expressed intention of the legislature. It was, without doubt, the legislative intention, by the dower act, to endow the widow of every beneficial estate of inheritance of which her husband was seised at any time during the coverture; by the acts respecting judgments and mechanics' liens, to bind the beneficial interest of the debtor in the land, by the lien of the judgment or mechanic's lien, as soon as this land became vested in him. In other words, the legislative design was to prevent the husband in the one case, and the debtor in the other cases, from making any use of his beneficial interest that would tend to defeat the just claim of the dowress or of any creditor. The distinction is clear. If the estate comes into the hands of the grantee subject to legal or equitable liens, such liens will not be postponed to those of his own creation. But, if he take it free from lien, he cannot create

liens which will take precedence over the statutory ones. And here the technical rules of conveyancing come in to further the intention of the legislature. It is elementary that the mortgagor cannot make a legal conveyance of land by way of mortgage until he becomes seised of that land, but at the moment of seisin—while he is, so to speak, in the act of becoming seised—the statutory lien fastens itself upon the estate, and any conveyance of it by the grantee must follow, and not precede, the lien thus attaching. The case of the purchase-money mortgage is an exception in point of form, and not of substance; for in substance, as I have said, the purchaser only gets, as the result of the one entire transaction, an equity of redemption. This is well illustrated by the case of *Wallace v. Silsby*, 42 N. J. Law, 1,—a case at law, and therefore all the more significant. The question there was whether deeds of conveyance and reconveyance of certain minerals were to be regarded as parts of one transaction, in such manner as to prevent the first conveyance from vesting a greater interest in the subject-matter of the grant than the parties intended should be vested beneficially. It was held that they must be regarded as parts merely of one entire transaction; that the intention of the parties was to put the seisin in the grantee, under whom the plaintiff in that case made his inequitable claim, for a particular purpose, and only for an instant; and that the court, disregarding “the outward figure and mode” of the business, would look at its substance, and give effect to it as the parties really intended it should have effect. In the course of his judgment the chief justice quotes with approval the following passage from Chancellor Kent: “A transitory seisin for an instant, when the same act that gives the estate to the husband conveys it out of him, as in case of a donee of a fine, is not sufficient to give the wife dower. The land must vest in the husband beneficially, for his own use, and then, if it be so vested but for a moment, provided the husband be not the mere conduit for passing it, the right of dower attaches.” The chief justice then proceeds: “It is obvious that all the considerations here given for the existence of this doctrine, in its application to dower, should be equally potent in their bearing on the law of the case now under consideration; for here, as in the case of the momentary seisin of the husband, the grantor of the plaintiff was not beneficially seised, even for a moment, in the ore forming the subject of litigation.” The case of *Mackintosh v. Thurston*, 25 N. J. Eq. 242, is not opposed to this view. It was there held that a purchase-money mortgage has preference over lien claims for work done and materials furnished in buildings and improvements put upon the mortgaged premises by the purchaser between the execution of the contract of purchase and the conveyance, not only to the extent of the purchase money, but also for all

advances made in accordance with the written contract of purchase for building the houses, improving the grounds, and paying taxes. Here, it will be perceived, there was a written contract stipulating for a conveyance on certain conditions. The grantee was to acquire the property only by conforming to those conditions, and the estate was to vest in him beneficially, subject thereto. The principle of decision is the same as that in *Wallace v. Silsby*, supra. The same remark is applicable to *Clark v. Butler*, 32 N. J. Eq. 664. Vice Chancellor Van Fleet was there considering the case of a mortgagee who released in favor of a purchaser of part of the lands mortgaged, and then took a new mortgage from that purchaser, crediting the amount of the new mortgage upon the old. He held, as on principle he was required to hold, that the new mortgage was prior to a previously existing mechanic's lien. It will be perceived that both of these cases gave to the vendee just such beneficial interest in the property as by the contract of purchase it was intended that he should acquire, but the case of *Gibbs v. Grant*, 29 N. J. Eq. 420, appears to go further. There, as here, work was done before the vendee got the legal title; and there, as here, a third person advanced to the grantee money, only part of which went to pay purchase money. Some of it went to workmen employed on the building, and the rest of it, we are told, went to the vendee. What he did with it the case does not show. The chancellor appears to have held that the entire amount of the mortgage had priority over the lien claim. The question here discussed does not seem to have been distinctly raised and passed upon, and hence the question may still be regarded as open. The cases cited by the chancellor in his opinion are no more than illustrations of the rule as I have stated it. I am therefore of opinion that, in order to give proper effect to the twenty-third section of the mechanic's lien act, it must be held that the lien attaches to the estate which comes into the hands of the grantee to the full extent that he acquires a beneficial interest in it, and that such lien has priority over any liens which the grantee may seek to create therein. Had the money which went to pay purchase money been secured by one mortgage, and the rest of the money lent been secured by another, given at the same time, the former mortgage would in my view have priority over the mechanic's lien claim, and the latter would not. That the mortgagor has secured the whole loan by a single mortgage cannot change the result. Only to the extent that the mortgage secures purchase money will it have priority over the lien of Walters.

A further question was raised in respect of the first mortgage. It was contended that, as against the subsequent incumbrancers, it was a valid lien only for the amount actually paid, viz. \$2,970, and not for its face, \$3,300. The difference between these two amounts

represents the premium claimed by the association of which Mrs. Bachelor was a stockholder. The evidence is that this premium, together with the monthly payments required to be made by the bond and mortgage, go, with all the other premiums and payments received from other members, into a general fund, out of which dividends are made on the stock. It has been so often decided that contracts of this kind are valid that the question is not an open one. *Association v. Conover*, 14 N. J. Eq. 219, on appeal 17 N. J. Eq. 497; *Association v. Furey*, 47 N. J. Eq. 411, 20 Atl. 890; *Bowen v. Association*, 51 N. J. Eq. 272, 28 Atl. 67. It was said that this case differs from the cases cited in that here the money was loaned without any bidding. I do not understand that this is material. It does not affect the ground upon which transactions of this kind are vindicated. *Association v. Stephens*, 26 N. J. Eq. 355.

A question is also made in reference to the amount of interest and premiums due. The bond and mortgage were given on July 27, 1893, and there were three payments upon the stock, and two payments of interest. The payments upon the stock were made in the months of July, August, and September, 1893; the payments of interest, in July and August. As the mortgagor thereafter made default, the principal sum of \$3,300 became, by the terms of the bond and mortgage, payable in December, 1893. If anything more is claimed than this principal, with interest thereon at 5 per cent. from December, 1893, I will hear counsel as to whether, on the facts of the case, such claim is sustainable.

(54 N. J. E. 594)

BROWN et al. v. MURRAY.

(Court of Chancery of New Jersey. Oct. 12, 1896.)

LIFE INSURANCE—SOLE USE OF THE WIFE—SURVIVORSHIP OF ASSURED HUSBAND—DISTRIBUTION OF INSURANCE MONIES.

1. Under a policy on the life of a husband, in consideration of annual premiums to be paid by him, "in the amount of \$2,000, for the term of life, for the sole use of his wife," where the husband survives the wife, and makes no assignment of the policy, the money received thereon by his executor is payable to the executor of the wife, for the benefit of her estate.

2. Under a certificate in the Clergyman's Mutual Insurance League, which recites that the assured is a member, and that the certificate "is issued at his request in favor of his wife, * * * [who] will be entitled to receive from the league within 40 days after the death of the [assured]" a certain sum from each and every member, where the husband survives the wife, and makes no assignment of the certificate, the money received thereon by his executor is payable to the executor of the wife, for the benefit of her estate.

Bill between Elizabeth W. Brown and others, administrators of the estate of Alexander Shiras, deceased, and Thomas S. Murray, executor of the estate of Frances B. Shiras, deceased, to determine to whom belong certain insurance moneys, the proceeds of policies on the life of

Alexander Shiras. Decree in favor of defendant.

On October 20, 1847, the Mutual Benefit Life Insurance Company issued to Alexander Shiras a policy of insurance, containing the following provision: "This policy of insurance witnesseth that the Mutual Benefit Life Insurance Company, in consideration of fifty-two dollars and eighty cents to them in hand paid by Alexander Shiras, and of the annual premium of fifty-two dollars and eighty cents to be paid on or before the twentieth day of October in every year during the continuance of this policy, do assure the life of Alexander Shiras, of Georgetown, in the county of Washington, district of Columbia, in the amount of two thousand dollars, for the term of life, for the sole use of his wife, Frances B. Shiras. And the said company do hereby promise and agree to and with the said assured, his executors, administrators, and assigns, well and truly to pay or cause to be paid the said sum insured to the said assured, his executors, administrators, or assigns, within ninety days after due notice and proof of the death of the said Alexander Shiras, deducting therefrom all notes taken for premiums on this policy unpaid at the time." Alexander Shiras paid the premiums on the policy up to the time of his death, in November, 1894. Mrs. Shiras, the beneficiary named therein, died before her husband, in August, 1892. Alexander Shiras also held in his possession at the time of his death a certificate in the Clergyman's Mutual Insurance League, reading as follows: "This certifies that Rev'd Alexander Shiras is a member of the Clergyman's Mutual Insurance League, —, he having made application and paid his membership fee. This certificate is issued at his request in favor of his wife Frances B. Shiras. And the said Frances B. Shiras will be entitled to receive from the league, within 40 days after the death of the said Alexander Shiras, the sum of two dollars from each and every member of the league; provided that, if the said Alexander Shiras be in arrears for dues at the time of his death —, this contract shall be void. Given at Red Bank, this 4th day of May, A. D. 1870. F. C. Putnam, Pres. Wm. D. Dannel, Treas." The Mutual Benefit Life Insurance Company has paid the money due on the policy issued by it to the complainants, as administrators of Alexander Shiras. The Clergyman's Mutual Insurance League still retains the moneys payable on their certificate. The bill prays that decree may be made determining whether the insurance moneys above mentioned belong to the estate of Alexander Shiras, or to that of his wife.

E. S. Atwater, for complainants. W. M. Lanning, for defendant.

STEVENS, V. C. (after stating the facts). I think the obvious and proper reading of the clause in the policy of the Mutual Benefit Life Insurance Company in respect of which the present controversy has arisen is this: "The

said company does hereby promise and agree to and with the said assured [Alexander Shiras], his executors, administrators, and assigns, well and truly to pay or cause to be paid the said sum insured, to the said assured [Alexander Shiras], his executors, administrators, or assigns, for the sole use of his wife, Frances B. Shiras." The wife died before the husband, and the question is, what interest did she take? Was it an interest which was contingent upon her surviving her husband, in which case the insurance money would belong to her husband's estate; or an absolute interest, in which case it would, at the wife's death, have passed to her executor for the benefit of her estate?

Where a person procures a policy upon his life, payable to another, and himself pays the premiums, and retains the policy in his own possession, there is some conflict among the cases as to whether the insured has power to change the beneficiary, and consequently some difference of opinion as to the nature of the beneficiary's interest. But the question is not an open one in this state, the law having been settled by *Landrum v. Knowles*, 22 N. J. Eq. 504. In that case a policy was taken by a wife on her husband's life, in favor of and payable to her children. She paid several premiums, and then assigned the policy, in payment of her husband's debt. After the assignment, the husband died, and the children filed a bill against the creditor, claiming the whole amount of the insurance money. It was decided that the children were entitled to the reserve or accumulated fund belonging to the policy at the time it was assigned, and that the creditor was entitled to the balance. The chief justice said: "The interest in this policy was effectually transferred to these appellants, for by its very terms it is made payable to them, and it is difficult to perceive what ceremony or fact is wanting to the perfection of the gift to them. The mother pays the premium for the use and benefit of the children, and the insurance company at her instance, in the policy, enter into an agreement to pay the insurance money to them. The gift to the children is voluntary, but, very clearly, it is completely executed as a gift by the mother, from whom it proceeds." The meaning of this passage is unmistakable, and the case is all the stronger because the chief justice is not speaking of a policy payable to the insured, his executors and administrators, for the use of the beneficiary, in which case the insured would properly retain possession of the policy as trustee, but of a policy payable directly to the children. The point decided was that, at the time of the delivery of the policy, the gift was executed in the children, who immediately acquired a vested interest in the reserve fund belonging to it; but that, as the wife had not entered into any covenant to pay future premiums, and so was not bound to pay them, the children had an interest co-extensive only with the value of the payments she had paid. Of this interest she could not deprive them, but she might deprive them of all other interest. It will thus be seen

that the court of errors has taken a middle ground. It refuses, on the one hand, to assert with Mr. Bliss, and with perhaps a majority of the state courts which have considered the question, that the person procuring the insurance and paying the premiums has no power to divert any part of the fund from the beneficiary named (*Bliss, Ins. § 318; Insurance Co. v. Palmer*, 42 Conn. 60; *Drake v. Stone*, 58 Ala. 136; *Harley v. Heist*, 86 Ind. 197); and it refuses, on the other hand, to hold, as the supreme court of Wisconsin, in *Foster v. Gile*, 50 Wis. 606, 7 N. W. 555, and 8 N. W. 217, held, that every policy made payable to a person other than the insured, and remaining in the possession of the insured, should be read as if it contained a power of revocation, enabling him at any time, at least with the consent of the company, to completely divest the beneficiary named therein of all interest.

The nature of the beneficiary's interest having thus been ascertained, it will not be difficult to solve the question at issue. It is to be noted, in the first place, that Mr. Shiras did not at any time during his life attempt to alter the destination of the fund, and, in the second place, that his continued possession of the policy was consistent with the provision that the money was to be paid to himself, his executors and administrators; not, however, for his or their benefit, but "for the sole use of his wife, Frances B. Shiras." The policy contains the only contract between the parties. By its terms, the right of the wife to the money is absolute. The gift is not limited in point of time, and is not made contingent upon the happening of any event. The only duty which the trustees had to perform with respect to the money they were to receive was to pay it over to the wife, who was to have the sole use of it. So broad is the language of gift that I understand it to be conceded that, had the wife survived the husband, she would have taken it absolutely. But it is said the gift was made contingent upon her survivorship. Not being able to find words of contingency in the policy itself, it is argued that we cannot suppose that the husband had the design of benefitting his wife's relatives, at the expense of his own. The case does not show what relatives Mr. and Mrs. Shiras had, nor how Mr. Shiras felt towards them. The facts are not before the court, and could not be proved for the purpose of varying the terms of the contract. The effort really is to add to the words "for the sole use of his wife, Frances," the further words "if she should survive him." It would hardly be contended that the court would do this if the beneficiary were a child (*United States Trust Co. v. Mutual Ben. Life Ins. Co.*, 115 N. Y. 153, 21 N. E. 1025; *Wes ton v. Richardson*, 47 Law T. [N. S.] 514; *Ricker v. Insurance Co.*, 6 N. W. 77, 27 Minn. 193), or a creditor; and on what principle would it do it in the case of a wife? Should the same words be construed as giving to the wife one kind of interest, and as giving to the

child or creditor another kind? In all the cases cited by counsel there were to be found in the policy itself words importing contingency. *Fuller v. Linzee*, 135 Mass. 469, is a case of this description. There the language was, "In case the said assured [the wife] should die before the decease of N. G. F. [the husband]," the insurance money was to be paid to the children; and the court was able to declare that the policy itself warranted the inference that Mrs. Fuller was to take nothing unless she survived her husband. In *Olmsted v. Keyes*, 85 N. Y. 593, the Mutual Life Insurance Company issued a policy upon the life of I. O. K., the husband (who procured it, and paid the premiums upon it), to I., as trustee for his (I. O. K.'s) wife. The wife died in her husband's lifetime, and subsequently the husband married again, and assigned his interest in the policy to his second wife. The court sustained the assignment. This case is plainly an authority in favor of the view I have taken, for Earl, J., says that the husband's title came to him from his first wife on her death, he being entitled to her choses in action, *jure mariti*. In *Harley v. Helst*, 86 Ind. 197, the policy was payable to "the said assured [the husband], his executors, administrators, and assigns, for the benefit of and payable to Wilhelmina, his wife." The husband attempted to assign it to a creditor after his wife's death. It was held that the assignment was invalid, as against the claims of his wife's heirs at law. And see *Campbell v. Insurance Co.*, 98 Mass. 381, 400. I am assured of opinion that the complainants, who are administrators of the husband, should pay the money they have received on this policy to the executor of the wife, for the benefit of her estate.

As to the certificate issued by the Clergyman's Mutual Insurance League, I can find absolutely nothing in it which gives the complainants the semblance of any claim. If they have any by reason of their intestate's membership, or by reason of the constitution or by-laws of the league, the bill does not disclose it.

(64 N. J. E. 581)

DUVALE v. DUVALE.

(Court of Chancery of New Jersey. Oct. 13, 1896.)

TRUST—CONVEYANCE TO WIFE—PROMISE TO EXECUTE WILL—ENFORCEMENT OF.

1. Evidence that at the time a husband bought property, which he had conveyed to his wife, and improved as a home, he stated to the lawyer drawing the conveyance that the property was to be returned to him in case of his wife's death, and, after consultation, directed the preparation of reciprocal wills, which were executed by himself and his wife in favor of each other, is sufficient to overcome the presumption of a settlement on the wife arising from the conveyance to her, and to establish a resulting trust in the husband.

2. A promise by a wife to make a will in favor of her husband, followed by the execution of such a will, in consideration of which the husband thereafter made valuable improvements

on property which he had caused to be conveyed to the wife, though resting in parol, is valid, and will be enforced in equity; and where the wife has revoked the will made, and repudiated the promise, the court will, by its decree, during her lifetime, on the principle of *quia timet*, protect the rights of the husband by fixing upon the property a resulting trust in his favor.

Bill by Charles L. Duvalé against Celine M. Duvalé to have a trust declared in certain property in favor of complainant. Decree for complainant advised.

H. S. Terhune, Charles H. Ivins, and C. L. Corbin, for complainant. William B. Guild, R. Wayne Parker, and Courtlandt Parker, for defendant.

REED, V. C. This bill is filed by a husband against his wife. The subject-matter of the suit concerns a house and its curtilage, situated at the Atlantic Highlands, N. J., the legal title to which is in the wife. The land was purchased and improved, and the buildings upon it were erected with the money of the husband. The prayer of the bill is that the wife may be declared to hold the said property in trust for her husband, or that she may be compelled to execute a will in his favor for it.

The admitted facts are these: On May 7, 1890, the husband contracted with one Kay and one Cornwall to convey to him a lot of land for the sum of \$3,000. On June 12, 1890, a deed was made by Kay and Cornwall to the wife for said lot. The husband began the erection of a dwelling house thereon, and also the general improvement of the property. On September 9, 1891, he purchased an adjoining lot from one Bernadou for \$1,000. On July 29, 1892, he bought a third tract, adjoining the homestead tract, from one Swift, for the sum of \$2,250. The titles of both these lots were taken in the name of the wife. In the purchase of these lots, in the erection of the dwelling house and the stables thereon, and in the grading and terracing of the grounds, the husband has spent from \$35,000 to \$45,000.

Upon the bare facts so far disclosed no trust in favor of the husband results. The fact that the grantee is the wife of the payor of the consideration rebuts *prima facie* the presumption of a resulting trust in the payor, which trust would have arisen had the grantee been a stranger. The grantee being a wife, the presumption is that the property was put in her name as a settlement. But the presumption that the deed was made by way of advancement or settlement is a rebuttable presumption. Facts antecedent to or contemporaneous with the purchase, or so immediately following the purchase as to constitute a part of the same transaction, may be put in evidence for the purpose of refuting the presumption of a settlement. *Lewin, Trusts*, marg. pp. 175-177; *Read v. Huff*, 40 N. J. Eq. 229. So, also, subsequent admissions by either husband or wife against his or her own inter-

ests are evidential for the same purpose. *Lewin, Trusts*, marg. p. 177; *Midmer v. Midmer's Ex'rs*, 28 N. J. Eq. 290-305. While the same kind of evidence which raises the presumption is admissible to overcome it, the circumstances in both instances must be so clear as to leave no reasonable doubt as to the intention of the parties. *Peer v. Peer*, 11 N. J. Eq. 432-439; *Read v. Huff*, supra. The testimony upon both branches of the complainant's insistence, viz.: First, that there was a resulting trust; and, second, that there was a promise to make a will for a consideration which has been performed,—is so entangled that a single statement of the facts disclosed upon the hearing must include that which bears upon both points. The testimony of the parties themselves upon the substantial points is entirely contradictory. The husband swears that he and his wife, previous to the execution of the deed for the first lot, had been living for three consecutive summers at the Atlantic Highlands; that his wife, finding that the climate there suited her, urged him to buy a home at that place. Influenced by her request, he contracted in writing, in his own name, for the purchase of the first lot. Between the date of the making of the contract and the date of the execution of the deed for it he had several conversations with his wife concerning the matter. In one or more of these she said to him: "Look here, if you put that land in my name, it will prove to me that you are not going to run away with that woman you are keeping in New York, and it will make me happy." Mr. Duvalé says: "She told me that she would sign any paper I wanted her to sign to secure me. Whenever I wanted, she would deed it back to me." She said, "I will sign anything you want, and whenever you want it." The allusion to the woman in New York contained in the testimony related to a Miss Hunter, with whom at one time the wife thought her husband had formed an illicit connection. The deed for the property conveyed to the wife was drawn by Mr. Cannon, a lawyer of the state of New York. Mr. Duvalé says that about the time the deed was made—perhaps a week later or a week earlier—he spoke to his wife about the execution of reciprocal wills in each other's favor. When recalled to the stand on a subsequent day, he, after talking with Mr. Cannon, said that the conversation occurred before the execution of the deed to his wife. It is conceded that two wills were drawn and executed, one from her to him and the other from him to her, of all the property of each respectively. These wills were executed on August 26, 1890. Then followed the purchase of the two adjoining lots, the title to which was put in the name of the wife. In March, 1893, Mrs. Duvalé left her husband's home at the Highlands. Mr. Duvalé says that some time during that month he saw her on the cars in Jersey City, a few days after she had

left him, and she then told him that she had made a new will, and had given all her property to her relatives in France. She had in fact made such a will on March 15, 1893. In reply to her information he says he told her that she had a right to make all the wills she wished to, but, of course, she would give him back his property, and that she replied, "Yes." Then she said: "But let me have it. I know that I have done wrong, and I will bring back that will, and you can destroy it." Mr. Duvalé refused to accede to her proposition. In June she returned to her home in the Highlands. Shortly before this, she seems to have executed another will, drawn by Senator Applegate, in favor of her husband. This will was subsequently destroyed by Mrs. Duvalé in the summer or fall of 1893. This is a brief statement of the husband's account of the transaction. Mrs. Duvalé admits that they agreed to make reciprocal wills, but she denies that she ever heard anything about the making of these wills until shortly before their execution. She also denies having had any conversation with her husband previous to the time of the execution of the deed to her, in which conversation she promised to sign any paper in respect to the property in his favor.

The case, so far as it rests upon the testimony of the parties themselves, therefore stands thus: The husband swears that before the deed was made to his wife she promised to sign any paper to secure his title to it, that the wills were afterwards executed to effectuate that purpose, and that she destroyed the will in his favor, and executed another to a new beneficiary. All the material parts of his testimony the wife denies. Of the testimony of persons other than the parties, the most important is that of Mr. Cannon, who drew the deed, and also drew the wills. Mr. Cannon says that he received instructions from Mr. Duvalé to draw reciprocal wills. He thinks these instructions were contemporaneous with the closing of the title and the passing of the deed to the wife. His account is as follows: "Mr. Duvalé asked me what would be the effect of putting the title in Mrs. Duvalé's name in case Mrs. Duvalé died intestate. I told him that according to our laws (and I think I looked up the laws of New Jersey), in both instances, they never having had any children, it would go to the heirs at law of Mrs. Duvalé. I said to Mr. Duvalé that the only way I could see, if he placed entire confidence in his wife, between him and his wife, to make reciprocal, or, as we sometimes call it, counter wills." As already observed, Mr. Cannon had already said that he received instructions to draw such wills, he thinks, on the 12th of June, when the deed was made. Drafts of these wills were sent by mail to Mr. Duvalé on the 28th of June. Mr. Cannon accounts for the 16 days intervening between the date of the deed and the reception of the wills by Mr. Duvalé by saying

that he first drew "what we termed drafts of the wills," and submitted them to Mr. Duvalé, by sending them, "by one of our clerks or an office boy to Mr. Duvalé's office." He thinks that the drafts came back to the office, and that final drafts were sent by mail to Mr. Duvalé on June 28th, as the charge for drawing them was made on that day. He says that he did not send the drafts immediately after receiving instructions to draw them, for that they were always behind in their office in such matters.

The remaining testimony consists of subsequent admissions of the respective parties concerning their understanding of the condition of the title to the property. First in this line is the testimony of Edmund Moutenot, who is the only son of Mrs. Duvalé by her first husband. It is conceded that in the agreement made between the husband and wife respecting the wills, at whatever period that agreement was made, it was understood that her will was to contain a legacy in favor of her son of \$100. Mr. Duvalé says that after the execution of the wills he told Mrs. Duvalé that she should inform her son that she had made such a will, so that he would not contest it after her decease. Moutenot swears that some time between September 15 and October 15, 1890, his mother came to his house near Belvidere, N. J., and she then and there said she had come to tell him what arrangement had been made between Mr. Duvalé and herself in regard to this property. She said that the title was put in her name, and that it was understood that she was to return those deeds if Mr. Duvalé should ask for them, for any reason. Then she spoke about the will. She admitted leaving everything to Mr. Duvalé, except \$100, which was left to him, in case anything should happen, she did not wish him to bother the will. Moutenot also says that he was at the Duvalés' house in March, 1893, about the time the will was destroyed. He says that he heard Mr. Duvalé say to his wife, "I would like to get the papers of my property back." She replied, "I will make a new will." He said, "You can give me a will to-day, and make another to-morrow, and what I want is, my title to the property back." She said he should have it. Now, although Moutenot and his mother are estranged, I am convinced that his testimony is as correct as a restatement of a conversation usually is. Of more importance than the testimony of Moutenot is that of Dr. Du Plasse. He says he was the physician of Mrs. Duvalé, as well as the friend of both. He says that Mrs. Duvalé was talking to him and his wife, in his dining room, some time in 1892. She was complaining of her husband, and she said, "I don't know what to do with my money." Dr. Du Plasse said: "Make my little girl your heir. Give her your house, and she will be satisfied." Mrs. Duvalé answered, "I cannot dispose of my house, because it has been put in my name

under conditions that I make my will in favor of Mr. Duvalé." In the other testimony I find little of significance in respect to the question at issue. In an affidavit to a bill filed to enjoin a railroad company from going through this property, and in the testimony delivered on the trial in the condemnation proceedings brought by the same railroad, Mr. Duvalé stated that Mrs. Duvalé was the owner of the property. But the statements do not seem to be of much value. She did hold the legal title, and for the purpose which was in the mind of Mr. Duvalé at the time the language meant no more. Nor is the testimony of Mrs. Lewis and her son-in-law, that Mr. Duvalé, at the time his wife left, said that he had given her the house, and she had left it away to strangers; nor of Mr. Parmalee, that he (Duvalé) said that he had given the house to her to make her quiet and contented, if possible; or of Rosalie Lehner, to the same effect,—to my mind, significant; for when he said he had given her the property it was true that he had given it to her so long as she could herself enjoy it. On the other hand, I think Mr. Hamilton is mistaken when he says that Mrs. Duvalé went before the commissioners in the condemnation proceedings already mentioned, and spoke of this property as her husband's property, which had been put in her name. And I find little significance in the testimony of Mr. Bernadou, who was procured by Mr. Duvalé to make the purchase for him of the second lot, when he says that at the time of that purchase Mr. Duvalé told him that he wanted the deed made to Celine M. Duvalé, remarking, "She holds my home in her name."

From this statement of facts, colored as they are by the general complexion of the testimony, I have arrived at the conclusion that Mr. Duvalé, when he directed the deed of the first lot to be made to his wife, intended that, in case he survived her, the property should be his. If it be a fact that at or preceding the time when the conveyance of the first lot to Mrs. Duvalé was executed a conversation was held between Mr. Cannon and Mr. Duvalé as detailed in Mr. Cannon's testimony, it conclusively appears that Mr. Duvalé, at the time of the execution of the deed to his wife, intended to reserve the legal title in himself after her death. I think that it is true that she, after he had contracted for the property, persuaded him to put it into her name; that she used in her conversations with her husband the arguments and promises which he attributes to her; that, with this in mind, Mr. Duvalé had his talk with Mr. Cannon about the best method for carrying into effect his intention. Mr. Cannon suggested reciprocal wills. Then came the direction to draw the wills. The draft and execution of these wills were acts done in consummating the intention of Mr. Duvalé in the method pointed out to him. Under these conditions a trust resulted to the husband.

If, however, the testimony should be regarded as insufficient to overcome the presumption of a settlement, how does the case stand in respect to the second ground, namely, that Mrs. Duvalé, for a consideration of value, which has been performed, promised to make a will devising this property to her husband. She admits that they agreed to exchange wills. This, however, did not create a contract which became enforceable. The mutual agreement lacked consideration. The execution of one of the wills was not such a part performance of the agreement as will confer jurisdiction upon a court of equity to decree the execution of the other. By the execution of the will nothing was parted with by the testator or received by the named beneficiary. It was an act which became operative only in the event of death, if still unrevoked. By the existence of the absolute power of revocation until the occurrence of death, its execution was not detrimental to the one nor beneficial to the other, during the life of the testator. But if the promise of the wife to make a will of this particular property was based upon a valuable consideration, then a court of equity will see that the promisee loses nothing by a breach of the contract. If a contract is to pay for services or for property by devise or bequest, an action will lie for the value of the service or the property in default of the promised testamentary compensation. *Ridgway v. English's Ex'rs*, 22 N. J. Law, 423; *Smith v. Smith's Adm'rs*, 28 N. J. Law, 216; *Updike v. Ten Broeck*, 32 N. J. Law, 105; *Stone v. Todd*, 49 N. J. Law, 275, 8 Atl. 300. If there is a promise to devise or bequeath specific property for services or for property, a court of law will allow an action to recover upon a quantum meruit, and a court of equity, where the contract is clearly proven, will, in its discretion, decree what is equivalent to a specific performance of the contract. 22 Am. & Eng. Enc. Law, p. 974; *Wat. Spec. Perf.* par. 41. Nor will the fact that the agreement rests in parol debar a court of equity from exerting its power in this way, if there has been part performance. The leading case in this country upon this subject is *Johnson v. Hubbell*, 10 N. J. Eq. 332, decided by Chancellor Williamson in 1855. A married woman died, leaving a large estate, and two children, a son and a daughter. In the then existing condition of the law, the son inherited two-thirds and the daughter one-third of the mother's estate. The father, who was tenant by the curtesy, persuaded the son to equally share the mother's property with the daughter, by telling him that, if he did not do so, he (the father) would leave all his property to the daughter; but that, if the son made an equal division of the mother's property, he (the father) would leave his own property equally between the two children. The son, induced by these representations, executed the necessary deeds to accomplish an equal division. When the father died, it

was found that, instead of leaving his property as he had promised, he had cut off the son entirely. A large portion he devised to his daughter, who had been cognizant of the inducements which led to the partition, and had participated in carrying out the arrangement for a division of her mother's property. It was held that the contract between father and son was valid, and, although resting in parol, it having been performed by the son, and, the contract being definite and certain, it was decreed to be specifically carried out. The reasoning of the Chancellor in *Johnson v. Hubbell* was adopted as the ground of decision by the court of appeals of New York in *Parsell v. Stryker*, 41 N. Y. 480. The principle so decided was recognized and applied by this court in the subsequent cases of *Vanduyne v. Vreeland*, 12 N. J. Eq. 142; *Davison v. Davison*, 13 N. J. Eq. 252; *Pfugur v. Pultz*, 43 N. J. Eq. 444; 11 Atl. 123. Whatever may be thought of the policy which permits a person to irrevocably direct the disposition of his property after his death without putting his intentions in the shape required by the statute of wills, it cannot be questioned that instances of glaringly fraudulent conduct in obtaining services or property by the inducement of such unfulfilled promises have led to a series of decisions in England and in this country, in which courts have taken hold of and remedied such instances of fraud by seizing the property of the promisor, and by devoting it to the relief of the defrauded party. The note of Mr. Freeman to the case of *Johnson v. Hubbell*, as reported in 66 Am. Dec. 773, contains a large collection of cases in which this doctrine has been asserted.

It is proved to my satisfaction that Mr. Duvalé spoke to his wife about the execution of the wills, if not at the time, soon after, the deed of the first lot to her was executed. The execution of the will was delayed from June 28, when he received it, until August 20, 1890. He says that she had an antipathy to signing a will, thinking that the fact of its execution would injure her health. He had begun the improvements which were subsequently placed upon the property. He says that he requested her to execute the will; that she delayed doing so; and that he finally told her that, if she did not do so, he would discharge the men, and cease work upon the place; that he did discharge the men; that then she signed the will, and the work was resumed. This testimony impresses me as natural and veracious. The case then stands thus: She understood that she was to make a will, not merely in consideration that he would make a will in her favor, but also in consideration that he was to add to the value of the property by improvements, the cost of which would amount to many times the cost of the lot itself. Upon the faith of her promise to do so, and of her having done so, he proceeded to carry out his intention in the lavish spirit displayed by the testimony. In my judgment, she promised to make a will in

his favor, including this property, upon a valuable consideration, which he has performed, and that her promise should be specifically performed. The property included in the agreement covered all accessions to the original lot. When Duvalé purchased the additional adjoining lots, and added them to the first plot, and built within and improved the whole, all became subject to the terms of the agreement.

But in what shape should the decree be framed? I do not think the decree will substantially differ whether it be drawn upon the theory that there was a resulting trust, or upon the notion that there was a promise to make a will. While it is true that a promise to make a certain will is not broken until the death of the promisor, and it is true that actions in which such promises have been enforced have been in cases occurring after the death of the promisor, yet I do not see why the court cannot, upon the principle of *quia timet*, fix upon the property a liability to answer the promise, in any case where the promisor has, during life, repudiated its terms, and attempted to make other disposition of the property. This Mrs. Duvalé has done, and now, by her answer, claims the absolute right to do. Chancellor Williamson recognized the right of the promise to protection upon the principle of *quia timet* in the case of *Vanduyne v. Vreeland*, supra. Vreeland and wife had adopted a child under a promise that all the property they had should, at his death, go to the child. Before his death, Vreeland sold the property for the purpose of cutting out the right of the adopted child to a purchaser who had notice of such rights. Although the complainant in that case, under the agreement, had no right to the property until the death of Vreeland, yet the chancellor decreed that the purchaser held the property subject to the agreement between Vreeland and his adopted son, and that upon the death of Vreeland, and after the accounting, the purchaser should convey the property to the complainant. I will advise a decree that the defendant holds her title to the property in suit subject to the trust mentioned, as well as subject to her agreement to make a will for it in favor of the complainant; also that she be enjoined, while the complainant is living, from making a will devising the property to any person other than the complainant; and that, in the event of her dying during the life of her husband, her heirs at law shall at once execute a conveyance of the said property to the complainant.

(59 N. J. L. 26)

JACKSON v. CONSOLIDATED TRACTION CO.

(Supreme Court of New Jersey. June 15, 1896.)

NONSUIT—ACTION FOR DEATH—DAMAGES.

1. A motion to nonsuit or direct a verdict on the ground of the lack of evidence on a certain point, which evidence the trial judge might, at

his discretion, permit to be supplied, should bring to the attention of the judge the precise point relied on in support of the motion, or the ruling thereon will not, in general, be reviewed on a rule to show cause.

2. While juries, in determining the pecuniary injury occasioned by the death of a person to his next of kin, under our statute, may be obliged, to some extent, to form their estimate of damages on conjectures and uncertainties, yet, when the evidence furnishes some standard for the calculation of damages, a verdict disregarding such standard, and awarding damages in excess of any possible calculation based thereon, will not be permitted to stand.

(Syllabus by the Court.)

Action by Andrew Jackson, administrator of Jay J. Cooper, deceased, against the Consolidated Traction Company, for death by wrongful act, in which there was a judgment for plaintiff. On rule to show cause why a new trial should not be granted. Discharged on condition of remittitur.

Argued February term, 1896, before the CHIEF JUSTICE, and DIXON, GARRISON, and MAGIE, JJ.

Warren Dixon, for the rule. John Linn, opposed.

MAGIE, J. Among the reasons assigned in support of this rule are two based upon the refusal of the trial judge to nonsuit the plaintiff, or to direct a verdict for the defendant. It is first argued that such refusals were erroneous, because there was no evidence that the trolley car which struck and killed plaintiff's intestate belonged to defendant, or was controlled or run by it. An examination of the case shows that there was no direct evidence of that sort. But, in my judgment, this contention should not be considered. Neither the motion to nonsuit nor the motion to direct a verdict presented to the trial judge such lack of evidence as the ground on which the motions were made. If his attention had been called to this point, he had discretion to permit the evidence to be supplied; and doubtless it would have been supplied. The motions were made upon the ground, among others, that plaintiff had not established the liability of defendant. This vague statement left the mind of the trial judge unenlightened as to defendant's claim. Whether it was that the evidence failed to prove that the death of plaintiff's intestate was caused by the trolley car, or that the motorman was negligent, or that the motorman was in defendant's employ, so that the maxim *respondet superior* would apply, was not disclosed. Upon error, a bill of exceptions which does not show that the precise point of which a review is sought was made by counsel, presented to the mind of the court, and decided, will not be considered. *Insurance Co. v. Barraciff*, 45 N. J. Law, 543. The same reason applied to the review of such rulings of the trial judge by rules to show cause. But there was some evidence from which it could be justly inferred that the trolley car which

caused the death of plaintiff's intestate was under the management and control of defendant. Plaintiff called as a witness the person who had been the conductor in charge of the car at the time of the accident. In cross-examination of this witness defendant's counsel drew out that he had been discharged from his employment, and then, upon counsel's stating that he desired to show the animus of witness towards defendant, he was permitted to ask witness whether he had not been discharged for failure to "ring up fares." If the conductor in charge of the car was in the employ of defendant, it was fairly inferable that the car was run by defendant. Nor were these refusals erroneous upon the other grounds upon which the motions were made, viz. lack of proof of negligence or misconduct on the part of the motorman, and negligence of the deceased contributing to his death. There was sufficient evidence to go to the jury of the negligence of the motorman from witnesses who testified that the car was driven at an excessive speed. Whether or not deceased, under the circumstances, was in the exercise of the required care was clearly a question for the jury.

But the defendant's contention that the damages found by the verdict were excessive presents a more serious question. The evidence disclosed that deceased at the time of his death was 22 years old. He was earning \$12 per week, of which he gave his mother from \$5 to \$9 per week for his board. His father was his next of kin. Assuming that the payments to the mother were a pecuniary benefit to his father, it is obvious that the amount of such benefit was measured, not by the weekly payments, but by the profit retained out of them after furnishing deceased his board. The pecuniary injury to the father by the death of his son, recoverable under our statute, cannot exceed the loss of the above-mentioned benefit during the probable duration of the life of the father. The case does not show the age of the father, and therefore there was nothing to indicate his probable expectancy of life. But, of course, it was less than the expectancy of life of his son. The joint expectancy of the life of the son and the father was also less than that of the son. The verdict was for \$5,000, which is about the present worth of \$7 per week for the expectancy of life of a man of 22 years of age. That amount plainly exceeds the pecuniary injury to the father, whose expectancy of life was less than that; and the present worth is calculated apparently upon a sum much exceeding any pecuniary benefit shown to have been derived, or to be likely to be derived, by the father from his son. While, as has been well said, a jury in these cases must, to a large extent, form their estimate of damages on conjectures and uncertainties, yet, where the evidence furnishes some standard for valuation of the

damages, a verdict wholly disregarding such standard ought not to stand, because evidently not the result of the judgment of the jury, but of prejudice or carelessness. But the cause appears to have been fully tried, and the verdict of the jury is, in other respects, unexceptionable. Under those circumstances we think that, if plaintiff will abate from the verdict rendered the sum of \$3,000, the verdict may stand for the remainder, and this rule be discharged; otherwise, for this excessive verdict, the rule must be made absolute.

(59 N. J. L. 117)

STATE ex rel. POWELL v. BOARD OF
CHOSEN FREEHOLDERS OF
CAMDEN COUNTY.

(Supreme Court of New Jersey. June 24, 1896.)

COUNTIES—MORGUE KEEPERS—COMPENSATION—
FEES AND EXPENSES—ANNUAL
SALARY—ESTOPPEL.

Under Supp. Revision, p. 488, § 7, which provides that the county boards of freeholders shall fix the fees and expenses of morgue keepers, where a board resolves that "the morgue keeper shall perform such duties as are provided for by law, and shall receive a salary of \$500 per annum, payable quarterly by the collector," and the keeper for several years thereafter is paid and accepts such salary, he cannot then claim that the fees and expenses which the law allows him have not been paid by the county.

Application on the relation of Patrick Powell for a writ of mandamus to compel the board of chosen freeholders of Camden county to fix his fees and expenses as morgue keeper. Denied.

Argued February term, 1896, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Albert De Unger, for relator. Henry S. Scovel and Thomas B. Hall, for respondents.

PER CURIAM. The relator asks for a mandamus to compel the defendants, the board of freeholders of the county of Camden, to fix his fees and expenses, as keeper of the morgue of that county, for the recovery and care of the bodies of the unknown dead during his term of office. The act relative to morgues and morgue keepers provides that the fees and expenses of morgue keepers for the recovery and care of the bodies of the unknown dead shall be fixed by the board of freeholders and paid by the county collector (Supp. Revision, p. 488, § 7); and this is the only provision for compensation for the duties performed by them, except that they are entitled to a burial fee not exceeding \$10 in each case. *Id.* § 10. Under color of the provision of the act requiring boards of freeholders to fix the fees and expenses of morgue keepers, the defendants in 1887 passed a resolution that "the morgue keeper shall perform such duties as are provided for by law, and shall receive a salary of \$500 per annum, payable quarterly by the county collector." From the time of the passage of this resolution in 1887 until the expiration

of relator's term of office in 1893, he "performed such duties as are provided by law," and received the annual salary of \$500 fixed by the resolution. The only ground upon which the payment and acceptance of this salary can be accounted for is upon the theory that it was paid and accepted in satisfaction of the fees and expenses which he was entitled to receive for the performance of those duties which the law imposed upon him. He was not entitled to it except for the performance of those duties, and having accepted it he cannot now, with seven years' salary in his pocket, successfully claim that the fees and expenses which the law allows him have not been paid by the county. The mandamus should be denied, with costs.

(55 N. J. B. 141)

**DELAWARE, L. & W. R. CO. v.
BRECKENRIDGE et al.**

(Court of Chancery of New Jersey. Oct. 20, 1896.)

EQUITY—JURISDICTION TO ENJOIN TRESPASS—ACTION INVOLVING LEGAL TITLE.

A court of equity is without jurisdiction of an action to enjoin a continued trespass on lands by the maintenance across them of pipes laid under the surface, where the right to relief depends on the question of the complainant's being the owner of the legal title to the land, which has not been determined by a court of law, the trespass being one not involving irreparable injury, and one for which an action in ejectment affords full and complete relief.

Bill by the Delaware, Lackawanna & Western Railroad Company against Henry R. Breckenridge and others for a mandatory injunction. Heard on bill, answer, replication, and proofs. Bill retained to await action at law.

J. Franklin Fort, for complainant. J. M. Roseberry, H. S. Harris, and Mr. Sherman, for defendants.

EMERY, V. O. This is a bill for a mandatory injunction and other equitable relief against the continuance of trespasses on lands alleged to be in complainant's possession as lessee of the Morris & Essex Railroad Company, and against the continued forcible occupation and forcible detention of these lands. The principal invasion of complainant's rights which is complained of is the laying of pipes for the transportation of oil beneath the surface of an undergrade crossing made by the Morris & Essex Railroad in the original construction of its railroad across a farm in Warren county, then belonging to one Cornelius Stewart, and over which crossing the railroad continues to be operated by complainant under the lease. Stewart conveyed to the Morris & Essex Railroad Company a strip of land through this farm by deed dated March 26, 1864, the deed stipulating, among other things, for the erection of this undergrade crossing. Complainant claims that the Stewart deed conveys the exclusive title and right

of possession to the soil under the roadway of the undergrade crossing, subject only to a right of way across the surface of the road. The defendant Breckenridge claims title to the roadway, and the right to lay pipe under the soil, his claim of title being based upon conveyances of lots or parcels of the original Stewart farm on each side of the crossing, made by the grantees of Stewart's title after his conveyance to the railroad company, and also upon conveyances subsequently made by the heirs or devisees of Stewart of the title remaining in Stewart to all of the lands described in his deed to the company, after his conveyance to the railroad company. The defendant Breckenridge claims that by the true construction of complainant's deed the title to the soil under the roadway of the crossing did not pass to the railroad company; and, further, that by his deeds he has the title and right to possession of the roadway, which title he holds in trust for the defendant the United States Pipe-Line Company. Under this claim of title the pipe-line company, about October 27, 1895, laid two pipes under the roadway of the crossing, and, for the purpose of preventing the forcible removal of the pipes by the railroad company, themselves occupied the whole of the undergrade crossing, inclosing it by fences and other obstructions reaching upon the embankments of the railroad, and retained possession of these structures by force. These structures were, as was agreed by counsel at the hearing, placed around the entrances to the undergrade crossing for the purpose of defense against the complainants in their attempts to remove the pipes, and not under any claim of right to put them there as a permanent structure, this intention being disclaimed in open court. On October 29, 1895, a bill was filed in this court by Breckenridge to enjoin the complainant from removing the pipes which had been laid, and an application for a preliminary injunction was made before Vice Chancellor Bird, who granted an ad interim stay against the removal of the pipes pending the hearing. The application for preliminary injunction was denied after argument, upon the ground that by the true construction of the Stewart deed the title to the soil under the roadway was in the railroad company, and the pipe-line company were trespassers. Upon the injunction being refused, the complainant thereupon attempted to remove the pipes and structures, but the defendants resisted the attempt, and retained possession of the whole crossing by force for that purpose. This bill was thereupon filed by the Delaware, Lackawanna & Western Railroad Company for the purpose of obtaining a declaration that the laying of the pipes for the purpose of transporting oil through them, and the erection of these structures, is a continuing trespass on the lands of the complainant, and also to compel the removal of the pipes laid, and to enjoin the future laying of the pipes or other trespass on the lands of complainant, or the interference with their peaceable and exclusive possession. Pending.

ing the hearing, a restraining order was granted on the application of complainant, and afterwards modified on application of the defendants; the effect being to retain the status quo, and to allow the pipes and structures to remain pending the hearing. The structures erected by defendants at the crossing still remain, but since the restraining orders the force of men has been withdrawn. Counsel upon both sides desire an adjudication upon the main question in dispute, viz. the right of the railroad company, under the deed from Stewart, to the exclusive possession of the soil under the roadway against the subsequent grantees or devisees of Stewart under whom defendants claim. On the facts now appearing, this is a pure question of the construction and legal effect of the deed to the railroad company. The defendants, in their answer, raise no objection to the jurisdiction of this court, and counsel on both sides at final hearing request the construction to be made, in order that the rights of the parties may be put in course for a final determination on appeal, and they have fully argued the question of construction. But it is apparent that this question of title, as now presented, is a question of purely legal title, asserted upon one side and denied upon the other, and, this being the aspect of the case, the preliminary question must necessarily be whether a court of equity has jurisdiction to determine this legal title.

Ballantine v. Town of Harrison (Err. & App., 1883) 37 N. J. Eq. 561, and *Hart v. Leonard* (Err. & App., 1880) 42 N. J. Eq. 416, 7 Atl. 885, are both cases where the jurisdiction was denied on appeal from decrees entered on final hearing, without (so far as appears by the reports) any objection taken in the court below to the jurisdiction; and these cases settle the rule that before deciding upon the question of legal title it must first appear that the court of equity has jurisdiction. This question must, therefore, be first examined. The first case—*Ballantine v. Town of Harrison*—makes irreparable injury the test of equitable cognizance over cases involving the tortious taking and holding of real property, and it was said (Chief Justice Beasley, page 562) that “no case could be found in our reports purporting to hold that the mere taking possession of lands and holding them *vi et armis* will form the basis for the arrest of the doing of such wrong by the arm of equity.” In *Hart v. Leonard*, inadequacy of legal remedy is made a test, and it was declared that where the legal right of complainant, though formally disputed, is yet clear on facts which are not denied, and legal rules which are well settled, a court of equity would have jurisdiction where the bill is filed to ascertain the extent of the right, and to enforce or protect it in a manner not attainable by legal procedure. Complainant’s counsel insist that the construction of the deed, and its legal effect in reference to the points now disputed, are well settled by several adjudications of our courts, and rely upon several cases as establishing the juris-

diction of a court of equity to enjoin continuing trespasses in such cases. But none of these cases in which injunctions were issued reach to the present case. In *Morris & E. R. Co. v. Hudson Tunnel R. Co.* (1874) 25 N. J. Eq. 334, the case principally relied on,—Chancellor Runyon, in directing an injunction against occupation of complainants’ land, says (page 388) that if the complainants’ proprietary rights had been invaded, they were entitled to protection, and that the trespass was of a continuous nature. But the decision was not placed upon the ground solely of such trespass to land, but upon the fact that the defendant—a railroad incorporated under the general law—was required first to make compensation, and that this right to compensation before entry was one to be protected by injunction. The later cases in the court of errors and appeals, above cited,—*Ballantine v. Town of Harrison*, *Hart v. Leonard*,—both put the right to protection by injunction in such cases on the protection of express constitutional or statutory right to compensation before entry, and on that alone. In *Carlisle v. Cooper*, 21 N. J. Eq. 576, also cited by counsel, the legal right was established or admitted, and the object of the bill was to define the right, and protect it by means unattainable at law. The sole claim to equitable jurisdiction in the present case must, as it seems to me, under our decisions, be placed upon the inadequacy of the legal remedy. Now, so far as the removal of the pipes already laid is concerned, the remedy by ejectment accomplishes this precise object. The actual fixing of the pipes and their forcible detention in the soil by defendants seems certainly to constitute such an actual possession of the soil occupied by them as to sustain an action of ejectment. The right of the owner of the soil of a highway or other way subject to a right of surface passage to bring ejectment is settled in our state (*Wright v. Carter*, 27 N. J. Law, 76; *Burnet v. Crane*, 56 N. J. Law, 285, 288, 28 Atl. 591); and in several cases pipes of this character laid in the soil under grants of rights in the soil are held to be real estate under the tax laws (*Pipe-Line Co. v. Berry*, 52 N. J. Law, 308, 19 Atl. 665; *Water Co. v. Haig* [N. J. Sup.] 83 Atl. 215). The only additional remedy now asked, therefore, would be the injunction against the laying of other pipes hereafter, either in the same or any other part of the roadway. If the defendants, after their right to lay the present pipes is determined against them by the proper court, should attempt or threaten to lay other pipes in other portions of the same roadway, on the assertion of the same rights which had been adjudicated against them, a distinct ground of equitable jurisdiction for relief against the repeated assertion of unfounded claim would probably arise; but there is nothing in the present case which would justify the retention of the decision of the legal rights here upon the ground that

the defendants intend hereafter to assert any such claim. The mere laying of the pipes beneath the surface does not interfere with the complainant's occupation and use of the lands conveyed for the purposes of its railroad, and the continuance of the pipes under the surface is manifestly not an irreparable injury to the property itself. The real injury to complainant from the laying of the pipes, as set out in its bill, is the invasion of its proprietary right in the lands, and the forcible detention of the lands by the defendants for the purpose of transporting oil through the pipes; this transportation of the oil being in itself (if the complainant's claim of title is well founded) a continuous trespass on complainant's lands for the sake of profit. This right of transportation across its lands complainant, as proprietor, and in the absence of any statute allowing the lands to be taken by condemnation, is entitled either to allow at its own price or to refuse it altogether.

Some cases, notably *Goodson v. Richardson*, 9 Ch. App. 221, seem to protect mere proprietary rights by injunction where the defendant sets up no fair claim of right whatever, and where it is doubtful whether ejectment could be brought. But this case, if it can be relied on as to extending to proprietary rights in general the protection by injunction, was criticised in *Ballantine v. Town of Harrison*, 37 N. J. Eq. 563, as not in harmony with the current of authorities. In *Goodson v. Richardson* all of the judges seemed to be of opinion that the only clear, legal remedy of the complainant was an action of trespass, and that there was no clear right to ejectment, and the general doctrine of the English courts is that the remedy by injunction cannot be used simply to accomplish the object of an ejectment. *Deere v. Guest* (1836) 1 Mylne & C. 516. Sir George Jessel, in *Cooper v. Crabtree*, 20 Ch. Div. 589, 592, distinguishes between an enormous injury to the property of complainant and an actual damage done by the trespass. The injury to the property in these cases of infringement of proprietary rights consists, he says, in the landowner being deprived of the large sums which he would be entitled to claim for the privilege of crossing, and he refers to cases where injunctions were granted. But all of these cases, except perhaps *Goodson v. Richardson*, were cases in which ejectment did not lie, and other circumstances were sufficient to give a court of equity jurisdiction. Except in those instances where the proprietary right is expressly protected by constitutional or statutory provision against seizure without compensation, our courts have not yet recognized the mere proprietary right in real estate as entitled to be protected by injunction in the absence of facts showing the inadequacy of legal remedies. The equitable remedy in this case, so far as relates to the removal of the pipes now laid, could give no different relief from

the execution in ejectment, and this legal remedy would go beyond the equitable remedy, inasmuch as a recovery in ejectment carries with it the right to recover damages for mesne profits, which may perhaps extend beyond the mere value of the land, and may compensate complainant for the injury to its proprietary right. *Sedg. Dam.* (5th Ed.) pp. 133, 134. I conclude, therefore, on the authority of the two decisions above cited, that, as the case now stands, I have no right to adjudicate upon the main question in dispute, viz. the legal title of the parties to the soil under the roadway; but that the same must first be settled at law. So far as relates to the claim in complainant's bill that the defendants, by their structures on the crossing and otherwise, have interfered with the care and necessary protection of the embankments, culverts, and drains, I think the complainant is entitled, pending the settlement of its legal right in the roadway, to be protected by injunction against any interference with its access to and passage over the crossing for the operation of its railroad and the protection and care of the roadbed, with its appurtenances. Whatever may be the ultimate decision as to the rights to the soil, the complainant has the undoubted right to such access to and over the crossing, without interference, and the proofs show that a case has arisen for the interposition of a court of equity, in the control of the crossing to this extent, pending litigation. This aid will, however, be granted to the complainant only upon the equitable terms that such access and passage is not to be used for the purpose of removing the pipes, and the further condition that the complainant shall, without delay, bring its action at law to determine its legal rights.

There is another reason in this case for directing the title to the roadway to be settled at law. The right of a court of equity to interfere by injunction for the protection of legal title does not generally exist, unless the legal title has been settled, either by admission of the parties or by suit at law, or the legal rules on which it depends are so well settled as not to require further adjudication at law. At the argument of the cause I was inclined to agree with the complainant's contention that Vice Chancellor Bird's opinion and the cases referred to by him in denying the preliminary injunction in the *Breckenridge* suit had settled the construction and operation of complainant's deed in accordance with the claim of complainant. *State v. Brown*, 27 N. J. Law, 13, decides that a conveyance of lands in fee to a canal company, to have and to hold "as long as used for a canal," conveys a qualified fee, under which, so long as the estate continues, the grantee has the same rights and privileges as if it were a fee-simple absolute, and that during its continuance the grantor had no reserved rights in the land, upon which he could claim to be riparian owner

of them. In *Fitzgerald v. Faunce* (Err. & App. 1884) 46 N. J. Law, 536, it was held that the conveyance of the right, etc., for the purposes of fishing, and for no other purpose, of a tract of land, conveyed the exclusive use of the lands for this purpose, and would prevent the grantor being considered the riparian owner of the lands. Where lands are taken by condemnation, however, the company is entitled only to an easement in the lands condemned for the purposes of its charter, and the condemnation leaves the fee in the owner of the land, with right to make such use of it as will not prevent the company from having the full enjoyment of the easement. *New Jersey Zinc & Iron Co. v. Morris Canal & Banking Co.*, 44 N. J. Eq. 398, 15 Atl. 227 (Van Fleet, V. C., 1888); affirmed on appeal, 47 N. J. Eq. 598, 22 Atl. 1076. And it seemed to me that the English cases mainly relied on by defendants' counsel—*United Land Co. v. Great Eastern Ry. Co.*, 10 Ch. App. 586—differed radically from the present case in several particulars, one of them being that they were cases where the title of the railroad company, although consummated by deed, was considered as taken directly under the act of parliament only, and held, therefore, under rights strictly analogous to the title taken by condemnation under our statutes. But, upon consideration of the case, I find a decision in our own courts, not referred to by counsel on either side, which seems to raise a question whether complainant's title, under the language of this deed, conveys any greater right in respect to the lands at this crossing than it would have acquired by condemnation. This arises from the fact that in the deed from Stewart to the railroad company in this case the habendum limits or purports to limit the estate in fee which was granted by the granting words of the deed "to the uses and purposes of the charter," and the question arises what effect, if any, this limitation in the habendum has upon the estate in fee previously limited in the granting part of the deed. In *Green v. Railroad Co.* (Ch., 1858) 12 N. J. Eq. 165, one Green conveyed to the M. & E. R. R. Co., their successors and assigns forever, the right to take possession of, hold, have, use, occupy, and excavate a certain tract of land, with liberty to erect embankments, etc., and to do all other things which shall be suitable for the completion or repair of said road; "to have and to hold the said tract of land and premises unto the said the M. & E. R. R. Co., and to its successors and assigns forever, for the purposes above mentioned, and for all the other purposes mentioned in the said act of incorporation, and the several supplements thereto." This is the language in the habendum of complainant's deed. Chancellor Williamson was of opinion (see 12 N. J. Eq. 172, 173) that, the language in the deed being the same as the language of the sixth section of the act (Laws 1835, p. 27) which defined the rights the company would acquire by assessment, the deed confined the

company to the same use of the land as the act confined them to under the assessment; and the fact that the seventh section of the charter, providing that upon payment of the compensation fixed by assessment the corporation shall be deemed to be seised and possessed in fee of the lands, was not referred to as affecting the rights under the sixth section. The learned chancellor held that the deed did not relieve the company from the obligation to provide a suitable farm crossing. On appeal, Mr. Justice Brown, delivering the opinion of the court (*Railroad Co. v. Green*, 15 N. J. Eq., 469), says (page 475) that it may fairly be questioned whether, upon a fair construction of the deed, it did release the company from the charter obligation to construct roadway, but that decision of this point was not necessary, and would be reserved. Mr. Justice Depue, in *Perry v. Railroad Co.* (Sup., 1893) 55 N. J. Law, 178, 26 Atl. 829, commenting on the above decision of Chancellor Williamson on the construction of the deed, recognizes the language of the deed as different from the language of usual conveyances of land, and does not refer to the decision in the *Green Case* as overruled by the subsequent decisions. In the *Green Case* the question involved was, it is true, the continued existence of charter obligations as to crossings, notwithstanding the deed had been given, and the case may, for other reasons, not be applicable to the decision of the present question; but it may be fairly questioned whether the ratio decidendi of the case as stated by Chancellor Williamson does not reach the present case, and whether it has been overruled by the later decisions relied on by complainant. The case leaves the title as one which should be settled definitely at law, and for this additional reason the bill should be retained, as suggested in *Hagerty v. Lee*, 45 N. J. Eq. 256, 17 Atl. 826, until after suit at law. The form of the order will be settled on notice, and the addition of the *Morris & Essex Railroad Company* as complainant may then be formally made, as stipulated by counsel, if desired.

(50 N. J. L. 114)

HENRY R. WORTHINGTON (A Corporation)
v. MAITLAND.

(Supreme Court of New Jersey. June 29,
1896.)

PROCESS—AMENDMENT—SUBSTITUTION OF DEFENDANT.

After the defendant named in a summons has been regularly brought into court, the writ cannot be amended by substituting the name of another person as defendant, and altering the return day, for the purpose of procuring the relisting thereof, and its service upon the substituted defendant.

(Syllabus by the Court.)

Action by Anna Maitland, administratrix of John Maitland, deceased, against the Worthington Pumping Engine Company. On motion to vacate an order amending the summons by substituting Henry R. Worthington, a cor-

poration, as defendant, and by changing the return day thereof, and to set aside the summons as amended. Granted.

Argued February term, 1896, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

E. M. Collie, for the motion. Howard W. Hayes, opposed.

GUMMERE, J. The summons in this case was originally issued on October 28, 1895, against the Worthington Pumping Engine Company, a corporation of this state, and was returnable on the 8th of November then next. The sheriff of the county of Union, to whom it was delivered for service, returned it "Not served," and, it then being made to appear by affidavit to the satisfaction of the court that process could not be served upon the defendant corporation, it was brought into court by publication, as provided by section 90 of the corporation act (Revision, p. 193). Subsequently, on November 29, 1895, proof was made to the court, by the affidavit of the plaintiff's attorney, that the corporation against whom the plaintiff had a cause of action was not the Worthington Pumping Engine Company, but another corporation of this state, incorporated under the name of Henry R. Worthington, and that the name of the former of said corporations was inserted in the summons by mistake. It also appeared by the affidavit that the plaintiff's claim against the said Henry R. Worthington was for the death of her intestate, which was alleged therein to have been caused by the negligent act of said corporation while he was in its employ; and that said death had occurred on the 31st day of October, 1894. Upon this proof, and for the reason that a new suit could not then be successfully brought by the plaintiff against the said Henry R. Worthington, owing to the bar of the statute of limitations, which had taken effect shortly after the issuing of the original summons, the court, upon the ex parte application of the plaintiff, ordered that the summons be amended by changing the name of the defendant therein to Henry R. Worthington, and by changing the return day thereof to December 14, 1895, and that it be reissued, and served upon the substituted defendant in the manner provided by law. The summons was thereupon amended as prescribed by the said order, and was reissued, and regularly served upon Henry R. Worthington, the substituted defendant. Application is now made, in behalf of this latter corporation, to vacate this order on the ground that the amendment of the writ which is directed thereby is not authorized by that provision of our practice act which regulates the amendment of original process. Revision, p. 856, § 50. That provision is that: "When the service of the summons in any civil action is defective or insufficient, by reason of any mistake on the part of the plaintiff or of the officer, as to the place where, or the person with whom the summons or copy of the summons ought to have

been left, the court or a judge thereof may, in their discretion, order the summons to be amended, and re-issued and served in such manner as they or he shall direct." It will be perceived that this statutory provision only permits the amendment of the process when its service has been defective or insufficient. There was no such defect or insufficiency in the case now before us. The sheriff, not having found any officer or director of the defendant corporation named in the writ upon whom to make service, returned the writ "Not served," and thereupon the defendant was brought into court by publication in the manner provided by our statute. What is really sought to be accomplished by this proceeding is, under the guise of an amendment of the summons, to procure the issuing of a new writ against a person other than the party originally proceeded against, and in that way to prevent the statute of limitations from being set up as a bar to the action. The power which the court possesses of amending a summons for a defective or insufficient service falls very far short of that which has been exercised in the matter now under consideration. If the practice adopted in this case was permitted to prevail, a claim might be kept alive indefinitely against an unconscious defendant, notwithstanding the statute of limitations, by issuing the writ against a third person, and, months after it had been served and returned into court, amending it by substituting the name of the real defendant, and altering the return day to a future date, and then causing it to be reissued, and served upon the party whose name had been substituted. As was said by the chief justice in the case of *Lynch v. Railroad Co.*, 57 N. J. Law, 4, 30 Atl. 187, in discussing a somewhat similar question: "Subject to such a system, who could say when the statute of limitations had barred claims that had been imminent for years? Indeed, by force of such a practice the statute that puts a time restraint upon action would have no claim to be called a statute of repose." In my opinion, the order directing the amendment of the summons should be set aside, and the amended summons annulled.

(54 N. J. B. 615)

BENZ v. FABIAN et al.

(Court of Chancery of New Jersey. Oct. 13, 1896.)

WILLS—CONSTRUCTION—NATURE OF ESTATE.

Testator gave to his wife a house and lot and household furniture, "to use, occupy, or dispose of * * * as she may think proper," and directed that, if she "should continue in the use, occupation, and ownership of the said house and lot and furniture and household goods until her death," the same should then go to his children, etc. Held, that the limitation over to the children was void, and the will vested in testator's wife a fee-simple estate.

Action by Augusta Benz against Peter Fabian and others to foreclose a mortgage. Decree for complainant advised.

The complainant on the 8th day of January, 1886, received a mortgage, made to her by one Elizabeth Fabian, conditioned to secure the payment of the mortgagor's bond for \$300, which mortgage was recorded January 9, 1886. The mortgaged premises consist of a house and lot of land in Trenton, Mercer county, N. J., and the mortgage purports to convey a fee-simple estate by way of mortgage, and recites title to have been derived under a devise from Nicholas Fabian by his last will, dated April 17, 1869, proven July 20, 1880. By this will Nicholas Fabian, after providing for the payment of his debts, disposed of the mortgaged premises in these words: "Item. I give and bequeath unto my beloved wife, Elizabeth Fabian, my house in which I now reside, situate in the city of Trenton aforesaid, together with all furniture and household goods which may be in the same, and to me belonging, of every kind and description, to use, occupy, or dispose of the said house and lot and furniture and household goods as she may think proper. And if my said wife should continue in the use, occupation, and ownership of the said house and lot and furniture and household goods until her death, then it is my will, and I do so order, that the same shall go to my children in equal proportion, to be divided at the majority of the youngest surviving; and, if my said wife should die before the majority of the youngest surviving, then it is my will, and I do so order, that the proceeds from the rent of the same, after the expenses of taxes and necessary repairs, be expended for the maintenance and education of such of my said children as may still be in their minority. Lastly. I hereby appoint my wife, Elizabeth Fabian, executor of this my last will, and guardian of my said children." Nicholas Fabian died in 1880, leaving him surviving, his widow, Elizabeth Fabian, the mortgagor, and his children and heirs, Peter Fabian, the judgment debtor hereinafter named, and others. On September 19, 1882, Frederick A. Potts recovered a judgment in Mercer county circuit court against Peter Fabian, which was at once docketed in the supreme court, for \$832.61. On November 9, 1888, Potts, the plaintiff, died testate; and the defendants Sarah B. Potts, W. R. Potts, and Joseph T. Moore were appointed executors of his will, and have proven it. On December 22, 1892, Elizabeth Fabian made another mortgage to the complainant, on the same mortgaged premises, to secure the payment of \$200. This mortgage was recorded on the day of its date, and purports to convey a fee-simple estate, and recites title under the will of Nicholas. On December 30, 1894, Elizabeth died. She left a will dated December 3, 1894, which was proven March 2, 1896, whereby she directed her debts to be paid, her estate, real and personal, to be sold, and after paying the debts, etc., "to divide the rest and remainder from the proceeds of such sale among my children, their legal heirs, repre-

sentatives, or assigns, in equal shares." Elizabeth left, her surviving, her son, Peter Fabian, and other heirs at law. The executors of the will of Frederick A. Potts are made defendants in the bill of complaint in respect to their claim of lien under the above-named judgment upon Peter Fabian's estate in the premises mortgaged to the complainant. The complainant files her bill for the foreclosure of her two mortgages and sale of the mortgaged premises, and charges that the judgment held by the defendants the executors of Potts is subsequent and subject to the lien of both the complainant's mortgages, and acquired with full notice thereof. The executors of Potts by their answer admit the mortgages to be valid, but they claim that Peter Fabian, the defendant in their judgment, has, either as one of the heirs at law of his father, Nicholas, or as one of his devisees, an interest in the mortgaged premises upon which their judgment, on its entry, became a lien. They admit the priority of the lien of the mortgages upon the premises, to the extent of an estate during Elizabeth's life, but they claim that Elizabeth, under Nicholas' will, took no greater interest than a life estate; that Elizabeth continued in the use, occupation, and ownership of the premises, etc., until her death, and that under the limitation over in Nicholas' will his children, of whom Peter is one, took the fee of the premises, etc.; that the estate of Elizabeth terminated with her death, the mortgages she had made thereupon ceased to be liens upon the premises, and the Potts judgment is therefore a superior lien, upon Peter Fabian's share, to both the complainant's mortgages.

H. H. Hamill, for complainant. J. L. Connett, for defendants.

GREY, V. C. (after stating the facts). There are two well-defined rules which have been recognized and applied in this state in the construction of wills in cases where there is a gift of property and also a donation of a power of disposal to the beneficiary. In one class of cases, where there is a gift without definition of the estate given, and also an unlimited power to dispose of the property, the generality of the gift and the unrestricted power of disposal are construed to pass an absolute estate to the beneficiary, and any subsequent gift over is held to be void, because such a limitation over is inconsistent with the complete estate given to the first taker. In this class, supporting this rule, may be found the following named cases: *Robinson v. Dugate*, 2 Vern. 182; *Maskelyne v. Maskelyne*, Amb. 750; *Hixon v. Oliver*, 13 Ves. 108; *Dutch Church at Freehold v. Smock*, 1 N. J. Eq. 153; *Sharp v. Humphrey*, 16 N. J. Law, 25; *Annin v. Van Doren*, 14 N. J. Eq. 143; *Borden v. Downey*, 35 N. J. Law, 74, affirmed on error; *Downey v. Borden*, 36 N. J. Law, 461; *McClellan v. Larchar*, 45 N. J. Eq. 17, 16 Atl. 269. The

other construction is sometimes called an exception to the foregoing rule, and is applied when the estate given is, by the express terms of the will, defined to be a life estate; and if a power of disposal be added the beneficiary will take a life estate only, and the added power of disposal will be held to be a separate and distinct gift, which has no effect to enlarge the life estate into a fee, or to prevent a limitation over. Supporting this doctrine, but recognizing the force of the former construction when circumstances call for its application, are the following cases: *Tomlinson v. Dighton*, 1 P. Wms. 149, Salk. 239; *Cory v. Cory*, 37 N. J. Eq. 200; *Pratt v. Douglas*, 38 N. J. Eq. 516; *Wooster v. Cooper*, 53 N. J. Eq. 684, 33 Atl. 1050. In the case of *Kent v. Armstrong*, 6 N. J. Eq. 637, the construction limiting the estate given to be a life estate only was carried further than in any other case in this state. The terms of the devise were that the testatrix gave the lands "to my beloved daughter E. R. A., to be by her possessed, enjoyed, and occupied, to her and her heirs forever. * * * But if my said daughter should die without heirs, and intestate," then, etc., over to others. The case was certified into the supreme court for its opinion as to the effect of this devise. That court reported its unanimous opinion that the devise gave E. R. A. an estate in fee simple; that the words "without heirs and intestate" implied a power of disposition, and are inconsistent with and avoid the limitation over. There was a decree accordingly. *Id.* 559. On an appeal from this decree the court of errors recognized the rule that the gift of an estate generally, with an unlimited power of disposal, would vest a fee, but held that in the case before the court the power of disposal was not absolute; that the words "and intestate" so limited the power that it could only be exercised in the mode prescribed, i. e. by will; and that this was such a restriction that it could not be presumed that the testatrix, by creating the power, intended to give an absolute estate. On the contrary, these "qualifications and additions were annexed to the devise to limit what would otherwise have been an absolute interest." On this ground it reversed the decree, and construed the devise to give a life estate only to E. R. A., and that on her dying without issue, and intestate, the executory devise over operated. The case stands as the law of this state to establish the construction that where there is a devise in terms in fee, with a limitation over on the death of the devisee without issue, and intestate, the power of disposition is limited to be exercised by the making of a will; and this is such a restriction of the power that the intention of the testator will be deemed to be to give a life estate only, with an added, though distinct and separate, power of disposition by will. The declaration of Mr. Justice Randolph (page 642, 6 N. J. Eq.) that words conferring a power of disposal will be held to give a mere power, not only where an estate for life is given 'n express words, but also where

the life estate arises by necessary implication or construction, was subsequently disapproved of in *Downey v. Borden*, 36 N. J. Law, 468, by the court of errors; but the general rule of construction in this state of such devises, as established in *Kent v. Armstrong*, was fully accepted and declared by that court in the case of *Cantine v. Brown*, 46 N. J. Law, 601. The same rules of construction declared in the above-cited New Jersey cases are held to be equally applicable to bequests of personal estate and to devises of real estate. *Pratt v. Douglas*, 38 N. J. Eq. 516; *Wooster v. Cooper*, 53 N. J. Eq. 684, 33 Atl. 1050.

Applying the law as declared in these cases to the construction of the devise to Elizabeth Fabian, the mortgagor, in the will of Nicholas Fabian, the subject-matter of the gift is found to be the house, the furniture, etc. These things themselves are given, not merely the use and enjoyment of them. Neither the words of the gift, nor any other expressions in the will, indicate any intention to give Elizabeth a life estate only. No limitation of the estate given her is expressed, either as to the time of enjoyment, or the character or the quantity of the estate devised. The limitations over do not in any way define the estate given to Elizabeth. I think it must be held that the estate of Elizabeth in the property given, as expressed in the words of the will, is general and indeterminate, and the terms of the power of disposition must be examined to define it. Upon examining the power of disposition, the house and lot and furniture, etc., appear to be given to Elizabeth to use and occupy, or to dispose of, "as she may think proper." There is no prescription as to the time when or during which, or the manner in which, Elizabeth shall exercise this power. She had an unrestricted power to dispose of the property as she might think proper, and no direction as to what disposition she should make of the proceeds arising from her exercise of the power. The provision for the maintenance and education of the children is contingent upon the wife's dying before the majority of the youngest surviving, and, even if valid, would affect only the income which might be received from the property, and not the proceeds from any disposition made of the property. In *Hixon v. Oliver*, 13 Ves. 108, a gift to a wife, "to be disposed of as she thinks proper," the power was held to be unlimited and to vest a fee. The same ruling was declared as to the words "to be at the disposal of his wife, * * * to whom she shall think fit to give the same." in *Robinson v. Dugate*, 2 Vern. 182. The rule thus early declared in England has been followed in this state, and a gift "to my beloved wife" of "one-third of all my estate, * * * for to dispose of as she may see proper," was held in *Downey v. Borden*, *supra*, to be an indeterminate devise of the third, and the power of disposition to be unlimited, so that a fee vested in the wife, though the power was not exercised and she died intestate, and the fee-simple estate of her heirs therein by

descent from her was sustained. In *McClellan v. Larchar*, supra, there was given "full power to alienate, convert, or dispose of the same in such manner as she may deem best," and it was held to be an unrestricted power and to vest a fee. In the case in hand the testator, Nicholas Fabian, further shows his intent to give his wife unlimited power "to make an absolute disposition of the property, for he predicates the first limitation over upon the condition that his wife "should continue in the use, occupation, and ownership of the said house and lot," etc., "until her death"; thus showing that he recognized the possibility that, by the exercise of the unlimited power he had previously in his will given her, she might, before her death, have ceased to be the owner. I think the true construction of Nicholas Fabian's will must be that the general devise to Elizabeth shall be considered, with the unlimited power given her to dispose of the property, to have vested in her a fee-simple estate in the mortgaged premises; that the limitations over to the children of Nicholas of the house, etc., and of the rents, are void, because inconsistent with the devise to Elizabeth, under the doctrine fully stated in the cases above cited; that both the complainant's mortgages are therefore valid liens upon a fee-simple estate in the mortgaged premises; that the defendant Peter Fabian took no estate under the will of Nicholas Fabian, because the limitation over to Peter and Nicholas' other children was void, being inconsistent with the devise in fee to Elizabeth, and Peter took nothing as heir of Nicholas, because Nicholas had by his will devised his whole estate to Elizabeth, but on the death of his mother, Elizabeth, Peter did take, by descent from her, an undivided one-third part of her fee-simple estate in the mortgaged premises, subject to the complainant's two mortgages, and also subject to the exercise of the power of sale created in Elizabeth's will. The estate of Elizabeth, the mortgagor, being shown to have been a fee simple at the time of making the complainant's mortgages, it is of no significance whether she had, under the power to "dispose of the said house," etc., "as she may think proper," given her by Nicholas' will, authority to make a valid mortgage on the premises, considering that authority to have been merely a power, and not effective to define the estate given.

It was argued that this was but a power to sell, and that a power to sell did not necessarily give a power to mortgage, and that in this case the will of Nicholas could not be construed to give the latter power. If the question arose in the case, I should hesitate to hold that a power to dispose of property as the donee may think proper, with no direction as to any disposition to be made of the proceeds arising from such disposal, is limited in its exercise to the making of a sale only. The donor authorizes a disposition to be made of the land. He does not limit the mode in which the power may be exercised, nor the extent of the estate which may be created under

it; and if the donee does unlimitedly exercise the power, so that she ceases to be the owner of the property thereby, the testator gives to no one the right to call upon her or her estate to account for the proceeds. By the authorization to the donee to dispose of the property "as she may think proper," it may be forcefully claimed that the donor of the power referred the selection of the mode of disposal—whether by sale, mortgage, lease, or otherwise—to the discretion of the donee, and that the making of the complainant's mortgage by the donee was thought by her to be a proper exercise of the power of disposition. I do not consider it to be necessary to determine this point, inasmuch as the weight of authority seems to settle the primary question in favor of the complainant. I will advise a decree in favor of the complainant, in accordance with the views above expressed.

(88 Conn. 29)

BUCK v. ROSS.

(Supreme Court of Errors of Connecticut.
June 5, 1896.)CORPORATIONS—INSOLVENCY—PURCHASE OF STOCK
BY CORPORATION.

Where a stockholder, knowing of the corporation's insolvency, sells to it his stock, receiving fully secured notes held by it, recovery can be had of him for the benefit of its creditors, though the notes were surrendered to the payee, and he gave new notes payable to the stockholder, and secured on property other than that by which the original notes were secured.

Appeal from superior court, Windham county; Robinson, Judge.

Action by Edwin A. Buck, trustee, against William Ross. Judgment for plaintiff. Defendant appeals. Affirmed.

Charles E. Perkins and George W. Meloney, for appellant. Elliot B. Sumner and Charles E. Searls, for appellee.

ANDREWS, C. J. The plaintiff is the trustee in insolvency of the W. G. & A. R. Morrison Company, a corporation legally organized pursuant to the laws of this state, and located at Windham. That corporation was declared, on the 28th day of February, 1894, to be insolvent, by the court of probate for the district of Windham, and the plaintiff was appointed the trustee. The defendant had been a stockholder in that corporation, owning 40 shares of its stock of the par value of \$100 each. The complainant alleges that said corporation was on the 29th day of July, 1889, insolvent, and thereafter continued to be so insolvent until the date it was so declared by the court of probate; and that "the defendant, on the 14th day of June, 1890, * * * well knowing the insolvency of said company, with the purpose and design of escaping financial loss and evading liability as a stockholder of said company, and in fraud of the then existing and future creditors of said company, un-

lawfully transferred and surrendered to said company said forty shares of the capital stock of the said company, and received in exchange therefor from said company \$4,000 in good and valuable notes and securities of said company, whereby the defendant unlawfully took from the capital of said company the sum of \$4,000, which he still retains." It is also alleged that the estate of said corporation is deeply insolvent, that said stock now in the hands of the plaintiff is wholly worthless, and that the amount so illegally withdrawn by the defendant is needed to pay the claims of creditors proved against the said insolvent estate. The plaintiff claimed to recover the value of said shares with interest. The superior court found, in substance, that the averments of the complaint were true, and rendered judgment for the plaintiff. As to the transaction between the defendant and the said corporation on the 14th day of June, 1890, this appears: Prior to that day, the said corporation had sold to one A. G. Turner a large amount of silk-manufacturing machinery, and had taken his notes therefor, aggregating in the whole more than \$40,000. These notes were absolutely secured by said machinery. One of these notes for the sum of \$2,500 had been sold by the said corporation to the defendant. On said day the defendant reconveyed said \$2,500 note to the corporation, transferred to it the said 40 shares of its capital stock, and gave in cash \$3,384, and received from the said corporation \$10,000 of said Turner's notes. The corporation surrendered to Turner \$10,000 of his said notes, which were secured upon said machinery, and in lieu thereof Turner gave his notes for the same amount directly to the defendant, and secured these by a mortgage of other property. These notes, so secured, were and are perfectly good. In *Crandall v. Lincoln*, 52 Conn. 73, 94, this court said: "The stock of a corporation is its only basis of credit. Unlike a partnership, its members generally are not individually liable for its debts. The character, reputation, and credit of its promoters do not attach to the corporation itself, except to a limited extent. Hence it is of vital importance that the law should rigidly guard and protect the capital stock; otherwise, especially in these days, when so large a portion of the business of the country is carried on by corporations, confidence, on which the prosperity of the country largely depends, would be seriously impaired. Hence it is that in equity the capital stock of a corporation is now regarded as a trust fund for the payment of debts. The creditors have a lien upon it, which is prior in point of right to any claim which the stockholders, as such, can have upon it; and courts will be astute to detect and defeat any scheme or device which is calculated to withdraw this fund, or in any way to place it beyond the reach of creditors,"—citing *Wood v. Dummer*, 3 Mason, 308, Fed. Cas. No. 17,944. This

is the settled law. In *Cook, Stock, Stockh. & Corp. Law* (2d Ed.) § 312, it is said: "The objection usually made to allowing a corporation to purchase its own stock is that thereby the corporation funds are expended, and no property is received by the corporation except the right to resell. * * * The better rule goes still further, and declares that if a corporation, by a purchase of shares of its own capital stock, thereby reduces its actual assets below its capital stock, or if its actual assets at that time are less than the capital stock, such purchase may be impeached, and set aside, and the vendor of the stock rendered liable thereon at the instance of a corporate creditor." *Mor. Priv. Corp.* § 781; *Webster v. Upton*, 91 U. S. 65, 67; *Hightower v. Thornton*, 8 Ga. 486, 499. The appellant does not dispute this rule of law. He only attempts to extricate this case from that rule. His claim is that, as the property on which Turner gave a mortgage to secure the notes he had given to the defendant was property which had never belonged to the corporation; therefore the defendant had taken nothing from the fund from which the creditors of the corporation were to be paid, and consequently ought not to be required to pay back anything. That claim is wholly inadmissible in this court. The finding of the superior court settles the facts adversely to such claim. It is found that by the said transaction and sale the defendant obtained from the corporation, in exchange for his 40 shares of stock, valuable assets of the company; and that the assets thus obtained were of the value of \$4,000. That finding is conclusive, unless inconsistent with the subordinate facts set out. Here the finding is fully supported by the facts detailed in it. The Turner notes held by the said corporation, and secured upon the machinery, were perfectly good. The Turner notes which the defendant obtained, secured upon other property, were no better. The Turner notes were the real thing which the defendant took out of the assets of the corporation. The security given for the notes, whether before or after the 14th of June, 1890, was only an incident. There is no subtlety of words which can make the incident displace the real thing, or make a shadow more important than the substance. There is no error. The other judges concurred.

(68 Conn. 33)

TRUMBULL v. O'HARA.

(Supreme Court of Errors of Connecticut.
June 5, 1896.)REOPENING CASE — PENDENCY OF MOTION FOR
NONSUIT.

Refusal of plaintiff's motion to reopen case to introduce further testimony, being based on the erroneous supposition of the court that it could not be entertained pending a motion for nonsuit for insufficiency of evidence, is ground for reversal.

Appeal from court of common pleas, Litchfield county.

Action by Samuel Trumbull against Thomas O'Hara on a note. Judgment of nonsuit, and plaintiff appeals. Reversed.

John T. Hubbard and Charles D. Burrill, for appellant. William H. O'Hara, for appellee.

TORRANCE, J. This is an appeal from the decision of the court of common pleas of Litchfield county in refusing to set aside a nonsuit, and also, upon the record as amended by this court, from certain rulings made before the nonsuit was granted. In the court below, after the plaintiff had rested his case, the defendant made a motion for a nonsuit on three grounds, namely, that the evidence showed that the suit had been prematurely brought; that it failed to show that any consideration had been given for the note in suit, or that the plaintiff had any title thereto. Thereupon the plaintiff's counsel made a motion that the case be reopened for the purpose of allowing him to introduce further testimony on behalf of the plaintiff. Counsel for the defendant objected to this motion on the ground "that the court has no power to entertain a new motion while a motion for a nonsuit is pending." The court below took this same view of its powers in respect to this motion to reopen the case, and thereupon denied such motion. To this the plaintiff duly excepted. Subsequently the court granted the nonsuit, and, upon motion afterwards made to set it aside, refused to do so.

We are of opinion that the court below erred in taking this view of its power over the motion to reopen the case, and in denying such motion for lack of power to grant it under the circumstances. For aught that appears, the plaintiff, when he made his motion to reopen the case, was then and there fully prepared with evidence that would clearly make out a prima facie case. The motion was seasonably made, the plaintiff asked for no delay in the trial on account of it, it was for the interest of all concerned that the litigation should end then and there, and no good reason why the motion was denied appears anywhere upon the record. Doubtless, if the court had not taken an erroneous view of its power with respect to this motion, it would have granted it. It is true, ordinarily, that the allowance of a motion to reopen a case is discretionary with the trial court, and also that with a reasonable exercise of that discretion this court will not interfere, but here the court below refused to exercise any discretion because it erroneously supposed it had none under the circumstances. If we assume that the plaintiff, when he rested his case, had not in fact made out a prima facie case (a matter about which we express no opinion), it was still the duty of the court below, upon the facts as they appear of record, to have granted his motion, and the refusal to do so for the reason given was error.

It is unnecessary to consider the other questions on the record, as they are not likely to arise again in the case. There is error in the judgment of the court below, and it is set aside, and a new trial granted. The other judges concur.

(83 Conn. 35)

COOLEY v. HOLCOMB et al.

(Supreme Court of Errors of Connecticut.

June 5, 1896.)

MECHANIC'S LIEN — BUILDING CONTRACT — DELAY IN COMPLETION — ADDITIONAL ITEMS — LIMITATIONS.

1. Under a building contract, after the work is substantially done, a delay in completing it will not stay the running of the 60 days within which the contractor may file the statutory lien, unless it affirmatively appear that such delay was not unreasonable or unnecessary.

2. Under a building contract the work was substantially done on January 25, 1894, in the lifetime of the owner. Minor items were furnished April 13, 1894, amounting to four dollars, all of which could have been added by March 1, 1894. The owner died February 4, 1894, leaving an insolvent estate, and on February 16, 1894, the house being fit for occupancy, the family of the deceased moved into and continued to occupy it. The contractor filed his lien on June 6, 1894. *Held*, that his delay in completing the work was inexcusable, and hence the lien was not filed in time.

Appeal from court of common pleas, Hartford county; Calhoun, Judge.

Action by Henry Cooley against Joel C. Holcomb and others to foreclose a mechanic's lien. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

William S. Case, for appellant. Theodore M. Maltbie, for appellees.

FENN, J. The plaintiff claimed a foreclosure of a mechanic's lien. The court of common pleas in Hartford county denied such relief, and rendered judgment for the defendants, on the ground that upon the facts found the certificate of lien of the plaintiff was not filed with 60 days after the completion of his contract, and that his delay in completing his work and filing said lien was inexcusable and unnecessary. The correctness of this action is the sole question presented to us by the appeal.

The facts material to this question are these: The plaintiff, a carpenter and builder, on November 23, 1893, contracted with one Joel B. Holcomb—since deceased—to make additions and repairs to a house thereafter to be occupied by said Holcomb. On the 2d day of December, 1893, the plaintiff commenced work upon said house under said contract, and continued the same until about January 25, 1894, when he substantially completed the additions and repairs under said contract. On February 4, 1894, said Holcomb died, and March 1, 1894, an administrator was duly appointed and qualified on his estate, and thereupon represented said estate insolvent; and said estate is, in fact, insolvent, and insufficient for the payment of

the debts of said deceased. On February 16, 1894, said house being fit for occupancy, the family of said deceased moved into it, and have ever since occupied the same. The plaintiff, under an agreement with said Holcomb, made a portable china closet to take the place of one which he was to build in said house; and after said Holcomb's death, in the month of March, 1894, said closet was removed to said house by the plaintiff. April 13, 1894, the plaintiff caused work to be done in said house in fitting new stops to two windows, putting window fastenings on, and planing tight places to ease the running of the windows. The expense was about four dollars. All of this work could have been done at any time before the house was occupied, except the planing, which could have been done by March 1, 1894, and which was not necessary for the completion of the plaintiff's contract after said last date. The court found that the reason of the delay of the plaintiff in completing his contract was that, on finding the estate of Joel B. Holcomb insolvent, he was honestly in doubt what course to pursue to obtain his pay; that during the time from March 1, 1894, until April 13, 1894, he was unwilling to do more work on the house without a prospect of compensation; and that he finally did the work on April 13, 1894, for the purpose of preserving his lien. There is now due the plaintiff on account of said contract the sum of \$319.90. On the 6th day of June, 1894, the plaintiff lodged with the town clerk of East Granby a certificate of lien, in the usual form, for the labor done and materials furnished under said contract.

The decision of the court as stated, based upon the above facts, was, we think, correct, and in full accordance with the principles underlying previous decisions of this court. *Flint v. Raymond*, 41 Conn. 510-514; *Sanford v. Frost*, *Id.* 617; *Cole v. Uhl*, 46 Conn. 296; *Nichols v. Culver*, 51 Conn. 177-183. Concerning these cases, in view of the arguments made before us, we will briefly speak. In *Cole v. Uhl* it was said by this court in the opinion that in *Flint v. Raymond* the doctrine was affirmed that, "after the work is substantially done, there must be no unreasonable delay in fully completing it, and that work done after such delay cannot be considered in fixing the sixty days allowed for recording the lien." It was also said: "The case of *Sanford v. Frost* adopts the same principle, and further requires that the fact must appear affirmatively that there was no unnecessary or unreasonable delay." It was said that the case then under consideration was distinguishable from both of the cases above mentioned, "not only that the amount of work done after the time for fulfilling the contract was greater, while the delay was comparatively short, but more especially in the fact that the reason for the delay must be regarded as sufficient against the original party to the contract, at whose special instance and request the work was so

postponed." Again, in *Nichols v. Culver*, which was held to be within the principles established in *Cole v. Uhl*, the court said that the finding that the work was "substantially completed" at a certain date "would be controlling, were it not for the additional facts also found." Of one of the additional facts, namely, the furnishing of a small amount of work and materials at a subsequent date, relied upon to save the lien, it was said: "If it appeared that this work might have been added by the builder for the mere purpose of saving his lien, we should not feel disposed to sanction it." These references bring us to the real point of the present case. The court below has found that the work under the contract was "substantially completed" on or about January 25, 1894, in the lifetime of Holcomb. It has found that the minor item of April 13, 1894, amounting to four dollars, being all that was furnished within 60 days prior to the lodging of the certificate of lien, could have been done at an earlier date named; that it was delayed for a reason which differed from that which it was held in *Flint v. Raymond* should not be regarded only in this: that there the consideration of "personal favor" was of such favor to the party with whom the plaintiff contracted, while here it was extended by the plaintiff to himself. He was in doubt what course to pursue to obtain his pay, and "unwilling to do more work on the house without a prospect of compensation." He is not to be condemned for this. But the court adds: "He finally did the work for the purpose of preserving his lien." Surely, it cannot be said to "appear affirmatively that there was no unnecessary or unreasonable delay"; that the additional facts found prevent the finding as to when the work was substantially completed from being controlling; and that the court erred, as a matter of law, in its conclusion that the plaintiff's delay "in completing his work and filing said lien was inexcusable and unnecessary." There is no error in the judgment complained of. The other judges concurred.

(58 Conn. 55)

FULLER et ux. v. METROPOLITAN LIFE INS. CO. OF NEW YORK.

(Supreme Court of Errors of Connecticut.
June 5, 1896.)

TRIAL — OBJECTION TO EVIDENCE — REFUSAL TO RULE — RES JUDICATA — APPLICATION — EXTENSION OF LIMITS — ACTION BY ASSIGNEE.

1. Under Gen. St. § 1064, which provides that, whenever evidence offered on the trial of a civil action is objected to as inadmissible, the court must, if either party request it, pass on such objection, where evidence is received subject to objection, and the court refuses to then pass on it, the error is one which entitles the party making the request to a new trial, if it appear that he was injured thereby.

2. Within this rule, the confusion and embarrassment to which the uncertainty as to what has and has not been proved subjects counsel in the trial of their cause may be an injury.

3. To make a fact *res judicata*, it must have

been in issue under the pleadings, and must also have been actually litigated and determined. It must be identical with the fact sought to be established in the second action, and the identical persons between whom the fact was adjudicated, in the same right or capacity, or their privies claiming under them, must be the parties to the second action.

4. The considerations of public policy which support the rule of *res judicata* do not justify its extension to make a fact adjudicated in an action between two persons, litigating a cause of action which has arisen between them in their individual capacity, *res judicata* in subsequent actions brought by one, as assignee of a chose in action, against the other and a third person, which the plaintiff has purchased of such third person after his right therein has become fixed, and since the judgment in the first action was rendered.

5. A fact cannot be urged as *res judicata* where the record itself shows that the party's contention that it was in issue was ruled upon by the trial court and denied, and that the fact was not tried and determined because it was not a fact in issue.

Appeal from superior court, New Haven county; Wheeler, Judge.

Action by Austin B. Fuller and wife against the Metropolitan Life Insurance Company of New York upon policies of life insurance. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Henry C. Robinson, Henry Stoddard, and Goodwin Stoddard, for appellant. John W. Alling, Talcott H. Russell, El. P. Arvine, and L. A. Fuller, for appellees.

HAMERSLEY, J. In affirmance of a salutary principle in the conduct of trials, section 1064 of the General Statutes provides that, whenever evidence offered upon the trial of any civil action is objected to as inadmissible, it shall be the duty of the court, if either party shall request a decision, to then pass upon such objection and admit or reject the testimony. Upon the trial of this case the plaintiffs offered in evidence the records, pleadings, and depositions in a former action in the United States circuit court, as evidence and conclusive evidence of facts material in the present case. The defendant objected to this evidence as inadmissible. The trial court received and heard the evidence subject to objection. Substantially at the close of the plaintiffs' case the defendant asked that the evidence so received be excluded, and insisted that its objection to the evidence as inadmissible be then finally disposed of. The court refused to then pass upon such objection, and when the case was decided, some months after the trial, filed its ruling excluding the evidence. In this the court erred, and the error is one which entitles the defendant to a new trial, if it appear that he was injured thereby.

When inadmissible evidence is received subject to objection and afterwards excluded, a party may be injured, either by the influence such evidence may have had, even unconsciously, on the mind of the judge, or by the confusion and embarrassment which the uncertainty as to what has and has not been proved may subject counsel in the trial of their cause.

Jacques v. Railroad Co., 41 Conn. 61, 66. And "In such cases the question is, does it fairly and with reasonable certainty appear upon the record that the party complaining could not have been harmed by the action of the court? Unless it does so appear, a new trial will ordinarily be granted." *Peck v. Pierce*, 63 Conn. 310, 319, 28 Atl. 524, 528. It is impossible to examine the rulings of the trial court, from the first admission of the evidence in question to its final exclusion, without deeming it probable that the embarrassment caused by the errors complained of was a material injury to the defendant in the trial of its case. A new trial, therefore, should be granted.

Counsel for the plaintiffs, in their ingenious and able brief, maintain that the court erred in the final exclusion of the evidence; that the judgment excluded was admissible as *res judicata*, and conclusive as to the main question at issue; and that, therefore, the defendant was not injured by the error complained of. We think the court did not err in excluding the judgment; that the *res judicata* established between the parties to the action tried in the circuit court does not apply to the parties in this action. The term "*res judicata*" is used with different meanings in connection with different conditions, and not always with discrimination. Perhaps an exact discrimination is not always practicable in the present state of the law on this subject. The two most important applications of the principle are where it is invoked in respect to a cause of action once finally determined by a judgment, and where it is invoked in respect to the conclusiveness of a fact contested between the parties to an action, and determined by the judgment in that action, upon the same parties when agitating their controversies in another suit upon a different cause of action. There is an evident distinction in these cases, not only as to the effect of a judgment, but as to the grounds on which the principle producing the effect is based. This distinction is drawn with great clearness in the opinion of Justice Field in *Cromwell v. County of Sac*, 94 U. S. 351, 357. In the former case the judgment is produced as conclusive evidence that no cause of action exists. Either the cause of action has been satisfied and merged in the judgment, or its non-existence has been judicially determined and forever settled by the judgment, and the controlling principle depends primarily on the legal effect of a judgment on the cause of action determined. The judgment is not treated merely as an estoppel to the proof of any fact involved in the trial of the cause of action alleged, but is rather held to be conclusive evidence that the cause of action alleged does not now exist, or never had an existence. In the latter case the judgment is produced as evidence of some material fact in the cause of action on trial, the truth of which fact both parties are estopped from denying. In such case the controlling principle depends upon the effect of a judgment in giving indefinite life and irrebuttable probative force to any fact once

judicially found to be true. It is with this latter principle alone that we are now concerned, and it must be borne in mind that the principle does not relate to the finality of a judgment in disposing of a cause of action, but to the vitality of a judgment in preserving for evidential purposes a fact once found. As stated by Baldwin, J., in 1810, the rule is "that a fact once decided shall not be again disputed between the same parties." *Church v. Leavenworth*, 4 Day, 274, 281. This principle is now settled beyond controversy. *Sargent & Co. v. New Haven Steamboat Co.*, 65 Conn. 116, 126, 31 Atl. 543, 547. But its limits in all directions are not so well settled. The very nature of the principle calls for narrow limits in its application. Within certain limits, public policy, that regards unnecessary litigation as an evil, and that looks upon the reargitation by parties of controversies once submitted by them to a final adjudication as contrary to equity and good conscience, supports the application of the principle as wise and equitable; but the same public policy might regard its application beyond those limits as dangerous and unjust. Among the recognized limits are the following: The fact must be established by a final judgment. It must have been in issue under the pleadings and must also have been actually litigated and determined. It must be identical with the fact sought to be established in the second action. The identical persons between whom the fact was adjudicated in the same right or capacity, or their privies claiming under them; must be the parties to the second action.

In the present case the defendant claims that the fact which the judgment was offered to prove has not been established by a final judgment, and that the fact claimed to be so established is not identical with the fact now sought to be proved. We do not discuss these claims, because we are satisfied that the identical persons between whom the facts at issue in the former action were adjudicated in the same right and capacity are not the parties in the present action. The precise question is this: When A. and B. have, in their individual right and capacity, litigated a fact in issue in the trial of a cause of action arising from the breach by B. of a nonnegotiable contract between them, is a fact found to be true by the adjudication of that action *res judicata* in a later trial of a different cause of action, arising from the breach by B. of a different contract between him and C. brought by A., in his capacity as an assignee of C., subsequent to such breach? Such use of an adjudicated fact does not come within the limits to the application of this principle as generally stated. No authority has been cited holding a fact to be *res judicata* under such circumstances. The case of *Flint v. Bodge*, 10 Allen, 128, might be used as indicating some support to the plaintiffs' claim, but the opinion of the court does not refer to the present question, and it evidently was not considered. The opinion of the supreme court in *Collins v. Hydnor*, 62 Hun, 286, 288,

17 N. Y. Supp. 228, was reversed in the court of appeals. 135 N. Y. 320, 32 N. E. 69. And the opinion of the appellate court, which is the last statement of the law in New York upon that subject, seems expressly to state that, for the purpose of the application of this principle of *res judicata*, the assignee of a chose in action in prosecuting the right assigned is not acting in the same capacity as when he prosecuted a different chose in action to which he was an original party. *Curtis v. Bradley*, 63 Conn. 99, 115, 31 Atl. 591, 596, which was also cited, has no application. In that case *Curtis*, *Bradley*, and one *Plumb* were parties to a verbal agreement under which *Plumb* was to build a house on land *Bradley* had purchased from *Curtis*. As the work progressed *Curtis* was to pay *Plumb* for his services, and for all the labor and materials that went into the construction of the house, and, when the house was completed and occupied, *Bradley* was to pay the money expended for construction. *Bradley* accepted and occupied the house, and refused to pay. *Curtis* sought to enforce the contract through a mechanic's lien filed in the name of *Plumb*. Failing in this, because the court found that *Bradley's* promise of payment was not to *Plumb*, he brought suit under the same contract against *Bradley* to recover the same money. In this suit the judgment in the former suit was offered in evidence, and admitted, for the purpose of showing that *Bradley* was estopped from claiming that this contract was made with *Plumb*. Its admission was objected to on the ground that the record was that of a suit between different parties. The admission of the judgment was sustained by this court because it appeared from the appeal record that *Curtis*, in his individual right, was "the actual plaintiff in the former action," under the rule recognized in *Buckingham's Appeal*, 60 Conn. 143, 22 Atl. 509. The opinion (page 115, 63 Conn., page 596, 31 Atl.) referred to the fact that after the commencement of the action *Curtis*, having taken an assignment from *Plumb*, had been substituted for *Plumb* as plaintiff, in connection with the unfounded claim that it was necessary that *Curtis* should have been a party to the record in the former action, as well as the party in interest who actually brought and conducted the suit. The question now before us was not involved nor considered. The fact that the recognized general statement of the limits of the application of this rule of *res judicata* seems to exclude cases where the first suit is upon a cause of action arising between parties in their individual capacity, and the second suit is brought by one of the parties in his capacity as assignee of a cause of action arising between the other party and a third party, and that it has never in this state been extended to such cases,—and, so far as we are advised, has never been extended to such cases by courts of last resort in other jurisdictions,—is significant that such extension is not supported by authority. We think it cannot be supported on principle.

As stated above, the rule which gives an in-

definite life, a continued and conclusive probative force, to an adjudicated fact in future litigation of other and different causes of action, is based on considerations of public policy, and must be confined within the limits where those considerations are operative. When confined to the identical persons who were parties to the first action, in the same capacity in which they were parties, the considerations of public policy are clear, and the rule should be applied in the broad spirit that governs the application of a rule so founded. But when these limitations are wholly removed the rule is no longer supported by such considerations. On the contrary, it is clearly opposed to them. It is certainly not in the interest of peace and honesty that every adjudicated fact should thereafter remain an irrefutable witness to be employed in all future litigation by whoever may need its services. Such unlimited application of the rule would promote litigation and encourage dishonesty. So, in a less degree, the considerations of public policy which support the rule within its proper limits do not apply where the evidential capacity of the adjudicated fact is made the subject of trade, so that a person possessing a cause of action in the prosecution of which the fact cannot be used as a witness may secure the benefit of its services by a trade with some other person; and for this reason the conclusiveness of a fact adjudicated between two persons contesting in their own right ought not to be extended to future actions in which one of the parties prosecutes a cause of action belonging to a third party, in which he is interested only by virtue of an assignment made subsequent to the judgment in the first action. The possible and probable consequence of such an extension of the rule is illustrated by the present case. A. recovers judgment against B. in a cause of action which has arisen between them. A fact therein adjudicated may be conclusive on the merits of another cause of action which has arisen between B. and C. To induce C. to put his cause of action in litigation, A. offers him the benefit of the adjudicated fact which is conclusive on B. as against A., but not as against C., and promises C. one-half the net proceeds of the litigation to be conducted solely at the expense of A., if C. will assign his claim to him upon such consideration. Surely such a transaction violates public policy in various ways. It promotes litigation. It erects a technical bar against proving the truth. It tends to bad faith. This rule of *res judicata* exists because, within its proper limits, it tends to put an end to the litigation of obstinate litigants; because, as between them, in equity and good conscience the fact adjudicated ought to be conclusive. An extension of these limits, so that the probable consequences will be the opposite, cannot be justified on the considerations of public policy that support the rule.

In stating this conclusion we do not intend to pass upon the limits of this rule of *res judicata* in other respects. The considerations of public policy on which the rule rests may justify some apparent extension of those lim-

its, but they do not justify an extension which makes a fact adjudicated in an action between two persons litigating a cause of action which has arisen between them in their individual capacity *res judicata* in subsequent actions brought by one as assignee of a chose in action between the other and a third person, which the plaintiff has purchased of such third person after his right thereon has become fixed, and since the judgment in the first action was rendered. The statute authorizing such assignee to bring a suit in his own name, alleging the assignment, his equitable ownership in good faith, and the manner of acquiring such ownership, does not alter the relations of assignor and assignee. They remain unchanged. *Beach v. Fairbanks*, 52 Conn. 167; *Saugatuck Bridge Co. v. Town of Westport*, 39 Conn. 337, 349. The principle which seeks to prevent multiplicity of actions is not, as was suggested by counsel for plaintiffs, involved in this discussion; nor is there any ground for claiming the admissibility of this judgment as a sort of judgment in rem binding on all the world, or as evidence of reputation, or of the fixed meaning of a term of art. The cases cited by the plaintiff do not apply to the present conditions. The judgment in the United States circuit court being inadmissible as *res judicata*, the exemplified copy of the judgment appearing in the record of the injunction case could not be used for such purpose.

The court below also erred in admitting the record in the injunction case as conclusive evidence of the invalidity of the receipts in full. The finding does not clearly show that this evidence was objected to, but as the same question is distinctly raised by the ruling of the court that the judgment in the injunction case was conclusive on the question of the invalidity of the receipts, and as the question is likely to arise in the same form if a new trial is had, we think it should be decided now. In the action for injunction the present defendant sought to enjoin A. B. Fuller and wife from bringing actions on the policies of insurance set up in the present suit, on the theory that upon the facts alleged the assignments to them of the claims under said policies were against public policy and void. The answer contained a first defense which was a general denial, and a second defense alleging that the receipts referred to in the complaint were obtained by fraud. Counterclaims were also filed, each counterclaim being in effect an action on a separate policy which had been assigned to the Fullers. By order of court the case was tried on the first defense alone. The court held that upon the facts alleged the plaintiff had no right to the remedy sought, refused to render judgment for the defendants on the first defense, and to admit them to prosecute their counterclaims in that action, and dismissed the complaint for want of equity. It is clear that nothing could have been adjudicated in this case except the facts in issue under the first

defense. Counsel for the present plaintiffs claim that the complaint should be construed as alleging the validity of the receipts as a material fact; that the first defense contains a denial of that fact, and therefore the judgment is conclusive evidence of the invalidity of the receipts. Aside from other considerations, it is an insuperable objection to this result that the record itself shows that the claim that the complaint should be so construed was ruled upon by the trial court and denied, and that the validity of the receipts was not tried, and was not determined, because it was not a fact in issue.

There is no other alleged error in the rulings of the court during the trial, clearly presented by the finding and likely to occur in the same form upon a retrial, of sufficient importance to call for consideration. The main claims of error in the conclusions of the court upon the facts found relate to the construction given to the language of the book entitled "Key to the Reserve Dividend Plan," and to the conclusion of fraud in obtaining the receipts. The first question is embarrassed by the finding that the contracts of insurance were in fact made upon an agreement in each case that certain selected passages in said book contained the accepted definition of the "reserve dividend plan" specified in the policy, and the other question depends almost wholly upon the language of the finding in the statement of facts. These questions have been argued elaborately and with great ability. We regret that it is not practicable to express some opinion that may be useful upon a retrial. But inasmuch as a new trial must be granted, and we cannot assume that upon a retrial the facts proved will be the same, or that the finding of facts which may come again before us will present the questions in the same manner, it is apparent that an expression of opinion on the questions as presented by this finding may not be applicable to the facts established on the new trial, and may operate unfairly on the parties in preparing and trying their cause, and raising the precise issues of law that should determine their rights. We therefore refrain from indicating any opinion on these questions. A new trial is granted. The other judges concur.

48 Conn. 101)

STATE v. ORR.

(Supreme Court of Errors of Connecticut.
June 25, 1896.)

MUNICIPAL CORPORATIONS — GARBAGE ORDINANCE
— VALIDITY — MONOPOLY — PROSECUTION FOR
VIOLATION — EVIDENCE — INSTRUCTIONS.

1. Under the charter of the city of Bridgeport, which empowers it to regulate by ordinance the collection and removal of garbage and offal, an ordinance which prohibits any person from collecting and removing such "refuse matter" as accumulates in the preparation of food for the table, without a license, is valid.

2. Act Feb. 28, 1895 (Sp. Acts 1895, p. 7), empowers the board of health of the city of

Bridgeport to contract for the collection, removal, and disposal of garbage and offal for such period of time, and at such price, as the board of health shall deem to be for the best interests of the city. *Held*, that an ordinance of such city which prohibits the collection and removal of garbage without a license, and which authorizes the board of health to contract with a single person to collect and remove such refuse matter from the entire city, or with several persons to collect and remove it from as many different portions of the city, is not invalid as authorizing the creation of monopoly in the removal of such garbage.

3. The absence in the charter of any express provision as to the grant of licenses to engage in such business does not prevent the city from resort to that mode of regulation.

4. The city of Bridgeport, as authorized by its charter and Act Feb. 28, 1895 (Sp. Laws, 1895, p. 7), passed an ordinance prohibiting the collection and removal of garbage without a license, and empowering the board of health to contract with one person or several persons to collect and remove such garbage from the city. *Held*, in a prosecution for violation of such ordinance, that it was not error to exclude evidence that defendant had been for many years engaged in the business of collecting and removing garbage in the city, in carts so constructed as to satisfy the requirements of the ordinance, and that he had applied to the clerk of the board for a license or permit, and met with a refusal.

5. It was not error to exclude evidence that permits had been previously issued to others, but, before defendant applied, the board had instructed its clerk to issue no more to any one.

6. Nor was it error to exclude evidence to show that all the garbage collected by defendant came from certain restaurants with the proprietors of which he had contracted for its removal.

7. Defendant put in evidence that the garbage he collected was fresh, and some of it fit for food, and there was no evidence on either side tending to show that any of such garbage was "sour or putrid, and for that reason dangerous to the public health." *Held*, that it was not error to refuse to charge that the privilege of contracting to transport garbage is a liberty and property right of which one cannot be deprived without due process of law, unless such garbage, at the time of its transportation, is a nuisance detrimental to health.

Appeal from criminal court of common pleas, Fairfield county; Walsh, Judge.

Charles S. Orr was convicted in the city court of Bridgeport of violating an ordinance of such city which prohibits any person from collecting and transporting garbage and offal without a license, and appealed to the criminal court of common pleas. From a judgment of conviction, he appeals. *Affirmed*.

Defendant did not dispute the violation of the ordinance as alleged in the complaint, but he claimed (1) that the ordinance was void; and (2) that, if it was not, he was entitled to an acquittal on the ground that he tried to procure a license, and failed, because the board of health of such city refused to license any one.

David B. Lockwood and Alfred B. Beers, for appellant. John H. Light and V. R. O. Giddings, for the State.

BALDWIN, J. The charter of the city of Bridgeport conferred upon the common council ample power to regulate by ordinance the collection and removal of garbage and offal. The ordinance brought in question upon this

proceeding deals only (section 2) with "such refuse matter as accumulates in the preparation of food for the table." "Refuse matter," as the term is thus employed, can embrace nothing which has not been refused or rejected as unsuitable for table use. It may be thus rejected because it has little or no value for human food, or because it is decayed or unwholesome. It must, in its nature, be perishable, and can include little which is not liable to become decomposed or offensive if left where it falls. The common council therefore had authority to regulate its disposition in such a way as to prevent it from becoming the occasion of a nuisance. Much, however, that is of the nature of garbage and offal, and has slight value for table use, may be not unsuitable for the food of animals, for manure, or as materials for manufacture. Construing this ordinance with the strictness properly applicable to municipal legislation of a penal nature, the term "refuse matter" can only extend to matter which is in fact noisome, or which has been refused and rejected by the owner as worthless. Meat trimmings, potato parings, specked apples, and many other things of a like character, might be thrown aside in preparing table dishes, and yet properly utilized afterwards for other purposes. The mode of regulation of the disposition of kitchen refuse which is contained in this ordinance seems to be one of an alternative character. The board of health is empowered to take such measures as it may deem effectual for the removing of this refuse from the whole city or any portion of it, and to this end to employ or make contracts with one or more persons, subject to certain rules, of which the following are the leading ones: No person shall collect and transport such refuse in the city without first having obtained a permit from the board. It shall all be carried through the city in water-tight, covered carts, so loaded as not to spill; each to be plainly marked "City Garbage Cart," with the name of the contractor, and number of the cart, and of the ward, and to be used only when inspected, approved, and licensed by the clerk of the board. All such refuse is to be placed by the person on whose premises it originates in suitable covered vessels, set there in a position convenient for removal, or in some place designated by the clerk of the board, so that it "may be called for by the garbage contractor of said city; provided, however, that any person may be excepted from the provisions of this section upon obtaining a permit to that effect from the clerk of the board of health." No other matter whatever can be placed in such a vessel. "The garbage contractor or other person employed by the board of health shall call regularly at all dwellings, tenements, hotels, restaurants, or other buildings designated by the said board, and remove promptly and in as cleanly a manner as possible all garbage or offal that may be offered, and shall return the receptacles to the place on such premises

from which the same were taken. All garbage and offal which shall be removed through said city shall be carried and deposited in such places as may be designated and approved by the board of health, and shall be disposed of in such manner as not to create a nuisance, and the covers of all carts, wagons or vessels used for the purpose of removing such garbage or offal, shall be kept tightly closed while they are being transported through the streets of the city. No deposit of garbage or offal shall be made within the limits of the city of Bridgeport, or upon any wharf, or upon any vessel lying at any wharf, except by permit from the board of health." The clerk of the board is to enter in a record book "all contracts entered into, or licenses issued by authority of said board."

Under these provisions, and the authority of the special act of 1895,¹ the board of health might contract with a single person to collect and remove garbage from the entire city, or with several persons to collect and remove it from as many different portions of the city. It might also make such contracts with respect to part of the city, or to certain buildings in part of the city, and leave the collection and removal of garbage from other places open to those who obtained from its clerk a proper permit, and provided proper means of transportation. By neither method of procedure would any monopoly be created, by which the common rights of citizenship would be infringed upon. *Slaughterhouse Cases*, 16 Wall. 36; *Alpers v. City of San Francisco*, 32 Fed. 503; *Fertilizer Co. v. Lambert*, 48 Fed. 458. Nor did the absence in the charter of any express provision as to the grant of licenses to engage in this business prevent the common council from resort to that mode of regulation, since it was a business which, as usually carried on, is in its nature dangerous to the public health; and as carried on in Bridgeport might, under the act of February 28, 1895, have been made by the board of health the subject of a public contract. Over any such occupation a strict watch must be kept, and the general police powers vested in the city by section 24 of its charter, in connection with the act of 1895, justify the implication of a right to limit the number of those who pursue it. *State v. Wordin*, 56 Conn. 216, 228, 14 Atl. 801; *Vandine, Petitioner*, 6 Pick. 187.

The defendant offered evidence to show that he had been for many years engaged in the business of collecting and removing garbage in Bridgeport, in carts so constructed as to satisfy the requirements of the ordinance; and that he had applied to the clerk of the board for a license or permit, and met with a refusal. He

¹ Act Feb. 28, 1895 (Sp. Acts 1895, p. 7) empowers the board of health of the city of Bridgeport to "contract for the collection, removal, and disposal of garbage and offal in said city, for such period of time and at such price as said board of health shall deem to be for the best interests of the city."

also offered evidence, which was excluded, that permits had been previously issued to others; but that, before he applied, the board had instructed its clerk to issue no more to any one. This evidence was properly excluded. The board of health having the right to limit the number of those engaged in this particular occupation, the defendant had no absolute title to a license. If the number which it had issued was unreasonably small, and if an inquiry into that subject was open to him in any proceeding, it was certainly not open in this, to which the board was not a party. He could not thus assume to take the law into his own hands, and pursue the business without a license, because a license had been wrongfully refused. His remedy, if he had any, would be to apply by mandamus to compel the board to grant him one.

The defendant offered evidence to show that all the garbage collected by him came from certain restaurants, with the proprietors of which he had contracts for its removal. This also was properly excluded. It was not claimed, and cannot be assumed, that such engagements had been entered into before the adoption of the ordinance. Without inquiring whether, had the fact been otherwise, the law would have been otherwise, it is sufficient, as the case stands, to say that no contract to perform an unlawful act can justify its performance.

The defendant further offered evidence to prove, and claimed that it did prove, that the garbage he collected was fresh, and some of it fit for food; and there was no evidence on either side tending to show that any of this garbage "was sour or putrid, and for that reason dangerous to the public health." In view of this, the defendant asked the court to instruct the jury that "the privilege of contracting to transport garbage is a liberty and property right, of which one cannot be deprived without due process of law, unless the jury find that such garbage, at the time of its transportation, is a nuisance, and detrimental to health." Such instructions were properly refused. It was a violation of the ordinance to collect and transport the kitchen refuse which was its subject, whether such of it as was being transported at the time of the act complained of was noxious or innocuous. It was enough that it was "such refuse matter as accumulates in the preparation of food for the table." There is so much of this kind of matter that is offensive and dangerous to the health of the community that all may be properly made the subject of public supervision and control. The ordinance does not extend to everything that is separated and thrown aside in the preparation of food for the table. Whatever of this description is not abandoned as worthless, remains property which, so long as it does not constitute a nuisance, may be sold or otherwise disposed of at the will of the owner. If the evidence had shown both that the contents of the defendant's cart, while they had been rejected for table use, were not offensive, and that they were in his possession as the agent or vendee of the original owners,

he might have been entitled to a verdict, for he could not then have been engaged in the business for which a license was required.

The court of common pleas was requested but declined to instruct the jury that "the board of health has no power to assume in advance that garbage is or will become a nuisance, and detrimental to public health, and so contract arbitrarily for its removal, or prohibit its removal by purchasers thereof; that the board of health cannot prohibit the carrying on of a lawful business not necessarily a nuisance, and which may be conducted without injury or danger to the public health; that the common council has no power, under the charter of the city of Bridgeport, to refuse a citizen the right to exercise a lawful calling, or to prohibit his exercise of the same when not dangerous to public health or safety." There was no error in refusing these instructions. Ample authority is found in the charter and the act of 1895 for dealing with the business of disposing of garbage and offal as one dangerous to the public health. Any occupation comes within the range of the police power which is such as to be naturally liable to create a nuisance unless subjected to special regulations, whether it be so conducted as, in fact, to create a nuisance or not. The prevention of nuisances is quite as important as their abatement. *Raymond v. Fish*, 51 Conn. 80, 96. There is no error in the judgment appealed from. The other judges concur.

(58 Conn. 113.)

PERKINS v. TOWN OF COLEBROOK et al.

(Supreme Court of Errors of Connecticut.
June 25, 1896.)

PRIVATE ROAD — REPORT OF COMMITTEE — OBJECTIONS WAIVED — APPLICATION.

1. A petitioner for a private way under Gen. St. § 2722, cannot, in his remonstrance to an adverse report of the committee appointed to hear the application, set up new matters which he had an opportunity to present to the committee at the hearing.

2. In a report of the committee appointed to hear an application for a private way through the land of one P., which entirely surrounded petitioner's premises, a finding that a pond, through which petitioner asked that the way be laid, is surrounded by the lands of P., and "is posted as a private fish pond by said P., and is claimed to be of considerable value as such pond," etc., is, in effect, a finding that the pond is a private pond, in which P.'s rights are exclusive of the public.

3. A petitioner for a private way cannot object to the report of the committee appointed to hear the application, on the ground that such report contains irrelevant findings of fact, if he made no objection at the hearing to the admission of the evidence on which such finding is based.

4. In an application under Gen. St. § 2722, to lay out a private way over the land of another, in order that petitioner may have access to his own premises, the committee may consider, in determining the question of the necessity and convenience of the way as prayed for, the injury to the land over which it must run, and the fact that a reasonably convenient way for petitioner could be laid out elsewhere on such land.

5. Where a committee appointed to hear an application to lay out a private way over P.'s

land report that a way somewhere over the land is necessary in order to give petitioner access to his own premises, but refuse to lay out the way described in the petition on the ground that another route can be found which will be more desirable, and result in less damage to P., it is not necessary that the committee lay out a way over some other route.

6. An application to lay out a private way must describe with reasonable certainty the precise route desired.

Appeal from superior court, Litchfield county; Prentice, Judge.

Application by Augustus M. Perkins to lay out a private way. The committee reported adversely to the application, and from a judgment accepting the report over petitioner's remonstrance, and denying the application, he appeals. Affirmed.

George P. McLean and Donald T. Warner, for appellant. Samuel A. Herman, for appellees.

TORRANCE, J. The plaintiff applied to the selectmen of the town of Colebrook for the layout of a private way in said town over the land of one Horace M. Phelps, to the land of the plaintiff. The selectmen neglected to lay out said way, and the plaintiff then brought his application for said layout to the superior court. That court, after due hearing, appointed a committee to hear said application, and the committee, after due notice and hearing, made a report adverse to the plaintiff. To this report the plaintiff filed a remonstrance, which the court overruled. The court accepted the report, and denied the plaintiff's application, and from that judgment the plaintiff took the present appeal.

Both the town and Horace M. Phelps were made parties defendant in the superior court, but Phelps died before the committee was appointed, and Julia E. Phelps, who appears to have succeeded Horace M. Phelps in the occupancy and ownership of the Phelps land, was afterwards duly made a party, and appeared, and was heard in the proceedings subsequent to the appointment of the committee. In the application to the superior court the way prayed for was thus described: "Commencing in the center of said highway (previously described in the application) at a point 41 links south from the southwest corner of a large rock being near the entrance to the 'Old Boat Landing,' so called; thence N., $77\frac{1}{2}^{\circ}$ W., 280 links; thence S., 74° W., 100 links, to the current at the outlet of 'Baker Pond,' so called; thence following the channel of said Baker pond to the inlet of said pond, about 86 rods; thence following up the inlet of said pond to the said land of said petitioner; said private way being three rods in width." The application alleged that the plaintiff's land was bounded on all sides by lands of Horace M. Phelps; that it was not contiguous to any public highway; that there was no means of access to it except by crossing the Phelps

land; that plaintiff had been unable to obtain a right of way over the land of Phelps by purchase or otherwise; that the right of way prayed for was a necessary and convenient one, and that the selectmen had at all times refused to lay it out. The superior court found that the selectmen had neglected and refused to lay out the way prayed for, and thereupon appointed a committee "to hear and decide said application and report their doings to said court." The committee, in their report, found the following facts: "The petitioner owns 30 acres of land in said town of Colebrook, bounded on all sides by lands formerly occupied and owned, or claimed to be owned, by Horace M. Phelps, deceased, and now occupied and owned, or claimed to be owned, by said Julia E. Phelps, and the plaintiff has no means of access to his said land except by crossing such surrounding lands of said Julia E. Phelps. The land of the plaintiff is situated west of the brook running into 'Baker Pond,' so called, and is bounded on the east by the west bank of said brook; and the land on each side of said brook is swampy for several rods, and is impassable, except in very dry weather or when the ground is frozen. Said Baker pond is surrounded by said lands of said Julia E. Phelps, and covers about 12 or 15 acres of land, and is posted as a private fish pond by said Julia E. Phelps, and is claimed to be of considerable value as such pond, and the value of the farm of Mrs. Phelps is largely dependent on the keeping of said pond under the control of the owner of the farm. If the prayer of the petitioner should be granted, and a right of way be laid out as asked for in the plaintiff's application, from a certain point on the outlet of said pond up said outlet, across said pond and up the inlet to the land of the petitioner, the damage to the property of said Julia E. Phelps would largely exceed the value of the land of the plaintiff. The committee find that for all purposes for which the land of the plaintiff can be utilized, another way more desirable and of less damage to the property of Mrs. Phelps can be found. The committee find that the way prayed for is not of such convenience or necessity that it ought to be granted, and they therefore refuse to survey and lay out the same, and have, therefore, made no estimate of damages. The committee also find that the selectmen of the town of Colebrook ever have been, and now are, ready and willing to lay out a private way for the plaintiff, in a reasonable and convenient place to give the plaintiff access to his land." The objections to the acceptance of the report, set up in the remonstrance, may be summarized as follows: (1) The committee found all the substantial allegations of the complaint to be true, and yet refused to lay out the way prayed for. (2) The finding "that the way prayed for is not of such convenience or necessity that it ought to be

granted" is based upon the fact that such way will injuriously affect the right of Mrs. Phelps in Baker pond, and yet it is not found that she owns said pond, nor how her rights therein would be injuriously affected. (3) It is not found whether Baker pond is a public or private pond. (4) Baker pond is a public pond, used by the public from time immemorial for floating and hauling lumber, timber and wood, "and no exclusive rights therein are owned by said Julia E. Phelps." (5) "It did not appear in evidence before said committee, and is not the fact," that the selectmen of Colebrook ever have been ready and willing to lay out a private way for the plaintiff in a reasonable and convenient place, "and it is not found as a fact that said town ever laid out such way, or actually offered to lay out such way." (6) Because the committee considered the damages to Mrs. Phelps as an element in determining the question of the necessity of the way prayed for. (7) "Because it appears from the facts in detail, as reported by the committee, that a private way to the plaintiff's land was necessary, yet the committee do not find whether or not it was necessary, but only find that, in view of the damage to Julia E. Phelps, it 'is not of such convenience and necessity that it ought to be granted.'" (8) Because the committee do not find what part of the land adjacent to Baker pond is actually owned by said Julia E. Phelps." The ninth and last paragraph of the remonstrance prayed that the report be not accepted, but be recommitted to the committee, to ascertain and report upon the matters which in the preceding paragraphs it was alleged the committee had not found. An amendment to the remonstrance set up certain other objections to the acceptance of the report, but, as the reasons of appeal cover only the action of the court upon the remonstrance as originally filed, it becomes unnecessary to state or consider the matters alleged in the amendment.

The errors assigned upon this appeal are 11 in number. The third, fourth, and tenth reasons allege that the court erred in not recommending the report to the committee to find certain facts which the remonstrance alleged had not been found, namely, whether Baker pond is a public or a private pond, whether or not the public had such rights in it as the remonstrance alleged, whether or not Mrs. Phelps had the exclusive right to said pond, and what part of the land adjacent to said pond was actually owned by Mrs. Phelps. There is no foundation in fact for these assignments of error, for we are of opinion that the report does, in effect, find that this was a private pond, surrounded by the land of Mrs. Phelps, and that her rights therein were exclusive of the public. But, even if this were not so, the plaintiff had no right to be heard upon this part of his remonstrance, because these were new matters set up for the first time in the remonstrance. If they were relevant upon the

question of convenience and necessity, the plaintiff had the opportunity to present them before the committee; and, if they were not, they are wholly outside the case as it stood before the committee. *Scutt v. Town of Southbury*, 55 Conn. 405, 11 Atl. 854.

The fifth assignment is that the court erred in accepting the report, because the committee, having found that the selectmen were ready and willing to lay out a way for the plaintiff in a reasonably convenient place, had not also found the further fact that they had ever laid out, or ever actually offered to lay out, such way. Neither the fact found nor the one not found, is material to the validity of the report; and the claim upon this point on its face seems to be that the report, having found one immaterial fact, should be rejected because it has not found another. As shown by the brief, however, the real claim of the plaintiff upon this point is that evidence of the readiness of the selectmen to lay out a way elsewhere was irrelevant, and so not admissible. It must be conceded that the evidence in question was irrelevant; but, this being so, the plaintiff should have objected to it, and taken a ruling upon it, and, if the ruling was against him, pressed that adverse ruling in his remonstrance and reasons of appeal. So far as appears, he took no such course before the committee, and his appeal is not because irrelevant evidence was received and an irrelevant fact was found from it, but because the committee failed to find a fact which is clearly irrelevant, and which the plaintiff himself claims to be irrelevant. The remonstrance upon this point was properly overruled.

The remaining assignments, with the exception of the first, may be considered together, because they all relate to the question whether the committee could rightfully consider, as elements in determining the question of the private necessity and convenience of the way as prayed for, the injury to the land of Mrs. Phelps, in connection with the further fact that a reasonably convenient way for the plaintiff could be laid out elsewhere over her land. We think the record fairly shows, as claimed by the plaintiff, that the committee did take the two elements aforesaid into account in reaching their final conclusion, and that their action in arriving at that conclusion was largely influenced thereby; and we are of opinion that they might rightfully take them into account. The power to lay out private ways seems to have been first conferred upon towns in 1773 (*St. Conn.* [Ed. 1808] p. 378); and the method of laying them out, as then provided, remains to-day substantially the same. This statute has been held to provide not only for the layout of such private ways as might be for the common use of the inhabitants of a town, but also such as might be for the sole use of the applicant. *Reynolds v. Reynolds*, 15 Conn. 83, 97. In the syllabus of that case it is made a *quære* "whether it is within the constitutional power of the legislature to authorize the laying out of a way for the sole

use of a particular individual over the land of another," but as the point was not raised in that case it was neither considered nor decided; and for the same reason we have no occasion either to consider or decide that question now.

The power to take the property of A. in invitum, and transfer it to B., solely for the private benefit of B., even if we assume it to be a constitutional exercise of power, and that full compensation is to be made, is certainly a most extraordinary one. If such a power exists at all, its exercise should be strictly guarded, and limited to the attainment of the object contemplated in conferring it. A statute conferring a power in its operation so highly derogatory to the rights of private property, should receive a strict construction, and such rights should be no further invaded than is necessary to effect the object of the statute, with as little injury to the rights of others as possible. The present proceeding is brought under the provisions of section 2722 of the General Statutes. The principal object of the statutes relating to the layout of private ways is to give to the applicant a reasonably convenient way somewhere to and from his land, and when this is done the object of the statute is accomplished. It is immaterial whether that was is provided over route A or route B, if the one is about as reasonably convenient for the applicant as the other. And if, in the above case, the way laid out over route A will greatly injure and inconvenience the person over whose land it runs, and if laid out over route B will injure and inconvenience him very much less, he ought to have the right to show those facts, and no good reason has been shown why the committee should not take them into account. If A. brings his application for a private way through the garden or orchard or lawn of B., and alleges that the way as prayed for is the only reasonably convenient way for him, we think B. should be permitted to show, if he can, that a way equally convenient for A., and much less injurious to B., than the one prayed for, can be laid out elsewhere. In such a case the rights of B. and the injury and inconvenience to him should be considered, as well as the rights and convenience of A. It is of no consequence that B. is to receive full compensation for the property taken. He may not want to part with his property at any price, and he should not be compelled to part with it for the private use of another, unless the object of the statute cannot be otherwise accomplished.

In the case at bar, what the plaintiff was entitled to under the statute, if to anything, was a reasonably convenient way somewhere, over the Phelps land, to his own land. In his application he describes one route across the land, over which route he asks to have his way laid out; and he says, in effect, that no other way will reasonably serve his purpose. Mrs. Phelps denied this before the committee, and one of the issues before the committee was whether the way as prayed for was

the only reasonable way for the plaintiff over the Phelps land; that is, was the way, as prayed for, of such private necessity and convenience to the plaintiff that it ought to be laid out? Upon this issue the facts objected to by the plaintiff in his remonstrance were relevant, and might be proved before, and considered by, the committee.

In one of the assignments (the ninth) now under consideration the plaintiff says the committee have not found that the way as prayed for was necessary or not necessary, "but only the relative fact or opinion that, in view of the damages to Julia E. Phelps, it is not of such convenience and necessity that it ought to be granted." The conclusion of the committee here alluded to is not reached, as above intimated, solely "in view of the damages to Julia E. Phelps," but, so far as appears, in view of all the facts in the case; and that conclusion, in a case of this kind, for aught that appears upon the record, was a proper conclusion, and is, in effect, a finding that the way as prayed for was not of private convenience and necessity within the meaning of the statute.

What has been already said disposes of all the assignments except the first, which, in substance, is this: The committee finds that the plaintiff has no means of access to his land except by crossing the Phelps land, and yet they refuse to lay out the way as prayed for, or any other convenient way. In his brief upon this point the plaintiff, in substance, says that the committee in the case at bar, having found that a way somewhere over the Phelps land was necessary, were bound either to lay out the one prayed for, or provide one over some other route. That the committee were not necessarily bound in this case to lay out the way as prayed for follows from what has been already said. Were the committee, then, having refused to lay out the way as prayed for, bound to lay out a way over some other route? We are of opinion that they were not. The method of procedure for laying out private ways is substantially the same as that for laying out public highways, as may be seen by a reference to title 44 of the General Statutes. It is a statutory procedure, and the rules which have been established by the decisions of this court in proceedings to lay out public highways must govern to a large extent in proceedings to lay out a private way. In proceedings to lay out a public highway it is necessary to describe, in the application, the highway prayed for, with reasonable certainty. *Pierce v. Town of Southbury*, 29 Conn. 490, 495; *Clark v. Town of Middlebury*, 47 Conn. 331; *Town of Windham v. Litchfield*, 22 Conn. 226. This is necessary for the convenience and protection of all concerned. The committee thus have, upon the record, a definite route, upon the convenience and necessity of which route alone they are to pass. The inquiry before the committee is thus properly limited, so that each party

interested may know, just what he has to meet; and the finding of the committee can thus be pleaded in bar. *Webb v. Town of Rocky Hill*, 21 Conn. 468; *Terry v. Town of Waterbury*, 35 Conn. 526. It is further settled in such cases that the committee, if they lay out any road at all, must lay out the road prayed for, or some part of it, without substantial deviation from the route prayed for. *Clark v. Town of Middlebury*, *Pierce v. Town of Southbury*, and *Town of Windham v. Litchfield*, supra. These decisions must govern in the present case. The plaintiff, as was his right, described in his application the precise way that he wanted. The question before the committee was whether that described way was of private convenience and necessity to him under the statute. That was the precise way he had asked the selectmen to lay out, and which they refused to lay out. Under the statute the committee could lay out no way substantially different from the one described in the application. For these reasons we are of opinion that the court below committed no error in overruling the remonstrance.

In the case at bar it is apparent that the way prayed for was substantially a way over the waters of a pond,—a waterway. Whether a private way over water, like the present one, can be laid out at all under the statute may well admit of doubt. The statute, in speaking of public highways and private ways, seems to contemplate solid ways that can be worked and repaired, over which men and animals may pass on foot, and whereon wheeled vehicles may be drawn, and whose limits are defined by permanent solid objects, and not an air-drawn line. It contemplates a road or path as distinguished from a ferry or right of ferriage. In *Imlay v. Railroad Co.*, 26 Conn. 249, 256, this court said: "The term 'public highway,' as employed in such of our statutes as convey the right of eminent domain, has certainly a limited import. Although, as suggested at the bar, a navigable river or canal is, in some sense, a public highway, yet an easement assumed under the name of a highway would not enable the public to convert a street into a canal. The highway, in the true meaning of the word, would be destroyed." But, as the question thus suggested is not raised in the present case, and as its decision is not necessary to the disposition of the case, we pass it without deciding it, thus leaving it an open question. There is no error. The other judges concurred.

(68 Conn. 80)

HART v. BRAINERD et al.

(Supreme Court of Errors of Connecticut.
June 5, 1896.)

NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

1. On the issue whether B. executed an instrument purporting to be his will, and to have been executed on a certain day in New York City,

there was testimony of experts as to handwriting on both sides. The three witnesses thereto testified that it was executed in their presence at such time and place, and his daughter testified that he was at his home, in Portland, Conn., on such day, having returned several days before, and remained there for some time afterwards; and that on such day he paid one of her servants at his home. She also offered testimony that he, when in New York, always stopped at a certain hotel, and that he was not registered as there that day. *Held*, that the testimony of such servant and another that B. made such payment on such day at his home, and had been continuously at home for several days immediately prior, is cumulative evidence, and therefore not ground for new trial.

2. New trial for newly-discovered evidence is properly denied where it does not appear that it would even probably produce a different result.

Appeal from superior court, Middlesex county; Shumway, Judge.

Petition by Emily O. Hart against Frank Brainerd and others for new trial for newly-discovered evidence. Demurrer to petition was sustained, and petitioner appeals. Affirmed.

William S. Case, for appellant. Charles E. Gross, for appellees.

TORRANCE, J. This is a petition for a new trial on account of newly-discovered evidence in the case of Hart's Appeal, reported in 68 Conn. 575. The petition alleges, in substance, that in the trial of that case it was a material question whether Erastus Brainerd did in fact execute the instrument offered as his will, which purported to have been executed in New York City on the 20th of August, 1887, and whether he was in fact in New York City on the 18th, 19th, and 20th days of August of that year; that the exhibits annexed to the petition contained substantially all the evidence offered in the case; that since said trial the plaintiff had discovered material evidence in her favor, which she failed and was unable to discover before or during the trial, "although she used all reasonable diligence in endeavoring to find testimony in her favor"; and that the verdict and judgment against her in said case are unjust. The petition then sets out the newly-discovered evidence. That evidence consists solely of the testimony of two sisters, formerly servants in the family of the plaintiff, who, it is alleged, will testify, in substance, that they were in the service of the plaintiff, and inmates of her house, in 1887; that they spent the month of August of that year at the residence of Erastus Brainerd, in Portland, in this state, with the present plaintiff; that Mr. Brainerd was at his home in Portland all day of the 20th of August, 1887, and paid to one of the new witnesses her wages on that day about 1 o'clock in the afternoon, at the request of the present plaintiff; and had been continuously at home for some days immediately prior thereto. The defendants demurred to the petition on several grounds, the substance of which may be stated as follows: The evidence is not newly discovered. It could have been discovered before the for-

mer trial by the use of due diligence. It fails to make it clear that injustice was in fact done at the former trial. It is not alleged, and does not appear, that the testator "could not have been both in Portland and New York on one and the same day." The evidence is merely cumulative in its character, and might be met by other and opposite cumulative evidence on the part of the defendants. It is not sufficient to show that, if a new trial were granted, a different result would be produced. The superior court sustained the demurrer, and rendered judgment for the defendants.

The record does not show whether the demurrer was sustained upon only some of the grounds, or upon all of them; but we are of opinion that it should be sustained, on the ground that the facts alleged and set forth do not make it apparent either that any injustice was done upon the former trial, or that the new evidence is sufficient to turn the cause in favor of the plaintiff if a new trial were granted. One of the claims made by the present plaintiff on the former trial was that the signature to the will was a forgery. Upon the issue raised by that claim both sides offered not only the testimony of experts as to the handwriting, but also testimony as to the whereabouts of the testator on the 20th of August, 1887. Upon this latter point the present plaintiff testified, in substance, that the testator, who was her father, was at his home, in Portland, on the 20th of August, 1887; that she requested him that day to pay one of her servants, and that he then and there did so, in the dining room, in her presence; and, further, that he returned home from Block Island on the 15th of August, 1887, and was in Portland until the latter part of September. She also offered testimony showing that the testator always stopped at a certain hotel when he was in New York City, and that he was not registered as stopping there on or about August 20, 1887. Upon this particular point the other side offered the evidence of the three witnesses to the will, to the effect that the testator executed it in their presence, in the city of New York, on the 20th of August, 1887. It thus appears that the newly-discovered evidence is to the very same fact, and the same attending circumstances, testified to upon the former trial, and it is of the very same nature as that before offered in proof of that same fact. It thus comes clearly within the definition of evidence merely cumulative. *Waller v. Graves*, 20 Conn. 305. But, in addition to this, it by no means appears from the petition and the exhibits forming a part of it, that the new evidence would even probably be sufficient to turn the cause in favor of the plaintiff, and show that, if a new trial were granted, a different result would be produced; or that its effect will certainly be to make a doubtful case clear; or that any injustice was done on the former trial. On the contrary,

after a careful consideration of all the testimony set forth in the petition, we are of opinion that, if a new trial should be granted, it is very improbable that the newly-discovered evidence would produce a result different from that of the former trial. Even if the jury should be convinced by it that the testator was in Portland on the 20th of August, 1887, it is very improbable that it would satisfy them that he did not execute the will in New York, if they determined the case "solely upon the law and the evidence." We are therefore of opinion that the demurrer was properly sustained. *Railroad Co. v. Cahill*, 18 Conn. 484, 493; *Waller v. Graves*, 20 Conn. 305, 310; *Parsons v. Platt*, 37 Conn. 563-565; *Husted v. Mead*, 58 Conn. 55, 64, 19 Atl. 233, 234. There is no error. The other judges concurred.

(68 Conn. 72)

GILPIN v. CITY OF ANSONIA.

(Supreme Court of Errors of Connecticut.
June 25, 1896.)MUNICIPAL CORPORATIONS—CHANGING GRADE OF
HIGHWAY—DAMAGES—APPRAISAL OF—RIGHT
OF ACTION TO RECOVER.

1. Changing the grade of an established highway, though it may result in consequential damage to adjoining property, is not a taking of such property for public use, within the provision of the constitution as to the exercise of the right of eminent domain.

2. Compensation for damage that may result to abutting property from a change of grade of a highway is not a condition precedent to the right to make such change, unless required by statute.

3. Where a borough was chartered as a city, the charter providing that the city should succeed to all rights, and be subject to all obligations, of the borough, the city properly proceeded under its charter to assess the benefits and appraise the damage caused by the change of grade of a highway by the borough, such action not having been taken by the borough, and there being no change in respect to such action made by its charter, except as to the method of procedure.

4. Where the charter of a city requires an estimate of damage caused by changing the grade of a highway to be made by the common council, such estimate is not rendered invalid because based on the report of a committee.

5. While there is an absolute liability on the part of a municipal corporation for damage caused by changing the grade of a highway, a right of action therefor does not accrue until the municipality has failed to proceed to ascertain such damage in the manner prescribed by law.

6. While it is the duty of a municipality to proceed to the appraisal of damages caused by a change of grade of a highway within a reasonable time after completion of the work, the question of what is a reasonable time is dependent on all the circumstances, and a delay will not authorize the bringing of an action to recover such damages where the proceedings have in fact been commenced, and nearly completed, before the action is brought.

Appeal from court of common pleas, New Haven county; Hotchkiss, Judge.

Action by Sarah L. Gilpin against the city of Ansonia to recover damages to property by reason of a change of grade of a highway, made by the borough of Ansonia in 1892. In June, 1893, the city of Ansonia was incorporated, and the borough was merged therein,

and all rights of the borough vested in the city, which was made liable for all the debts and obligations of the borough. In July, 1895, the city proceeded to ascertain the damages caused by the change. The action was begun in September, 1895. A demurrer to defendant's answer was overruled, and, plaintiff having failed to reply, judgment was rendered for defendant on the pleadings, from which plaintiff appeals. Affirmed.

E. P. Arvine and Charles O. Ford, for appellant. V. Munger and George H. Ennis, for appellee.

HAMERSLEY, J. The plaintiff's demurrer to the second defense states substantially five reasons why the pleading is claimed to be insufficient:

First. That the defendant, in stating its defense of a legal assessment of benefits and damages still in full force and effect, sets up a second and a separate and distinct defense, by alleging that the plaintiff consented to the change of grade, making no claim for damages therefor until July, 1895. This is plainly not so, especially in view of the amendment in which the defendant says the consent is claimed only as a license to the borough to make the change without prepayment of damages. However unnecessary such allegation may be, it does not make the pleading bad for duplicity.

Second. That the facts stated in the second defense show that the city of Ansonia had no power to make the alleged assessment. It is admitted that the borough had power to make an assessment, but it is claimed that the provision of the constitution prohibiting the taking of property for public use without just compensation required the payment of damages before the change in grade was made. How far such prepayment is necessary in the case of property clearly taken within the meaning of this clause of the constitution, especially when taken by the state directly or through the agency of a municipal corporation, has never been fully considered by this court. *Hooker v. Northampton Co.*, 15 Conn. 312, 326. The question does not arise in this case, because the sum which the defendant may be liable to pay for damages sustained by an owner of adjoining land by reason of a change of grade in the highway does not represent compensation for the "taking of property," within the meaning of the constitution. In such cases the "taking" occurs when the land within the highway is condemned for that public use. Compensation must then be made; and such compensation, at the time the constitution was adopted, included by force of a legal presumption all future consequential injury to property rights of the owners of adjoining land, caused by the lawful acts of the public in adapting the land taken to the purposes of a highway. A change in the grade of a highway is such lawful act, and does not necessarily cause a legal damage to the prop-

erty of adjoining owners; and, even when legal damage may result, such damage is not compensation for "property taken." *Nicholson v. Railroad Co.*, 22 Conn. 74; *Fellowes v. City of New Haven*, 44 Conn. 240; *Callender v. Marsh*, 1 Pick. 418. This legal presumption of compensation for consequential injuries that might arise in the future was partially abolished by statute (Gen. St. § 2703), and a liability to pay the amount of actual damage sustained by a change in the grade of a highway was recognized; but this legislation did not so alter the character of the act by which a grade is changed that a lawful use of property legally condemned becomes the seizure of property without compensation. A mere change of grade in a highway is clearly distinguishable from the appropriation of the highway to another use, from the imposition of an additional servitude. The distinction is pointed out in *Nicholson v. Railroad Co.*, 22 Conn. 85. This view was alluded to in *Platt v. Town of Milford*, 66 Conn. 320, 335, 34 Atl. 82, 84, but not settled, because unnecessary to the decision in that case. It is now a material question, and we hold that compensation for damage that may be incurred by a change of grade is not a condition precedent to the lawful execution of an order for such change, unless required by statute. In this case the charters of the borough and of the city do not require the appraisal to precede the work. It being lawful for the borough to make an assessment at the time of its merger in the city, it was lawful for the city to make such assessment. The charter of the borough was repealed, but the municipal corporation was not extinguished. The alteration of the form from a borough to a city did not break the continuity of its existence. The city charter expressly provided against such a result, and required the city to execute and perform every obligation of any kind and nature incumbent on the borough, and authorized it to have and execute all the rights of the borough. The liability of the city for any damage caused by the change in grade was the same as that of the borough; the obligation to appraise the damage and assess the betterments was the same; the liability to an action in case of neglect to perform that duty was the same. Upon December 1, 1893, it became the duty of the city to cause an appraisal of damages and assessment of betterments in respect to the change of grade in Tremont street to be made, and to have this assessment made in the manner provided by law; and the only manner provided by law was that contained in the city charter. The charter of 1893 modified, without substantially altering, the mode of assessment prescribed by the charter of 1887. It is not claimed that such an alteration of the procedure was of itself invalid, and we think there is no ground for such a claim. It follows that the city of Ansonia had power to make an assessment.

Third. That it appears from the facts stated in the second defense that the assessment

made was not in accordance with the charter. The procedure prescribed in the charter requires (1) an estimate by the board of common council, which is a valid assessment, unless the person or persons affected thereby neglect or refuse to accept the estimate of the common council; (2) in case of such neglect or refusal, an appointment by the mayor of freeholders, who shall make the assessment in the manner prescribed, and report to the common council; (3) an acceptance and adoption of said report by the common council; (4) notice to the parties named in the assessment. Such assessment is final and conclusive, unless an appeal is taken to the superior court for New Haven county held on the first Tuesday of the month next following. The second defense alleges the due performance of all these requirements. The only deviation suggested is the appointment of a committee by the common council, which gave a hearing to the parties and made an estimate, which was, on September 11, 1895, adopted by the council. The appointment and action of the committee did not prevent the final action being that of the common council, in accordance with the charter. *Bartram v. City of Bridgeport*, 55 Conn. 122, 10 Atl. 470.

Fourth. That the present action was brought before the assessment was made. The plaintiff assumes that she had a fixed right of action against the borough the moment its servants entered upon the highway for the purpose of changing the grade. This is not the law. In *Platt v. Town of Milford*, 66 Conn. 329, 84 Atl. 82, we said that section 2703 "recognized an absolute liability for damages caused by such alteration on the part of the municipality ordering the same; so that, when such municipality failed to follow the mode prescribed for it by law in ascertaining such damages, the party injured may bring an ordinary action at law, based on such absolute liability, to recover his damages." This liability does not exist until actual damage has been sustained, and the right to an action is not complete until the municipality has failed to perform its duty in ascertaining the damages in the manner prescribed by law. The very statute which recognizes a legal liability prescribes how its amount shall be ascertained. It does not exclude the parties from compromising their differences by an agreement, express or implied; but it does not permit each person injured to enforce his separate claim by an action at law, until the municipality charged with the duty of ascertaining in the prescribed manner the amounts due shall have failed to perform that duty. Public interest calls for the settlement in one proceeding of claims arising from one public improvement. When this action was brought, the city of Ansonia had not failed to perform that duty (unless the delay had been such as to bar the statutory proceeding). On July 13th the city set in motion the proceedings for a legal

assessment. On September 11th the first step in the assessment was completed,—a step which might constitute a final assessment through the acceptance of the plaintiff. She refused to accept, and on September 28th the next step was taken, and on October 5th the amount of the final assessment was fixed. This action was brought on September 17th, after the assessment proceedings had commenced, and was made returnable October 7th, after the amount of the assessment had been determined. When this action was brought, the proceedings prescribed by law for the ascertainment of the damages and benefits was in process of execution. When the defendant appeared in court in obedience to the writ, the proceeding had been substantially completed. These facts are a complete defense to the material allegation in the sixth paragraph of the complaint that "no provision has been made by either the borough of Ansonia or the said city of Ansonia for the legal assessment of benefits and damages by reason of said change of grade on said Tremont street." It thus becomes unnecessary to consider the claim urged by the defendant that the plaintiff, by appearing before the assessment committee on October 5th, and presenting her claim, was estopped from pursuing an action which might have been maintained if she had not appeared.

Fifth. That it appears from the second defense that no assessment was made within a reasonable time after the change of grade was made. It was not incumbent on the municipality to make the assessment until after the change in grade had been completed, but it was its duty to make the assessment within a reasonable time thereafter. An unnecessary delay may justify a party injured in bringing his action at law. Such delay, whether long or short, is evidence of a failure to commence the proper proceedings, but is of no avail as such evidence when the proceedings have in fact been commenced before suit is brought, unless, indeed, a delay may be so unreasonably long as to be a bar to any legal assessment. Assuming, for the purposes of argument only, that a legal assessment may be so barred, we cannot say that it appears from the second defense that the delay was so wholly unreasonable. The law in relation to assessments for changes in grade since the enactment of section 2703 has not been well settled. We cannot say that it was altogether unreasonable for the borough, under the existing state of the law, to assume that the damages and benefits from a particular change were equal, and that no duty to make an assessment existed unless somebody claimed a damage; and in respect to this particular change of grade our reports show that the validity of the borough action in making the change was in controversy, and consequently the power of the city to make an assessment was in doubt until that question was settled. *Cook v. City of Ansonia*,

66 Conn. 413, 34 Atl. 183. The record before us shows that within a short time after the decision settling the duty of the city these proceedings for an assessment were commenced. The assessment of benefits and appraisal of damages, as alleged by the defendant and admitted by the demurrer, was a good defense to the action; and the demurrer was properly overruled. There is no error in the judgment of the court of common pleas. The other judges concurred.

(68 Conn. 126)

CHAMBERLAIN v. PLATT et al.
(Supreme Court of Errors of Connecticut.
June 25, 1896.)

OPINION EVIDENCE.

On an issue as to the condition of the light at defendant's station at the time plaintiff fell in alighting from a car, the opinion of a witness who had a general acquaintance with the station, and was there on the night in question, that it was not light enough to be reasonably safe, is not admissible unless such witness testifies that he observed the condition of the light on the night of the accident, and states what that condition was.

Appeal from superior court, Hartford county; Ralph Wheeler, Judge.

Action by James Chamberlain against Thomas C. Platt and others, receivers of the New York & New England Railroad Company, to recover damages for personal injuries. From a judgment for plaintiff, defendants appeal. Reversed.

Edward D. Robbins, for appellants. Charles H. Briscoe and George B. Fowler, for appellee.

ANDREWS, O. J. The defendants are the receivers of the New York & New England Railroad Company. The plaintiff was a passenger on a train of that railroad, and arrived at the station where his passage ended, in the evening. In getting down from the car to the platform of the station he fell, and received the injuries for which this action was brought. The defendants suffered a default, and there was a hearing in damages. The trial judge awarded substantial damages, and the defendants appealed.

It appears from the finding and from the judge's memorandum of decision that the case turned on the question whether or not the platform was sufficiently lighted to make it reasonably safe for the plaintiff to get down from the car. Various reasons of appeal were assigned, but only two are pursued in this court. The first one is that the judge applied to the defendants a higher degree of care in respect to lighting its platform at the station and the steps of its cars than the law requires. As to this assignment, we are not able to say that there is any error.

The other assignment is that the court erred in admitting the testimony of one H. O. Parsons. The ground of the error is that Parsons was a nonexpert witness, and was permitted to state his opinion as to whether there

was light enough at the place where the plaintiff got off the train to make it a safe place for a passenger to get down, and without giving the facts observed by himself, on which his opinion was based. The witness Parsons was called in behalf of the plaintiff, and testified that he was familiar with the station, and was there on the night when the plaintiff was hurt. He was then asked generally whether it was a dangerous place or not. This question being objected to, counsel changed to this: "I will limit it to the question as to whether it was so that night. Taking the light into consideration, the light that existed at the time and the shadows that were cast, if any there were, the situation of the platform, its width, its lower and upper platform, I ask you if it was a reasonably safe place for passengers to alight?" A. You mean on that particular night? Q. Yes; I mean on that particular night. A. I don't think it is light enough there to get off. I don't think it was that night, and I am sure it was not other nights. Q. Confine it to that night. A. No; I don't think it was. Q. You don't think it was a safe place? A. I don't think it was light enough. Q. Will you answer the question whether you would consider it a dangerous or a safe place for a person, taking into consideration all these circumstances that have been stated? * * * A. I don't think it is, unless one is pretty well acquainted with the ground." To all this evidence counsel for the defendants objected, but the judge allowed it to stand. It does not appear anywhere in the case that this witness stated the condition of things at the station as they existed that night, on which he based his opinion that it was not light enough to be reasonably safe. Indeed, it does not even appear that he observed the condition of things that night in respect to the light, so as to be able to form an opinion; but rather the contrary appears,—that he did not that night take much notice. The ordinary rule is that all witnesses who testify in court must speak only to such facts as are within their own knowledge, and may not state their opinions. But this rule is sometimes departed from. On certain subjects some classes of witnesses may give their opinions. When the subject of inquiry so far partakes of the nature of a science or trade as to require a previous course of study or experience in order to the attainment of a knowledge of it, then persons who have given such a course of study to the matter, or who have had such previous experience, may be allowed to state their opinions. And there is a class of cases in which the witness states the result of his observation or judgment as a fact rather than as an opinion, as in cases of personal identity, cases of handwriting, cases where the value of real or personal property is in question, or in such instances as were described in *Porter v. Manufacturing Co.*, 17 Conn. 249, and *Quinn v. Railroad Co.*, 56 Conn. 44, 12 Atl. 97. In these cases it must appear that the witness is acquainted with the subject concerning which he attempts to speak. So, too, where the subject-matter of the in-

quity is so indefinite and general as not to be susceptible of direct proof, or where the facts on which the witness bases his opinion are so numerous or evanescent that they cannot be held in the memory and detailed to the jury precisely as they appeared to the witness at the time. Numerous instances which fall within this latter class are mentioned in *Sytleman v. Beckwith*, 43 Conn. 9, 11. In this class of cases, of course, it is indispensable that the opinion be founded on facts within the personal observation of the witness; and it is important, and perhaps indispensable, also, that the witness should state such of the facts as will show presumptively that his opinion is well founded. *Sytleman v. Beckwith*, supra; *Bassett v. Shares*, 63 Conn. 39, 27 Atl. 421.

The precise question before the trial court was the condition of the light at the station at the time the plaintiff fell. A general acquaintance with that station would not at all enable a witness to speak on that question. A knowledge of the way that station was lighted on other evenings would not afford a witness any safe criterion by which to judge the light that night. If the moon was shining, if it was starlight and a clear sky, the platform might have been perfectly safe, so far as the light was concerned, even with no artificial light. And, on the other hand, if it was cloudy, or if stormy, then a strong artificial light might not remove the danger of the place. It could have been only by observing the condition of the light at the time the accident happened, and stating what it was, that would have made the opinion of the witness admissible; and, as Mr. Parsons did not do so, we think it was error to receive his opinion. There is error, and a new trial is granted. The other judges concurred.

(63 Conn. 94)

In re CONE et al.

(Supreme Court of Errors of Connecticut.
June 25, 1893.)

**DISTRIBUTION OF ESTATE—DUTY OF DISTRIBUTORS
—TITLE TO ASSETS.**

In proceedings for the distribution of an estate between heirs, neither the distributors, nor the court of probate, nor the superior court as an appellate court of probate has power to pass on the title to the property, or the validity of claims in the hands of the executor or administrator as assets of the estate, but their duty is to distribute such assets as found.

Appeal from superior court, Fairfield county; George W. Wheeler, Judge.

From a decree of the court of probate, made in the distribution of the estate of Orlando O. Nichols, deceased, Joseph H. Cone and others appealed to the superior court, where judgment was rendered against them, from which they appeal. Affirmed.

John C. Chamberlain and Elbert O. Hull, for appellants. David B. Lockwood and Carl Foster, for appellee.

TORRANCE, J. Orlando O. Nichols died in February, 1875, leaving a widow, and four chil-

dren, James, Charles, Sarah, and Mary. By his will his widow was given the life use of all his estate, both real and personal, and after her death the same was to be equally divided between the children. The widow died in May, 1890. After her death, distribution was made by distributors duly appointed by the court of probate, and the return thereof was accepted by said court on the 26th day of June, 1893. In August, 1878, the present appellants obtained a judgment against Charles, one of the four children of the deceased, and a third party, for about \$500, and during the same month filed a lien to secure said judgment, upon the undivided interest of Charles in the real estate belonging to his father's estate. On May 12, 1893, the appellants foreclosed said judgment lien, and the amount then found to be due to them was \$953.65. In the distribution the real estate was valued at \$7,900, and the personal estate at \$3,584.17. By the distribution the property was set to the children as follows:

To James:	Real estate	\$2,386 00
	Personal estate	485 04
		<hr/> \$2,871 04
To Charles:	Real estate	\$ 878 00
	Personal estate	1,993 04
		<hr/> \$2,871 04
To Sarah:	Real estate	\$2,351 00
	Personal estate	520 04
		<hr/> \$2,871 04
To Mary:	Real estate	\$2,285 00
	Personal estate	588 04
		<hr/> \$2,871 04

Included in the personal estate set to Charles was a demand note of \$750, made by him and his wife in November, 1872, to the order of his father, with interest thereon, computed at \$900; making in all \$1,650.

The present appellants appealed to the superior court from the order of the court of probate accepting said distribution. In their reasons of appeal, after alleging their title, which was admitted, they alleged in substance that Charles, in collusion with the other children of the deceased, procured the distribution to himself of only a small and comparatively worthless portion of the real estate; that, in lieu of his full share of the real estate, he consented to receive said note and interest thereon, "which said note had long prior to that time been outlawed and did not constitute any valid claim against said Charles H. Nichols, and was no part of the estate of Orlando O. Nichols;" and that all this was done to defraud the appellants and to deprive them of their just rights in said estate. The appellees denied these allegations. The superior court has found that there was no collusion and no fraud as alleged, and that the distribution was made in entire good faith; and this disposes of that part of the reasons of appeal.

With reference to the note in question, the

superior court finds as follows: "Said note, at the time of the distribution, was due and unpaid, and I find as a fact from the facts found in this finding that said note was a valid obligation, and a valid asset of the estate of Orlando O. Nichols. Nothing had ever been paid as interest or principal on said note. No claim had ever been made by said Charles H. Nichols that said note was outlawed, and he had always expected to pay the same, and upon the trial stated that he knew of no reason why the note was not a valid note, and that he had had the said \$750. The distributors were informed that said Charles H. Nichols had acknowledged the validity of said note, and believed said note was a valid obligation; and, so believing, and exercising their best judgment, distributed it to said Charles H. Nichols. Charles H. Nichols was not present at the distributors' meetings, and made no acknowledgment of the note to said distributors; and upon the trial no evidence was offered whether he ever promised to pay or acknowledged the validity of said note, prior to said distribution." On the foregoing facts the appellants, in the superior court, claimed that said note, with the interest thereon, formed no part of the estate of the deceased, and should not have been set to Charles as a portion of said estate, and that the real estate should have been divided equally between the children. The court overruled this claim, and affirmed the order of the court of probate. The errors assigned upon the present appeal are all based upon the refusal of the superior court to hold, upon the facts found, that said note at the date of the distribution was barred by the statute of limitations, and therefore formed no part of the estate.

In the brief for the appellants it is claimed that, even if the note in question was a good and valid asset of the estate, still the distribution in question ought not to be upheld as against the appellants. This claim is made under the statute in force when the settlement of the estate began,—but not in force at the time of the distribution,—which provided, as a general rule, that the male heirs should have their part in the real estate. Revision 1875, p. 373. This claim is not within the reasons of appeal, and it does not appear to have been made in the court below; and, more than all, if it was in fact made and overruled, the action of the court in so doing is not assigned for error. For these reasons it is unnecessary to consider that claim. It is apparent from the record that the matter which the appellants really asked the court of probate, and the superior court as an appellate court of probate, to try, was the title of the estate to the property represented by the promissory note in question. That note had been inventoried in 1875—when it was unquestionably a valid obligation—as one of the assets of the estate; and as such asset it was charged to the executor in his final account rendered to the court of probate, and accepted by it, before the distribution in question was ordered or made. No appeal was tak-

en, so far as the record shows, from the order accepting the final account. Clearly, then, so far as the inventory and final account and the action of the court of probate thereon were concerned, the note was a part of the estate of the deceased. The real grievance of which the appellants complain, and upon which all their assignments of error are based, is that the court below, although it found, as the appellants claim, facts that showed the note to be barred by the statute of limitations, still held it to be a valid asset of the estate. The appellants, in effect, pleaded the statute of limitations in bar of the note, and, in effect, denied that the estate had any legal title to a part of the inventoried property, and asked the superior court, sitting as a court of probate, to try that question of title. The argument of the appellants is that Charles might have done this, and they, standing in his shoes, may do the same. We are of opinion that neither Charles nor the appellants could do this in a proceeding of this kind, for the reason that neither the court of probate, nor the appellate court of probate in a proceeding of this kind, can try such a question. The distributors cannot try questions of title. Their duties are statutory and ministerial, and they distribute the estate as they find it in the hands of the executor or administrator after the allowance of the final account. Under the circumstances, they were bound to consider this note as a valid asset of the estate, and to distribute it. As the only objection to their report was that they did include it, and did distribute it as an asset of the estate,—that is, had performed their duty according to law,—the court of probate was bound to accept the distribution, if it was in other respects fair and equal, unless it had power to try the question as to the validity of the claim of the estate against Charles. But the court of probate had no such power. It is not empowered to try the question as to the validity of claims in favor of or against the estates of deceased persons; and the superior court, as an appellate court of probate, in a case of this kind, "can do no more than could have been done" by the court of probate. *Homer's Appeal*, 35 Conn. 113; *Hart v. Hart*, 44 Conn. 327; *Hewitt's Appeal*, 58 Conn. 24, 1 Atl. 815; *Dickinson's Appeal*, 54 Conn. 224, 6 Atl. 422; *Mallory's Appeal*, 62 Conn. 218, 25 Atl. 109; *Hall v. Pierson*, 63 Conn. 332, 28 Atl. 544. Whatever the powers of similar courts in other jurisdictions may be over matters of the kind here in question, the cases cited show that our courts of probate, in a proceeding like the present, cannot grant the relief prayed for by the appellants. In this view of the case, it is immaterial whether the court below did or did not err in overruling the claims of the appellants, and we deem it unnecessary to express any opinion upon that question. In either case, the judgment was just what it should have been, and must stand. There is no error in the judgment complained of. The other judges concurred.

(68 Conn. 31)

CROFUT v. LAYTON et al.

(Supreme Court of Errors of Connecticut.
June 25, 1896.)CONTRACTS—VALIDITY—CONSIDERATION—PER-
FORMANCE.

1. C. and K., partners, and an only son of each, interested in the business, in view of the formation of a corporation, made a contract, which provided, among other things, that each of said members of the two families now interested in the co-partnership of C. and K. agree not to sell their stock in said corporation during their lifetime, and "further agree by will to bequeath their holdings of stock to the other members of the same family then living; that is, said C. and his son are to bequeath by will their respective holdings to each other, and the said K. and his son are likewise to bequeath their respective holdings to each other, but the surviving members thus taking such stock as legatees may, if they so desire, sell any portion of the stock so bequeathed to them to any of the stockholders then living." *Held*, that the agreement to bequeath the stock, as between C. and his son, was supported by sufficient consideration.

2. Such contract was not performed by C., by a will giving to his wife, *inter alia*, \$500 a year, and giving to his son all the shares of capital stock of such corporation on the express condition only that he pay to C.'s wife an annuity of \$500.

3. The married woman's act of 1877 (page 211), giving the wife a share of the property owned by the husband at his decease, does not prevent him, during his lifetime, from disposing of it or incumbering it by lawful agreement.

Appeal from superior court, Fairfield county; George W. Wheeler, Judge.

Action by James K. Crofut against Jacob M. Layton, executor of the estate of Andrew J. Crofut, deceased, and others, to compel the transfer and conveyance by defendants to plaintiff of certain shares of stock of the Crofut & Knapp Company, owned by deceased at the time of his death. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

The complaint alleged, in substance, that deceased agreed in writing under seal to bequeath to plaintiff all the shares of stock held by him in the Crofut & Knapp Company; that he left a will, duly probated, of which defendant Layton is executor; that he owned 306 shares of stock in such company, which were the shares referred to in such contract; that he did not bequeath such shares to plaintiff; that they have no fixed market value, and no sales thereof had been made; that defendants Harriet R. Crofut and Grace Mathewson were deceased's only heirs at law and next of kin, and the only legatees under his will; and that plaintiff had no adequate remedy at law. Plaintiff set out a copy of the contract, and made it a part of the complaint. The answer admitted the execution of the contract, but denied that it was for a good and valuable consideration, so far as the agreement to bequeath was concerned, and denied that testator did not bequeath such stock as provided in the contract. It admitted the death of testator, and the probate of the will, and that defendant Layton was his executor; that deceased owned 306 shares of capital stock in such company; that it was the same stock referred to in

the contract; that it had no fixed market value, and no sales of it had been made; that the persons named were his only heirs and legatees; and that plaintiff had no adequate remedy at law. The trial court found that plaintiff was married in 1884; that he had little property at the date of the agreement, except an interest in the business of Crofut & Knapp; and that testator did not bequeath his stock to the plaintiff, unless the bequest contained in his will and codicil was a compliance with the terms of said agreement.

Charles E. Perkins, Morris W. Seymour, Howard H. Knapp, and John H. Light, for appellants. John H. Perry and Russell Frost, for appellee.

HAMERSLEY, J. The issues presented for trial by the pleadings involve two questions: Was there a valid consideration for the agreement made? Has the agreement been fulfilled?

1. Was there a good and valuable consideration for the alleged promise, aside from any consideration implied by its inclusion in an instrument under seal? The main facts from which such consideration may be implied are the statements contained in the instrument itself. That instrument is a peculiar one, and was made under the following circumstances: Andrew J. Crofut and James H. Knapp were partners, who had built up a manufacturing business under the firm name of Crofut & Knapp. Each had a son, who, for some time past, had been connected with the partnership; not as partner, nor as salaried employé, but receiving for his services certain interests in the profits of the firm. Each son had a valuable interest in the business of the firm. The firm had three employés, who were desirous of purchasing an interest in the business. The partners wished to change the partnership into a joint-stock corporation, with a capital stock of \$100,000, of which \$76,100 should be represented by the assets and good will of the firm, and \$23,900 by cash paid in. They also wished to perpetuate the firm name by the corporate name, and to secure the control of the corporation for as long a time as possible in the two Crofuts and the two Knapps and their survivors; to pay off the interest that Crofut, Jr., and Knapp, Jr., owned in the business of the firm by the issue to them of stock fairly representing the value of that interest, and to secure their permanent assistance in the control of the corporation; to satisfy the three employés by issuing stock to them at a fair price, to secure during life their services to the corporation, and to prevent their ever disposing of the stock to any except the other stockholders; to provide in aid of the scheme, and for the respective interests of the Knapps and Crofuts, that each father and son should agree between themselves that the survivor should eventually have all the stock apportioned upon the organization of the company to both. These purposes were embodied and carried out in

the sealed instrument executed by the Crofuts, the two Knapps, and their employes. The provisions are somewhat complicated, but the net results are as follows: The Crofut & Knapp Company is organized with a capital stock of \$100,000, divided into 1,000 shares of \$100 each. This capital consists of the assets and good will of the firm of Crofut & Knapp, and \$23,900 in cash; 306 shares are apportioned to A. J. Crofut in full satisfaction of his partnership interest; 105 shares to J. K. Crofut in payment of his interest in the business of the firm; 306 shares to J. H. Knapp, which is an overpayment of his partnership interest made good by a cash payment to the corporation of \$10,000; 105 shares to P. N. Knapp (the son), which is an overpayment of his interest in the firm business made good by a cash payment to the corporation of \$300; 178 shares to the three employes for \$13,600 paid in cash, being at the rate of \$76 and \$77 per share. Each of the stockholders is bound during his life not to sell his stock to any one. Each of the three employes covenants that upon his death his stock shall be sold at its market value to the other stockholders. The special agreement between the two Knapps and the two Crofuts is contained in the following provision: "Each of said members of the two families now interested in the co-partnership of Crofut & Knapp, agree not to sell their stock in said new corporation during their lifetime, and further agree by will to bequeath their holdings of stock to the other members of the same family then living,—that is, the said A. J. Crofut and J. K. Crofut are to bequeath by will their respective holdings to each other; and the said James H. Knapp and P. N. Knapp are likewise to bequeath their respective holdings to each other; but the surviving members thus taking such stock as legatees may, if they so desire, sell any portion of the stock so bequeathed to them to any of the stockholders then living." Here is an agreement on the part of A. J. Crofut, plain, direct, void of doubt, and any suggestion of ambiguity, to hold during his life the 306 shares of stock apportioned to him, and to bequeath them by will to his son; and a similar agreement on the part of J. K. Crofut. It is claimed that the evident purpose of the whole arrangement was to continue the control of the stock in the Crofut and Knapp families, and that such apparent purpose alters the plain meaning of the language used, so that the agreement is not to hold and bequeath a specific number of shares, but to so act in respect to the shares that the two families shall remain in substantial control of the stock. In other words, that by force of the general purpose the specific covenant not to sell the stock during life means merely an obligation not to sell so much of the stock as to interfere with the substantial control of the two families; and the specific promise to bequeath 306 shares means merely a promise to bequeath such portion of the shares on such terms and conditions as, if accepted by the legatee, will continue such substantial control.

This claim is wholly unfounded. Undoubtedly one purpose inducing this transaction was to keep the substantial control of the stock in those members of the two families connected with the old firm; but to give complete effect to that purpose it was deemed necessary to make a specific and binding agreement by which, whether father or son should first die, the survivor should have and hold his stock, even if unable to buy it, or any portion of it. Such specific agreement cannot be held nugatory or uncertain, because one purpose which induced it might possibly be accomplished through a different agreement.

These facts show that the agreement was upon a good and valuable consideration. Andrew J. Crofut (whether his motives are wholly or partially selfish or disinterested is immaterial) wishes his son to sell out his interest in the firm business for 105 shares of stock in the new corporation, to hold that stock during life, and to bequeath it by will to his father; and offers, in consideration of his making such purchase of stock and assuming these onerous obligations, to himself purchase and hold during life 306 shares of the same stock, and to bequeath it by will to his son. Such considerations are amply sufficient to support the promises. The adequacy of the consideration is equally clear. So long as the consideration is adequate, it is unnecessary to show whether the agreement was more to the advantage of the father or son. Indeed, from the nature of the transaction, it is impossible to affirm on which side the advantage lies. If the son's stock is less than that of the father's, it is nevertheless his all. He is deprived during life from using his property in any other business, he is deprived from leaving it to the natural objects of his bounty, and bound to bequeath it to his father, who would not be his heir or next of kin; while the father's stock is but a portion of his property,—how large or small a portion does not appear,—and the obligation to bequeath it to his son is a promise to give it to one of those who, without a will, would inherit his whole property, and does not prevent him from equalizing the division of his estate between his children, by depriving the son by will of any interest in the rest of his property. It certainly cannot be assumed that the advantage is on the side of the son. There is a good and valuable consideration for the father's promise, and there is nothing in the record to prove that the contract is not fair, equitable, reasonable, certain, and mutual.

2. Has A. J. Crofut's promise to bequeath been fulfilled? Mr. Crofut's will was made prior to the change of the partnership to a corporation. He gave to his wife, Harriet R. Crofut, certain policies of insurance, amounting to nearly \$20,000, some other personal property, and some land. He also gave her \$500 a year, to be paid her in equal quarterly payments, for the period of 10 years after his death, if she lived so long.

out of his share in the co-partnership of Crofut & Knapp; to his daughter Grace certain personal property; to his son, the plaintiff, his whole interest in the co-partnership, "in the hope that said co-partnership, in the building up of which my life has been chiefly spent, may continue after my decease the same as before"; and also some other personal property. The gift of interest in the partnership was upon the express condition that his son should pay his unsecured debts and the expenses of settling his estate, and also that he should pay the wife the annuity of \$500 a year. He gave the residue of his estate, real and personal, in equal shares to his wife and two children. The codicil, which was executed some five months after the agreement in question and two months before the testator's death, referred to the gift in his will of his share in the partnership to his son, and the change of the co-partnership to a corporation, and gave to his son, "in order to insure the fulfillment of my said purpose as expressed in said will," all the shares of capital stock of the Crofut & Knapp Company which he might own at his death, "upon the express condition only that he shall pay to my wife, Harriet R. Crofut," an annuity of \$500 in half-yearly payments of \$250, the first payment to be made in full in the month of January following his decease, and so half-yearly for 10 years if she live so long. No allusion is made in the codicil to the agreement in question. The defendants claim that the language used in the will and codicil show that A. J. Crofut did not intend, in executing the agreement, to bind himself to hold the 306 shares during his life, and bequeath them to his son, and therefore the minds of the parties did not meet, and there was no agreement. It is difficult to regard this claim as seriously made. It certainly has no foundation. The codicil was not a fulfillment of A. J. Crofut's agreement, which plainly calls for an absolute and unconditional bequest. The requirement of a payment of \$250 each half year is the same in legal effect as if that sum was multiplied by 100. The condition violates both the obligation and purpose of the agreement. It is immaterial whether Mr. Crofut, in framing this codicil, intended merely to express a wish in such terms as might induce his son to acquiesce, or acted in ignorance or willful violation of his contract. However this may be, he has not bequeathed the shares as agreed.

We do not think that the defendants are in a position, under the pleadings, to raise the other questions suggested in the reasons of appeal. They did not demur to the complaint. They admitted every fact alleged except the two facts which their answer put in issue, namely, the sufficiency of the consideration for the agreement, and the failure to fulfill the agreement. These issues being properly decided against them, they cannot now raise any questions of law which might

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have been raised by a demurrer which was not filed, or by a special defense which was not alleged. It may be urged, however, that any of the facts specially set forth in the judgment as the facts on which it is founded, claimed to indicate the invalidity of the agreement, raise questions of law on the record proper to be considered on this appeal. If this is true, the questions so raised are of no consequence. The fact that the plaintiff was married in 1884, and that his wife, living at the execution of the agreement, would be entitled if she survived him, to a portion of his estate under the law of 1877, is clearly immaterial. The statute gives the wife a share of the property owned by the husband at his decease. It does not prevent him during his life from disposing of his property, or incumbering it by lawful agreements. It was also immaterial whether or not the plaintiff had bequeathed the shares apportioned to him, to his father. The fulfillment of the mutual agreement between father and son, from its very nature could not be complete during their joint lives, and a breach by either could not be affirmed until his death.

The facts specially found plainly support a decree for specific performance. It is difficult to see how any other remedy could be adequate in the case of breach of a promise to transfer shares of stock which has no fixed market value. There is no error in the judgment of the superior court. The other judges concurred.

(59 N. J. L. 307)

NESTER v. STATE.

(Supreme Court of New Jersey. Nov. 9, 1896.)

CRIMINAL LAW—REASONABLE DOUBT.

If there be degrees of reasonable doubt, the definition of such degrees is a matter of no moment in the administration of criminal justice; for if, after carefully weighing the evidence, the jury finds its judgment unconvinced of guilt, a state of reasonable doubt exists, the benefit of which must be given to the accused, without reference to its degree. It was erroneous, therefore, to charge the jury in a criminal case that "any reasonable doubt must be given to the defendant, but it must be a very reasonable one"; for such a direction permitted, if it did not require, the jury to refuse to the accused the benefit of such a doubt unless it was of the highest, or at least of a very high, degree.

(Syllabus by the Court.)

Error to court of quarter sessions, Atlantic county; Thompson, Judge.

Dell Nester was convicted of a crime, and brings error. Reversed.

Argued June term, 1896, before the CHIEF JUSTICE, and GARRISON, LIPPINCOTT, and MAGIE, JJ.

William Edwards, for plaintiff in error. O. L. Cole and S. E. Perry, for the State.

MAGIE, J. Among the many assignments of error in this case, there is one which, in my judgment, points to an error so palpable that no consideration need be given to the

others. It appears by the bills of exceptions that the only direction given to the jury by the trial judge upon the subject of reasonable doubt was that contained in this sentence: "Any reasonable doubt must be given to the defendant, but it must be a very reasonable doubt." Under our system of criminal jurisprudence, nothing is better settled than that the presumption of innocence shields from conviction any person accused of crime, unless the prosecutor, in behalf of the state, has provided evidence which convinces the judgment of a jury of his guilt beyond a reasonable doubt. If it be true that reasonable doubt can be said to exist in different degrees, it is obvious that the classification and definition of such degrees can be of no practical moment in determining the question which the jury must solve; for if, after carefully weighing all the evidence, the judgment of the jury remains unconvinced of his crime, there is a state of reasonable doubt, the benefit of which must be given to the accused, without reference to its class or degree. But the instruction complained of in this case permitted, and perhaps required, the jury to refuse to the accused the benefit of such a doubt unless it was of the highest, or at least of a very high, degree. This was erroneous, and plainly tended to the injury of the accused. For this reason his conviction was wrong, and the judgment of conviction must be reversed.

(59 N. J. L. 350)

STATE (LEARY, Prosecutor) v. MAYOR, ETC., OF CITY OF ORANGE.

(Supreme Court of New Jersey. Nov. 5, 1896.)

MUNICIPAL CORPORATIONS — TRANSFER OF POLICE OFFICERS.

The act of February 23, 1886 (P. L. 1886, p. 48), prohibits the transferring of a police officer from the position of sergeant to the inferior position of patrolman for any other cause than incapacity, misconduct, nonresidence, or disobedience of the rules and regulations of the police force of which he is a member.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Daniel Leary, against the mayor and common council of the city of Orange, to review a resolution. Resolution set aside.

Argued June term, 1896, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Samuel Kalisch, for prosecutor. E. M. Colle, for defendant.

GUMMERE, J. This writ brings up a resolution of the common council of the city of Orange, passed March 2, 1896, in the following language: "Resolved, by the common council of the city of Orange that on and after the 1st day of April, A. D. 1896, Daniel Leary be, and he hereby is, relieved from performing the duties of desk or night sergeant on the police force of said city of Orange, and that the duties to be performed by him on and after the 1st day of April,

1896, shall be those of a patrolman on the police force of said city of Orange." The question involved in the case is the right of the city of Orange to remove the prosecutor from his position of desk or night sergeant, and assign him to duty as a patrolman. The prosecutor was appointed a sergeant of police by resolution of the common council passed May 3, 1886, and from the time of that appointment he performed the duties of desk sergeant up to the time of the passage of the resolution now under review. His salary as desk sergeant was \$75 a month. The compensation of patrolman was \$70 a month. He was removed from his position as desk sergeant and assigned to duty as a patrolman without notice and without a hearing. The position of patrolman was not only lower in character, but was different in the kind of work to be performed, and carried with it a smaller compensation than that of desk sergeant. The act of February 23, 1886 (Supp. Revision, p. 515), forbids the removal of any person from office or employment in the police department of any city, or from the police force of any city, for political reasons, or for any other cause than incapacity, misconduct, nonresidence, or disobedience of just rules and regulations established, or which may be established, for the police force or police department of such city. There is no suggestion in the case that the prosecutor was incapable of performing the duties of desk sergeant, or that he had been guilty of any misconduct, or of disobedience of any rules or regulations of the police department, or that he was not a resident of the city. Resolutions similar in their effect to that now being considered have been held by this court to be in contravention of the act of 1886, or of statutes of like import, and for that reason have been declared void. *Michaels v. Jersey City*, 49 N. J. Law, 154, 6 Atl. 881. *Douglass v. Jersey City*, 53 N. J. Law, 118, 20 Atl. 831. If the question were an open one in this court, we should have some difficulty in reaching the conclusion that it was intended, by the act of 1886, to so restrict municipalities in their control over their police departments as to prevent them from shifting persons employed therein from one position to another, as the public good might require, without regard to the character of the duty to be performed or the compensation to be received. It would seem to be a matter of necessity that such a power should be lodged in the governing body of a municipality in order that the efficiency of its police department might be properly maintained. But, so far as this court is concerned, the effect to be given to the act of 1886 in cases like that now before us is settled by the decisions above referred to, and we have nothing to do but follow those decisions. The result, therefore, is that the resolution brought up for review must be set aside, and judgment entered for the prosecutor, with costs.

(59 N. J. L. 271)

JOHNSON v. STATE.

(Supreme Court of New Jersey. Nov. 5, 1896.)

OYER AND TERMINER—ABOLISHMENT—JURY—IM-PANELING—REVIEW—FILING OF JURY LIST—HOMICIDE—EVIDENCE—FOOTPRINTS.

1. The act of June 13, 1895, that was designed to abolish the pleas, oyer, and sessions, being unconstitutional in its entirety, did not abolish any of them.

2. The decision of the trial judge, sitting as the statutory trier of challenges to the jury, is conclusive with respect to the facts involved in the inquiry.

3. The statutory regulation that the sheriff shall file a list of jurors summoned by him is directory, and not mandatory.

4. Impressions of footprints made in a box of sand with the boot worn by the prisoner may be exhibited by the state to witnesses who had seen certain footprints near the body of the murdered person, for the purpose of comparison.

5. The merits of the case examined by virtue of the act of 1894.

(Syllabus by the Court.)

Error to court of oyer and terminer.

Jacob S. Johnson was convicted of murder, and brings error. Affirmed.

Argued June term, 1896, before BEASLEY, C. J., and DIXON and GARRISON, JJ.

Steele & Meehan, for plaintiff in error. Nelson Y. Dungan and Jas. J. Bergen, for the State.

BEASLEY, C. J. This trial took place before the oyer and terminer of the county of Somerset, and resulted in a conviction of the defendant of the crime of murder in the first degree. The case is now before this court through the medium of a writ of error allowed by the chancellor. The first exception to these proceedings urged in the brief of counsel is that the case has been tried before a tribunal that did not exist. This contention is founded on the provision of the statute enacted June 13, 1895, and which is entitled "An act to abolish the inferior court of common pleas, courts of oyer and terminer and general jail delivery, and courts of general quarter sessions of the peace, and to establish in their place a county court in each of the counties of this state, and to provide for and define the jurisdiction, powers and duties of such county courts." The first section of this act abolishes the courts thus designated, and erects upon their ruins another court, which it invests with the jurisdictions of the tribunals thus superseded. In the case of *Schalk v. Wrightson* (N. J. Sup.) 32 Atl. 820, the question was considered in this court whether the jurisdiction inherent of old in the court of common pleas could be transferred to the new court thus created; and the conclusion was that, so far as related to the transference of such jurisdiction, the act was unconstitutional. Applying the usual legal test to such a juncture, it would seem to follow as a matter of course that, if the act be invalid in the particular mentioned, it is so in its entirety. The effect of the decision referred to is to strip the newly-designed tribunal of almost all of its power over civil causes, and certainly, in view of such a

mutilation, it is impossible to predicate that the institution thus diminished is in accordance with the legislative intent. The adjustments of this law are so interdependent that part of it cannot be retained and carried into effect in the absence of any one of its substantial provisions. The inquiry is manifestly controlled by the well-known rule of construction applicable to cases of this class, which is thus stated in a decision of this court in these words, viz.: "If all the provisions of the act are so interwoven as to be incapable of distinct separation, or of such a character that it cannot be said that the legislature intended that the valid parts shall be enforced if the other parts fail, the entire law will be held to be invalid." This exception is overruled.

The second objection consists of a challenge to the array of the jury on the grounds that the sheriff, in making up the jury list, designedly excluded persons of color therefrom, and failed to file in the oyer a copy of the list of jurors summoned by him. With regard to the first of these contentions, the refutation is threefold: First, that it was not shown that there was a single colored man in the county of Somerset who was entitled to serve as a juror; second, that there was no evidence that any person of color was designedly excluded from the jury in this case by the sheriff, or even that such person was omitted, except in the same way that white citizens not selected were omitted; and, third, that the entire matter, being one of fact, was tried by the court by virtue of the statute. Such a decision is not subject to review, as was settled in the case of *Patterson v. State*, 48 N. J. Law, 382, 4 Atl. 449. We find no legal basis for the exception. Another exception is founded on the fact that the sheriff did not file in the court a list of jurors summoned by him in accordance with the requirement of the statute. The statutory provision referred to is plainly directory, as was held by the trial judge. The failure of the officer to comply with the act in this respect has not, and could not, injuriously affect the defendant. That such statutory regulations are directory only was decided by this court in the case of *Gardner v. State*, 55 N. J. Law, 17, 23 Atl. 30. The objection is overruled.

The next fault alleged to have occurred at the trial relates to the admission of a certain particular of testimony. The question was presented in this wise: Certain witnesses testified to having seen certain footprints of a peculiar character in the dirt and soil near to the body of the woman who had been murdered, and, for the purpose of showing that such footprints had been made by this defendant, the state produced the boots that were shown to have been worn by the prisoner on the night in question. Certain impressions in sand, made in the presence of the jury, by the boots just mentioned, were exhibited to the jury against objection taken by the counsel of the defendant. Witnesses were then interrogated as to the similarity between these fictitious impressions and those seen by them near the body. The court

has concluded that this testimony was unobjectionable. It was plainly competent for the witnesses who had seen the footprints to describe them to the jury,—their dimensions, their shape, their peculiarities. For the purpose of such description, a photograph or a drawing could have been referred to. In the present instance the witnesses made a comparison of the real footprints as seen by them with the artificial prints made by the boots, which latter were undoubtedly genuine. The question was one of identity, and in such cases all that a witness can do is to express his opinion; and such expression of opinion, in this class of cases, is plainly admissible. The subject has been under judicial consideration on various occasions, and the rule as stated has been very generally applied. Thus, in *Com. v. Dorsey*, 103 Mass. 412, on a trial for murder, the testimony of persons not experts was held admissible to the effect that hairs on a club appeared to the naked eye to be human hairs, and resembled the hair of the deceased. Many decisions can be found to the same effect. This objection also cannot prevail.

The last contention is, in the language of the brief of counsel: "That legal guilt is not established, and that the circumstances proved are not inconsistent with any other rational conclusion than the guilt of the defendant." With respect to this point we think it sufficient to say that by force of the act of 1894 all the evidence in the case has been carefully examined and considered by each member of the court, and our unanimous conclusion is that the verdict could not reasonably be other than it is. The judgment therefore must be affirmed.

(59 N. J. L. 367)

STATE (DOWD, Prosecutor) v. JONES.
(Supreme Court of New Jersey. Nov. 5, 1896.)

CERTIORARI—ALLOWANCE OF SECOND WRIT.

Where a certiorari to review a judgment of the court of common pleas on an appeal from the district court has been dismissed for want of prosecution, a second writ should not be allowed to the prosecutor. His remedy is to move to set aside the order of dismissal, and this will be done only where it is made to appear that the order was irregularly or improvidently made.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Dennis Dowd, against David M. Jones. On motion to quash the writ. Allowed.

Argued June term, 1896, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Wm. M. Dougherty, for the motion: George J. McEwan, opposed.

GUMMERE, J. David M. Jones, the defendant here, recovered a judgment in the district court in an action brought by him against Dowd, the prosecutor; and that judgment was afterwards affirmed by the court of common pleas of Hudson county, on appeal. The prosecutor thereupon obtained a certiorari removing into this court for review the judgment of the court of common pleas. The

writ was duly returned into this court, and subsequently, at the February term, 1896, was dismissed for want of prosecution. After his writ was dismissed, and at the same term, the prosecutor applied to set aside the order of dismissal as having been improperly made. This application was denied, and the record, which had been brought up by the writ, was remitted to the court of common pleas. The prosecutor then made application to one of the justices of this court, at chambers, for a second writ, which was allowed, and we are now asked by the defendant to quash this second writ on the ground that it was improvidently allowed. In cases where the province of the writ of certiorari is to bring into this court for review the judgment of the court of common pleas on an appeal from the district court, it is, in its effect, a writ of error, and is used in the place of that writ only because the statute (Supp. Revision, p. 253, § 164) so directs. *Hinchman v. Cook*, 20 N. J. Law, 271; *Mowery v. Camden*, 49 N. J. Law, 106, 109, 6 Atl. 438; *Potter v. Fritz*, 54 N. J. Law, 436, 24 Atl. 553. The same practice, therefore, should prevail in the allowance of a second certiorari, where it is used as a statutory substitute for a writ of error, as prevails in the suing out of a second writ of error. The question of the right of a litigant to sue out a second writ of error after he had suffered his original writ to be dismissed for want of prosecution was considered and determined by the court of errors in *Welsh v. Brown*, 42 N. J. Law, 323; and it was there held that the plaintiff in error, under such circumstances, would not be permitted to sue out a second writ, but that if his first writ was irregularly or improvidently dismissed his remedy was by motion to set aside the order of dismissal. In view of this decision of our highest court, it is quite clear that the prosecutor in this case was not entitled to a second certiorari after his first writ was dismissed for want of prosecution. His remedy, if he considered himself injured by the order dismissing his original writ, was to apply to vacate that order, and this remedy he availed himself of. The motion to quash is allowed, with costs.

(59 N. J. L. 378)

STATE (MYERS, Prosecutor) v. CAMPBELL, Tax Collector.

(Supreme Court of New Jersey. Nov. 5, 1896.)

FLEDER SECURING SURETY—RIGHTS OF CREDITOR.

1. Securities belonging to a principal debtor, and pledged by him to indemnify his surety, will inure in equity to the benefit of his creditor.

2. The maker of a note mortgaged his real estate to one who indorsed the note, for his accommodation, to indemnify the indorser against the indorsement, and afterwards the note was discounted in bank. *Held*, that the debt in the hands of the bank was secured by the mortgage, and that the maker of the note was entitled to have the amount of the debt deducted from the valuation of the real estate for the purpose of taxation.

(Syllabus by the Court.)

Certiorari by the state on the prosecution of Wallace Myers against William Campbell, collector of taxes in the town of Newton, to review an assessment of taxes. Assessment set aside.

Argued June term, 1896, before LUDLOW and DIXON, JJ.

Charles M. Myers, for prosecutor. Louis Van Blarcom, for defendant.

DIXON, J. The prosecutor, residing in Newark, and being the owner of real estate in Newton, was taxed in the latter place for the real estate on a valuation of \$3,800. He duly claimed a deduction for the amount of two promissory notes, aggregating \$4,700, drawn by him to the order of John C. Howell, indorsed for his accommodation by Howell, and discounted for him by the Merchants' National Bank in Newton, of which Howell was cashier. At the time of the levy and claim the notes were held by the bank, but not yet matured. The claim for deduction was based upon the fact that the prosecutor had given to Howell two mortgages on the real estate in Newton to indemnify him against his indorsements. The claim was disallowed, and its validity is now the subject for consideration. The sole objection made against the claim is that the debts for which deduction was asked were not secured by the mortgages, and this raises the whole question for us to decide. Viewed merely as mortgages to Howell, the mortgages did not secure the debts, for the debts were not owing to Howell. They were owing to the bank, which was the creditor, Howell being only surety for the debtor, the prosecutor. In order to hold that the mortgages secured the debts, it must appear that they operated to secure the creditor, the bank. The question, then, is, will securities belonging to the principal debtor, and pledged by him to indemnify his surety, inure to the benefit of his creditor? The authorities answer this question in the affirmative. *Eastman v. Foster*, 8 Metc. (Mass.) 19; *Rice v. Dewey*, 13 Gray, 47; *Russell v. Clark's Ex'rs*, 7 Cranch, 69; *Evertson v. Booth*, 19 Johns. 486; *Warner's Appeal* (Pa. Sup.) 7 Atl. 216; *Brandt*, Sur. § 282. Although the bank's claim to the benefit of these mortgages would become perfect and absolute only after it had fixed the liability of the surety by due demand and notice on maturity of the notes, yet it is evident that before maturity the debts in its hands were rendered more secure by these mortgages, just as they were by the indorsements. Nor was the real security impaired by the fact that it was available in equity only. In practice, all mortgages of real estate are merely equitable securities. Our conclusion is that the debts were substantially secured by the mortgages, and that, under our tax act (Gen. St. p. 3275, §§ 113, 198), the deduction claimed by the debtor should have been allowed, and the debts

should have been assessed as property of the bank. Indeed, the debts probably were so assessed, for, on the assessor's theory, they were not secured by mortgage. The assessment against the prosecutor is set aside, with costs.

(59 N. J. L. 278)

WOOLEY v. GENEVA WAGON CO.

(Supreme Court of New Jersey. Nov. 5, 1896.)

CONDITIONAL SALES—FAILURE TO RECORD—NON-RESIDENT VENDOR.

1. The act of 1895 requiring the recording of instruments attesting the conditional sales of chattels does not invalidate such sales, in favor of creditors, if the instrument be unrecorded. In such event it is avoided only in favor of subsequent purchasers and mortgagees.

2. When the vendor does not reside in this state, and the articles sold are not in it, at the time of the sale, the statute has no application to the transaction.

(Syllabus by the Court.)

Error to court of common pleas, Monmouth county; Conover, Judge.

Action by the Geneva Wagon Company against Mathias Wooley. Judgment for plaintiff. Defendant brings error. Affirmed.

On August 14, 1894, a writ of attachment issued out of the Monmouth pleas, in favor of Nicholas J. Demarest, against Morris Kraus and Benjamin Kraus, nonresident debtors, which was placed in the hands of the plaintiff in error, who was then sheriff of Monmouth county; and by virtue thereof the sheriff attached two wagons which were then in the possession of the defendants in attachment, Kraus Bros. Shortly after this levy the Geneva Wagon Company, the defendant in error, demanded the wagons thus attached, claiming them as its own property on the ground that, by virtue of a written agreement, the Kraus Bros. were not to have title to the property until the purchase money should have been paid.

Argued June term, 1896, before BEASLEY, O. J., and MAGIE, GARRISON, and LIPPINCOTT, JJ.

J. E. Howell, for plaintiff in error. A. Walling, Jr., for defendant in error.

BEASLEY, O. J. (after stating the facts). It is not disputed in this case that the defendant in error is the owner of the property in controversy, the only contention being that as it made a conditional sale of such property to the defendants in attachment, and the instrument of sale was not recorded, thereby the things attached were subjected to this levy by force of the statute of this state. The ground taken is that the plaintiff in attachment, as a creditor of the conditional vendees, had the right to seize the property in question. The act that is vouched for this doctrine is entitled "An act requiring contracts for the conditional sale of personal property to be recorded," and contains in its first section the following regulation, viz.: "That in every con-

tract for the conditional sale of goods and chattels hereafter made, which shall be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things contracted to be sold, all conditions and reservations which provide that the ownership of such goods and chattels is to remain in the person so contracting to sell the same, or other person than the one so contracting to buy them, until such goods and chattels are paid for, or until the occurring of any future event or contingency, shall be absolutely void as against subsequent purchasers and mortgagees in good faith, and as to them the sale shall be deemed absolute, unless such contract for sale with such conditions and reservations therein, be recorded as directed in the succeeding section of this act." Laws 1889, p. 421. It is obvious that the legislative purpose, as here expressed, is not left liable to the suggestion of a doubt; for it declares most perspicuously that the instruments to which it relates shall be void as against two classes of persons,—that is, "subsequent purchasers and mortgagees in good faith." In the presence of this definite and accurate designation of the persons in whose behalf it is to operate, it would be plainly absurd to contend that, so far as this section is concerned, there is an iota of uncertainty. This appears to be admitted in the brief of counsel, but it is contended that the provision is to be modified inferentially by the regulation contained in the last section of this law, which is in these terms, viz.: "That every contract of sale hereafter recorded pursuant to the provisions of this act shall be valid against the creditors of the person contracting to buy and against subsequent purchasers and mortgagees, from the times of the recording thereof," etc. The argument urged in this respect is that the declaration herein contained, that if a conditional sale shall be recorded it shall be valid against creditors, implies that if it be unrecorded it shall be invalid against such creditors. It is true that this provision adds nothing to the right of the owner against creditors, because, in the absence of such provision, his ownership is paramount to the claims of creditors of his conditional vendee. These legislative expressions, therefore, are a recognition of his common right in the articles sold, but they do not impose any limitation upon such right. Such a construction would operate in amplification of the language of the first clause of the act above recited, but, as that language is unambiguous, it is, upon the plainest principles, unalterable by implication. These two sections are not out of harmony, for they can both be effectuated according to their terms. Under such circumstances, the function of the court is to interpret, and not to construe, these statutory terms. It is also to be borne in mind that as this act restricts the right of property, by regulating its use, the legal rule is that when such legislation is to be construed the construction must be strict.

Besides the foregoing considerations, there is also another, which, although it appears to have escaped the attention of counsel, is entirely conclusive of the question raised. The facts stated upon the record plainly show that the sale here in question is not within the operation of the statute requiring the recording of instruments that evidence the conditional sale of chattels. It here appears that the property sold was at the time of such contract in the state of New York, and that the vendee was then a resident of that state, and that the property was subsequently, without the knowledge of the vendor, brought by the purchaser into New Jersey. By reference to the act of 1895, which is the pertinent one, it will become manifest that the instrument now in question could not by any possibility have been recorded in conformity to its requisition. Touching this particular the statutory language is as follows, viz.: "That the instruments mentioned in the preceding section shall be recorded in the office of the county wherein the party contracting to buy, if a resident of this state, shall reside at the time of the execution thereof, and if not a resident of this state then in the clerk's office of the county where the property so conditionally bought shall be at the time of the execution of the instrument," etc. As has been shown, in the present case the vendee was not a resident of this state, nor were the articles sold within this state, at the time of the execution of the contract of sale, and consequently the statute has no connection with the transaction. The sale was good at common law both in New York and in this state, and, as there is nothing in our statutes that regulates its status so as to expose it to the attack of creditors under certain conditions, the title of the vendor must prevail. The attachment had nothing upon which it could be legally levied, and consequently the judgment must be affirmed.

(59 N. J. L. 54)

PENNSYLVANIA R. CO. v. HULSE.
(Supreme Court of New Jersey. June 4, 1896.)

EASEMENTS—ADVERSE POSSESSION.

Where the plaintiff's use of a way was at its inception permissive, its mere continuance for the statutory period will not ripen into a hostile right.

(Syllabus by the Court.)

Action by Rebecca Hulse against the Pennsylvania Railroad Company, in which there was a judgment for plaintiff. On rule to show cause why a new trial should not be granted. Rule made absolute.

Argued February term, 1896, before the CHIEF JUSTICE, and DIXON, MAGIE, and GARRISON, JJ.

Alan H. Strong, for defendant. Allen H. Gangewer, for plaintiff.

GARRISON, J. This is an action for damages for obstructing a private way. The easement to which claim is made is over the right

of way of the old Camden & Amboy Railroad, —not merely crossing it, but running parallel to and upon each side of the tracks now occupied by the Pennsylvania Railroad Company. The plaintiff put her case upon a grant from the railroad, and was permitted to prove an oral license or consent given to her predecessor in title at the time the railroad was built in 1831, and enjoyed without change ever since, until the defendant's obstruction in 1891. Notwithstanding the permissive origin and continuance of the plaintiff's use of the way, the case went to the jury as one where a hostile user had ripened into an adverse right. For this, if for no other reason, this case must be retried. The case appears also to touch a question of general importance, which, however, is not now here in such form that it can be dealt with. It is this: The right of way of a railroad company is a public highway in the possession of a corporation to enable it to perform a public duty. Whether such an agent may grant a dominant easement in such lands is the question to which reference has been made. The case now before us is disposed of, however, upon the ground before mentioned, and upon the further ground that the amount of damages given by the jury, to wit, \$5,000, indicates an entire misapprehension of the nature of the issue before them. The way was obstructed in November, 1891. Suit was begun in March, 1892.

For blocking the way to this farm during these four winter months, a sum of money was awarded about equal to the entire value of the farm as shown by the testimony.

There must be a retrial of the case.

(59 N. J. L. 9)

KRAEMER v. KRAEMER DRUG CO.

(Supreme Court of New Jersey. June 5, 1896.)

REPLEVIN—DEFECTS IN WRIT—WAIVER—DEMUR-
RER.

1. In replevin, after the defendant has appeared and demurred to the declaration it is too late for him to set aside the writ.

2. If the writ be quashed after demurrer and joinder filed, such judgment will be reversed on error brought.

(Syllabus by the Court.)

Error to circuit court, Essex county; Child, Judge.

Replevin by Charles F. Kraemer against the Kraemer Drug Company. From a judgment quashing the writ, plaintiff brings error. Reversed.

Argued February term, 1896, before BEASLEY, C. J., and MAGIE, DIXON, and GARRISON, JJ.

Samuel Kallisch, for plaintiff in error.
George W. Byram, for defendant in error.

BEASLEY, C. J. This was an action of replevin. The writ commanded the sheriff to cause to be replevied and delivered unto the plaintiff "the good will, fixtures, furniture, and stock in trade in the drug business now carried on in the name of the Kraemer Drug Com-

pany in the house on the southwest corner of Clinton & Mulberry streets, in the city of Newark, in the condition in which it is when you take possession," etc. This writ having been properly executed and returned, and the defendant thereby summoned, a declaration was thereupon filed, to which the defendant demurred. The issue thus tendered was accepted by the plaintiff, who put in a joinder. This being the situation, the defendant moved the circuit court in which the action was pending to quash the writ on the ground that the chattels to be replevied were not described in the process with sufficient particularity. That motion prevailed, and the judgment thereupon entered quashing the writ is the subject of this writ of error.

The court is of opinion that this judgment cannot be sustained. The force of the writ was spent by the appearance of the defendant and the putting in of the demurrer by him. The issue thus raised still remains undisposed of, and is in no wise affected by the quashing of the writ. If the demurrer should be noticed for argument, the question of law presented by it would have to be decided quite independently of the fact that the initial process in the action had been declared to be invalid. The question standing on the record and calling for judgment is whether a legal cause of action is exhibited in the declaration, and that question has manifestly nothing whatever to do with the decision that the writ is insufficient. It would be wholly impracticable to finally dispose of the case upon the record, so long as an issue formally introduced by the parties should remain undecided. The proceeding is entirely anomalous. Let the judgment be reversed.

In order to avoid misconception it may not be amiss to say that the writ in this case, in point of descriptive force, seems to be justified by judicial opinion. 20 Am. & Eng. Enc. Law, p. 1067, tit. "Replevin."

NEW YORK BAY CEMETERY CO. v. BUCKMASTER.

(Court of Chancery of New Jersey. Oct. 27, 1896.)

On petition for rehearing. Modified.

For original opinion, see 33 Atl. 819.

Babbitt & Lawrence, for petitioner. Talcott & Meyer, for defendant.

PITNEY, V. C. I have re-read the bill and combined answer and cross bill, the opinion filed and the decree made thereon, and have, to that extent, reconsidered the case as originally made.

1. I find I fell into error in stating that Clara Buckmaster was not a party to this cause. I was probably led into it by the fact stated and admitted, but not formally proven at the hearing, that 909 lots of the whole number of which the elder Buckmaster died seised had been set off to her in a sort of partition, and were the

subject of the action in *Cemetery Co. v. Buckmaster*, 49 N. J. Law, 449, 9 Atl. 591. It was said that there had been a partition between the heirs by proceedings in this court, which, however, were not put in evidence. I naturally supposed that the partition could only have gone so far as to set off Clara Buckmaster's share to her in severalty, leaving the other shares still held in common; for, if there had been a general partition, and each held certain lots in severalty, how could they join in an action of ejectment? And if Clara had her share set off to her, what interest had she in the remainder? The actual status of the case in this respect should, if necessary and proper, be ascertained, so that whatever settlement took place between the company and Clara should have its proper influence, and no more, in the accounting.

2. I also fell into an error in not including in the amount with which the complainant should be charged the amount received by it from single graves sold upon lots owned by the defendants.

3. I think also the master should not only ascertain the number of lots owned by the defendants, but their identity and location by such description by numbers or otherwise as may be practicable.

4. I find no complaint in the combined answer and cross bill to the effect that officers of the complainant made discriminations in their sales against defendants' lots. If such be the case, and it is shown to the court in a proper manner, the court may deal with it, and give the defendants relief in that behalf, if it shall seem equitable so to do, either by special directions to the complainant, or by permitting the defendants to employ an agent to make sales, giving him access to the grounds, etc., or in such other manner, as the case may require.

5. The principal aim of the motion is, in substance, to dispense with the accounting heretofore ordered, and to adopt a compromise arrangement between the parties, such as was adopted in the settlement with regard to the Clara Buckmaster lots. This the court has no power to do. It is said that the proceedings thus far before the master have shown that it will be impracticable to arrive at any just result. I cannot so believe. I do believe the master is competent to properly apportion the expense. The problem may be difficult, but it is not insoluble, and I cannot presume in advance that the master will make any mistake, or allow any extravagant expenditure. If he does, this court is competent to correct it.

I have already expressed orally my view as to several of the special matters noticed in the brief, and I am ready to give further directions upon any matters which may arise during the accounting, upon it being brought before me in such a shape as to enable me to deal with them. I am unable to change my views as to the merits of the case expressed in the opinion. The accounting ordered may be onerous to the defendants, and it may not, at this time, bear them any fruits; but it must be taken sooner

or later, and, if the defendants abandon it now, they, in substance, abandon their rights in the lots in question. In fine, if I am wrong in my original conclusions, the remedy is by appeal.

(59 N. J. L. 380)

**STATE (PEOPLE'S BANK & TRUST CO.
Prosecutor) v. TUFTS.**

(Supreme Court of New Jersey. Nov. 5, 1896.)
**BANKS—SET-OFF AGAINST DEPOSIT—COLLECTIONS
—ASSIGNMENT OF DEBT.**

1. The relation between a bank and its general depositors is that of debtor and creditor, and the bank may set off against a general deposit a debt due to it from the depositor.

2. A. sent to a bank for collection a writing which appeared to be a note made by one of the bank's depositors, and indorsed by A. to the bank for collection, payable to the order of A. Without trying to collect the note, the bank remitted to A. the amount of the note, and charged the same to the depositor's account. The depositor really owed to A. the amount of the note. *Held*, that the transaction operated as an assignment by A. to the bank of the debt mentioned in the note, and that the bank could not recover from A. the amount paid him, even though the note had been signed by the depositor's clerk without authority.

(Syllabus by the Court.)

Certiorari to court of common pleas, Passaic county; Hopper, Inglis, and Van Hovenberg, Judges.

Action by James W. Tufts against the People's Bank & Trust Company. Judgment for plaintiff. Defendant brings certiorari. Affirmed.

Argued June term, 1896, before LUDLOW and DIXON, JJ.

E. C. Moore, for plaintiff. Mr. Luce, for defendant.

DIXON, J. This certiorari brings up a judgment of the Passaic common pleas, in rendering which the court, sitting without a jury, disallowed a set-off claimed by the defendant. This action of the court is now the subject of complaint. The set-off arose in this way: The plaintiff had sent to the defendant, an ordinary bank of deposit in Passaic, a note of which, with its indorsements, the following is a copy: "\$67.50. Rutherford, N. J., Feby. 13, 1894. For value received, April 1, 1894, after date, I promise to pay to the order of James W. Tufts, sixty-seven dollars and 50 cents. The consideration of this and other notes is certain soda apparatus and appurtenances described in contract between me and the said James W. Tufts bearing date January 8, 1894, and which I have received of said James W. Tufts. Nevertheless it is understood and agreed by and between me and the said James W. Tufts that the title to the above-mentioned property does not pass to me, and that until all said notes are paid the title to the aforesaid property shall remain in the said James W. Tufts, who shall have the right, in case of nonpayment at maturity of

either of said notes, without process of law to enter and retake immediate possession of the said property, wherever it may be, and remove the same. C. W. Knappe, per MacNeill. Payable at the — Bank. Due April 1, 1894." Indorsed: "Pay People's Bank and Trust Company, for collection on my account. James W. Tufts, Boston, Mass." Attached to above note: "James W. Tufts, Boston: No protest. If not paid, ascertain reasons. Take this off before presenting." Without making any attempt to collect the note from Knappe, and without any solicitation on the part of the plaintiff, the defendant on April 4, 1894, sent to the plaintiff, in Boston, a draft on a New York bank for the amount of the note, and charged the same to the general account of Knappe, who was a depositor in the defendant bank. Some time afterwards Knappe, on being informed of the charge, by the balancing of his bank book, stated to the defendant that the signature to the instrument had not been authorized and would not be sanctioned by him, and he demanded that the charge be annulled. This had not been done at the time of the trial, nor had Knappe sued the defendant for the amount of the charge. The plaintiff was first notified of the situation several months after the payment. The defendant now seeks to recover from the plaintiff the amount paid.

In arguing the cause before us, counsel for the defendant treats the writing upon the back of the note as a commercial indorsement of negotiable paper. But evidently it is not of that character, for it neither transferred the title of the note, nor guaranteed payment. It was a mere delegation of authority to the defendant to collect the amount of the note for the plaintiff. The claim of the defendant against the plaintiff cannot be tested by the peculiar rules of the law merchant, but must depend on the general principles of the common law. Under these principles, the most for which the defendant can contend, as a basis for its claim that the plaintiff shall return the money which it voluntarily paid him, is that it acted upon a false representation which it had a right to believe and act upon. Hence the question arises, was it shown in the court below that such a false representation had been made? Now, it seems to us that the only propositions on which the defendant acted are these: That Knappe owed the sum stated in the note, and that, if the defendant paid that debt to the plaintiff, it could offset the same against Knappe's deposit. On these points we find in the case no room for controversy. All the evidence produced at the trial tended to establish the proposition that, when the note was sent to the defendant, Knappe owed the amount thereof to the plaintiff for the very consideration mentioned in the instrument; the only dispute there being as to whether MacNeill had authority to sign a note therefor. When the plaintiff ac-

cepted from the defendant payment of that debt, it passed, as a chose in action, to the defendant, as legal owner, whether the instrument was a valid note or not. Gen. St. p. 2591 (section 840 of the practice act); *Gerli v. Manufacturing Co.*, 57 N. J. Law, 432, 81 Atl. 401. The instrument identified the debt, and the indorsement became operative as an assignment thereof. In that situation, the defendant, being Knappe's debtor for the amount on general deposit (*Pott v. Clegg*, 16 Mees. & W. 321; *National Bank v. Insurance Co.*, 104 U. S. 541), and being his creditor for the amount mentioned in the writing, was legally entitled to set off the one debt against the other, and could be made to pay to Knappe the balance only (Gen. St. p. 3109, "Set-Off"; *Bank v. Hughes*, 17 Wend. 94; *Falkland v. Bank*, 84 N. Y. 145; *Bank v. Jones*, 119 Ill. 407, 9 N. E. 885). This right the defendant exercised, and having thus applied the debt to the satisfaction, pro tanto, of what it owed Knappe, it cannot recover the same from the plaintiff. The judgment below was right, and is affirmed, with costs.

(50 N. J. L. 412)

STATE (CAVANAGH, Prosecutor) v.
BOARD OF POLICE COM'RS OF
CITY OF HOBOKEN.

(Supreme Court of New Jersey, Nov. 4, 1896.)

MUNICIPAL CORPORATIONS — BOARD OF POLICE COMMISSIONERS — POWER TO REMOVE MEMBER OF POLICE FORCE — CERTIORARI — WEIGHT OF EVIDENCE.

1. The board of police commissioners of the city of Hoboken has power to try a member of the police force on a charge of misconduct duly made against him, and to dismiss him from the force if, on a fair trial, the charge be sustained.

2. Where there is any evidence to support a judgment against defendant, the supreme court, on a writ of certiorari, will not weigh the evidence on which the board acted.

John J. Cavanagh was dismissed from the police force of the city of Hoboken by the board of police commissioners, and prosecutes a writ of certiorari to review the action of the board. Judgment affirmed.

Argued February term, 1896, before LIPPINCOTT and LUDLOW, JJ.

William S. Stuhr, for prosecutor. James F. Minturn, for defendant.

LUDLOW, J. The prosecutor was a patrolman on the police force of Hoboken, and December 9, 1896, was dismissed from the service by the board of police commissioners in said city for misconduct. This certiorari brings up for review the proceedings and action of said board removing him from said office. It appears from the return to the said writ and the evidence therewith that Mr. Cavanagh was charged with misconduct,—conduct unfit for a policeman,—forbidden by the rules and regulations established by the police department of

said city, and justifying his dismissal. The said charge was made in writing, signed by the person making it, and duly and properly filed; and after reasonable notice to him (as to which notice no objection was or is made on the part of the prosecutor) and after his plea of not guilty thereof, the said charge against him was publicly examined into by said board of police commissioners of the city of Hoboken,—the appropriate municipal board,—in his presence and in the presence of his counsel, in such manner of examination as prescribed by the properly established rules and regulations governing the same; and from the evidence before us it is shown that he was given a fair trial upon said charge, and every reasonable opportunity to make his defense thereto, such as he had, or chose to make. Witnesses were produced and examined and cross-examined by both parties. At the close of the examination the said board found he was guilty of the said charge against him, and thereupon dismissed him from the police force of said city forthwith.

It is the province of this court to see that rights given to such officers under our statutes are secured to them, and it does not appear that in this case there has been any disregard of such rights of the prosecutor. In 48 N. J. Law, 434, 5 Atl. 451, in his opinion in *Devault v. Mayor, etc.*, in this court, Justice Dixon held: "The technical rules that have been judicially adopted with regard to inferior criminal prosecutions are not to be applied to these investigations, for, while it is proper that proceedings to deprive persons of common rights for alleged crimes should be confined by somewhat strict limits, the removal of incompetent or ill-behaved officials from their exceptional positions of authority and responsibility should be easy and prompt, and no forms should be requisite which are not in themselves substantial safeguards of justice." The defendant board had the power to try the prosecutor as he was tried on the charge which was duly made against him, and, if the charge was sustained on a fair trial, it had the power to dismiss him from the police force. The court will not weigh the evidence on which the board acted. It is enough that there was evidence on which the board found the prosecutor guilty of the charge, and that such evidence, whether weak or strong, formed a rational basis for its judgment against him. *Devault v. Mayor, etc.*, 48 N. J. Law, 433, 5 Atl. 451; *Ayers v. Newark*, 49 N. J. Law, 170, 6 Atl. 859; *Ackerly v. Jersey City*, 54 N. J. Law, 310, 23 Atl. 668. The reasons which are assigned by the prosecutor for reversal of the action of defendant board in dismissing him from the police force of Hoboken are based on the insufficiency of the proof of his guilt, and on technical points relating to the conduct of his trial; none of which reasons, in our judgment, have sufficient foundation in law or in fact to warrant our interference with the action of said board. The dismissal of Mr. Cavanagh from his said office by said defendant board was legal, and is affirmed, with costs.

(59 N. J. L. 110)

STATE (SLOCUM, Prosecutor) v. OCEAN GROVE CAMP-MEETING ASS'N.

(Supreme Court of New Jersey. June 24, 1896.)

MUNICIPAL CORPORATIONS—ORDINANCES—POWER TO PRESCRIBE PENALTY—DELEGATION.

Where, by statute, a municipality is empowered to pass ordinances and to fix and prescribe penalties for their violation, the power to fix such penalties must be exercised by the municipality itself, and cannot be delegated by it to the justice of the peace before whom a prosecution is had for an infraction of the provisions of one of such ordinances.

(Syllabus by the Court.)

Certiorari to court of common pleas, Monmouth county; Conover, Judge.

Certiorari by the state, on the prosecution of David Slocum, against the Ocean Grove Camp-Meeting Association, to review a conviction of a violation of an ordinance of defendant. Reversed.

Argued February term, 1896, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

S. A. Patterson, for prosecutor. J. E. Lansing, for defendant.

GUMMERE, J. The judgment of the common pleas court brought up by the writ in this case was recovered against the prosecutor for the violation of an ordinance of the defendant association forbidding the vending from a wagon of fruits and vegetables within the limits of the association territory, unless the person so vending should first take out a license for that purpose. The suit was originally brought before a justice of the peace, and, from the judgment rendered against him in the justice's court the prosecutor appealed to the court of common pleas, which affirmed the judgment of the court below. We are now asked to set aside the latter judgment as illegal and void. In 1894 the legislature passed an act conferring certain governmental powers upon boards of trustees of camp-meeting associations. P. L. 1894, p. 142. By the eighth section of the act power was granted to such boards to make and enforce ordinances regulating the granting of licenses, and fixing the fees to be paid therefor, and by the same section said boards were authorized to prescribe penalties for the violation of such ordinances. The ninth section of the act conferred upon such associations the right to prosecute any person before a justice of the peace for failure to observe the provisions of any such ordinance, and to recover judgment for the penalty prescribed therein. Under this statutory authority the board of trustees of the Ocean Grove Association passed an ordinance regulating the granting of licenses, and fixed the fees to be paid by hucksters and persons vending fruit and vegetables in wagons at \$10. They further ordained that no person should use the streets within the limits of their territory for any purpose for which a license was required, without first obtaining such license: and that any one doing so should, upon conviction thereof before a jus-

tice of the peace, be punished for each offense by a fine of not less than \$10 nor more than \$25. The validity of the judgment under review is challenged by the prosecutor on the ground that the portion of the ordinance which imposes punishment for infractions of the provisions referred to is not within the grant of power conferred by the act of 1894, in that it fails to prescribe a precise penalty for such infractions, but leaves it to the justice of the peace by whom the case is heard to fix such penalty, within certain limits. This contention on the part of the prosecutor seems to me to be well founded. The statute authorizes the board of trustees "to fix and prescribe penalties" for the violation of its ordinances, and this power cannot be delegated by the board to the justice of the peace before whom the prosecution is had. In order to make effectual a prosecution for failure to observe the provision of an ordinance, the board of trustees must themselves fix the exact amount of the penalty to be imposed. This was the view taken by this court in the case of *State v. Zeigler*, 32 N. J. Law, 262, and again in *Melick v. Inhabitants of Washington*, 47 N. J. Law, 254. The judgment of the court of common pleas should be reversed.

(50 N. J. L. 140)

STATE (LOUCHEIM, et al., Prosecutors) v. HEMSLEY et al.

(Supreme Court of New Jersey. June 15, 1896.)

CONDEMNATION PROCEEDINGS—COMMISSIONERS—QUALIFICATIONS.

A special authority delegated by statute to particular persons to take away a man's property and estate against his will must be strictly pursued, and must appear to have been so pursued on the face of the proceedings in which the authority is exercised.

(Syllabus by the Court.)

Certiorari by the state on the prosecution of Walter O. Loucheim and others against Frederick Hemsley and others, city hall commissioners in Atlantic City, to review condemnation proceedings. Proceedings set aside.

Argued June term, 1896, before LUDLOW and DIXON, JJ.

Lindley M. Garrison, for prosecutors. Allen B. Endicott, for defendants.

DIXON, J. The certiorari brings up, among other things, the appointment of commissioners for the construction of a city hall in Atlantic City, under the provisions of the act approved April 15, 1887 (P. L. p. 168) and its supplement. The commissioners having taken steps to acquire the land of the prosecutors by condemnation, the latter forthwith sued out this writ, and now assign as one of the reasons for setting aside the proceedings of the commissioners that in the record of their appointment it does not appear that they were members of different political parties, and residents of Atlantic City, as the statute requires them to be. The commissioners were appointed by the may-

or in a written communication to the city council, and the concurrence of the council is evidenced by votes entered upon its minutes. Neither in the communication nor in the minutes is any reference made to the statutory qualifications of the commissioners. This omission is fatal. A special authority delegated by statute to particular persons to take away a man's property and estate against his will must be strictly pursued, and must appear to have been so pursued on the face of the proceedings in which the authority is exercised. *Van Wickie v. Railroad Co.*, 14 N. J. Law, 162, 166; *State v. Mayor, etc.*, 26 N. J. Law, 444; *Wilkinson v. Inhabitants of Trenton*, 36 N. J. Law, 499; *Griffin v. Wanser*, 57 N. J. Law, 535, 537, 31 Atl. 222. Our conclusion on this point renders it unnecessary to consider the other reasons alleged for reversal. The appointment of the commissioners and their proceedings must be set aside, with costs.

(59 N. J. L. 151)

STATE (ELLIS et al., Prosecutors) v. BOARD OF EXCISE COM'RS OF CITY OF BURLINGTON et al.

(Supreme Court of New Jersey. June 15, 1896.)

INTOXICATING LIQUORS—LICENSE—INNS AND TAVERNS.

The act of June 1, 1886, amending "An act to establish an excise department in cities of this state," passed April 8, 1884, requires the board of excise commissioners to pass an appropriate ordinance or by-law for the licensing of inns and taverns before it can actually license such a house. Quære: Is that act of June 1, 1886, repealed pro tanto by the supplement of February 24, 1892?

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Theodore S. Ellis, Jr., and others, against the board of excise commissioners of the city of Burlington and others, to review the grant of a liquor license. Proceedings set aside.

Argued June term, 1896, before LUDLOW and DIXON, JJ.

Mr. Walker, for prosecutors.

DIXON, J. This writ brings up the proceedings of the board of excise commissioners of the city of Burlington in attempting to grant to George Wells a license to keep an inn and tavern in said city. The board consists of five members, and seems to have been organized under the act to amend an act entitled "An act to establish an excise department in cities of this state," passed June 1, 1886 (P. L. 1886, p. 397). The powers of such a board must be exercised in accordance with that statute, one of the provisions of which is "that such board of excise commissioners shall have the sole power within such city to make, establish, amend, or repeal ordinances and by-laws to license, regulate or prohibit inns and taverns." This plainly indicates that the adoption of an appropriate ordinance or by-law is a necessary prelude to the granting of licenses for such houses. This is the

primary power, expressly conferred upon the board. The power to license, in pursuance of the ordinance or by-law, is only secondary, existing in the board by mere implication from other features of the statute. *Winants v. Mayor, etc.*, 44 N. J. Law, 114. The case shows that the board has passed no ordinance or by-law for the licensing of inns and taverns, and therefore the proceedings under review are illegal, and must be set aside. The question whether this amendatory act of June 1, 1886, was not repealed as to all cities except those of the first class by the supplement of February 24, 1892 (P. L. 1892, p. 29), which seems to be a substitute for it, was not raised on the argument, and is not decided. The proceedings to license Thomas S. Wells and Hays B. Falkenburg are, for the same reason, set aside. The prosecutors are entitled to costs.

(59 N. J. L. 323)

CAMDEN, G. & W. R. CO. v. GUARANTORS OF PENNSYLVANIA.

(Supreme Court of New Jersey. Nov. 5, 1896.)

UNINCORPORATED ASSOCIATIONS — DISSOLUTION — SERVICE OF PROCESS ON — WHO ARE OFFICERS.

1. An unincorporated association cannot voluntarily go out of existence while its contracts or obligations are outstanding.

2. Where the articles of association of an unincorporated company provide that the government of the association shall be vested in a board of governors, a member of such board is an "officer" of the company on whom process against the company may legally be served.

Suit by the Camden, Gloucester & Woodbury Railroad Company against the Guarantors of Pennsylvania. Rule to show cause why the summons and service should not be set aside. Rule discharged.

Argued November term, 1896, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Thomas E. French, for the rule. D. J. Pancoast, opposed.

DEPUE, J. This suit was brought by the plaintiff upon a contract to indemnify it against legal liability for injury to or death of persons arising by reason of casualty occurring in, upon, or about, or by reason of, the plaintiff's street railroad. The contract is dated July 11, 1893, and was for the period of one year. It was made in the name "The Guarantors of Pennsylvania." This body is an unincorporated association composed of 100 individuals, who are engaged in this branch of business under the name above mentioned. By the articles of association the government of the association is vested in a board of government consisting of 25 members to be elected annually. The summons was served by the sheriff of Camden county on Maurice A. Rogers, a member of the association, and also one of the board of governors. This application is made to set aside the summons, service, and return, on two grounds: (1) That the association was not in existence when this suit was begun; and (2) that service on Mr. Rogers was not legal

service. It does not appear that the association was dissolved by any legal proceedings. All that appears is that in March, 1894, the association quit business. The policy issued in this case, although in form purporting to be in a corporate name, is in legal effect the contract of the individual members of the association, doing business in the assumed name. An association of this kind, like an ordinary partnership, cannot go out of existence while its contracts and obligations are outstanding. Nor does it appear that Mr. Rogers had ceased to be one of the board of governors when process was served upon him. When he was last elected a governor, does not appear. His name is on the plaintiff's policy as a governor, and all else that appears is that he was one of the board of governors at the time the association went out of business, in March, 1894. Inasmuch as the elections were held in January in each year, the fair inference from the testimony is that Mr. Rogers, who was a member of the board in March, continued in office as a member of the board until the succeeding December, when the writ was served. Service of process in suits against associations of this kind is regulated by statute, P. L. 1890, p. 353. The statute enacts "that any unincorporated company, stock company or association consisting of two or more persons united together for business purposes and having a recognized name, may be sued by such recognized name * * * in any action affecting the common property or the joint rights and liabilities of such company or association, and all processes or other papers in such suit shall be served on the president or on any officer for the time being of such company or association, or on the agent or manager of such company or association, or upon any person being in charge of the business of such company or association." This company is an unincorporated company, within the meaning of this statute. The articles of association, under the title of "Officers," provide that the government of the association shall be vested in a board of governors. The articles also provide for monthly stated meetings of the governors, at which a full report of the preceding month's business should be presented, which, having been countersigned by order of the board of governors, shall be printed and furnished to each member; and the board of governors is required to designate the depository or depositories in which the funds of the association shall be placed. The articles provide for the election of chairman and two vice chairmen, but those officials have no duties, except to be ex officio members of all boards. They also provide for a board of five managing directors, to be elected by the board of governors from its members. Under these articles of association, the affairs of this company were under the management and control of the board of governors. A member of that board is an officer of the association, within the meaning of the statute. We think that service was properly made upon Mr. Rogers. The rule to show cause should be discharged with costs.

(59 N. J. L. 408)

STATE (BEASLEY, Prosecutor) v. COMMON COUNCIL OF TOWN OF BELVIDERE.

(Supreme Court of New Jersey. Nov. 4, 1896.)

MUNICIPAL CORPORATIONS—DEDICATION OF STREET—ACCEPTANCE—NONUSER—VACATION.

1. In 1825 an owner laid out a tract of land in numbered lots, and delineated various streets across it, among which was K. street, 66 feet wide. A map was duly recorded, and thereafter adopted in the description of lots conveyed by the original owner and subsequent grantors. K. street was not at once formally accepted by the town authorities, but was used as a street by owners of lots on the map, and generally considered a street of the town. In 1895 an ordinance was passed, which provided that K. street "be opened and extended 66 feet in width to conform to the map and profile of the extension of said street according to the survey thereof," and "that all lands and real estate embraced within the boundaries of said K. street be taken and appropriated for the purpose of a public street," as dedicated. *Held*, that the titles to lots abutting on K. street were taken subject to the dedication, and hence the ordinance did not take private lands for public use, but simply accepted the dedication as an easement.

2. Within the meaning of Acts March 24, 1859, and Supp. March 26, 1874 (Gen. St. p. 2821, § 78; *Id.* p. 2846, § 200), which vacate streets once regularly laid out as public streets, and not opened, worked, or used for more than 20 years before, K. street did not become a "laid-out" street till the ordinance of 1895 accepted the dedication of 1825.

Certiorari by Carrie A. Beasley to review an ordinance relating to the opening of a street in the town of Belvidere, and all proceedings concerning the same. Ordinance and proceedings affirmed.

Argued February term, 1896, before LIP-PINCOTT and LUDLOW, JJ.

Henry S. Harris, for prosecutor. J. H. Wilson and Shipman & Taylor, for defendants.

LUDLOW, J. This certiorari went to the defendant, and brings here for review an ordinance relating to the opening of Knowlton street, in the town of Belvidere, passed September 2, 1895, and all proceedings concerning the same. The prosecutrix is owner of some land in Belvidere, on Knowlton street, which the evidence shows was dedicated to public use as a street in 1825, by Mr. Garret D. Wall, who, then the owner of a considerable tract of land in Belvidere, N. J., filed or recorded in the clerk's office of Warren county, June 7, 1825, a map thereof, entitling it "Plan of the Town of Belvidere belonging to and laid out by Garret D. Wall, Esq., June, A. D. 1825," the survey for which was made by George Hiles. By this map Mr. Wall laid out his land in numbered lots or parcels, and set out and delineated various streets across and through it, among which was the street, Knowlton street, which was shown on the map to be 66 feet wide, and extending from Oxford street south to Independence street (an old public road). This map was thereafter recognized

and adopted in the description of lots in various and numerous conveyances thereof made by Mr. Wall in his lifetime, and by others, his grantees and successors, in title; and about 1856 Israel Harris became purchaser and owner of several lots, portions of said land, by conveyance which recognized and adopted in the description of the premises therein conveyed, and by reference therein, the lot numbers and streets, particularly Knowlton street, laid down on said map, for the monuments and boundaries thereof. Mr. Harris subsequently died, and the prosecutrix and others, his heirs, took his title. As to the fact of the dedication of Knowlton street to public use as a street, there is no doubt under the evidence; and its course, width, and lines are distinctly shown on said map. Other maps of said original Wall tract have been made in later years, but in every instance such new maps and conveyances of lots thereon have recognized and adopted Knowlton street, and other streets by names and lines, as delineated on and dedicated by the original Wall map. The prosecutrix, being owner and having title according to said map and its dedications, has no right to question the dedication of Knowlton street as a street. Neither has she any right to interfere with the opening of that street according to its course, boundaries, and location as delineated on that map.

The ordinance objected to is the first action of the public authorities of Belvidere in the way of formal or official acceptance of said Knowlton street as a public street of said town since its dedication; and while it has been, since its dedication, used as a street by owners of land on the map, and generally considered a street of the town, it has never been an opened and laid-out street and highway according to law until the action of the common council of Belvidere promulgated by its ordinance of September 2, 1895. So far as the prosecutrix is concerned, according to the evidence, she has no ground for any objection to the action of common council in its acceptance of said dedication of Knowlton street, and its opening of such dedicated street as it is delineated on the said Wall map. Her first reason assigned, or objection, as well as the second and third reasons, are based—First, upon her claim of title to the fee of part of the land forming the said street, and that, therefore, there should have been proceedings of condemnation by the town, and that she should have been awarded damages for her said land taken; and, second, that the common council, under the town's charter, had no authority to take lands except for straightening lines of streets; and, third, that said ordinance takes and appropriates her lands for public use, without compensation. There is no sufficient foundation for any of these reasons. Her title is subject to the said dedication. The town is merely ac-

cepting a dedicated street, an easement,—not condemning for a street. The ordinance does not take or appropriate any lands; it merely adopts as a public care and charge as a public street what was long ago dedicated to public use, whenever the public should assume such care and charge. Nothing has been or is taken for which the prosecutrix can have any claim or right for compensation. The language of the ordinance is as follows: (1) "That Knowlton street in said town be opened to Independence street" [which is as laid down on said map]. (2) "That said Knowlton street be opened and extended sixty six feet in width to conform to the map and profile of the extension of said street according to the survey thereof made by George Hiles and now of record in Warren county clerk's office in Book of Deeds, volume 1, page 276," etc. (said Wall map). (3) "That all lands and real estate embraced within the boundaries of said Knowlton street be taken and appropriated for the purpose of a public street and the sidewalks thereof, for which the same is dedicated." In substance, it is an acceptance of said dedication. The fourth reason for reversal recognizes the once existence of the proposed dedicated street, but claims that under the Acts of March 24, 1859, and supplement of March 26, 1874 (Gen. St. p. 2821, § 78; *Id.* p. 2846, § 200), the said street was vacated as a street. The vacating acts referred to have relation to streets once regularly laid out as public streets, and not opened, worked, or used for more than 20 years before, etc. But Knowlton street was never regularly laid out or opened as a public highway or street, and did not become a "laid-out" street, until the ordinance of September 2, 1896, accepting the dedication of 1825, as aforesaid, and said vacating acts do not and did not affect it. The fifth and last reason objects because the street is not necessary for public purposes. With this we have nothing to do. The public authorities of Belvidere determine that according to their judgment. The proceedings of Belvidere, and the ordinance brought here by this certiorari, are affirmed, and the certiorari is dismissed, with costs.

(59 N. J. L. 352)

STATE (PRUDENTIAL INS. CO. OF AMERICA, Prosecutor) v. TAYLOR.

(Supreme Court of New Jersey. Nov. 5, 1896.)

DISTRICT COURT ACT—APPEALS—BOND—ADJOURNMENTS—JUDGMENT—TIME FOR RENDITION.

1. When the losing party in a suit in the district court gives notice of an appeal to the court of common pleas, and files his appeal bond, and the district court thereupon sends to the appellate court a transcript of the proceedings, an appeal is taken within the meaning of the district court act, notwithstanding the fact that the appeal bond is not filed within the time prescribed by the statute, and that the appellate court, for that reason, refuses to entertain the appeal, and remits the transcript to the trial court.

2. The provisions of the district court act

which regulate the matter of adjournments only relate to the trial of the cause, and to such other proceedings therein as require the attendance of the parties in order that their interests may be conserved. They do not preclude the court, at the conclusion of the trial, from reserving its decision for a reasonable time, without fixing a day for the rendition of its judgment.

(Syllabus by the Court.)

Certiorari to Camden district court.

Certiorari by the state, on the prosecution of the Prudential Insurance Company of America, against Joseph R. Taylor, administrator, to review a judgment. Affirmed.

Argued June term, 1896, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

E. A. Armstrong, for prosecutor. Alexander Gray, for defendant.

GUMMERE, J. The district court of the city of Camden rendered judgment against the prosecutor in an action brought against it by the defendant, and we are now asked to set that judgment aside on the ground that the court was without jurisdiction to render it. It appears by the return made by the district court to the writ of certiorari that three days after the judgment was rendered the prosecutor filed with the court a notice of appeal to the court of common pleas, and five days later filed an appeal bond, as required by the statute. Both the notice of appeal and the appeal bond are set out in full in the return to the writ, and ordinarily the taking of these steps would constitute an appeal. *Thompson v. Wright*, 14 N. J. Law, 38; *Rodenbough v. Rosebury*, 24 N. J. Law, 491. It is, however, stated in the brief of counsel for the prosecutor that, "after judgment was rendered, notice of appeal was given, but no appeal was ever legally made; and, while the clerk of the district court improperly sent the papers to the court of common pleas, they were returned by that court to the district court as having been improperly sent; and it is agreed between counsel that such is the state of facts." Counsel for the defendant, too, in his brief, states that "no appeal was legally taken to the common pleas, and that, had there been a legal appeal, properly taken, the common pleas would not have dismissed the appeal."

The first question, therefore, which the case presents for consideration is whether an appeal was in fact taken from the judgment of the district court to the court of common pleas; for, if such appeal was taken by the prosecutor, it is not now entitled to have the judgment of the district court reviewed here, even if it appears that such judgment was *coram non iudice*. The statute (Gen. St. p. 1264, § 276) gives the party injured by such a judgment relief by appeal to the common pleas, or he may, at his option, resort to the remedy by certiorari (*Ritter v. Kunkle*, 39 N. J. Law, 259); but, having selected one remedy, and failed to obtain the relief sought by it, the aggrieved party cannot afterwards avail himself of the other (*Illingworth v. Rich* [N. J. Sup.] 34 Atl. 757). Was there, then, an ap-

peal taken? The situation, gathered from the facts set out in the return to the writ and from the statements of counsel, seems to be this: After the judgment was rendered, notice of appeal was given, and an appeal bond filed, as has been already mentioned, and the clerk of the district court thereupon sent to the appellate court a transcript of the proceedings in the cause. The appellate court, when the matter came before it, dismissed the appeal, and returned the transcript to the trial court on the ground, as stated by counsel, that the appeal had not been legally taken. In what the illegality consisted is not mentioned in the briefs of counsel, nor in the proceedings sent up. Presumably, however, it lay in the failure of the prosecutor to file its appeal bond within five days after the rendition of the judgment in accordance with the requirement of the statute, as such failure would ordinarily invalidate the appeal, and necessitate its dismissal by the court of common pleas. *Delaney v. Burcklee*, 57 N. J. Law, 323, 30 Atl. 800. It seems to me that the taking by the prosecutor of the steps referred to constituted the taking of an appeal within the meaning of the district court act. By the serving of the notice of appeal and the filing of the appeal bond and the subsequent sending by the district court of the transcript of the proceedings to the court of common pleas, the case was removed into the latter court, and judicial action by that court was necessary in order to determine whether or not the prosecutor had observed the mandate of the statute in taking his appeal. It was only because an appeal was taken that the court of common pleas was required to act. Unless there was an appeal, the case could not have been before that court for its consideration, and it could not have been called upon to decide whether or not the appeal bond had been filed within the statutory period. Considering, as I do, that the prosecutor, by giving notice of appeal and filing its bond, elected to pursue its remedy by appeal, I am of opinion that it is not now entitled to have the judgment of which it complains removed into this court for review by certiorari, notwithstanding the fact that the remedy selected by it has proved abortive by reason of the delay in filing the bond.

But, even if I had reached the conclusion that no appeal had been taken from this judgment to the court of common pleas, I should still think that the writ in this case was improvidently issued; for it is only in cases in which the judge is without jurisdiction that the remedy by certiorari exists (Gen. St. p. 1229, § 87), and in this case it is quite clear that there was jurisdiction. The only grounds upon which jurisdiction is challenged by the prosecutor are: First, that suit was instituted against it by the defendant individually, but that judgment was entered against it in favor of the defendant as administrator of his deceased wife; and, second, that the judgment was pronounced after the case had been

adjourned by the court for an unlawful length of time, and for an indefinite period. As to the first ground of challenge, it is enough to say that, although the suit was instituted in the name of the defendant individually, the proceedings were afterwards amended by the court so as to permit the further prosecution of the suit by him as administrator. The power of amendment bestowed upon the district courts is amply sufficient to permit an amendment of this character. Gen. St. p. 1233, § 103. There is no substance, therefore, in this objection. Nor can the second ground of challenge be sustained. The case was not adjourned for an unlawful length of time, for the judge of a district court is authorized to adjourn, as in his judgment may be necessary, any suit or proceeding, from time to time, and for such periods as he may direct. Gen. St. p. 1255, § 225. Neither was it adjourned for an indefinite period. It was originally tried on the 26th of August, 1896, but was not then decided, the court hearing the argument of counsel on the 9th of September. After hearing argument, and before reaching a decision on the case, the court, on November 25th, listened to an application for a rehearing, and adjourned the argument on that application from time to time until January 17, 1896, when the matter was argued. The court reserved its decision on the whole case without fixing a day when it would be announced, and on the 20th of January rendered the judgment under review. It was the reservation of its decision by the court without the adjournment of the case to a future day for the purpose of declaring its conclusion that is challenged by this last objection. But, as I understand the provisions of the district court act which regulate the matter of adjournments, they only relate to the trial of the cause, and to such other proceedings therein as require the attendance of the parties in order that their interests may be properly conserved. At the conclusion of the trial the judge may reserve his decision for a reasonable time without fixing a day for the rendition of the judgment. The judgment of the district court should be affirmed, with costs.

(59 N. J. L. 331)

STATE (SEWARD, Prosecutor) v. CITY OF ORANGE et al.

(Supreme Court of New Jersey. Nov. 5, 1896.)

MUNICIPAL CORPORATIONS—POWER OVER COMMONS.

1. The common council of Orange has no power to lay out a highway over what is known as "Military Park."

2. An ordinance that it shall not be lawful to use any part of the park as a highway, except on the extension or continuance of Hickory street over it, is an abuse of the authority given by the city charter over the park.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of John L. Seward, against the city of Orange and Alpheus Struble, city clerk, to

test the validity of an ordinance. Ordinance set aside.

Argued at June term, 1896, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Colle & Swayze, for prosecutor. Coult & Howell, for defendants.

VAN SYCKEL, J. This certiorari is prosecuted to test the validity of an ordinance passed by the city of Orange October 7, 1895. The land affected by said ordinance is about 1,000 feet long, with an average width of about 150 feet. It is now ornamented by shrubbery and trees, and its entire boundary is surrounded by unbroken curbing. It is bounded on the north by Main street; on the south by South Main street; and on the south side of South Main street there are a number of fine dwelling houses fronting on this strip of land, popularly known as the "Military Common," in the city of Orange. A plot of ground, including this common, was granted in 1799 to the Mountain Society, as a parsonage lot. June 1, 1797, the church records show that the land now called a "common" was a training ground. In 1802 the church conveyed lots to different persons, with a covenant that the parsonage ground in front of the lots so conveyed should be and remain as it then was (a common) forever. The prosecutor derives his title from one of these grantees of the church. On the 12th of August, 1868, the common council of Orange passed an ordinance as follows: "It shall not be lawful for any person to lead, ride or drive any animal whatsoever, whether such animal be attached to any vehicle or not, along, across or upon the public ground known as the 'Military Common'; neither shall it be lawful for any person, himself or herself, to propel any vehicle, other than a child's wagon, along, across or upon said common, except upon any flagged walk which may be laid thereupon, under the penalty of five dollars for every such offence." The ordinance certified into this court for review is as follows:

"A supplement to an ordinance entitled 'An ordinance to protect the Military Common from injury and nuisances.'

"Be it ordained by the common council of the city of Orange as follows:

"Section 1. That section one of the said ordinance is hereby amended so that the same shall read: 'It shall not be lawful for any person to lead, ride or drive any animal whatsoever, whether such animal be attached to any vehicle or not, along, across or upon the public ground, known as the "Military Common" except upon the driveway crossing the same in a line in continuation of Hickory street, from South Main street to Main street as the same is laid across said common; neither shall it be lawful for any person, himself or herself, to propel any vehicle other than a child's wagon, along, across or upon said common except upon

said driveway and any flagged or graveled walks which may be laid thereupon, under the penalty of five dollars for every such offence.'

"Sec. 2. That all the provisions of section one of said ordinance inconsistent with the terms of this ordinance are hereby repealed.

"Passed October 7th, 1895.

"Alpheus Struble, City Clerk."

By the charter of Orange no express power is given to the city to lay streets over the common. By the charter of 1866 (Laws 1866, p. 220) the city is given exclusive control of the ground known as "Military Common," with power to improve and decorate the same and to protect it from injury and nuisance, but without authority to "sell or lease or in any way to divert it from public use, or from any use to which it may have been originally donated." By the act of 1867 (Laws 1867, p. 932) the city was given power to lay out a street and sidewalk along the southern side of the common, and also to appropriate money to decorate and improve the common. By an act passed in 1869 the city is given power to regulate, protect, and improve Military Common. If the legislature had power to authorize a highway to be laid across this common, it has not been granted to the city by any of the acts referred to. The expression of the power granted is a limitation upon the power which the city may lawfully exercise, and a withholding of the power not granted. "Expressio unius est exclusio alterius" applies. The laying out of a highway merely for the purpose of giving the public a right to cross over it with vehicles is not an improvement or decoration of the common, as roads laid out in a park for the purpose of enjoying it might be. Such a street laid across so narrow a park would manifestly interfere with the enjoyment of it by the public. But, if the city had power to lay out a street across the common, that power has not been exercised in the manner provided by the city charter for laying out highways. Assuming that the city was without power to authorize the crossing of the common on the continuation of Hickory street, is there anything in the ordinance of October 7, 1895, which entitles the prosecutor to the judgment of this court that it shall be set aside? The ordinance of August 12, 1868, provided a penalty of five dollars for any one who led or drove an animal over or upon the common. If the common council on the 7th of October, 1895, had passed an ordinance wholly repealing the ordinance of August 12, 1868, it is clear that certiorari would not lie to review that action. The ordinance of October 7, 1895, does not repeal the ordinance of 1868 wholly, but amends it; providing that it shall not be lawful for any person to drive with any vehicle along, across, or upon Military Common, except upon the driveway crossing the same in a line in continuation of Hickory street as the same is laid across said

common. This is a declaration by the common council, in effect, that it shall not be unlawful to drive across the common on the continuation of Hickory street. This was a clear abuse of the power given to the common council by the charter of 1866 "to improve and decorate the park, and to protect it from injury and nuisance, but without authority to sell or lease or in any way divert it from the public use, or from any use to which it may have been originally donated." Such a traveled way is not for the use of the park as a park. On the contrary, it diverts a portion of the park to a wholly different use, and a use to which it was not donated. The common council, having undertaken to exercise the granted power to protect the park from injury, by an ordinance, was bound to make the ordinance applicable to the entire park, and could not expose a portion of it to be trespassed upon at the will of the public. The ordinance, as passed, was an invitation to the public to do what the council had no power to permit, and it must therefore be set aside. How far the private right of the prosecutor extends, it is not necessary to decide.

(68 Conn. 16)

STATE ex rel. JUDSON v. COMMISSIONERS OF FAIRFIELD COUNTY et al.

(Supreme Court of Errors of Connecticut.
June 5, 1896.)

CONSTRUCTION OF STATUTE — BRIDGE BETWEEN COUNTIES—DUTY TO BUILD APPROACHES — ON WHOM CAST.

Pub. Acts 1889, c. 214, p. 129, authorized the owners of bridges across the river between certain counties to transfer their interests in the property to said counties, and made it the duty of those counties thereupon to take charge of the bridges and operate them as free public bridges, the expense to be apportioned between said counties. After the various towns in these counties had taken steps to transfer their interests in the bridges to the counties, it was decided by the supreme court that it was still the duty of each town to build and maintain an approach to any bridge at the end located in such town. Pub. Acts 1895, c. 236, amended the act by adding, "The terms bridge or bridges in this act shall be construed to include bridge approaches." *Held*, that this amendment could not operate retroactively, so as to relieve the towns which had transferred their interests in a bridge to the counties from their duty under the former statute, as construed by the court, to build and maintain the approaches, and impose such duty on the counties, but was intended to provide that the towns which had conveyed their property in the bridges to the counties should build approaches, if not already built, and convey them to the counties, and that then, and not till then, the latter should take charge of such bridges, including the approaches. Hamersley and Torrance, JJ., dissenting.

Appeal from superior court, Fairfield county; George W. Wheeler, Judge.

Petition by Lewis F. Judson for a writ of mandamus to compel the county commissioners of Fairfield county and of New Haven county to build the approaches to the Washington bridge over the Housatonic riv-

er between said counties. From a judgment denying the writ, petitioner appeals. Affirmed:

Stiles Judson, Jr., and William B. Stoddard, for appellant. George P. Carroll and William L. Bennett, for appellees.

ANDREWS, C. J. This was an application for a writ of peremptory mandamus to require the defendants to build approaches at each end of Washington bridge. The defendants are the county commissioners of New Haven county and of Fairfield county. The superior court issued an alternative writ, which was duly served. On the return day the defendants appeared in court and moved that the alternative writ be quashed. The court granted that motion and the relator has appealed to this court. It is necessary to consider but one question. The alternative writ (paragraph 10) alleges that "it is the legal duty of the county commissioners of said counties of New Haven and Fairfield to build safe, substantial, and permanent terminals or approaches at either end of said bridge structure, in order to provide the public with safe and reasonable access to said bridge." If the facts set forth in the writ do not show this averment to be correct as a legal conclusion, then the motion to quash was properly allowed, and there is no error.

The general assembly passed an act in 1889 (Pub. Acts 1889, c. 214, p. 129) by which the owners of all bridges across the Housatonic river between the counties of New Haven and Fairfield were authorized to transfer all their right, title, and interest in and to the stock, property, and franchises in the said bridges to the said counties. The act then further provided as follows:

"Sec. 4. Upon such transfer being made to said counties, it shall be the duty of said counties to take the charge, management, and control of the said bridges, and to keep, maintain, operate, and control them as free public bridges.

"Sec. 5. The expense of maintaining and repairing said bridges shall be paid in equal proportions by each of said counties, by orders drawn by the county commissioners upon their respective treasurers, and the county commissioners of said counties, acting as a joint board, shall have the control and management of the said bridges."

After the passage of that act the towns of Stratford, Bridgeport, and Milford took such steps as they deemed necessary to convey all their interests in the Washington bridge to said counties; and presumably all the other towns in said counties between which there were bridges over the Housatonic river did the same as to such bridges. In that condition of things the case of New Haven and Fairfield Counties v. Town of Milford, 64 Conn. 568, 30 Atl. 768, arose, and was decided as appears in our Reports. That decision showed that it was the duty of the commissioners of said counties to build and

maintain all the bridge structures named in said act, but that their duty in such behalf extended no further; that it was not their duty to build or maintain any approach to any of said bridges. While it is true that the town of Milford was the only one of the towns interested which was a party to that record, both counties and the county commissioners of both were parties. That decision defined the duty and liability of the counties and of the county commissioners under the said act. The duty of the towns remained precisely the same that it had been before that act was passed, except so far as changed by that act, as construed by that decision; that is, it remained the duty of the town of Milford to build and maintain the approach at the end of said Washington bridge which is in that town, because it was a part of the highway in that town, and for the same reason it was the duty of the town of Stratford to build and maintain the approach at the end of said bridge which is in that town. And it was in like manner the duty of each of the other towns to build and maintain the approach to any bridge named in said act which was in such town. We understand this to be conceded by the relator. It ought to be said that the defendants are those executive officers of these counties who are charged with the duty of carrying out whatever obligations these counties are under in respect to any of these bridges. Whatever obligation rests on the counties in this matter, it is the duty of the defendants to see that it is performed. The duty of the counties is the duty of the defendants. *State's Attorney v. Selectmen of Branford*, 59 Conn. 402, 411, 22 Atl. 336. And of course when there is no duty upon the counties there is no duty upon the defendants.

It is claimed in behalf of the relator that certain legislation in 1895 transferred the duty of building and maintaining the approaches to the Washington bridge from the towns of Stratford and Milford to the two counties of New Haven and Fairfield; in other words, that such legislation had relieved the said towns of the duty which theretofore rested upon them in respect to these approaches, and had imposed it upon the counties. The legislation of that year which it is claimed has effected this change is in two acts; chapters 265, 266, p. 615, of the Public Acts of that year. It had been provided in section 1969 of the General Statutes of 1888 that any county might take land which the commissioners deemed necessary for the site, or for an addition to the site, of any county building; and chapter 265 of the Public Acts of 1895 added to the said section of the General Statutes the words, "or for the construction of bridges or bridge approaches." Chapter 266 of the Public Acts of 1895 amended chapter 214 of the Public Acts of 1889, hereinbefore quoted, by adding to section 5 of said act the following: "The terms bridge or bridges in this act shall

be construed to include the bridge approaches." The act of 1889 did not impose upon the counties any immediate duty, but a duty which was to arise afterwards, when the owners of the several bridges over the Housatonic river between the said counties should convey to the counties all their interest therein. A certain conveyance of Washington bridge had been made to the said counties, and it appears that all the duty which devolved on the counties in respect to the Washington bridge by that conveyance to them of that bridge had been fully discharged. The question then in the case is this: Did the legislature intend by the said Acts of 1895 to impose any new and further duty on the counties, in the absence of any further conveyance by the towns? If that had been the real intention, it would have been natural and easy to say so in direct words, and, there being in these Acts no such direct words, the presumption is that such intention did not exist. The effect which the legislature intends shall result from any act it has passed can only be discovered by the words it has used in the act. A legislative intention not expressed in some appropriate words has no legal existence. In seeking to ascertain the legislative intent in any case, the question is not, what did the legislature mean to say? but what is the meaning of the words the legislature has used? *Lee Bros. Furniture Co. v. Cram*, 63 Conn. 433, 438, 28 Atl. 540. And in arriving at the meaning of the words used by the legislature, if they are at all uncertain or doubtful, reference may be had to the surrounding circumstances. In the light of such circumstances the words are usually made clear. *New York & N. E. R. Co.'s Appeal from Railroad Com'rs*, 62 Conn. 527, 534, 26 Atl. 122. The legislature is always presumed to know all the existing statutes, and to have in mind the effect its action or nonaction will produce. *State v. Staub*, 61 Conn. 553, 566, 23 Atl. 924. In enacting chapter 266 of the Acts of 1895, it is certain the legislature had in mind the act of 1889, because especial reference is made therein to that act. It is equally certain that the legislature had in mind the judicial construction which had been put on that act in the case of *New Haven and Fairfield Counties v. Town of Milford*, supra. That case made it the duty of Stratford and Milford to provide necessary approaches to Washington bridge, as we have already pointed out. The legislature might easily have assumed that those towns had performed that duty. At the argument of the former case (*New Haven and Fairfield Counties v. Town of Milford*) it was stated—and as it was not denied we have assumed it to be true—that the towns of Derby and Huntington had at their own charge provided approaches to the bridge at Derby, which is one of the bridges named in the act of 1889. It is altogether probable that the legislature had that fact also in mind, and intended to have the other towns do the same, and to enact by the amendment of 1895 that if the towns of

Stratford and Milford had provided approaches to Washington bridge, or when they should do so, and should convey them by appropriate action to the said two counties, then, and not until then, it should be the duty of the counties "to take charge, management and control of the said bridge, including the approaches, and to keep, maintain, operate and control" the same as a part of the said bridges. It is a firmly established rule of construction that all statutes are intended to operate prospectively. Retroaction is never to be allowed to a statute unless the words in which it is expressed so clearly require it as to exclude any other reasonable interpretation. *Plumb v. Sawyer*, 21 Conn. 355; *Smith v. Lyon*, 44 Conn. 177; *City of Middletown v. New York, N. H. & H. R. Co.*, 62 Conn. 497, 27 Atl. 119.

If the intention above mentioned is the one which the legislature designed to express by the act of 1889 as amended by the act of 1895, then the act as amended is simple, easy, consistent, has only a prospective operation, and produces equality among all the towns affected by it. From the language of these acts, and because there is a total absence in them of any words imposing on the counties such a duty as the relator claims, we think this is the construction which ought to be put on them. The interpretation urged by the relator would produce the contrary effects; especially it would require that a retroactive force be given to the Acts of 1895,—a result which, as we have shown, ought not to be allowed. There is no error.

FENN and BALDWIN, JJ., concur.

HAMERSLEY, J. (dissenting). The act of 1889 (Pub. Acts 1889, p. 129) placed upon the counties of Fairfield and New Haven the duty of maintaining and operating, as free public bridges, five bridges across the Housatonic river. Some of these bridges were toll bridges owned by private corporations or individuals. All were subject to some property rights in individuals or towns. As incidental to the duty of maintenance, the act provided that the counties should not be called upon to pay for any of those property interests. For this purpose the first three sections of the act deal with the property interests in each of the bridges separately. Washington bridge was owned by a corporation and operated as a toll bridge. The stock of this corporation was owned by the three towns of Milford, Stratford, and Bridgeport, and they were authorized to transfer to the counties, without compensation, all their interest in the stock, property, and franchises of the corporation, and in the bridges. Bennett's bridge, between the towns of Southbury and Newtown, was owned by private persons. These "owners" were authorized to transfer in the same manner their interest in the bridge, but the towns of Southbury and Newtown, having no property rights in the bridge, were not authorized to transfer

anything. As to the other three bridges, each town having property rights in each bridge was authorized to transfer such interest. Having thus provided for securing the counties, in the case of each bridge, against any claims for the appropriation of property rights, the real object of the act is expressed in section 4, which provides that, "upon such transfers being made to said counties, it shall be the duty of said counties to take charge, management, and control of said bridges, and to keep, maintain, operate, and control them as free public bridges." Section 5 provides for apportioning between the counties the expense of maintenance, and that "the county commissioners of said counties, acting as a joint board, shall have control and management of said bridges." In 1895 (Pub. Acts 1895, p. 615) this act was amended, by adding to section 5 of said act the following: "The terms bridge or bridges in this act shall be construed to include the bridge approaches." The relator claims that this definition of "bridges" applies to that term as used in the act, in respect to the duty of maintenance imposed upon the counties in sections 4 and 5, and that from the passage of the amendment the imperative duty of maintenance of bridge and bridge approaches is placed upon the counties. The respondents claim that the language of the amendment requires the words "and bridge approaches" to be added to the word "bridge" or "bridges" wherever it occurs in the first three sections of the act, and that by so adding those words the act as amended severally requires the respective persons who have already transferred to the counties their property in the bridges, to convey to the counties bridge approaches already built, and, if such approaches have not been built, to build and convey them to the counties, and "that then, and not until then, it should be the duty of the counties to take the charge, management, and control of the said bridges, including the approaches." The literal application of the respondents' claim makes the amended act difficult of any rational construction. The language of the amendment is certainly loose, and not in proper form for accomplishing the evident purpose of the legislature; but, when the legislature expresses its will in language open to criticism for want of accuracy and appropriateness, it is the duty of this court to give effect to a legislative purpose plainly, however awkwardly, expressed, and certainly this court should not be asked to employ the subtleties of hypercriticism to discover a possible meaning that will make the law ineffective. "In arriving at the legislative intent as expressed in any statute, it is always expedient to recur to the circumstances which surrounded the legislature at the time the statute was passed." *New York & N. E. R. Co.'s Appeal from Railroad Com'rs*, 62 Conn. 527, 534, 26 Atl. 122. Applying this rule to the amended act so far as it affects Washington bridge, the legislative intent ex-

pressed in the language used seems to me unmistakably plain. In pursuance of this act as originally passed, the towns of Stratford, Milford, and Bridgeport, not merely as municipal corporations, but as property owners, had transferred to the counties their interest in all the stock, franchises, and property of the bridge corporation and in the bridge owned by that corporation, and any interest owned by the corporation in the approaches of the bridge were included in that transfer. The towns were not authorized, and are not authorized by the amended act, to transfer any so-called interest either of them may have in any public highway, as such, by virtue of the burden of maintaining highways with which they are charged by law. Such interest is inseparable from the duty to maintain, and when that duty is imposed on another state agency the "interest," of necessity, follows the duty. The interest transferred by the towns in pursuance of the authority given was an interest in property, including \$4,000 in cash paid over to the counties. Upon such transfer the duty of maintenance became absolute in the counties, and could not unqualifiedly be replaced on the bridge corporation, or upon the three towns which owned its stock, without the plainest violation of vested rights. The counties also, in pursuance of the powers implied from the duty of maintenance, had built a new "Washington bridge" in a different place, and so constructed the bridge that it could not be used without building an approach and condemning land for that purpose. In an agreed case submitted to this court by the counties and the town of Milford, it had been held that the law of 1889, imposing on the counties the duty of maintaining a free public bridge at this place, did not impose upon the counties the duty of building and maintaining this approach; and this construction had been given to the law on the ground that, as the counties had no power to condemn the land necessary for such approach, the legislature could not have intended to impose a duty without giving the powers of performance. It is at least doubtful if the construction could be maintained on any other ground. The approach, therefore, if built, must be built by the town of Milford alone, not by force of any obligation growing out of the act of 1889, and resting upon it in common with Stratford and Bridgeport; not by force of any obligation to maintain an existing highway, but solely by force of an obligation, implied from the general duty of towns in respect to highways, to lay out a new highway in order that the public might reach the bridge highway which the counties had established. These conditions appear in the case of *New Haven and Fairfield Counties v. Town of Milford*, 64 Conn. 568, 30 Atl. 768, and the legislature must have had this judicial construction of the act of 1889, and the reasons for it, in mind when the amendment of 1895 was en-

acted; and so it said, too plainly to be misunderstood, that the term "bridge," used in the act to define the duty of maintenance, and construed by this court as excluding the approach made necessary by the mode of building the new bridge, should hereafter include the approaches; and at the same time, on the same day, and, as it were, with the same breath, the legislature declared that the counties should have power to condemn the land necessary for building such approach. Pub. Acts 1895, p. 615. Surely there can be no question of the expressed intent of the legislature to put upon the counties, in respect to this approach, the same duty of maintenance already resting upon them, under the act of 1889, in respect to the bridge exclusive of the approach. Such legislation is not retrospective because it takes a duty from one public body and imposes it on another; but if the amendment could be construed, as claimed by the respondents, so that, after the three towns had turned over their property to the counties in order that the bridge might be maintained as a free public highway, their transfer is declared to be of no avail, and they are ordered to make another of something they do not possess and cannot convey, before the duty to maintain the bridge can be exercised, the legislation would be retrospective in the most vicious form possible. I must dissent from the conclusions reached by the majority of the court. I think it is clearly the legal duty of the counties to maintain the approaches to the Washington bridge, as recited in the alternative writ, and that there is error in the judgment complained of.

TORRANCE, J., concurs.

(68 Conn. 1)

TOWN OF NORWALK *ex rel.* FAWCETT
v. IRELAND *et al.*

(Supreme Court of Errors of Connecticut.
June 5, 1896.)

DEMURRER — CONSTABLES' BONDS — LIABILITY OF
SURETIES — EVIDENCE — MEMORANDA — APPEAL —
ASSIGNMENT OF ERROR — ESTOPPEL — CLOTHING
PERSONS WITH TITLE.

1. In an action against a constable and his sureties to recover damages for the act of the officer in attaching plaintiff's property in a suit to which he was not a party, a demurrer "to the prayer or claim for relief, because on the facts stated the plaintiff is not entitled to the relief therein sought," is properly overruled, under Gen. St. § 878, which provides that "all demurrers shall distinctly specify the reasons why the pleading demurred to is insufficient."

2. Where a constable takes the goods of one person upon a writ of attachment on *meane* process against another, such taking is a breach of his official bond conditioned for the faithful performance of his duties, and the sureties on such bond are liable.

3. The right of the person whose goods are so taken to recover against the officer's sureties was not taken away by Gen. St. § 1325, authorizing any person claiming the right to the possession of goods attached to maintain replevin against the officer.

4. In an action against a constable who had taken plaintiff's goods on attachment against another person defendant identified a memorandum which he testified was an inventory of all the goods attached, made by him partly from his own inspection of the goods and partly from information given by his assistants, but stated that he could not say as to any item whether he had written it from his own examination, or from information furnished by said assistants. *Held*, that the memorandum was not admissible in evidence for any purpose, since it related to matters to which the witness was unable to testify, through want of personal knowledge.

5. An assignment of error embracing several distinct claims is defective.

6. Defendant officer entered a store conducted by L., plaintiff's wife, to serve a writ of attachment against her, but did not demand that she turn out goods to satisfy the writ. L. pointed to a show case, saying, "Do not touch anything here; these do not belong to me," and during the attachment plaintiff came in, informed defendant that some of the goods belonged to him, and asked that he be allowed to see what was being taken, and make a list of the same; but his request was refused. Though there was nothing to indicate that the goods belonged to different owners, they were not confused, and no fraudulent intent appeared in keeping them together, nor had the attachment plaintiff, or any one else, given L. credit on the strength of her apparent ownership of the entire stock. *Held*, that plaintiff was not estopped from claiming a distinct interest in the property attached.

Appeal from court of common pleas, Fairfield county; Curtis, Judge.

Action by the town of Norwalk, on the relation of Wilmot Fawcett, against Samuel C. Ireland and others, to recover on an official bond. Judgment for plaintiff, and defendants appeal. *Affirmed*.

John H. Light, for appellants. John C. Chamberlain and Joseph A. Gray, for appellee.

FENN, J. This is an action brought against a constable and the two sureties upon his official bond to recover damages for the act of such constable in attaching the property of the plaintiff in a suit against the plaintiff's wife, to which suit the plaintiff himself was not a party. The court of common pleas in Fairfield county rendered judgment in the present suit in favor of the plaintiff against all of the defendants, for substantial damages. The appeal presents three reasons material for us to examine: First. It is claimed that the court erred in overruling the demurrer to the complaint of the two defendants who were sureties, Herman Quittner and William Ireland. Second. In refusing to admit in evidence a certain written inventory. Third. In overruling the claims of the defendants, to the effect that it appeared by the finding that, if the plaintiff had any interest in the property taken, it was not a separate and distinct interest, but either one in common with his wife, or as a partner with her; and, further, that the plaintiff was estopped from claiming a separate and distinct interest in such property. We will consider these claims separately and in the order above stated.

In reference to the first, it appears that the complaint is in proper and unexceptionable form for such an action, assuming any action lies in such a case against an officer and his sureties upon the official bond. It claimed the only proper relief in such an action, namely, damages. The demurrer is as follows: "The defendants, Herman Quittner and William Ireland, demur to the prayer or claim for relief, because on the facts stated the plaintiff is not entitled to the relief therein sought against them." In *Walkeo v. Walkeo*, 64 Conn. 74, 77, 29 Atl. 243, this court passed upon a similar demurrer, and there said: "It is in no sense what it purports to be, a demurrer to relief. 58 Conn. 567, § 11, 20 Atl. viii. It is in direct contravention to Gen. St. § 873, which provides that 'all demurrers shall distinctly specify the reasons why the pleading demurred to is insufficient.'" The rule for proceedings under the practice act, referred to in the above quotation, is too plain to admit of justification of an attempt to nullify the statute quoted in this way: "Where any relief demanded by the plaintiff cannot properly be demanded upon the allegations of the complaint, although these may be sufficient to call for some other relief, the defendant may demur to the relief so improperly demanded." This demurrer, so called, was therefore properly overruled; and the only claim sought to be made by the defendants under it, namely, that no form of liability was imposed upon them, and no action whatever could be maintained against them by reason of the act alleged, was not before the court below. If, therefore, upon this question—which has, in fact, been fully argued before us by counsel representing both parties, and which we have fully considered—we were of opinion that the views of the defendants were correct, we ought not, for the reason above given, in justice either to the trial court or to the plaintiff, on this ground, to disturb the judgment rendered. Since, however, we have reached the opposite conclusion in reference to the question, as it is of much practical interest and importance, and as there is no utterance of this court distinctly bearing upon it, although it has received frequent consideration in sister jurisdictions and by the supreme court of the United States, we have concluded that it will be proper for us to state our views regarding the matter.

The bond in suit in the present case is in the form prescribed by Gen. St. § 94. The condition is that the constable "will faithfully discharge the duties of his office, and answer all damages which any person may sustain by his neglect or unfaithfulness in his discharge thereof." The question, as before stated, is whether the taking by the constable, upon a writ of attachment on mesne process, against one person, of the goods of another, is a breach of this condition of the official bond, for which the sure-

ties upon such bond are liable. This question, either in the precise form above stated, or forms which are clearly analogous, has received examination showing much divergence of views and difference in conclusions in other jurisdictions. Perhaps at present the leading, as well as one of the most recent, cases upon the subject is that of *Lammon v. Feusler*, 111 U. S. 17, 4 Sup. Ct. 286. The opinion, in which the entire court concurs, is by Mr. Justice Gray. The citation and review of the earlier cases throughout the United States is most exhaustive. The precise point decided was: "The taking, by a marshal of the United States, upon a writ of attachment on mesne process against one person, of the goods of another, is a breach of the condition of his official bond, for which his sureties are liable." The bond in the case cited, as in the one before us, was conditioned for the faithful performance of the officer's duties. The line of reasoning adopted by the court, to summarize it, is this: The official duty of the officer serving the writ is to take the property of the defendant, and of no one else. The taking of the property of another is a breach of such duty; but the act, being done in executing the process, is an attempt to perform an official duty, and is an official act. While the person, other than the defendant, whose property is wrongfully taken, may indeed sue the officer, like any other wrongdoer, in an action of trespass to recover damages for the wrongful taking, the remedy of such person is not limited to such action against the officer personally. The official bond is not made to the person in whose behalf the writ is issued, nor to any other individual, but to the government for the indemnity of all persons injured by official misconduct, and such bond may be put in suit by and for the benefit of any such person. The court then refers to the decisions which hold that, when property of a third person is thus taken, the rightful owner cannot maintain an action of replevin, nor recover the property specifically in any way, except in the court from which the writ issued, and adds: "The principle upon which these decisions are founded is, as declared by Mr. Justice Miller in *Buck v. Colbath*, 3 Wall. 334, 'that whenever property has been seized by an officer of the court by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises.'" The court then proceeds to review the decisions upon the "analogous question," concerning the liabilities of sureties upon the official bond of a sheriff, a coroner, or a constable. The conclusion reached is that upon the weight of authority as well as upon principle the sure-

ties are liable. In this conclusion, and mainly for the reasons stated, we concur.

It was urged before us by the defendants in the present case that at the time when many of the decisions supporting the view above indicated were rendered there were few statutes authorizing the replevin of goods from an officer, and that the goods attached, whether such attachment was rightful or wrongful, were supposed to be in the custody of the court. It was claimed that the lack of this remedy influenced many decisions, including *Lammon v. Feusler*, *supra*, as alleged to be shown by the language to which we have referred. Attention was called to our present statute, which authorizes any person claiming the right to the possession of goods attached to maintain replevin against an officer. It is true, we have such a statute. But we think that upon this fact alone no distinction which will support the plaintiff's contention can be based. It was in the unquestionable power of the legislature to confer the statutory right provided in Gen. St. § 1325. But doing so does not destroy—it does not affect—the established principle that property attached is in the custody, if not indeed ordinarily, in this state, of the court, of what is equivalent,—of the law. Hence, as characterizing the taking, and proving that, while something for which trespass lies, it is not a mere trespass, the language of our decisions prior to the present existing extension of the statute in question is just as significant and applicable as it ever was. Thus, in *Bowen v. Hutchins*, 18 Conn. 550, 552, where it was held that a writ of replevin to obtain the restoration of goods attached in favor of a claimant who was not a party to the attachment must be brought against the attaching creditor, and could not be sustained against the officer who served the attachment, it was said: "The goods, when attached, are taken by the officer in custody of the law. And, if they were rightfully attached, they ought to be restored to that custody, that they may be disposed of as the law directs. But the officer has no interest in the property. To him it is perfectly immaterial whether it belongs to the plaintiff in the original suit or the plaintiff in the action of replevin. He has but to discharge his duty as a public officer." See, also, *Howard v. Crandall*, 39 Conn. 213; *McDonald v. Holmes*, 45 Conn. 157. We cannot hold that for such an act as that in question the plaintiff would have had a remedy by action upon the bond if it had occurred a few years since, but that such remedy is taken away by force of the statute (Gen. St. § 1325) in relation to replevin. The language of Chief Justice Shaw in *City of Lowell v. Parker*, 10 Metc. (Mass.) 309-313,—a similar case to the present,—is in point, and as much so now as it ever was. It was argued for the sureties that they were no more liable than if the constable had acted without any writ. The court said: "He was an officer, had authority to attach goods on mesne process, on a suitable writ, professed to have such process, and thereupon took the plaintiff's goods.

* * * He therefore took the goods colore official, and, though he had no sufficient warrant for taking them, yet he is responsible to third persons, because such taking was a breach of his official duty."

Coming to the defendants' second assignment of error,—the refusal of the court to admit certain evidence upon the trial to the court on the merits, under an answer of denial,—a statement of facts is essential, which facts will, some of them, be important also to consider when we reach the final assignment. At the time of the attachment, Louisa Fawcett, the plaintiff's wife, was engaged in conducting a millinery store, with a miscellaneous stock of millinery goods therein. The defendant officer, with a writ of attachment against said Louisa, entered said store, and attached the goods therein, including the goods belonging to the plaintiff, and carried the same away. When the officer entered the store, said Louisa was there; the plaintiff was not. The officer stated to Louisa his mission, but did not make demand for goods to satisfy the writ. She touched a large show case filled with goods, saying: "Do not touch anything here. These do not belong to me." During the attachment the plaintiff came in, and informed the officer that some of the goods in the store belonged to him, and asked that he might be allowed to see what he (the defendant) was taking, and make a list of the same. The request was denied. The goods of the plaintiff and of his wife were not kept separately, nor was there anything on or about the goods in said store to indicate to a stranger that they belonged to different owners. But there was no confusion of the plaintiff's goods with those of said Louisa, nor any fraudulent intent on the part of the plaintiff or said Louisa in mingling their goods together in the same store. Said Louisa paid the rent for said store, and employed and paid all the employes in the store. The work of trimming the hats in the store belonging to the plaintiff at the time of said attachment, and which were of the value of \$300, had been performed by said Louisa and her employes, and she had also furnished some of the trimmings. It was understood between the plaintiff and Louisa that when hats belonging to the plaintiff, and which had been trimmed by the said Louisa and the employes in said store, should be sold, said Louisa should take from the proceeds of such sales whatever amount satisfied her for the trimming, and give the plaintiff the remainder. Said Louisa Fawcett and the plaintiff both testified as to the value of the plaintiff's said goods, and the value of said Louisa Fawcett's goods. Concerning the ruling now in question, the finding in full is as follows: "Said defendant, while testifying in his own behalf, identified a written memorandum, which he testified was an inventory of all the goods attached, made by him at the time of said attachment, partly from his own inspection of the goods and the tags or tickets thereon, and partly from information given him at the time by John Lockwood and Wilbur F.

Young, who had been employed by him to assist in attaching and removing said goods. He testified that he could not specify any particular article in said inventory as one upon which he had seen a price mark, and could not say, as to any particular item in said inventory, whether he had written it from his own examination of the article, or from information furnished him by one of his said assistants. He also testified that nearly all of the goods attached were marked, and that he used said inventory in making out his return on the writ. The defendants' counsel, for the purpose of further showing the manner in which said inventory was made, then read a portion of the deposition of said Wilbur F. Young, as follows: "'Q. Did you and Mr. Ireland take an inventory of the stock attached? A. We did. Q. Did you attach to this inventory any value of the stock? A. Yes. Q. Upon what was this value based? A. Upon the amount it would bring at forced sale. Q. Were or were there not any tags with prices marked upon them affixed to the goods attached? A. There were. Q. Were or were not these prices so affixed taken by you and Mr. Ireland in making up the value in the inventory? A. They were.' The defendant then offered said inventory in evidence for the following purposes: (1) To contradict the plaintiff and his wife as to the value of the goods, she having testified that some of the goods were marked; (2) as a part of the *res gestæ*; (3) as descriptive of the property attached; (4) as tending to prove the value of said property. To the admission in evidence of said inventory the plaintiff objected, and the court excluded the same, but ruled that the witness (said defendant) might use said inventory to refresh his recollection as to the number and description of the articles attached, and the prices marked thereon. The defendants duly excepted to the court's ruling in refusing to admit said inventory in evidence. The witness did use said inventory to refresh his recollection, and, having so refreshed his recollection, testified as to the prices marked on 17 hats, 7 rolls of ribbon, and 4 pieces of velvet trimmings. On cross-examination he testified that he had selected and testified concerning said 17 hats, because, to the best of his belief, he had personally seen the price marks on one-half of the whole number of hats named in said inventory, and therefore had selected from said inventory alternate hats to the number of 17; and again stated that he could not select from said inventory any specific article as one he had personally seen a price mark on at the time of the attachment. Thereupon the defendant again offered said inventory in evidence, but the court refused to admit the same, to which ruling the defendant duly excepted." The general principles involved in the examination of the question thus presented have been so recently and so fully stated by this court (*Curtis v. Bradley*, 65 Conn. 99, 31 Atl. 591) that it can serve no good purpose to do more than refer to them, and to test this issue by the point of that decision (page 114, 65 Conn., and page 596, 31

Atl.), namely: "A memorandum of details which are essential to the full proof of a transaction at issue, proved to have been made substantially at the time of the transaction, and under such circumstances that the memorandum can make a correct statement of such details as they were then known to the person who made the memorandum, or saw it made, and who is himself a witness, and testifies to the transaction, but has lost all recollection of such details, is in connection with the testimony of such witness admissible as evidence." Tested by this rule, the inventory in question falls in one, and that the most vital, particular, to be admissible. The memorandum was not proved to have been made under such circumstances as to make a correct statement of details as they were then known to the witness who made the memorandum. It testifies to matters to which the witness is unable himself to testify, not from lack of recollection, but from want of personal knowledge. No case in any jurisdiction has gone so far as to admit memoranda which fall in this essential. "How far papers, not evidence per se, but proved to have been true statements of fact at the time they were made, are admissible in connection with the testimony of a witness who made them, has been a frequent subject of inquiry." *Curtis v. Bradley*, 65 Conn. 107, 31 Atl. 593. But it has never, so far as we know, been seriously claimed that such papers could even be used at all, by a witness under examination, except to refresh his memory, or to assist him to testify to something which he once knew to be true. This being so, it will appear that, if the present case presented the question, it would be much more doubtful whether the court below did not err in permitting the defendant to go so far in his use of the inventory in connection with his evidence than it is whether the defendant was injured by its exclusion as itself evidence.

The inventory was, as we have seen, claimed to be admissible for four purposes, or on four grounds. One of these was "as a part of the *res gestæ*." Manifestly this is independent of the question of the defendant's knowledge of the details in the memorandum, and it is equally evident that the claim has no foundation. Taking the definition of the term adopted by this court in *Stirling v. Buckingham*, 46 Conn. 461, 464, 465,—"*the circumstances, facts, and declarations which grow out of the main fact are contemporaneous with it, and serve to illustrate its character.*"—it is clear that no illustration of the character of the taking of the property of a stranger to the suit is derived from this inventory, nor did it "grow out of the main fact," in the sense in which that expression is used in this definition. But it was claimed also to contradict the plaintiff and his wife as to the value of the goods, she having testified that some of the goods were marked. But the defendant also testified that some were marked. The trouble was, the inventory, before us as an exhibit, does not show which of the goods were marked. The de-

fendant could not specify any article in said inventory as one on which he had seen a price mark, and could not say as to any item whether he had written it from his own examination, or from information furnished him by one of his assistants. One of these assistants only was called. His evidence, perhaps, bears more closely upon another claim of the defendants,—that the inventory was admissible as tending to prove the value of the property. But he testified that the value attached to the stock in the inventory was based upon the amount it would bring at forced sale; that is, of course, what the witnesses, or perhaps the officer and his assistants collectively, believed, estimated, or surmised that it would bring at such sale. But we know of no rule of law to the effect that a trespasser is authorized to convert property upon such valuation. It is true, this witness also stated that some of the goods had tags with price marks affixed, and that these were taken in making up the value of the inventory. But this was all. Finally, the inventory was claimed as descriptive of the property attached. But the same want of knowledge on the part of the witness is evident here throughout. The court, in its above ruling, committed no error prejudicial to the defendants.

The remaining assignment of error embraces several distinct claims. It is for that reason defective. *Slimmonds v. Holmes*, 61 Conn. 1, 23 Atl. 702. But, waiving this, we discover no error here. It is true, as this court said in *Gilligan v. Lord*, 51 Conn. 562-567, that "the relation of husband and wife gives special opportunities for fraudulent transfers of property, and therefore transactions between them are open to a special suspicion." But this is a consideration to be regarded by the trial court in reaching its conclusions of fact, and we find no ground on which to hold that it was not regarded by such court in this case. It is true, also, as this court further said in the case above cited, that the statement quoted holds only in relation to actual fraud. The court has found, and we are bound by the finding, that none existed; that there was no fraudulent intent on the part of said Louisa or of the plaintiff, in mingling their goods together in the same store. Further, as bearing upon this and the claim of estoppel, it does not appear that any creditor was misled to his harm by the plaintiff's conduct. There is nothing to show that either the plaintiff in the attachment suit, or any one else, gave credit to the wife on the strength of her apparent ownership of what was in this case held to be the plaintiff's property. Indeed, though this is perhaps not very material, the plaintiff in the attachment suit against the wife had no valid cause of action. *Banash v. Fawcett*, 66 Conn. 598, 34 Atl. 546. Nor was the defendant officer misled by the present plaintiff. He made no demand upon Mrs. Fawcett to turn out goods to satisfy his writ. She pointed out a show case full of goods, saying: "Do not touch anything here. These do not belong to me." The plain-

tiff then came and informed said defendant that some of the goods in the store belonged to him, the plaintiff. He asked and was refused to be allowed to see what said defendant was taking, and to make a list of the same. Surely, if the defendant officer is in the condition of those who are said in Holy Writ "to be destroyed for want of knowledge," it is for the same reason,—because he rejected it.

But, finally, it is asserted that the finding shows, as a matter of law, that, if the plaintiff had any interest in the goods attached, it was either one in common, or as a partner with his wife. No doubt, if such were shown to be the plaintiff's interest, the attachment would be justified. *Stevens v. Stevens*, 39 Conn. 474, 480. Doubtless, also, where the terms of the agreement and the facts all appear, whether or not a partnership existed is a question of law for the court to decide. *Morgan v. Farrell*, 58 Conn. 413, 423, 20 Atl. 614. But, taking the facts as found, and assuming full right to pass upon them, we cannot say that they show either a partnership or a tenancy in common in the goods attached between the plaintiff and his wife; not a partnership under any principle laid down, rule stated, or test applied in the cases on which the defendants rely (*Parker v. Canfield*, 37 Conn. 250, 266; *Tyler v. Waddingham*, 58 Conn. 375, 383, 20 Atl. 335); not a tenancy in common under any existing definition of such term, nor by the application of the clear test of such holding stated by this court in *Griswold v. Johnson*, 5 Conn. 363, 365. There is no error in the judgment complained of.

The other judges concurred.

(58 Conn. 39)

VAN EPPS v. REDFIELD et al.

(Supreme Court of Errors of Connecticut.
June 5, 1896.)

BASTARDY—CONSIDERATION OF FATHER'S CONTRACT
WITH MOTHER—APPEAL—PRESUMPTION—
DISCRETION OF TRIAL COURT.

1. On appeal from a judgment sustaining a demurrer to a complaint for specific performance, it cannot be assumed that the contract sought to be enforced was verbal, the complaint not stating whether it was written or verbal, though a considerable portion of the complaint consists of allegations apparently introduced to show sufficient part performance of an oral agreement, and a large part of plaintiff's brief as well as oral argument on appeal is directed to the claim that the facts stated are sufficient to denote such valid part performance.

2. A judgment sustaining a demurrer to a complaint for specific performance cannot be vindicated on the ground of exercise of discretion by the court, when it is apparent that it sustained the demurrer because of its view that under the law it could not do otherwise.

3. The legal obligation of the father of a bastard to the mother to assist in the maintenance of the child, enforceable in bastardy proceedings (Gen. St. §§ 1206-1208), makes the promise of the mother not to enforce it by legal proceedings, but to support and educate the child at her own expense, a legal consideration for his promise to convey property to her.

Appeal from superior court, Hartford county; Thayer, Judge.

Action by Emma J. Van Epps against John R. Redfield, administrator, and others, for specific performance. A demurrer to the complaint was sustained, and plaintiff appeals. Reversed.

William B. Stoddard and Sylvester Barbour, for appellant. Charles E. Perkins, for appellees.

FENN, J. The original complaint in this action was demurred to, and said demurrer was sustained. Thereupon an amended complaint was substituted. This was also demurred to, and again the demurrer was sustained. Although the appeal assigns error in reference to both of these rulings, we need only to consider the last complaint and the last demurrer, on which all the questions properly presented arise. The cause of action alleged may be thus stated: John C. Wasserbach died September 12, 1895, leaving a considerable estate, and a valid will. He also left one child, John C. Wasserbach, Jr. The estate is in settlement. Included in the inventory is a certain lot of land, described in the complaint, with dwelling house and other buildings thereon, situated in Hartford. Said child, John C. Wasserbach, Jr., was born May 20, 1884. The plaintiff is his mother. The deceased gave the child his own name, by which name such child has always been called, and said child was always recognized by said deceased, and adopted as his own child. The plaintiff and the deceased were never married. About the time of the birth of said child, "in consideration of the premises, and in consideration of the legal and moral obligation which the said Wasserbach, deceased, was under to the plaintiff, and in further consideration of the plaintiff's promise to and agreement with said Wasserbach, deceased, not to enforce by legal proceedings her legal rights and claims against him, said Wasserbach, deceased, to compel him to pay her towards the support and maintenance of said child, John C. Wasserbach, Jr., said Wasserbach, deceased, in part performance of his obligation to the plaintiff, agreed with and promised her to purchase and convey to her the aforesaid real-estate premises, No. 14 Westland street, which property was formerly owned and occupied by members of the plaintiff's family and relatives of hers." The plaintiff, in fulfillment of her said promise to and agreement with said Wasserbach, deceased, has never commenced any legal proceedings against him to compel him to pay any part of the expense for the support and maintenance of said child, but has always supported, maintained, and educated said child at her own expense. After said promise and agreement said deceased, in pursuance thereof, on or about September 22, 1885, purchased said real estate, but took the title in his own name. Immediately after such purchase he informed the plaintiff that he had purchased said real estate for her, according to his aforesaid promise and agreement, and delivered possession of said premises to the plaintiff, and informed her that said real-estate

premises were her own property, to be owned by her in fee simple, and be occupied by her as a home for herself and said child; and the plaintiff entered into possession of said premises under a claim of ownership, and has ever since occupied and now occupies the same with said child under said claim of ownership. This she did with the knowledge and consent of said deceased. From time to time since the aforesaid purchase, and up to the time of his death, the deceased renewed his said promise to and agreement with the plaintiff, upon the considerations aforesaid, to convey to her the legal title to said real estate, and had partially made arrangements so to do in the summer of 1895, when he was suddenly killed by an accident, and never in fact did deliver to her a conveyance of said premises. The plaintiff claimed—First, specific performance; second, damages.

In addition to a demurrer to the relief sought, the following grounds of demurrer were stated: "(1) Upon the allegations in the complaint, the agreement set up is not one which will be enforced in a court of equity, as not coming within the rules applicable to the specific performance of a verbal agreement relating to real estate. (2) Said complaint does not state any good and sufficient consideration for the said agreement therein asked to be enforced, as the consideration of the premises and the legal and moral obligations the deceased was under to the plaintiff is not a sufficient statement of a sufficient consideration for said agreement. (3) It is not a sufficient allegation to support the alleged agreement that the plaintiff agreed not to enforce by legal proceedings her legal rights and claims against the deceased to compel him to pay her towards the support and maintenance of said child, as such agreement, if ever made, would be invalid, under section 1209 of the General Statutes, without the consent or provision referred to in said section, and it is not alleged that such consent or provision was ever obtained. (4) Such agreement not to enforce said claim, if made, would not be a sufficient consideration, and would be contrary to public policy and void; nor would it have been an adequate consideration. (5) Said agreement alleged in said complaint, for the specific performance of which said suit is brought, was void as against public policy, and is not such a one as a court of equity will enforce." The demurrer to the legal relief, namely, damages, claimed upon the complaint, was well taken, and properly sustained by the court below, for reasons fully stated by this court in *Grant v. Grant*, 63 Conn. 530-545, 29 Atl. 15, 19. The demurrer to the claim for equitable relief by way of specific performance should have been overruled, because that was the appropriate relief to be demanded upon the allegations of the complaint, provided these were sufficient to call for any relief whatever. Rules of Practice, 58 Conn. 567, § 11, 26 Atl. viii. We come, then, to the special grounds of demurrer which have been stated. It is perhaps to be regretted that we cannot regard the first of these

grounds as presenting any question properly before us at this time for decision. We are not at liberty to say that the plaintiff relies upon "a verbal agreement relating to real estate." The record discloses that the defendants moved in the court below that the plaintiff make the original complaint more specific, by stating whether the promise and agreement alleged to have been made to her was in writing or verbal. This motion the court, however, overruled. It is true that a considerable portion of the complaint consists of allegations apparently introduced to show sufficient part performance of an oral agreement to remove the operation of the statute of frauds. It is also true that a large part of the brief as well as the oral argument before us in behalf of the plaintiff was directed to the claim that the facts stated were sufficient to denote such valid part performance. But notwithstanding this we feel constrained to take the pleadings as they are, and to be limited in our decision to the issues as they are presented upon the record. This limitation prevents also the full application, as a test of the correctness of the decision of the court below, of the doctrines concerning discretionary power in the court, so ably urged upon us by counsel for the defendants. It is very apparent that the trial court, in deciding upon the demurrer, did so, not in the exercise of any actual or assumed discretion, but because, in the view of the law held by said court, a judgment in favor of the plaintiff, upon the allegations of the complaint, could not be vindicated or sustained, not because of discretion to so decide, but because it had, as it deemed, no discretion to do otherwise. If this be true, there was no occasion and no opportunity for the exercise of the power of discretion. If it be not true, the fact that such power did really exist does not justify a decision in no wise based upon it. It is not too much to say that there are cases where complaints may show what may be called (as it is called in *Bisp. Eq. § 364*) a *prima facie* right to come into equity to ask specific performance; but after coming into equity it may, upon a hearing of facts relevant under such complaint, and in support of its allegations, nevertheless appear that the contract is not so equitable, reasonable, certain, or on good, adequate, mutual consideration, consistent with policy, and free from fraud, suspicion, or mistake, that specific performance should be decreed. *Patterson v. Bloomer*, 35 Conn. 57. In such a case a demurrer to the complaint will not reach the difficulty in the way of the plaintiff's recovery, which the full trial on the merits will disclose. On such a trial the considerations which the defendants have urged upon us as reasons why the relief prayed for should, in the exercise of discretion, be denied, will doubtless receive, as they will merit, full attention and weight.

The third ground of the defendants' demurrer is not well taken, and was not pressed. Gen. St. § 1209, was not passed until 1887, and does not affect the validity of the alleged cause of action in this case.

The remaining grounds of demurrer present, in effect, only a single question: Does the complaint allege a contract founded upon sufficient consideration, consistent with public policy, which a court of equity, in the exercise of its discretion, can enforce? Concerning the allegations of consideration in the complaint, what the legal or moral obligations of a person to a child which such person caused to be called by his own name, and "always recognized and adopted as his own child," may be, it is unnecessary to inquire, since such child is in no sense a party to this suit. Nor is it essential to determine what obligation the said John C. Wasserbach, deceased, was under to the plaintiff, except so far as it enters into the question of the alleged consideration for the asserted agreement and promise to her. Upon the facts stated, he, the said Wasserbach, was at the time stated,—about the time of the birth of the child,—by virtue of the statute (now Gen. St. §§ 1206-1208), under a legal obligation to the plaintiff, enforceable by what are called "bastardy proceedings," based upon such statutory enactments. She thereby, and by reason of the premises, had a valid and lawful cause of action against him, to compel him to assist her in the maintenance of their child. The prescribed proceeding is of a civil nature, and the plaintiff mother, in such a suit, has the rights of a party in an ordinary civil action, and her interest in such suit is a pecuniary one. *Town of Hamden v. Merwin*, 54 Conn. 418, 8 Atl. 670; *Booth v. Hart*, 43 Conn. 480-486; *Robbins v. Smith*, 47 Conn. 182-186. The complaint states that the plaintiff had the statutory right above referred to, and that in consideration of her promise and agreement not to enforce it by legal proceedings, but to support and educate the child without assistance from said Wasserbach, and at her own separate expense, he agreed and promised to convey to her the property in question. We cannot, in view of these allegations, indorse the claim of the defendants that "there is no suggestion here that there was any other consideration, legal or moral, than the fact of the illicit connection and the birth of the child," which assertion is made the basis of the claim that a past act is not a valid consideration, and that "a promise made in consideration of past illicit intercourse is void" unless, indeed, under seal. We will not discuss or express any opinion here concerning the soundness of these propositions, because it appears to us that the obligation relied upon has its sufficient basis in the legislative authority which created it, though, were it necessary, it would be easy to see that the provisions of such statutes are not opposed to, but in furtherance of, public policy, and in close accordance with the principles of natural justice.

But the defendants further claim that no liability as imposed by the statute arises unless the statutory provisions are followed. The case of *Heath v. White*, 5 Conn. 228, 235, was referred to, where this court said: "There is no possibility of deciding who is the father of a child begotten on a lewd woman. Her testi-

mony is permitted to rise so high in the scale of probability as to subject him to a contribution towards the child's maintenance, not as the father in fact, but the putative father only." But surely, if the testimony of a lewd woman is permitted to rise so high in the scale of probability as to accomplish the effect stated, what shall be said of the altitude in the scale of such testimony, when coupled with the facts alleged, that the asserted father gave the child his own name; by which such child was always called, and always recognized and adopted it as his own child? Truly, it cannot be claimed that this court meant to say in *Heath v. White* that the putative father only of an illegitimate child is liable to contribution, but that the real father is not. But it is said liability attaches only at the end of litigation of bastardy proceedings, which might be brought by the mother or by the town, and then only the amount would be fixed which the defendant should pay, either to her or to the town, for some indefinite time. It is further said that a promise on the part of the mother that she would not commence the suit would not terminate the liability of the deceased. As we have before said, the effect which the provisions of Gen. St. §§ 1200, 1210, might have had, if such statute had been in existence in 1884, is not involved, since such enactment was not made until 1887. But the very provisions of those sections appear clearly to recognize the authority of the mother, prior to that time, to effect a settlement, and the object of the statute was to limit and qualify that before-existing right. But it is further to be noticed that the complaint alleges that a part of the promise which the plaintiff made and fulfilled was to relieve the deceased, not alone from his obligation to her, but from the burden of the support, maintenance, and education of the child; thus in this way, at least, doing what would "terminate the liability of the deceased."

But finally, the defendants claim that the real question is whether the court, as a court of equity, will say that the consideration stated is such an adequate and sufficient one that under the circumstances of the case it will enforce the specific performance of the alleged agreement. But regarding this claim, for reasons which we have already somewhat considered in another connection, we do not feel at liberty to base a decision in the defendants' favor upon it, as the case now stands. It is alleged in the complaint that the appraised value of the real estate claimed is \$3,300. What the amount of the burden from which the plaintiff relieved the deceased by her promise and undertaking was, or would have been, does not appear. The trial would probably disclose much material information bearing upon this question of which we are ignorant. We can only refer to general principles applicable to the matter. In *Grant v. Grant*, 63 Conn. 540, 541, 29 Atl. 15, 18, the cases of *Wallace v. Rappleye*, 103 Ill. 229, and *Woods v. Evans*, 113 Ill. 186, are quoted from and approved. The principle is affirmed that "specific performance of a verbal

contract affecting real estate will not be decreed except upon due and conclusive proof of its existence and terms, and that the contract must be certain, equal, and fair, founded upon a valuable as distinguished from a merely good or moral consideration, and that, so proven, it is not a matter of right, but of sound discretion." Such discretion, in such a case so proven, pertains, at least in the first instance, to the trial court, guided also by what is further said by the court in the citation above given,—that such claims as the present "are always dangerous, and when they rest on parol evidence they should be strictly scanned." There is error in the judgment complained of, and it is reversed. The other judges concur.

(178 Pa. St. 424)

McCLANE v. PEOPLE'S LIGHT & HEAT CO.

(Supreme Court of Pennsylvania. Nov. 11, 1896.)

TRIAL—PROVINCE OF JURY.

Where the testimony on a disputed question of fact is all verbal, the issue is properly submitted to the jury.

Appeal from court of common pleas, Washington county; J. A. McIlvalne, Judge.

Action by M. W. McClane against the People's Light & Heat Company to recover the rental of a gas well drilled by defendant on plaintiff's premises. From a judgment for plaintiff, defendant appeals. Affirmed.

Todd & Wiley, for appellant. John H. Murdoch, for appellee.

PER CURIAM. While it is true that the plaintiff admitted that he had offered to reduce the rental \$50 per annum, it is also true that that offer was rejected by the defendant. The plaintiff denies that he agreed in any other way than this to make any reduction in the rental, and he especially denies that he agreed "to make it right," or that he agreed in any general way to reduce the rental. This raised a disputed question of fact, as to which the testimony was all verbal, and therefore had to be submitted to the jury. The plaintiff admitted that he said he would rather reduce the rental than have the well pulled, but that was not enough to make an agreement to reduce. Judgment affirmed.

(177 Pa. St. 512)

McARTHUR et al. v. SHERWOOD.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

SHERIFF'S DEED—DESCRIPTION—TRIAL—RESERVATION OF QUESTIONS OF LAW.

1. The boundary line between two adjoining landowners was in dispute, and one recovered from the other, in ejectment, to the line claimed by him, and sold to defendant his tract, described as extending to such line. Subsequently the land of the other was sold on execution, the sheriff's deed describing the land as bounded on the north by defendant's land. Held, that

the sheriff's deed carried the entire interest of such owner in the disputed strip, including the right to sue in ejectment for its recovery.

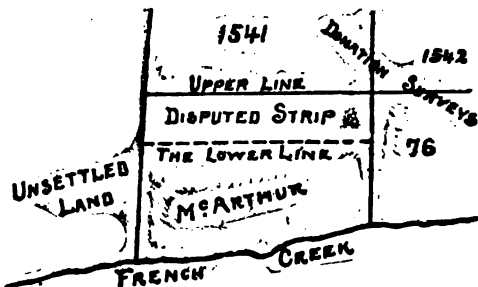
2. Where the facts regarding the levy upon and sale of land under execution are undisputed, the court properly reserves as a question of law whether the sheriff's deed passed title to a strip the title to which at the time of the sale was in dispute between the execution defendant and an adjoining landowner, the deed describing the land as bounded by the land of such owner.

Appeal from court of common pleas, Crawford county; Charles H. Noyes, Judge.

Ejectment by Moses McArthur and others against Alanson Sherwood. There was a judgment for defendant, and plaintiffs appeal. Affirmed.

Joshua Douglass, E. W. McArthur, Geo. W. Haskins, and John O. McClintock, as Haskins & McClintock, for appellants. Pearson Church, for appellee.

WILLIAMS, J. The situation of the land described in the writ, and the contention of the respective parties to this litigation, will be readily understood by a glance at the accompanying diagram. It is not drawn to a scale, and does not undertake to show the relative size of the several tracts appearing on it, but it illustrates the claims of both plaintiffs and defendant, and the question on which the case turned at the trial.



The tracts numbered 1,540, 1,541, 1,542, and 76 are part of a block of donation warrants surveyed in 1785. The land south of 1,541 and west of No. 76 was not included in the donation surveys, but was open to settlement under the land laws of the commonwealth. So much of this land as lay between 1,541 and French creek, and extended easterly to No. 76, was acquired by McArthur, by virtue of a settlement made in 1818. His tract called for No. 1,541 as its northern adjoinder, and the south line of No. 1,541 was therefore his north line. His contention is that this line is an extension westwardly of the boundary line between 1,541 and 76. The defendant and his predecessors in title to tract No. 1,541 contend that the southern line is about 90 rods further south than the location given it by the plaintiffs, and that for this distance it adjoins No. 76, as shown by the dotted line on the diagram. An action of ejectment brought to settle this question was tried as early as 1848, and resulted in a verdict in favor of the northern line. A sec-

ond action of ejectment, involving the same question, was tried in 1873, and resulted in a verdict in favor of the southern line. The plaintiff in that case took possession under his verdict, and has remained in possession down to the present time. A third action was brought in 1891 for the recovery of the land between these lines, which is the action now before us. On the trial, the defendant set up two independent lines of defense. He contended that the lower line was the true southern boundary of No. 1,541; but he also contended that, however the jury might find upon this question, the plaintiffs could not recover, because they did not hold the title to the land lying between the two lines. The jury found against him on the first question. The second question was held by the court to be one of law, upon all the evidence, and was reserved at the trial. Subsequently, the learned judge entered judgment on the reserved question in favor of the defendant, non obstante veredicto. The only question presented on this record is whether the question reserved was a question of fact, that should have gone to the jury, or was, as the court below regarded it, a question of law, that could properly be reserved.

The facts upon which it was presented were as follows: Cyrus Kitchen, who was the plaintiff in the action tried in 1873, was then the owner of No. 1,541. The result of the trial was to determine that the southern line was the true boundary between McArthur and his tract. Soon after he was put in possession of the land he had recovered, he sold his entire tract, by a description that included the land down to the southern line, to Sherwood, who went immediately into possession of his purchase. Some time in 1878, the McArthur tract was sold at sheriff's sale, and bought by D. C. Brawley. The tract was described by the sheriff as bounded on the north by Sherwood. Sherwood was in possession, and claiming the title, under his purchase from Kitchen, down to the lower of the two lines. His title was defeasible only by the bringing of a third action of ejectment, and a recovery therein against him. But, subject to the possibility of such future litigation within the statutory period, he was the owner in fee simple, and in possession as such. The description in the levy and sheriff's deed embraced the whole of the McArthur tract, for it extended on all sides to its adjoiners. There was no more reason for affirming that the line of the judgment fell short of Sherwood's land on the north than that it fell short of the adjoiners on the east or west. It seems evident, therefore, that Brawley acquired by his purchase whatever title McArthur had between French creek, on the south, and Sherwood's land, on the north. This included the land which was in McArthur's possession within the boundaries of the settlement tract, and the right to bring a third action of ejectment, in order to change, if able to do so, his northern boundary. McArthur's right and title

to the land, whether in possession or in action, passed to the sheriff's vendee. The learned judge, understanding the facts bearing upon the question to be in no controversy whatever, drew the attention of plaintiffs' counsel to them, and said to them that, if he was mistaken in thinking the facts to be conceded, he wished them to say so at once, as otherwise he would reserve the consideration of their legal effect as a question of law. Counsel remained silent. The question was reserved. It was subsequently decided as a question of law, and the complaint now made is that it was a question of fact.

We do not think counsel ought to raise this question after what transpired at the trial; but, treating it as properly raised, we are not satisfied that the learned judge erred in his view of the question. The question was the extent of the levy and sale. It was, in express terms, from French creek, on the south, to Sherwood's, on the north. Sherwood owned 1,541. The line of 1,541, as fixed by the last verdict, was the southernmost line of the two. There was no doubt about either of these facts. Their effect was to be decided by the court. There was no conflicting testimony, no room for diverse inferences of fact, no open question of settlement. The question, reduced to its lowest terms, is whether the right to bring the third action of ejectment passed to the sheriff's vendee under a description that covered the whole of the McArthur tract, and of McArthur's interest therein, or whether it survived in the original owner, notwithstanding the sale by the sheriff. We concur with the learned judge, not only in regarding the question as one of law, but in the conclusion that, upon the evidence, the plaintiffs cannot recover, because they do not appear to have any title to the land in controversy. The assignments of error are overruled, and the judgment is affirmed.

(173 Pa. St. 429)

RALSTON v. TRUESDELL.

(Supreme Court of Pennsylvania. Nov. 11, 1896.)

WILLS—NATURE OF ESTATE DEvised—ESTATE TAIL
SUBJECT TO EXECUTORY DEVISE—BARRING
ENTAIL—EFFECT ON EXECUTORY DEVISE.

1. Testator "bequeathed" certain land to his wife for life, and then declared, "I leave and bequeath unto my granddaughter N. all the real property that my wife enjoys during her life, and at my wife's death I bequeath the same property that she held during her life to N. and to the heirs of her body; but if she should die and leave no child or children, then * * * the said property shall be sold to the best advantage, and equally divided among my other legatees and their heirs." *Held*, that on the widow's decease N. took an estate tail, and the "other legatees and their heirs" an executory estate in fee; the former estate to terminate, and the latter to vest in the executory devisees, on the death of N. leaving no child or children.

2. Where an estate tail is devised, with a limitation over in fee on the death of the first taker leaving no child or children, a deed executed by the tenant in tail in the form prescribed by Act 1790, to bar the entail, and a reconveyance to such tenant, vest in him a fee, and prevent the executory devise from taking effect.

Appeal from court of common pleas, Washington county; J. A. McIlvaine, Judge.

Ejectment by J. M. Ralston, administrator of the estate of Nancy Ramsey, deceased, against Joel Truesdell, administrator d. b. n. c. t. a. of Joseph Alexander, deceased, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

The court of common pleas rendered the following opinion:

Joseph Alexander "left and bequeathed" to his wife for life certain real estate, including the land in dispute in this action. In his will, after thus providing for his wife, and making various bequests to his children, he made a devise in the language following: "I leave and bequeath unto my granddaughter Nancy Ramsey all the real property that my wife enjoys during her life, and at my wife's death I bequeath the same property that she held during her life to Nancy Ramsey and to the heirs of her body; but if she should die and leave no child or children, then in such a case the said property shall be sold to the best advantage, and equally divided among my other legatees and their heirs." The question reserved and now for decision, is, did Nancy Ramsey, who died after the testator and his widow, unmarried, leaving no child nor children nor lineal descendant, have, at the time of her death, under this provision of her grandfather's will, a life estate or an estate tail in the lands devised to her? If she had only a life estate, then our instruction to the jury to find for the plaintiff was wrong; but if she had an estate tail, then our instruction was right, as her estate had been enlarged into a fee simple and the right of possession at the time suit was brought was in the plaintiff. The language of the testator, to wit, "I bequeath the same property" (that is, the property his widow is to hold for life) "to Nancy Ramsey and to the heirs of her body," creates an estate tail. The words used are strictly and technically words of limitation. But these words follow: "But if she should die and leave no child or children, then in such a case the said property shall be sold to the best advantage, and equally divided among my other legatees and their heirs,"—and they must be taken with what precedes. It is argued by the counsel for the defendants that, as the words "child or children" are words of purchase, therefore the words "heirs of her body" were used by the testator in the same sense; that he purposely used the words "child or children" in the second clause of this paragraph to explain in what sense he used the words "heirs of her body" in the first clause of the paragraph; and that the whole paragraph, correctly construed, should read, "I leave and bequeath the said property to Nancy Ramsey and to the heirs of her body, but if she should die and leave no heirs of her body (by that I mean no child or children), then in such case (that is, at her death)

the said property shall be sold," etc. This construction would give to Nancy Ramsey a life estate, which would terminate at her death, she having died "unmarried and without child or children or other lineal descendant," as shown by the admissions of record. It is contended, however, by the counsel for the plaintiff, that no such qualifying effect can be given to the words "child or children," but that as the testator first used the words "heirs of her body" it is rather to be held that he used the words "child or children" in the same sense,—that is, as words of limitation and not of purchase. If it were necessary to choose between these two interpretations, the former would be adopted, as "the nature of a devise over is always to be looked at to ascertain whether a definite or indefinite failure of issue was intended"; and the words "child or children" would be taken as explanatory of what the testator meant by the words "heirs of her body." But if we can give to the words "heirs of her body" and to the words "child or children" their technical meaning, without one modifying the other, and allow both to be thus interpreted, we must do so. The presumption is that the testator intended that all the words he used should be given their legal signification. And it is only where an intention to the contrary clearly appears that a modified meaning can be given to such words as "issue," "heirs of his body," and "children." In our opinion, the testator used both the words "heirs of her body" and "child or children" in their legal sense, and that they must be so interpreted. His purpose was to give, in the first instance, an estate tail, to be reduced to a life estate on the happening of a certain contingency, to wit, the death of the first taker before she married and had a "child or children." The happening of the contingency—the death of the first taker leaving "no child or children"—was to abridge the estate tail or reduce it to a life estate, and make effectual the devise over to "the other legatees and their heirs." Nancy Ramsey had an estate tail, and "the other legatees and their heirs" took an executory estate in fee. The executory estate was limited, and was to take effect after a definite failure of issue of the first taker. If there was no such failure, then the estate tail was to remain as though there had been no limitation over, but if there was such a failure then the estate tail was to be reduced to a life estate and the fee was to vest in the executory devisees. Nancy Ramsey dying leaving no child or children, the estate tail, by the happening of that contingency, was to be abridged, and the estate in fee vested in the "other legatees and their heirs." *Ingersoll's Appeal*, 86 Pa. St. 245; *Taylor v. Taylor*, 63 Pa. St. 484. That the event of a person dying without leaving children to survive him can be made a contingency upon which an executory devise may be limited over, as well as the happening

of any other event, cannot be questioned. 2 Washb. Real Prop. 349.

But, granting that an estate tail was given to Nancy Ramsey to be abridged upon the happening of a certain contingency, as we have held, it is argued that that contingency did not happen. On the authority of *King v. Frick*, 135 Pa. St. 575, 19 Atl. 951, it is contended that the testator intended the devise over "to his other legatees and their heirs" only in the event of the death of the first taker, Nancy Ramsey, without children, during his life. We think, however, that that case can be distinguished from the one in hand. As said in *Jessup v. Smuck*, 16 Pa. St. 339, "the testator was providing for the disposition of his estate after his decease, and must be supposed to refer to events and their occurrence in time subsequent to his death." In the disposition made he provided that Nancy Ramsey should not come into the enjoyment of her estate until after the death of his widow, and he expected his widow to live longer than he did, for he gave her a life estate in the very land devised to Nancy Ramsey. The rule invoked by the counsel for the plaintiff is stated by Powell in these words: "But in cases of immediate gifts, it is generally true that a bequest over, in the event of the death of the preceding legatee, refers to that event occurring in the lifetime of the testator; yet this construction is only made ex necessitate from the absence of any other period to which the words may be referred, as a testator is not supposed to contemplate the event of himself surviving the object of his bounty." 2 Pow. Dev. 763-765. In *Jessup v. Smuck*, supra, Mr. Justice Chambers says: "In the cases which limit the death to the testator's lifetime, it is admitted that it is adopted from necessity, in aid of what was considered the general intent of the testator, and was not applied where the first taker is referred to or treated as living at a period subsequent to the death of the testator." Joseph Alexander, after giving a life estate to his wife, provided that "at my wife's death I bequeath the same property to Nancy Ramsey," etc. No immediate gift was made to Nancy Ramsey. She must wait, not only until after the death of the testator, but until after the death of his widow, the life tenant, before she receives anything. The testator, in making the devise to Nancy Ramsey, "referred to an event that would take place subsequent to his death," to wit, the death of his wife, who was made a life tenant of the very property devised. Again, he provided for a sale of the property, and a distribution among persons then in being,—"his other legatees,"—and this provision for a sale, which, of course, would be after his death, is connected as to time with the death of Nancy Ramsey; "if she die leaving no child or children, then in such a case [on the happening of such event] the said property shall be sold and divided equally among my

other legatees." Taking alone, then, the will of Joseph Alexander and the fact that Nancy Ramsey died leaving no child nor children, we would say that the estate tail terminated at her death, and the executory estate devised to the "other legatees and their heirs" took effect.

But Nancy Ramsey, on the 20th day of June, 1881, executed the deed to James I. Brownson, Jr., Esq., which was offered in evidence, and James I. Brownson, Jr., Esq., reconveyed the property conveyed to him back to her and her heirs and assigns. She died seised of the property now in dispute, claiming to hold a fee-simple title thereto under the deed received from Mr. Brownson. These deeds were executed in accordance with the provisions of the act of assembly entitled "An act to facilitate the barring of entail," and the question now is, was the executory estate, as well as the estate tail, barred by this deed executed under the act of 1799. In *Taylor v. Taylor*, 63 Pa. St. 485, Mr. Justice Sharswood says: "An estate tail may no doubt be subject to an executory devise over on some condition or event to take effect in abridgment or derogation of it; but such an executory devise can be destroyed by a common recovery suffered by the tenant in tail, which enlarges his estate into a fee and excludes all subsequent limitations, whether in remainder or by the way of springing use or executory devise. * * * A devise over after an estate tail on a definite failure of issue is not an executory devise, but a remainder; for it takes effect, not in derogation or abridgment of the preceding estate, but on its regular determination, though only in the event of the termination of the estate upon the death of the tenant. * * * There is, however, not much importance in the distinction as to the limitation over after a definite failure of the issue of tenant in tail, since, call it what you will, executory devise or vested or contingent remainder, it can be barred by a common recovery or by deed duly executed to dock the entail under the act of assembly of January 16, 1799. 3 Smith, 388." "If there be an estate tail with reversion in fee, and this reversion in fee is disposed of by way of executory devise, the interest under the executory devise will not be protected. It may be barred by the common recovery of the tenant in tail; for, as he may bar the reversion in the fee, he may as a consequence bar all estates and interest derived out of the reversion." 2 Prest. Abst. 121. "A devise to A. and the heirs of his body, and, if A. die under the age of twenty-two years, then that the land shall immediately belong to B. in fee or in tail, and A. suffers a recovery or bars the entail according to law during his life, the executory interest will also be barred. B.'s interest could not be saved as a remainder because it was to come in in abridgment of A.'s estate tail and not at its regular determination." 2 Washb. Real Prop. p. 356. "An executory devise is generally indestructible

by any alteration in the estate out of or after which it is limited, but if it is limited on an estate tail the tenant in tail can bar it, as well as the entail, by common recovery or by deed enrolled, etc., where such deed is by statute given the force and effect of a common recovery." 1 Bouv. Law Dict. 629. From these authorities it will appear that Nancy Ramsey, while holding the land in dispute as tenant in tail, by her deed of June 20, 1881, barred not only the entail, but the executory estate given to the "other legatees" of the testator, and which they would have taken by the abridgment of the estate tail upon the death of Nancy Ramsey leaving no child nor children, had not such deed been executed.

In conclusion, our opinion on the question of law reserved may be briefly stated as follows: (1) The testator used the words "heirs of her body" and the words "no child nor children" in their legal sense, and not the one set of words as explanatory of the other. (2) The first devise was to Nancy Ramsey and the heirs of her body,—an estate tail; the devise over was to the testator's "other legatees" (previously named, and all in being) "and their heirs,"—an estate in fee. The devise over was to take effect, and the estate tail to be abridged, on the happening of a contingency, to wit, the death of Nancy Ramsey "leaving no child nor children"; Nancy Ramsey died leaving no child nor children; therefore, taking the will as the only evidence of title, the land in dispute would belong to the "other legatees" (of the testator) "and their heirs." (3) The tenant in tail having executed the deed of June 20, 1881, in due form of law to bar the entail, not only barred the entail, but barred the devise over, and the deed to her from James I. Brownson, Jr., Esq., vested in her a fee-simple estate, which by her death and the probate of her will was, at the time of bringing this suit, vested in the plaintiff, and therefore judgment must be entered on the verdict of the jury as returned upon the question of law reserved. And now, September 1, 1896, judgment entered on the verdict of the jury in favor of the plaintiff, and against the defendant, for the land in dispute and described in the plaintiff's writ, six cents damage and costs.

J. M. Dickson, for appellant. Albert S. Sprowls and McCrackens & McGiffen, for appellee.

PER CURIAM. The judgment in this case is affirmed, on the opinion of the learned court below.

(178 Pa. St. 308)

COMMONWEALTH, to Use of CAMBRIA COUNTY, v. LLOYD, County Com'r.

(Supreme Court of Pennsylvania. Nov. 11, 1896.)

STATUTES — TITLE OF ACT — REPEAL BY IMPLICATION.

1. Act March 16, 1872 (P. L. p. 405), entitled "An act relating to the county commissioners

of Cambria county," provides (section 1) that the commissioners shall assemble at a certain date in each year for the purpose of organization, and that at said meeting each member shall produce his certificate of election. Section 2 fixes the salary of each commissioner at \$400 per annum. Section 3 empowers said commissioners to employ a competent clerk, whose compensation shall not exceed \$600 per annum. *Held*, that said act does not violate the constitutional provision that no bill shall be passed containing more than one subject, which shall be clearly expressed in the title, etc.

2. Act May 7, 1889, fixing the compensation of county commissioners throughout the state at a per diem sum, in lieu of all other compensation and charges, and providing that "all local laws fixing a rate of per diem compensation less than is provided in this act, be and the same are hereby repealed," did not repeal Act March 16, 1872 (P. L. p. 405), which fixes the salary of each commissioner in Cambria county at a specified sum per annum.

Appeal from superior court, Cambria county.

Action by the commonwealth of Pennsylvania, to the use of Cambria county, against J. G. Lloyd, one of the commissioners of Cambria county, to determine the validity of an allowance made to him by the county auditors. A judgment of the court of common pleas in favor of plaintiff was affirmed by the superior court, and defendant appeals. Affirmed.

The superior court rendered the following opinion:

"On the 16th day of March, 1872, an act of the legislature was approved, entitled 'An act relating to the county commissioners of Cambria county.' The first section of the act provides that the commissioners shall assemble at the seat of justice in said county on the third Monday of November in each year for the purpose of organization, and that at said meeting each member elected commissioner shall produce his certificate of election as now provided by law. The second section fixes the salary of each commissioner at \$400 per annum, in lieu of the daily compensation allowed by law. The third section empowers said commissioners to employ a competent clerk, whose compensation shall not exceed \$600 per annum. The constitution of Pennsylvania of 1838, as amended in 1864, provides that 'no bill shall be passed by the legislature containing more than one subject, which shall be clearly expressed in the title, except appropriation bills.' It is contended by the appellant that the act of 1872, above referred to, is unconstitutional, 'for the reason that the title does not indicate that which is embraced in the body of the act itself,' and that the body of the act contains more than one subject. The subject of the act of 1872 is, 'The County Commissioners of Cambria County.' The title of the act points and relates clearly to the said commissioners, and is a fair index of and concerning any legislation in the body of the act pertaining to the rights, duties, and powers of the said commissioners. The title clearly covers the provisions of the first section as to the time and place of organization in each and every year, and the production of the necessary certificate

to entitle a newly-elected member to his seat on the board. This is a duty imposed by the act. The second section gives the commissioners, each, compensation, as a right to which they are entitled, for services rendered the county in the discharge of their duties, and their compensation is fixed at \$400 per annum. We have said that the title clearly indicates any provision in the body of the act touching the rights, duties, and powers of the commissioners; and there is no right more thoroughly understood by all the people, as inevitably incident to an office, than the right to receive fair compensation for the performance of the duties thereof. By the third section the commissioners are empowered to employ a clerk for their assistance, and to pay him a salary, within certain limits, for his services. From the very nature of the duties to be performed by the county commissioners, a clerk to keep a correct record of their proceedings, and the books pertaining to the office, is a necessary incident thereto, and, from the first organization of counties in this commonwealth to the present time, persons peculiarly qualified have been employed and paid as commissioners' clerks; and it requires no stretch of the imagination on the part of any citizen or taxpayer to understand and take notice that the title of an act relative to county commissioners might and would include the right of such commissioners to employ, and fix the salary of, a clerk. We repeat that the title of this act is all-sufficient to give notice of any legislation properly pertaining to the rights, duties, and powers of the county commissioners of Cambria county, and there is nothing in the body of the act that does not pertain to such rights, duties, and powers; and, instead of being misleading, the title is germane to every subject mentioned in the body of the act, and the entire act pertains to but one subject.

"The amendment of 1864 and section 3 of article 3 of our present constitution are substantially the same, and the rule of construction, from 1864 to the present time, adopted by the supreme court, is a sufficient guide in determining the constitutional question raised by this record. As this court is not the final tribunal on this question, we propose to carefully consider some of the cases which we deem decisive, and first those in which it has been declared the subject of legislation was not clearly expressed in the title: In *Dorsey's Appeal*, 72 Pa. St. 192, the title of the act was, 'An act relating to the liens of mechanics, material-men and laborers upon leasehold estates and property thereon in the county of Venango.' The sixth section of the act provided for the filing of liens against freehold estates, and was declared unconstitutional, for the reason that the title gave no notice of liens to be filed against estates of freehold. In *Union Pass. Ry. Co.'s Appeal*, 81 Pa. St. 91, the title was, 'A further supplement to an act entitled an act to incorporate the Union Passenger Railway Company of Philadelphia approved April 8, 1864, authorizing said com-

pany to declare dividends quarterly and to lay additional tracks for the railway.' In addition to the territory authorized to be occupied by the railway company in the original act, section 2 of the supplement authorized the occupation by the railway company of certain new territory and additional streets not provided for in the original act. It was held that the last clause of the title did not clearly express an intent to confer a power to extend the railway into new territory, its apparent meaning being only to authorize the laying down of additional tracks upon the territory and streets mentioned in the original act. In *Beckert v. City of Allegheny*, 85 Pa. St. 191, the title was, 'An act relating to grading, paving, curbing and otherwise improving Troy Hill road in the city of Allegheny.' The body of the act provided for assessing damages for opening streets, not only in Allegheny, but in Reserve township, outside of Allegheny. Held unconstitutional, as the title did not clearly express the subject of the act. In *Re Road in Phoenixville*, 109 Pa. St. 44, the title was, 'An act relating to boroughs in the county of Chester.' The body of the act provided for the transfer of the burden of street damages from the property owners benefited in the borough to the taxpayers of the county at large. Held unconstitutional, as the subject of legislation was not clearly expressed in the title. In *Rogers v. Improvement Co.*, 109 Pa. St. 109, 1 Atl. 344, the title was, 'An act to incorporate the Manufacturers' Improvement Company.' The body of the act authorized the clearing out of Loyalsock creek from source to mouth, to erect dams thereon, and to use the same in floating saw logs and timbers, authorizing the charging of tolls therefor. Held unconstitutional, as the subject of legislation was not clearly expressed in the title. In *Com. v. Samuels*, 163 Pa. St. 283, 29 Atl. 909, the title was, 'An act creating the office of county controller in counties of this commonwealth containing one hundred and fifty thousand inhabitants and over, and prescribing his duties.' The act abolished the office of county auditor. Held unconstitutional. In *Evans v. Willistown Tp.*, 168 Pa. St. 578, 32 Atl. 87, the title was 'An act to regulate the nomination and election of public officers, requiring certain expenses incident thereto to be paid by the several counties and punishing certain offences in regard to such elections.' The body of the act provided for a mode of increasing indebtedness. Held unconstitutional for the same reason. To the same effect is *Ridge Ave. Pass. Ry. Co. v. City of Philadelphia*, 124 Pa. St. 219, 16 Atl. 741; also *City of Philadelphia v. Ridge Ave. Ry. Co.*, 142 Pa. St. 484, 21 Atl. 982. In *Sewickley Borough v. Sholes*, 118 Pa. St. 165, 12 Atl. 302, the title was, 'An act to exempt from taxation public property used for public purposes.' The body of the act exempted such property, and further provided that all property, real or personal, other than that in actual use, and from which any income is derived, shall

be subject to taxation. Held unconstitutional, as the body of the act embraced more than one subject. In *Hatfield v. Com.*, 120 Pa. St. 395, 14 Atl. 151, the title was, 'An act to prohibit the issuing of licenses within two miles of the normal school at Mansfield, Tioga county, Penna.' The first section of the act forbids the granting of any license within the designated territory. The second section made it an offense, punishable as therein provided, for any person to sell spirituous, vinous, malt, or brewed liquors, for drinking purposes, within the prescribed territory. Held unconstitutional, as containing two distinct subjects. In *Pierle v. City of Philadelphia*, 139 Pa. St. 583, 21 Atl. 90, the title was, 'An act to perfect the record of deeds, mortgages and other instruments in certain cases.' The body of the act creates a new duty to be performed in every recorder's office in the commonwealth, of which the title gave no notice. The title indicated an act to perfect records which required no perfecting, and was therefore misleading and unconstitutional. In *McGee's Appeal*, 114 Pa. St. 478, 8 Atl. 237, it is held that, if it be conceded that the title does not fully express the subject of the act, it is only those provisions not covered by it that are void. To the same effect is *Dewhurst v. City of Allegheny*, 96 Pa. St. 437. In *Blood v. Mercellott*, 53 Pa. St. 391, the title was, 'An act to increase the boundaries of Forest county.' The body of the act provided for the extension of the borders of the county, locating the seat of justice, and accepting donations for public buildings. Held not to conflict with article 11 of the constitution, as amended in 1864, prohibiting the inclusion of more than one subject in the title of an act. In *Com. v. Green*, 58 Pa. St. 228, the title was, 'An act to establish a criminal court for Dauphin, Lebanon and Schuylkill counties.' The act provided for the appointment and election of a judge, and for a clerk, by whom grand and common jurors should be chosen and summoned. Held, that the amendment of 1864 never intended that the title of an act should be a complete index of its contents; that there was nothing in the act not embraced in the title, nor which does not relate to the establishment of a criminal court in the counties named; that the intention of the constitutional amendment was to require that the real purpose of a bill should not be disguised or covered by the general words; and that it must be a clear case to justify a court in pronouncing an act, or any part of it, void on this ground. In *Yeager v. Weaver*, 64 Pa. St. 425, the title was, 'An act allowing parties in interest to be witnesses.' The body of the act extended the provisions of the law to persons not parties who had been before excluded as witnesses on the score of policy. Held to be cognate to the subject of the title, and, further, that the people, by the amendment of 1864, did not mean to require the title to be a full index of all the contents of the law, but by declaring that each bill should be confined

to one subject, which shall be clearly expressed in the title, to prohibit the vicious habit of rolling together what were termed 'omnibus bills,' including sometimes more than one hundred sections, on entirely different subjects, with the title of the enactment of the first section, 'and for other purposes.' In *Allegheny Co. Home's Case*, 77 Pa. St. 77, the title was, 'An act providing for an equitable division of property between Allegheny county and the city of Pittsburg.' The county composed a poor district known as the 'Allegheny County Home.' Certain townships of the county were annexed to Pittsburg. The second section of the act provided that the value of the interest of the annexed townships in the home property should be ascertained, and paid to the guardians of the poor of Pittsburg. The third section extended the provisions of the act to Allegheny City as provided for Pittsburg. Held, that the two sections were constitutional; that they did not contain more than one subject which was not expressed in the title, and, if even the third section were unconstitutional, that did not affect the constitutionality of the other sections. (2) All that is required is that the title fairly give notice of the subject of the act, so as to reasonably lead to an inquiry into its body. (3) The title should not mislead, or tend to avert inquiry into the contents of the act. In *State Line & J. R. Co.'s Appeal*, 77 Pa. St. 429, a supplement and a further supplement to an original act were considered. The title of the original act was, 'An act to incorporate the State Line and Juniata Railroad.' The further supplement was entitled 'A supplement to an act, entitled "An act to incorporate the State Line and Juniata Railroad."' The further supplement was entitled 'A further supplement to an act, entitled "An act to incorporate the State Line and Juniata Railroad."' All the provisions in both supplements referred to the State Line & Juniata Railroad Company. Held, that the object of the supplements was sufficiently expressed in their titles, the object being germane to the original act. To the same effect is *In re Borough of Pottstown*, 117 Pa. St. 538, 12 Atl. 573; also *Craig v. Presbyterian Church*, 88 Pa. St. 42. In *Railroad Co. v. Riblet*, 66 Pa. St. 164, it is held that the title of an act is part of the act, and a guide to its right construction; that the effect, not the purpose, of an act, determines its validity; that nothing but a clear usurpation of a power prohibited will justify pronouncing an act of legislature void.

"From the decisions above quoted, it follows that the following propositions have become legal maxims in Pennsylvania: First, that nothing but a clear usurpation of a power prohibited will justify pronouncing an act of the legislature unconstitutional; second, that the title of an act is part of the act, and a guide to its right construction; third, that the effect, not the purpose, of an act determines its validity; fourth, it is not necessary that the title of an act should be a complete index to

its contents; fifth, if the title fairly give notice of the subject of the act, so as reasonably to lead to an inquiry into the body of the bill, it is all that is necessary; sixth, no act can contain two distinct subjects. Applying these maxims to the case before us, it is apparent that the title of the act was sufficient to give notice to every party interested of the subject-matter contained in the body of the act, and that that matter related to the county commissioners of Cambria county, and to no other subject.

"It is also contended on the part of the appellant that the act of March 16, 1872 (P. L. p. 405), is repealed by the general act of May 7, 1880. The act of March 16, 1872 (P. L. p. 405), is a special local and particular statute, applicable only to the commissioners of Cambria county. Following the long-recognized and true rule of construction, we held in *Re Melon St.*, 1 Super. Ct. 73, that the general act of May 16, 1891, did not repeal the local and special act entitled 'A further supplement to the act incorporating the city of Philadelphia, approved April 21, 1858,' for the reason that a general statute, without negative words, will not repeal a previous local statute, although the provisions of both are inconsistent with each other. Notwithstanding the above rule, it is equally true that a subsequent general or local statute, intended as a substitute for a former one, repeals it *pro tanto*, and so it was decided in *Nusser v. Com.*, 25 Pa. St. 123; *Com. v. Grier*, 152 Pa. St. 176, 25 Atl. 624; *McCleary v. Allegheny Co.*, 163 Pa. St. 573, 30 Atl. 120; *Com. v. Weir*, 165 Pa. St. 284, 30 Atl. 835; *Com. v. Schneipp*, 166 Pa. St. 401, 31 Atl. 118; *Com. v. Mann*, 168 Pa. St. 290, 31 Atl. 1006; *Gilchrist v. Strong*, 167 Pa. St. 628, 31 Atl. 931; *Com. v. Wunch*, 167 Pa. St. 187, 31 Atl. 551; *Fenner v. Luzerne Co.*, 167 Pa. St. 632, 31 Atl. 862. In *Bruce v. City of Pittsburgh*, 166 Pa. St. 152, 30 Atl. 831, it was decided that the local act of April 6, 1860, limiting the debt of the city of Pittsburgh to \$1,500,000, is repealed by the constitution and act of April 20, 1874. It was also held that 'whenever any law regulating the municipal affairs of cities of a given class shall be found to conflict with a previous local statute, applicable to any member of the class, relating to the subject, the latter must give way, by reason of the nature and purpose of class legislation.' So it was held in *Com. v. Macferron*, 152 Pa. St. 244, 25 Atl. 556: 'While a previous local statute is not repealed by a subsequent general statute inconsistent with it, unless words of repeal are employed, yet such a rule is not applicable to the classification acts—First, because the legislative intent to repeal local laws is fully expressed in those acts; second, because those acts are of a character to exclude the operation of the rule, being intended to revise the laws relating to municipal affairs so as to reduce all former types and forms of municipal government to three, one for each class; third, because the very nature of class legislation renders the rule inapplica-

ble. Whenever any law regulating municipal affairs of cities of the given class shall be found to conflict with a previous local statute, applicable to any member of the class, relating to the same subject, the latter must give way, by reason of the nature and purpose of class legislation.' To the same effect is *Quinn v. Cumberland Co.*, 162 Pa. St. 55, 29 Atl. 289.

"There is another class of cases which should be carefully considered in arriving at a true solution of the question involved in this case. In *Brown v. Commissioners*, 21 Pa. St. 43, it was held that 'a general statute, without negative words, cannot repeal a previous statute which is particular, though the provisions of the two be different.' In *Bell v. Allegheny Co.*, 149 Pa. St. 381, 24 Atl. 209, it was said by Mr. Justice Heydrick that this rule was as old as the common law; and it was there held that 'a general affirmative statute will not repeal a previous particular statute upon the same subject, though the provisions of the former be different from those of the latter.' And it was further held that 'the local acts of May 1, 1861, and March 11, 1870, fixing the salary of the treasurer of Allegheny county, were not repealed by the act of March 31, 1876 (P. L. p. 13), because the salary of the treasurer was a fixed sum, not made up in part fees and part salary, and that the mandate of section 5, art. 14, of the constitution, that the compensation of the county officers shall be regulated by law, was satisfied, in regard to the treasurer of Allegheny county, by the special act of 1861, and its supplement of 1870.' But in the case of *Com. v. Grier* and *McCleary v. Allegheny Co.*, *supra*, it was decided that the general act of 1876 did repeal the prior local acts relative to the fees and salary of the district attorney and sheriff of Allegheny county, for the reason that they were partly paid by salary, and partly by fees, and there was a clear legislative intent to substitute for the local acts a new rule, by the provisions of the general act of 1876. In *Morrison v. Fayette Co.*, 127 Pa. St. 110, 17 Atl. 755, it was held that a general act which provided that the auditors of each county within the commonwealth should be allowed \$3 per day and mileage did not repeal the local law pertaining to Fayette county, which allowed the auditors \$3 per day, and was silent as to mileage, for the reason that there was no legislative intent to repeal the local act. In *Southwark Bank v. Com.*, 26 Pa. St. 446, it was held that 'the general rule is that, where two statutes contain repugnant provisions, the one last signed by the governor is a repeal of the one previously signed. This is so merely because it is presumed to be so intended by the lawmaking power; but where the intention is otherwise, and that intention is apparent from the face of either enactment, the plain meaning of the legislative power thus manifested is the paramount rule of construction.' By the provisions of section 14 of the act of March 31, 1876 (P. L. p. 13), entitled 'An act to carry into effect section 5, of arti-

cle 14 of the constitution, relative to the salaries of county officers and the payment of fees received by them into the state and county treasury, in counties containing over 150,000 inhabitants,' it was enacted, *inter alia*, that the salary of county auditors in counties containing between one hundred and fifty thousand and two hundred and fifty thousand inhabitants should be \$500 per annum. This act applied to the county of Luzerne, as that county, by the census of 1890, contained over one hundred and fifty thousand and less than two hundred and fifty thousand inhabitants. On May 12, 1887, a general act was passed entitled 'An act regulating the compensation of county auditors within this commonwealth.' The first and only section provided that the auditors in each county in the commonwealth should be allowed out of the county funds the sum of \$3 each for each and every day necessarily employed in the discharge of their duties, together with six cents per mile, circular, from and to their homes, once for each and every week so employed.

"In 1891 George W. Rymer, then one of the county auditors of Luzerne county, demanded compensation at the rate of \$3 per day and mileage, under the act of 1887, instead of his salary of \$500 per annum under the act of 1876, upon the ground that the general act of 1887 repealed the general act of 1876. The court below gave judgment, on a case stated, against him, holding that the act of 1876 was not repealed by the act of 1887. In *Rymer v. Luzerne Co.*, 142 Pa. St. 108, 21 Atl. 794, the supreme court affirmed the judgment, holding that 'while the act of 1876 is neither a local nor a special law, for the reason that it applies to all counties of a certain class, and that class created by the constitution itself, yet its operation is confined to a limited number of counties, and, we think, comes within the reason of the rule laid down in numerous cases, that a general statute, without negative words, does not repeal a previous statute which is particular, even though the provisions of one be different from the other.' Although this case was not cited by counsel in their paper books, we think it decisive of the question raised in this case as to the repeal of the local and particular statute of 1872, relative to the county commissioners of Cambria county, by the general act of 1889, and might have been decided on its authority. The importance of the question, however, to the people of Cambria county, and every other county governed by similar statutes, warrants us in pursuing the question, and considering it in all its features. And here the question of legislative intent presents itself, as the true solution of the matter at issue. Did the legislature, by the act of May 7, 1889, intend to repeal the act of March 16, 1872, or was the former act intended as a substitute for the latter? Quoting from the language of the learned trial judge: 'At the time the act of 1889 was passed, there were on the statute books of this state local laws fixing the compensation of the county

commissioners of Crawford, Cambria, and York counties at \$400 per annum; of Berks county, at \$500 per annum; of Bucks county, at \$800 per annum; of Dauphin county, at \$1,200 per annum,—and local laws for fifty-seven other counties in the state, fixing a per diem compensation, ranging from \$1.50 to \$4 (Northampton county being the only one in which the compensation was more than \$3.50). In Philadelphia and Allegheny counties the commissioners were allowed \$5,000 and \$2,000 per annum, respectively, under the act of March 31, 1876 (P. L. p. 13), fixing an annual compensation for all county officers in counties having upwards of one hundred and fifty thousand population; and in Perry and Union counties the compensation was \$1.50 per diem, under the general act of 1835, no local laws having been enacted for those counties. To recapitulate: In two counties of the state the commissioners were paid \$1.50 per day, under a general act; in fifty-six counties they were paid sums ranging from \$1.50 to \$3.50, under local acts; in one county, \$4, by a local act; and in eight counties an annual compensation fixed for six of them by local acts, and for two by a law general in its character. Applying the rule that the legislative intent must be collected from the words used, we find that by the act of 1889 it is provided, in the first section "that the county commissioners of the several counties in this commonwealth hereafter elected or appointed shall be allowed and paid out of the county funds the sum of \$3.50 each for each and every day actually and necessarily employed in the discharge of the duties of their office," with this proviso: "Provided, that the pay allowed by this act shall be in lieu of all other compensation and charges for the individual services and expenses of said commissioners." Section 3 provides as follows: "All local laws fixing a rate of per diem compensation less than is provided in this act, be and the same are hereby repealed." By section 8 it was clearly intended to repeal all local acts where the rate of per diem compensation was fixed at a less rate than \$3.50 per diem. By the act of 1872 no per diem compensation is fixed, but under its provisions each of the commissioners receives a salary of \$400 per annum, and, from the words of this repealing clause, no intention can be collected to substitute for this annual salary a per diem allowance. In connection with the act of May 13, 1889 (P. L. p. 200), and shedding light on the question of legislative intent, the legislature itself, by a contemporaneous act, has given construction to the repealing clause of the act of 1889, by an act approved May 13, 1889 (P. L. p. 200), entitled "An act regulating the payment of the traveling expenses of directors of the poor and county commissioners within this commonwealth." The repealing clause reads as follows: "So much of all general acts heretofore passed as are inconsistent herewith are hereby repealed, but this act shall not apply to any local law regulating the same." If the legislature intended by the general act of May

7, 1889, to repeal all local acts, why the use of the language above quoted in the repealing clause of May 18th, of the same year? Again, in 1893, by an act approved June 6 (P. L. p. 358), the legislature repealed the local acts fixing the salaries of the county commissioners of Crawford county at \$400, and by the same act extended to that county the provisions of the general act of May 7, 1889. If the act of 1872 was repealed by that of 1889 as to Cambria county, so was the local act of like character repealed as to Crawford county, but the legislature did not so construe its own work; hence the act of June 8, 1893, above referred to. The argument of the learned counsel for the appellant as to the intention of the act of 1889 to introduce a new and uniform system in the state for the payment of county commissioners, and that all local laws are supplied, and therefore repealed, by its provisions, cannot be sustained on principle or authority. *Rymer v. Luzerne Co.*, supra, is a sufficient answer to the argument, without more. Until the act of March 16, 1872, relating to the county commissioners of Cambria county, is repealed or supplied by apt legislation, it must stand. We fully concur with the learned trial judge in his very able opinion that the act in question is not repealed, nor is it unconstitutional. The specifications of error are overruled, and the judgment is affirmed."

Alvin Evans and M. D. Kittell, for appellant. W. Horace Rose and M. B. Stephens, for appellee.

PER CURIAM. We find no error in this record. For reasons given in the opinion of the superior court, the judgment is affirmed.

(55 N. J. E. 159)

DELAWARE, L. & W. R. CO. v.
BRECKENRIDGE et al.

(Court of Chancery of New Jersey. Nov. 18,
1896.)

APPEAL FROM INJUNCTION—STAY.

In a suit by a railroad to compel removal of pipes laid across the road under the soil for transportation of oil, and to prevent laying of other pipes, a preliminary injunction restraining use of the pipes was modified by an order limiting the protection of complainant to access to the crossing for purposes of operating its road and protecting its roadbed, final decree being deferred till determination by action at law of the title to the soil under the road. *Held*, that application for continuation of the original injunction pending appeal from the order would not be granted, as no material injury could come from the use of the pipes before final hearing.

Bill by the Delaware, Lackawanna & Western Railroad Company against Henry R. Breckenridge and others. Heard on application for a stay pending appeal.

Mr. Biller, for the motion. H. S. Harris and Joseph Roseberry, opposed.

EMERY, V. C. This is an application for a stay of proceedings, pending appeal by complainant from an injunction decree, and for

a continuance of the ad interim stay which was granted ex parte on filing the bill, and which was discharged by the injunction decree made on the hearing. This injunction order or decree is more limited in its scope than the ad interim stay, and the difference between them is, as complainant claims, vital to its claim for relief made in the bill and on appeal. The defendant pipe-line company, previous to the filing of the bill, had laid two pipes, for the transportation of oil, under the soil of the roadway of an under-grade crossing made by complainant or its lessors, in the construction of its railroad, and the pipes extended across the entire right of way or lands of the complainant. Complainant claims title to the soil under the roadway, by virtue of a deed from one Stewart, the original owner of the lands, through which the railroad was built. The pipe-line company claims title to the soil under the roadway, and also claims the right to lay pipes therein, by virtue of deeds from Stewart's subsequent grantees and devisees. Upon filing the bill, an ad interim restraining order was advised by Vice Chancellor Reed, which restrained (among other things) the use of the pipes by the defendants for the transportation of oil or any other purpose, until the hearing of the order to show cause, "and until the further order of the court." Upon the order to show cause coming on to be heard before me, the cause was, by consent of counsel, set down for final hearing at a future day, without any formal disposition of the order to show cause, and without ordering any preliminary injunction, the ad interim stay order being allowed to continue meantime, and as originally granted, without further order in relation thereto, except a modification advised by Vice Chancellor Reed on defendants' application. Practically, the restraining order as modified served the purpose of a preliminary injunction, pending final hearing. It was not merely an ad interim stay pending the hearing of the order to show cause, but, being expressly made to continue "until the further order of the court," it must for present purposes be treated as a preliminary injunction. In *Phillips v. Pullen*, 45 N. J. Eq. 157, 16 Atl. 915, a restraining order was held to be an injunction under the statute. On the hearing, instead of making a final decree in the cause, I advised that the cause be held pending the trial of the title to the soil under the roadway by action at law, and directed that an injunction issue in the meantime, but limited to the protection of the complainant in its access to the crossing for the purpose of operating its road and protecting its roadbed, which access the defendants had forcibly prevented. I also advised that the original ad interim stay or order be discharged. 35 Atl. 756. The complainant has appealed from the whole injunction order advised by me on the hearing, and the application is now made, under the 149th rule of the court, for a continuance of the original

ad interim stay as to the use of the pipes, pending appeal, or until the next term of the court of errors and appeals. This rule provides that "an appeal from an interlocutory decree or order shall not stay proceedings in the cause without an order of this court or of the court of appeals for that purpose first had, which order shall be granted upon such terms as the court making it may impose," and is substantially rule 61 of the rules promulgated in 1822 by Chancellor Williamson, the elder (4 Griff. Law Reg. 1831).

So far as the present application is to be disposed of by the practice of this court under this rule up to the present time, it is clear that it must be denied. The precise point was involved in the case decided by Chancellor Runyon, *Central R. Co. v. Standard Oil Co.* (1881) 33 N. J. Eq. 372. In this case an *ex parte* ad interim stay had been granted, restraining a pipe-line company, pending the hearing on a rule to show cause, from the use of the pipes laid across a bridge over the roadway of the complainant. On the hearing of the order to show cause, the preliminary injunction being denied, an appeal was taken by the complainant, and an application was made for a continuance of the ad interim stay pending appeal. The application was denied, upon grounds which were stated at length, and one of the grounds stated covered the main point involved in the present application, viz. the prevention of the use of the pipes pending appeal. It was there urged, as here, in support of the application, that the oil company had usurped the property of the complainant, and that to permit it to do so was an irreparable injury. The opinion of the late chancellor upon this contention was that it was a question whether the usurpation had, in fact, taken place, and that no material injury would come from the use of the pipes before final hearing. See opinion, pages 375, 376.

Complainant's counsel here insist, in addition, that this use of the pipes for transportation of oil would be a continuous trespass on its lands for the sake of profit, and on that account complainant would suffer an irreparable injury from such use, for which no adequate remedy exists at law; but the inadequacy of the legal remedy is, at least, a doubtful question, and it may be settled otherwise in the legal action. Since the argument of this cause, the court of appeal, in a late English case (*Whitwham v. Westminster, etc., Co.* [1896] 2 Ch. 538), have extended the rule of damages in the "Way Leave Cases" referred to in my opinion in this cause, to another class of trespasses, on lands for the sake of profit, and give, as damages to the owner, the value of the lands for the use to the trespasser. Pending final decision on this question, the stay pending appeal must therefore be denied, upon the principles settled by Chancellor Runyon in the above case. Counsel for complainant urge, however, that the recent decision of the court of errors and appeals in *Pennsyl-*

vania R. Co. v. National Docks & N. J. J. C. Ry. Co. (September, 1896) 35 Atl. 433, has established a different rule, and entitles complainant to an order of this court continuing the ad interim or preliminary stay pending appeal. In this case it was held that, by the mere act of filing notice of appeal, the final decree rendered in the cause lost all its force pending an appeal, and that an appellant could not fall into contempt by resisting the execution of the decree pending appeal. The final decree here appealed from was an injunction decree, restraining defendant from opposing complainant in making a causeway or tunnel under defendant's car yard, and requiring defendant to assist this construction by removing certain of its trains in the car yard. The court were of opinion that, if this decree were carried out pending appeal, it would deprive the appellate court of the ability to render anything more than a merely nominal decree on appeal in favor of the appellant. In support of the present application, counsel for complainant relies upon the express declaration in the opinion in the cause as to the effect of an appeal from an injunction decree. The language is as follows: "It is likewise the opinion of this court that an appeal in all cases will have that effect given to it which shall be necessary to preserve the subject to which the appellate procedure relates in such a condition as will enable this court to render an efficacious decree in the premises, and that for this purpose an injunction decree will be suspended or continued, or a previous injunction revived, by the act of filing an appeal whenever such construction shall be necessary for the end just stated." The complainant claims that, inasmuch as the appellate procedure on its part relates to the transportation of oil through the pipes, which it claims to be an irreparable injury, for which no adequate remedy at law exists, and against which it seeks a decree on appeal, no efficacious decree in the premises can be rendered for it on appeal, unless the ad interim injunction order is revived. It asks, therefore, that this court give it, by order, the protection to which it claims to be entitled by the appeal, and that the court revive the preliminary order or injunction pending appeal. The defendants, on the other hand, contend that the rule laid down in the above opinion does not go so far as to require in all cases the preservation of the status quo pending an appeal which involves the status, but merely requires the preservation of property the rights in which are the subject of decree, and of appeal, to the end that a decree on appeal in favor of the appellant may be made efficacious. Without deciding upon the construction of the rule laid down in the opinion, it seems to me that, even if complainant's construction be the correct one, a stay by this court to carry out this construction should not now be granted, for several reasons: First, the precise point now involved is the effect of the appeal upon an injunction previously granted, and which

has been discharged or modified by the decree appealed from. So far as relates to this point, I am not clear that the opinion is not obiter if tested by the usual rules applicable to decisions, because this point does not seem to have been necessarily involved in the decision of the case. The decision, as I understand it, establishes the rule that an appeal from an injunction decree, *ipso facto*, stays proceedings upon the decree appealed from to a certain extent and for a certain purpose; and it applied this rule to the case in hand, which was that of a decree granting an injunction, and settled the effect of an appeal from such decree. But the question as to the effect of this rule when applied to decrees discharging or modifying injunctions seems to be a different one, and to present special and different considerations, which should be made the subject of direct adjudication when the point is distinctly involved.

Under the New York practice previous to 1846, the rule was established by the courts that an appeal acted *ipso facto* as a stay upon the points appealed from, and that an order to proceed was necessary; yet the courts held that this rule did not have the effect of reviving an injunction discharged by the decree appealed from. In *Hoyt v. Gelston* (1816) 13 Johns. 139, a preliminary injunction stayed a suit at law. It was dissolved on motion, and an appeal entered at once from this order dissolving. The party originally enjoined proceeded with the suit at law, and on motion to set aside the verdict, on the ground that the appeal continued the stay, the supreme court say (page 140): "To give such an effect to an appeal from an order dissolving an injunction would be very mischievous in practice, and serve as a great engine of delay. We must consider the case as if no injunction had ever issued." In *Wood v. Dwight* (1823) 7 Johns. Ch. 295, an injunction which enjoined an execution at law was dissolved by order, and, on appeal from the order, an application was made by defendant for leave to proceed with his action. It was held that the appeal did not *ipso facto* revive the injunction, and Chancellor Kent says: "It is impossible that a process that is duly discharged and *functus officio* can be revived by the mere act of the party. How could this court undertake to enforce the process and punish contempts of it in the very face of the order dissolving it? When a process is once discharged and dead, it is gone forever, and it can never be revived but by a new exercise of judicial power. It is sufficient to declare that the defendant is entitled to pursue his remedy at law equally as if no injunction had issued. No special leave to proceed is requisite." In *Doughty v. Railroad Co.*, 7 N. J. Eq. 633, relied on in the opinion in the National Docks Case, the appeal was from an order dissolving an injunction; and Chief Justice Green, delivering the opinion of the court, cites the above New York cases apparently as authorities upon the point now considered, and seems to agree with them that even where, by virtue of the

practice of the courts, the appeal is of itself a stay of proceedings, on appeal from a decree refusing an injunction the appeal will not *ipso facto* have the effect of continuing the injunction which has been dissolved. On the other hand, Mr. Justice Randolph, in delivering the opinion of the minority of the court in *Doughty v. Railroad Co.*, 7 N. J. Eq. 632, is of the opinion that on an appeal from an order dissolving an injunction, where there is a rule for stay of proceedings, this has the effect of reviving or modifying the injunction until the appeal can be heard, and that, until the hearing on appeal, the case stands as though the order had not been made. As was said by Chancellor Kent in *Green v. Winter*, 1 Johns. Ch. 77, in reference to rules relating to stays pending appeal, there are difficulties in the operation of any general rule either way, and, in view of what seems to me a fair doubt whether the decision in the National Docks Case should be taken to cover the point now involved, the order for stay now applied for should not be made. If this view as to the scope of the decision is erroneous, and the rule as declared applies to this case, still the order for stay should not be granted, because, in the second place, if the complainant's construction be right, the appeal itself, under the decision, is effective to give the appellant all the protection to which he is entitled pending appeal, and this protection cannot be affected by the refusal of this court to stay. And, on the other hand, a stay in this cause to the extent claimed by complainant exceeds, as I have above shown, the limits which this court has usually fixed, and complainant should therefore be left to the protection of the appeal alone. In the third place, the stay should not be ordered, even if the complainant's construction of the opinion in the National Docks Case be correct, for another reason, which seems to me important as affecting the whole question of the stay of proceedings pending appeal from injunction decrees. The appellate jurisdiction on appeal, as has been well settled (*Barton v. Long*, 45 N. J. Eq. 160, 16 Atl. 633; *Phillips v. Pullen*, supra), begins with the filing of the notice of appeal in the court of chancery. From this time the appellate court has cognizance of the appeal, with the power (subject to legitimate statutory control) to regulate the entire appellate procedure, including the regulation of the stay of proceedings in this court, during the pendency of appeal. It is, in matter of practice, important, if not essential, that if the court of chancery has the right, in the first instance, to make an order granting or refusing a stay, this order should not be itself subject to an appeal, as indicated by Chief Justice Green in *Doughty v. Railroad Co.*, 7 N. J. Eq. 633, and Lord Eldon in *Huguennin v. Basely*, 15 Ves. 179, 182. No difficulty from such appeals from stay orders has heretofore arisen, perhaps for the reason that the rules of the court of chancery regulating stays on appeal, being the only formal regulations of any kind upon the subject by either the appellate or subordinate court, have been hitherto considered

as providing for a complete system of procedure relating to stays on appeal pending application to the appellate court itself. As to stays on interlocutory decree which are not injunction decrees, the opinion of the court of errors and appeals in *Barton v. Long*, 45 N. J. Eq. 160, 16 Atl. 683, expressly confirms the rules as continued in force by its assent. In this case the right of the chancellor to proceed with the cause pending an appeal from such decree was challenged, and the status of the rules in reference to such decrees was considered, and on these subjects the following language was used in the opinion of the court: "The power of the chancellor to proceed to a final decree during the pendency of an appeal from an interlocutory decree was challenged on the argument. That such right exists, however, is plain. The rules of chancery provide for and regulate such procedure, and those rules, and the practice under them, have been tacitly recognized and assented to, from a very remote period, by this court. It would seem that it would be competent for this court to put this procedure under its own regulation, but this has not been done, and this court has acquiesced in the methods established by the chancellor, and which, while they are permitted to remain in force, must be deemed unobjectionable. But it is clear that the party who proceeds with the cause in the court of chancery before the decision of the appeal from the interlocutory order will incur the hazard necessarily incident to such a step; for if the interlocutory order be reversed, and the error thus rectified shall have deprived the appellant of a right which would have benefited him on the final hearing, it is obvious that the final decree, under such circumstances, could not stand." This case differs from the *National Docks Case*, it will be perceived, in that the proceeding pending appeal did not, in the opinion of the court, deprive the court of the power to render an efficacious decree on appeal.

But, since the decision in the *National Docks Case*, it would seem to be clear that, as to interlocutory injunction decrees, the rules cannot be considered as adopted by the appellate court, and that a stay of an injunction decree granted pending appeal by the chancellor, under the rules of the court of chancery, can no longer be considered an order from which there is no appeal, for the reason that in these cases the appellate court declines to recognize the rules as existing regulations in a course of appellate procedure. The rules, therefore, and orders granted under them, on such decrees, would seem to have the same status as any other orders of the court of chancery, and to be appealable under the same limitations as other orders. Until, therefore, regulations relating to procedure in the original cause pending appeal are made, either by statute or by the appellate court, and the limit of the right

of the court of chancery, if there be any such right, to act on them, as well as the effect of its order, is defined, it seems to me that an appeal would lie from an order granting or refusing a stay on injunction decrees, which would stay that action. *Green v. Winter*, 1 Johns. Ch. 77, 80. This practice would introduce such an element of confusion in the whole practice relating to injunctions that the court which may deal with that writ in the first instance, pending the regulation of the subject of stays, either by statute or the appellate court, should not grant any orders or stays pending appeal unless they are absolutely necessary for the preservation of property pending appeal, or the prevention of irreparable injury by a change of the status quo, and unless, in addition, there is or may be, in any particular case, a fair question whether the mere filing of the appeal does, under the rule laid down in the *National Docks Case*, secure this protection. In the interest of justice, the question of protection should not in such cases be subject to doubt, and whether the order of the subordinate court in such case would be effective if appealed from must be left for the final adjudication of the appellate court. No such case exists here, and, for the reasons stated, the application is therefore denied, but without costs. These difficulties relating to stays in injunction cases pending appeal, which are suggested by this case and others which readily suggest themselves, lead me to express the hope, in the interest of the administration of justice, that the appellate court, to the extent of its power, will make provision for the regulation of this subject. The continuance of the present status may result in the embarrassment or defeat of the course of justice. Any uncertainty in reference to the precise legal status of injunction orders pending appeal, either as to their application or extent, seems to tend to a state of things which runs counter to one of the primary principles relating to injunctions, viz. that they should clearly indicate, so far as the subject-matter admits of it, what is and what is not to be done. Uncertainty in this respect will soon be seized upon by zealous litigants to further their interests, and, even where the extent of the stay pending appeal is certain, the fact that the appellant can, or may now by the mere act of filing appeal, preserve a desired status pending appeal, free from any terms as to speedy hearing, or other equities arising out of the case as developed by the hearing, will no doubt, in many cases, induce appeals for the main purpose of continuing as long as possible the status created by the original order. These orders are often necessarily made on a partial presentation of the case, and the aspect of the case is often materially changed at the hearing.

(59 N. J. L. 290)

RITCHIE v. WIDDEMER.

(Supreme Court of New Jersey. Nov. 9, 1896.)

SLANDER—PROFESSIONAL CHARACTER—EVIDENCE—PRIVILEGED COMMUNICATIONS.

1. Words derogatory to the professional character of a minister are actionable, without proof of special damage.

2. When slanderous words affect professional character by imputation of misconduct, strict proof that the slandered person has been admitted into his profession is not required, and it will be sufficient to prove that he has practiced it; but, when the words spoken deny the right to practice that profession, it seems that the right must be established by proof.

3. When the evidence fails to disclose a privileged occasion for speaking slanderous words, the defense upon that point may be overruled, or the jury charged to disregard it.

(Syllabus by the Court.)

Error to court of common pleas, Monmouth county; Conover, Judge.

Action by Howard T. Widdermer against William N. Ritchie. Judgment for plaintiff. Defendant brings error. Affirmed.

The action was in tort, and the declaration contained three counts. It stated, by way of inducement, *inter alia*, that the plaintiff was "a clergyman of the Presbyterian Church of the United States of America, duly ordained, and in good and regular standing therein," and that he was acquiring a livelihood in his profession at Asbury Park, in Monmouth county. It then charged, in the first count, that the defendant, for the purpose of causing it to be believed that plaintiff had conducted himself improperly and immorally, and without integrity, in his profession, and that he was not a clergyman as before stated, had spoken these words, "Mr. Widdermer has had trouble with a girl in every church he has ever had"; and the meaning of the words so spoken was charged to be that the plaintiff had committed disgraceful and immoral practices, and was unfit to follow and practice his said profession. In the second count it charged that defendant, for a like purpose, had spoken these words, "When he (meaning the plaintiff) first went to Passaic to preach, he got in with a girl, and, when his wife found it out, she threatened to leave him," and ascribed the same meaning to those words. In the third count it charged that defendant, for a like purpose, had spoken these words, "He (meaning the plaintiff) is not an ordained minister, and has no right to perform marriages nor baptism," and that the meaning of those words was that plaintiff was wholly incapacitated to perform the duties appertaining to his said profession, and without power or authority to exercise the functions of a minister of said church. The declaration stated that, by the speaking of the words, plaintiff was injured in his good name and in his profession; that his neighbors and others had been thereby induced to believe him guilty of disgraceful and immoral practices, and unfit to practice his

profession, and also to be without authority to perform the duties incident to his profession, and in consequence had refused to make use of his services in marriages and baptisms. The plea was the general issue, and a verdict passed for the plaintiff. The judgment thereon has been removed to this court by writ of error, and errors have been assigned upon exceptions taken in the course of the trial.

Argued June term, 1896, before the CHIEF JUSTICE, and GARRISON, LIPPINCOTT, and MAGIE, JJ.

Flavel McGee, for plaintiff in error. S. A. Patterson, for defendant in error.

MAGIE, J. (after stating the facts). The first assignment of error is based upon an exception taken to the refusal of the trial court to nonsuit the plaintiff below. The request to nonsuit was put upon two grounds,—one applicable to the first two counts, the other applicable to the third count only. The first two counts, as will be seen from the statement prefixed to this opinion, charged the defendant below with speaking certain words of plaintiff below in respect of his profession as a minister of the Presbyterian Church, and attributed to those words a meaning injurious to his professional character. The contention was that the evidence before the court was insufficient to justify the jury in finding that the words proved to be spoken bore the meaning which was attributed to them, or were injurious to the professional character of the plaintiff below. It is unnecessary to review the evidence in detail. The words proved to have been spoken by the defendant below were substantially those set out in these counts. They were spoken at a time when there was a controversy between the Presbyterian Church of Asbury Park, in which plaintiff below was then preaching, and the presbytery of Monmouth, to which that church belonged, respecting his services. From the circumstances under which the words were spoken, as detailed by the witnesses, the jury might well conclude that they were spoken of plaintiff below in his character as minister, and were intended to convey a meaning derogatory to that character, as charged in these counts. To say of a minister, whose employment as such was then in controversy, that wherever he had previously exercised ministerial functions he had had trouble with the female sex, and that in one instance the trouble was such that his wife threatened to leave him, may well and naturally be understood as attributing to him conduct improper, and inconsistent with the ministerial character. Derogatory words spoken of one in the way of his profession are actionable without proof of special damage. *Odgers, Sland. & L. p. 64.* The court below were therefore right in submitting the evidence to the jury upon these counts.

The third count charged defendant below with saying of plaintiff below that he was not an ordained minister, and had no right to perform marriages nor baptisms, and the meaning attributed to those words was that he had no power or authority to exercise the functions of a minister. It is upon this count that the allegation of special damage arising from persons refusing to engage his services in the performance of marriages is based. By our statute, marriages may be solemnized by any "stated and ordained minister of the gospel." 2 Gen. St. p. 2006, § 7. The words charged were proved to have been spoken. But the contention was that the plaintiff below had failed to prove that he was such a minister as he had averred he was, and such as could lawfully solemnize marriages. When the alleged slanderous words impute to one practicing a profession misconduct in his professional character, strict proof of his having been admitted into that profession is not required. It will be sufficient for him to prove that he was practicing it. But, when the words impute the nonexistence of a right to practice such profession, it seems that what is essential to establish that right must be proved. *Odgers, Sland. & L. p. 530; Collins v. Carnegie, 1 Adol. & E. 696; Smith v. Taylor, 1 Bos. & P. (N. R.) 198; Moises v. Thornton, 8 Term R. 303; 13 Am. & Eng. Enc. Law, 488.* But, if this rule be applied, I think that plaintiff below had sufficiently made out by proof that he was such an ordained minister as his declaration averred, or at least that in refusing to nonsuit on the ground of failure of proof in that respect there was no error leading to a reversal. His averment was that he was a minister of the Presbyterian Church, duly ordained, and in good and regular standing therein. The proof at the close of this case was that he had been ordained as a priest of the Protestant Episcopal Church; that he had been afterwards installed in a Congregational church by a council, and afterwards received into the presbytery of Newark, belonging to the Presbyterian Church. But it is contended that the averment, properly construed, required proof that he was a duly-ordained minister of the Presbyterian Church. If that be the necessary construction of the averment, and if there was a defect in the proof in this respect, that defect was afterwards remedied. In reviewing refusals to nonsuit for lack of proof, we are to look into all the bills of exceptions to see if the proof was afterwards made or completed. If so, the judgment will not be disturbed on that ground. *May v. Railway Co., 49 N. J. Law, 445, 9 Atl. 688.* In the evidence produced by defendant below it appeared that, when an ordained minister of the Protestant Episcopal Church is received into a presbytery of the Presbyterian Church, he is not required to be reordained. His previous ordination is recognized as valid by the Presbyterian Church.

The proof, therefore, that he had been received into the presbytery of Newark sustained the averment that he was an ordained minister of the Presbyterian Church. It is true that, in the course of the evidence on the part of the defendant below, there was entered on the stenographer's notes what purports to be an admission by plaintiff below that, before he had been received into the presbytery of Newark, he had been deposed from the ministry of the Protestant Episcopal Church. It does not appear what was the cause of such deposition, but perhaps it may be inferred from the case that he was deposed for having remarried, contrary to the canon, after having procured a divorce on the ground of desertion. There was evidence from the bishop of the diocese of New Jersey in respect to the status of a deposed priest in the Protestant Episcopal Church, and from a former moderator of the general assembly of the Presbyterian Church in respect to the right of the presbytery of Newark to receive the plaintiff below. There was raised thereby a question of fact. An exception was taken to the ruling of the court submitting the evidence on this count to the jury. No other ruling was asked. It results that no error is found in refusing to nonsuit on this count, or in permitting the case to go to the jury thereon. If the verdict thereon is against the weight of the evidence, we cannot correct that error.

Another objection made by counsel to the third count ought perhaps to be noticed. His contention is that it should have set out the names of those who, as it charged, had been induced by the slander to refuse to make use of the services of plaintiff below in performing marriages. This objection, if good, should have been taken by demurrer. But it would not then have prevailed. The case falls within the rule applied to a similar declaration by this court in *Insurance Co. v. Perrine, 23 N. J. Law, 402.*

It is next argued that the trial court erred in determining that the defense that the communications were privileged had not been made out, and in charging the jury that that point of the defense should be dismissed. It appeared in the case that the defendant below was also a clergyman of the Presbyterian Church, and that the persons to whom he spoke the words charged as slanderous were attendants upon or members of the Presbyterian Church at Asbury Park, in which the plaintiff below was preaching. It also appeared that a controversy had arisen over the right of the church of Asbury Park to accept the plaintiff below as their pastor, and the presbytery of Monmouth had requested the presbytery of Newark, into which he had been received, to recall him and forbid his further intrusion within the boundaries of the former presbytery, and the request had been declined. In one instance the communication of

defendant below was made in response to a request to explain the difficulty between plaintiff below and the presbytery. In the other instance, what defendant below said was volunteered. The contention is that, under the circumstances above mentioned, the communications of defendant below were privileged, or that it should have been left to the jury to say whether or not they were privileged. It is unnecessary to discuss at large the doctrine of privileged communications. It is well settled that the burden of establishing such a defense is cast upon him who sets it up, and it seems that, when evidence substantially undisputed is produced, a verdict for the defendant may be directed. *Fahr v. Hayes*, 50 N. J. Law, 275, 13 Atl. 261. The first point to be made out by proof is that the occasion was privileged; that is, that, under the circumstances, there was cast upon the defendant a duty to speak the words. Unless this point is made out, this defense cannot avail defendant, however honest he may have been in his belief in the truth of the words he spoke. In my judgment, the trial court was correct in holding that there was no evidence that the occasion was privileged. The occasion of speaking was the controversy as to the right of the Presbyterian Church of Asbury Park to engage the services of plaintiff below, who had been received into the presbytery of Newark while under deposition in another church for a canonical offense, against the will of the presbytery of Monmouth, to which the church of Asbury Park belonged. If it be conceded that this situation cast upon a minister of the Presbyterian Church a duty to state facts respecting that controversy to persons interested in that church, for their guidance, it obviously put no duty on him in respect to the ministerial character of plaintiff below in other respects than that drawn into question in that controversy. There was no occasion for calling upon defendant below to state facts derogatory to that character, or denying its possession. Nor did a request for explanation as to the difficulty between the presbytery and the plaintiff below furnish any occasion to state facts or rumors in respect to his professional character, in no respect concerned in that difficulty. In this view, there was no proof of this defense to go to the jury, and it was proper to overrule it as was done. None of the other assignments of error present any question which needs to be discussed. No error being found, the judgment must be affirmed.

(55 N. J. E. 42)

ADAMS v. ADAMS. ROBINSON v. SAME.
MAY v. SAME. WEEKS v. SAME.

(Court of Chancery of New Jersey. Oct. 26, 1896.)

BEQUEST—SATISFACTION OF DEBT—INTEREST—NOTE.

1. Where no demand for payment of legacies is made till after the death of the life tenant,

who is also executrix, interest on the legacies cannot be had against the remainder-men.

2. A bequest to a creditor of testator of a sum equal to or greater than the debt, contracted before the making of the bequest, is deemed a satisfaction of the debt; the will not showing a contrary intention, and no motive being assigned for the gift.

3. A promissory note fixing no time of payment is a demand note, and, containing no promise of interest, bears none till demand.

Bills by Elizabeth Adams, Anna Belle Robinson, Alice Weeks May, and Jennie Weeks against Clement J. Adams, administrator cum testamento annexo of James Stokes, deceased, to recover legacies.

Heard together on bill, answer, and statement of facts. The object of these bills is to recover four several legacies given to the four several complainants, respectively, by the will of James Stokes, late of the county of Atlantic, deceased. He died January 31, 1891, testate of a will made two days previously, the effective parts of which are as follows: "First. I give, devise, and bequeath unto my wife, Mary J. Stokes, all my estate, both real and personal, in trust, wherever the same may be, to have, hold, receive, use, and enjoy the rents, interest, issues, and profits thereof during the term of her natural life, except as hereinafter provided for. Second. I give, devise, and bequeath the sum of five hundred dollars to my wife's sister, Elizabeth Adams, and the sum of two hundred dollars to each of my nieces, Alice Weeks, Jennie Weeks, and Anna Belle Robinson. Third. I give to my executrix hereinafter named full power and authority to grant, bargain, sell, and convey all my said real and personal estate to any person or persons, in fee simple, at public or private sale, upon such terms as she shall think fit. Fourth. I direct that my real estate shall be sold as soon after my decease as shall seem meet, and the proceeds of said sale after paying the legacies above specified to be invested on bond and mortgage upon real estate. Fifth. I give, devise, and bequeath, after the death of my said wife, the balance of my said real estate remaining in her hands to my lawful heirs. Sixth. I do hereby constitute my said wife, Mary J. Stokes, executrix of this my last will and testament." The testator left no personal estate, but died seised of a boarding house or hotel in Atlantic City known as the "Arlington," which had considerable value. The widow duly proved the will, took possession of the real estate, and enjoyed it, with the rents and profits, until her death, on the 10th of October, 1894, without having sold the real estate or paid the legacies or any interest thereon. After her death, letters of administration de bonis non, cum testamento annexo, were granted to the defendant, Clement J. Adams, who sold the real estate on the 25th of March, 1895, and has in hand sufficient proceeds to pay the legacies. After the death of the widow, and the appointment of defendant as administrator, the complainant Elizabeth Adams produced and made a sworn demand against the estate, based upon a promissory note in these words: "Atlantic

City, New Jersey, March 23, 1888. For value received, I promise to pay to the order of Elizabeth Adams four hundred and fifty dollars (\$450.00). \$450.00. [Signed] James Stokes." At the time when these causes were submitted a suit by complainant against defendant on that note was pending in a court of law. No demand was made upon the executrix named in the will, by either of the complainants, for the payment of their legacies or any interest thereon, and the same is true as to the promissory note held by the complainant Elizabeth Adams.

George A. Bourgeois, Jr., for complainant.
Carlton Godfrey, for defendant.

PITNEY, V. C. (after stating the facts). Two questions were submitted: First, are the complainants entitled to interest on their several legacies, commencing from the statutory period of one year after the death of the testator? And, second, was the amount due on the promissory note held by Elizabeth Adams paid and satisfied by the bequest to her of \$500 found in the second clause of the will?

With regard to the question of interest on the legacies, it is argued by the defendant that, reading the second clause of the will in connection with the third, which gives power of sale, and the fourth, which directs that the real estate shall be sold and the legacies paid out of it, the time for the payment of the legacies was the sale of the real estate, and that they were not due, and therefore did not bear interest until such sale took place. I am unable to adopt that view. It is manifest from the language used that the testator did not contemplate any great delay in selling the land and paying the legacies; and it is not probable that he would subject the legatees to the risk of having the payment of their legacies indefinitely postponed, at the discretion of the executrix, who was also tenant for life, and thereby directly interested in the postponement of the sale and the payment of the legacies, and the consequent diminution of the body of the estate and the income to which she was entitled. I am of the opinion that, if the legatees had pressed their claims—as they had a perfect right to do, and as they might have done—for payment with proper diligence, they would have been entitled to interest after one year from the testator's death. But they did not press their claims, and rested quietly for upwards of three years, during which period the executrix, who had the power of sale, was enjoying the income of the property without diminution from the payment of these legacies. Now, it seems to me that this failure to act and collect their demands, on the part of the legatees, must be held, as against the persons entitled in remainder, to be a waiver on their part of the interest on their legacies. They had the power to enforce their claims, and refrained from doing so, to the benefit of the tenant for life, and at the expense of the tenants in remainder, if they are compelled to pay interest. I conclude, then, that the complainants ought not to recover, against this ad-

ministrator, any interest on their legacies. It appears that he acted promptly in the sale of the property, and that he was ready and willing to pay the face of the legacies as soon as the estate could be liquidated. Whatever claim the legatees may have for interest ought to be pressed against the estate of the widow, who enjoyed the benefit of the use of the property out of which the legacies ought to have been paid when due.

With regard to the second question, I doubt whether it is properly before the court, and intimated my doubts to counsel at the argument. Nevertheless they requested me to express an opinion upon it, and I have examined it, with the following result: The settled rule of construction is that a bequest, by a debtor to a creditor, of a sum of money equal to or greater than the debt, where the debt was contracted before the bequest was made, and no motive was assigned for the gift, and in the absence of any contrary intention discoverable on the face of the will, shall be deemed a satisfaction of the debt. In this case there is no direction in the will that the testator's debts should be paid, nor any other expressions to prevent the application of the rule of construction above stated; and the only question that remains is as to whether or not the bequest was as great as, or greater than, the amount of the debt. The face of the debt in this case is \$450, and it is evidenced by a promissory note dated March 23, 1888, but fixing no time for payment, and containing no provision for interest. It is urged that, in ascertaining whether the bequest is or is not as great as the debt, the interest, if any, which has accrued on the debt at the death of the testator, must be added to the principal, and the same taken as the debt. No authority was cited in support of this proposition, but, without admitting its soundness, I will adopt it for present purposes. As before stated, the note in question does not mention interest, nor does it fix any time of payment. It promises simply to pay so much money. It is well settled that such a note has precisely the same effect as if it had been drawn payable on demand. Story, *Prom. Notes*, § 29; Byles, *Bills*, pp. 79, 210; *Chit. Bills*, 151; 1 *Rand. Com. Paper*, § 119. The authorities go the length of holding that the insertion in such a note, by the holder, with the consent of the maker, of the words "on demand," is not such an alteration as to render it void. The law is equally well settled that on a promissory note, payable on demand, which does not mention interest, it does not begin to run until after demand is made, either especially or by the commencement of an action. *Mayne, Dam.* p. 172; Byles, *Bills*, p. 305; *Chit. Bills*, pp. 679, 681, 682. The reason of this rule is that, where there is no expressed promise to pay interest, it can be and is given only by way of damages for a default in the performance of duty. It is not a part of the contract

and recoverable as such. If one promises to pay money on a date named in a contract, he is in default if he does not pay on that date, and is at once liable to pay interest, by way of damages for his default. But, upon a promissory note which fixes no date of payment, he cannot be said to be in default until demand is made upon him to pay, and hence is not liable for damages until such demand. This result is not inconsistent with the existence all the while of a present right of action in the holder of such a promissory note. The mere fact that he has the present right to sue and recover a sum certain does not give him the right to recover damages for nonpayment of that sum before he demands payment. It follows that the statute of limitations may and does run against a promissory note, payable on demand, from its date, although interest does not run until its actual demand, unless so expressed in the note. Ang. Lim. § 95; Wood, Lim. § 124. It thus appears that, if the statute was pleaded to the action at law brought upon the promissory note here in question, the action would probably fail, but that question was not submitted to me. I think the note was satisfied by the legacy, and will advise a decree in accordance with the above views. I will hear counsel further as to costs, and merely say upon that subject that I see no occasion for the bringing of four suits to recover these small legacies.

(56 N. J. H. 181)

EDWARDS et al. v. McCLAVE et al.

(Court of Chancery of New Jersey. Oct. 26, 1896.)

EQUITY JURISDICTION—REMEDY AT LAW—LIABILITY OF HEIRS FOR DEBT OF ANCESTOR—SALE OF DECEDENT'S LANDS—ACTION AGAINST ADMINISTRATORS—PLEADING.

1. Under Act March 7, 1797 (Revision, p. 476), providing that any creditor may maintain an action against the heirs of a deceased debtor on a simple contract or specialty, the liability of heirs on a note executed by decedent is purely legal, and cannot be enforced by bill in equity.

2. On a bill in equity brought against the administrator and the heirs at law for the sole benefit of a single creditor of the estate, whose claim has not been admitted by the administrator, nor established against him by judgment or decree, the court has no power to render a decree against the heirs, charging the debt on the lands, or directing the sale thereof for its payment.

3. A note executed by H. for the accommodation of E., to whose order it was made payable, was delivered by the latter, after the death of H., but before maturity, to complainant, who had no notice of its accommodation character. By mistake the note was not indorsed, but E. executed a writing certifying that said note indorsed by him was deposited as collateral security for a loan, and authorizing the holder to negotiate it if the loan was not paid. On default in such payment, complainant, without having obtained judgment at law against the administrator, who had rejected the claim, filed a bill in equity against him and E. to compel the indorsement of the note, and to charge its payment on decedent's lands, the heirs at law being

also parties defendant; but the bill alleged that E. was a nonresident, and that it was impossible to serve him with process. Held that, as a decree for specific performance of E.'s contract to indorse could not be decreed for want of jurisdiction over his person, no decree could be rendered against the administrator.

4. Where it appears on the face of a bill that defendants were nonresidents at the time suit was commenced, and that the action does not relate to any of the subjects in respect of which the court is warranted in exercising jurisdiction over nonresidents, a demurrer for want of equity will be allowed.

Bill by Frank C. Edwards and another against Norman McClave and others. Heard on demurrer to bill. Order advised sustaining demurrer.

Howard W. Hayes, for complainants. E. B. Williamson, for demurrants.

BMERY, V. C. The bill in this case is filed by two complainants, Frank C. Edwards and Charles Bierman, against the administrator and the infant heirs at law of Hannah McClave, deceased, and also against one E. Wilkes McClave. Separate demurrers have been filed by the administrator and on behalf of the infant heirs at law, the special causes assigned being remedy at law, misjoinder of complainants, and multifariousness. The demurrer of the administrator sets up, in addition, that no relief is prayed against the administrator. At the hearing the want of equity was also relied on on behalf of all demurrants. The complainants, as appears by the bill, are the holders of, or interested in, a certain promissory note for \$648, dated September 3, 1891, at four months, signed by Hannah McClave, deceased, in her lifetime, for the accommodation of the defendant E. Wilkes McClave, the payee of the note. This note was delivered to the complainants, or one of them, by E. Wilkes McClave, after the death of Hannah McClave, who died on September 23, 1891, but before the maturity of the note, and was delivered by Wilkes McClave as collateral security for the payment of a loan then made by complainants to him upon four of his own notes, aggregating \$350. Upon obtaining the loan and delivering the note by Hannah McClave, the defendant E. Wilkes McClave failed to indorse this note, which was payable to his order, but executed and delivered to complainant Edwards a writing set out in the bill, certifying that the note of Hannah McClave, deceased, indorsed by him, was deposited with Edwards as collateral security for his (E. Wilkes McClave's) own notes, and authorizing Edwards, on his failure to pay these, to collect, sue for, sell, transfer, or in any way negotiate or collect the Hannah McClave note for any price he might obtain for the same, rendering the overplus to him. The bill alleges that it was the intention of E. Wilkes McClave and of the complainants that the note should be indorsed by E. Wilkes McClave, but that this was neglected by mistake. Hannah McClave died intestate on September 21, 1891, and E. Wilkes McClave was appointed administrator of her estate, but

was subsequently removed, and the defendant John McClave appointed in his place. The notes of E. Wilkes McClave were not paid at maturity, and, as the bill alleges, the complainant Edwards presented due proof of the Hannah McClave note to John McClave as her administrator, but he refused to pay the same, or any part thereof. On August 16, 1892, the complainant Edwards began a suit upon the note by attachment against the heirs of Hannah McClave, who were then nonresidents. The defendant heirs appeared in this suit, filed pleas, and gave specifications of defenses, one of which was that the note of Hannah McClave was without consideration. The testimony of E. Wilkes McClave, taken out of the state by commission, disclosed that the note was given for his accommodation, and this was the first information to complainants that the note was not given for value. The complainant brought the suit to trial, relying on his title to the note by assignment, and judgment was rendered in favor of the infant heirs. No suit at law appears to have been brought against the administrator of Hannah McClave upon the note. This bill is filed against the heirs for the purpose of charging the lands described in the bill, which have descended to the heirs at law, with the payment of the note, and prays that the lands of the deceased may be sold for the payment of the note. No special relief is prayed against the administrator, neither is any statement made in the bill as to the personal estate of the deceased, nor has any suit at law been commenced against the administrator to recover upon the note. A decree that E. Wilkes McClave may indorse the note is asked for, but the bill alleges that he is a non-resident, and that it is impossible to serve him with process, or compel his indorsement. So far as the heirs are concerned, the claim of complainants must, therefore, be treated, I think, as substantially a claim against the heirs at law of the deceased maker of the note, to subject the lands inherited to sale by suit in equity for an alleged obligation or debt of their ancestor. The complainants' equity for relief upon the note as against E. Wilkes McClave, the payee, is based upon his agreement to indorse the note, made upon good and valuable consideration, and without notice that it was accommodation paper. Had such notice been given, the delivery of the note after the death of the accommodation maker would seem to have been invalid. 1 Am. & Eng. Enc. Law (2d Ed.) 341, and notes 4, 5. To this agreement for indorsement made between complainants and the payee, Hannah McClave, the maker, was no party, and although E. Wilkes McClave could certainly be compelled to indorse the note, in order that complainants might sue the maker at law, it does not seem to be entirely clear that in such case a bill in equity would lie against the maker, if living, in connection with the payee, to compel payment of the note by final decree in equity in the suit brought to compel the indorsement. A

bill in such a case, where the maker and payee were joined, was sustained on demurrer by Vice Chancellor Van Fleet in *Hughes v. Nelson*, 29 N. J. Eq. 547, but in that case the complainant was held to have no legal title whatever, and the question argued and decided was the effect of the judgment at law as preventing any relief. The case did not proceed to final decree, nor was the form of relief to be finally granted considered. The cases cited by the learned vice chancellor upon the right of a court of equity to compel indorsement by the payee are all cases where the application was made against the assignees in bankruptcy of the payee without joining the maker, and the only order was that the indorsement be made. The parties seem to have been then left to pursue their remedy upon the indorsed paper. *Ex parte Greening*, 13 Ves. 206; *Ex parte Mowbray*, 1 Jac. & W. 428; *Ex parte Rhodes*, 3 Mont. & A. 217. In *Watkins v. Maule*, 2 Jac. & W. 243, the indorsement, which had been omitted to be made by the payee of an accommodation note, was made after his death, and after the maturity of the note, by his administrator, and the question in the case (which arose on a creditors' bill for the administration of the maker's estate) was whether the indorsement after maturity related back to the time the note was taken. The master of the rolls (Sir Thomas Plumer) held that it did so relate back, but this is a point upon which demurrants' counsel claims that other learned judges have taken different views. The contract of the maker upon the note was, in its inception, a purely legal contract on his part, and, having no connection with the contract relating to indorsement, made between the payee and the transferee, it would seem logical that the maker's only liability for the payment of the note was a legal liability, to be decided upon in a court of law after a court of equity had compelled the indorsement on the bill by the payee or transferee according to his agreement; otherwise the maker would be obliged to set up in the equity suit any defense to the note, and would be deprived of his right to a trial by jury in a suit upon the notes. But, without turning the case upon this point, and taking *Hughes v. Nelson* to be an authority for proceeding to final decree for payment of the note against the maker in the suit in equity to compel the indorsement, the case does not reach the main point now involved, which is whether the obligation of the deceased ancestor on the note can be enforced by bill in equity against his heirs at law, either as a personal debt or as a charge on the lands descended. And I am of opinion that no such liability, either by personal decree or by charge, can be enforced against the heirs on this bill. The reason is that the obligation of the heirs for the payment of the ancestor's debts of this character is a purely statutory liability, arising under the act of

March 7, 1797 (Revision, p. 476),¹ and it has always been held that under this statute the liability of heirs is purely legal, and enforceable only by action at law. *Insurance Co. v. Meeker*, 37 N. J. Law, 282, 299; *Insurance Co. v. Hopper*, 43 N. J. Eq. 387, 12 Atl. 528, affirmed 44 N. J. Eq. 604, 17 Atl. 1104. In *Holley v. Weedon* (1686) 1 Vern. 400, an action at law was brought against the heir at law upon a bond of the ancestor. The heir put in a false plea, and after verdict in the plaintiff's favor, but before the time for entering judgment on it, the defendant died, having devised the lands descended. On a bill against the devisee to be paid the debt, Lord Chancellor King said: "Dismiss the bill. There is no color of equity in the case, unless you'll have it that the heir died maliciously before day in bank on purpose to defeat plaintiff in his debt."

Nor can there, on this bill, be any decree that the lands descended to the heirs are chargeable with the amount of the note as a debt of the deceased ancestor. This is not a creditors' bill for the general administration of a decedent's estate, and bringing all the estate of deceased, both real and personal, into the court for administration, but a bill by one creditor to establish an alleged obligation against decedent's estate, upon the establishment of which he asks that a decree may be made for its payment out of the real estate of the deceased. There are no allegations in the bill in reference to the personal estate, which is the primary fund for payment of obligations of this character, and, even on the supposition that there was no personal estate whatever, the claim, as it seems to me, not being admitted by the administrator, must first be regularly established by judgment or decree against him before the lands which have descended to the heirs can be sold by the court. If established against him, by judgment or decree, and the personal estate is insufficient to pay the demand, the creditor would then be in a position to apply to enforce the payment of the debt by sale of the lands under the orphans' court act, on which application the heirs are entitled to be heard. But it would seem to be beyond the power of a court of equity, as against the heirs at law, to enforce against them a sale of lands by decree in this suit, brought for the sole benefit of a single creditor whose claim is not admitted by the administrators, and who has not established his claim by judgment or decree against him. *Haston v. Castner* (Err. & App., 1879) 31 N. J. Eq. 697, decides that a creditor whose claim has been presented to the administrator, and its validity admitted by him, may, without obtaining judgment, file a bill in behalf of himself and other creditors, to set aside conveyances of land made by the deceased in fraud of his creditors. The estate in this case had, however, been settled

as an insolvent estate before the filing of the bill (see page 697), so that the jurisdiction of the orphans' court was at an end. And in the later case of *Mayor, etc., v. Alvea* (Err. & App.; June, 1899) 84 Atl. 1073, the court decide that on a bill by a creditor for his sole benefit the court of equity will not, except for special cause, interfere with the jurisdiction of the orphans' court for the settlement of accounts of executors and administrators. This settlement in the orphans' court includes the application of real estate of the deceased for the payment of his debts, which application may, if necessary, be made by the creditor after establishing his claim by judgment against the executor or administrator. Orphans' Court Act (Revision, 769) § 79. In the absence, therefore, of any facts alleged in the bill showing the equity of complainants, to require a general settlement of the estate in this court, and a sale by the court of the lands of the deceased, including complainants' claim, if it be eventually established, I conclude that no decree can be granted against the heirs at law on this bill charging the debt on the lands, or directing the sale thereof for the purpose of payment. I do not consider the effect of the judgment at law in favor of the heirs at law, as this question may arise on any application for sale of the lands to pay complainants' debt, if it should be hereafter established against the administrator, and the consideration of the question is not necessary for the decision of this case.

So far, therefore, as the present bill seeks to charge the heirs at law personally, or the lands descended to them, with the payment of the note, it is without equity, and must be dismissed. As against the administrator, my view is that, if the complainants on the present bill could obtain a decree against E. Wilkes McClave for the indorsement of the note, then, on the authority of *Hughes v. Nelson*, supra, the administrator might perhaps be a proper, if not necessary, party to the suit, as the personal representative of the deceased maker, who is interested in determining the validity of the claims against the estate. The claim of the bill is that, if the indorsement is made by decree of the court, the complainant is entitled to stand equitably in the same situation as if the indorsement was made at the time of the transfer; and the personal representative of the maker of the note may, therefore, perhaps, properly be a party to a suit to compel the payee to indorse the note, but, unless the final result of the suit is a decree for indorsement by the payee, the maker's representative is under no equitable obligation upon the note. If the court cannot decree specific performance of the contract to indorse, it cannot, as it seems to me, decree a liability against the maker, as if the note were indorsed. If this view be correct, the complainants' bill must fail, as against the administrator, for the reason that it discloses that no such decree can be rendered against Wilkes McClave, the payee, because he is not within the jurisdiction of the court, and the bill states that he cannot be brought within

¹ Act March 7, 1797, provides, substantially, that creditors, whether by simple contract or specialty, may maintain actions against the heirs of a debtor who dies intestate, and against the heirs and devisees of a debtor who dies testate.

its jurisdiction, and the decree for payment without indorsement is prayed. A decree for indorsement of the note made against the payee upon publication, and without obtaining jurisdiction over his person, would be without due process of law under the fourteenth amendment to the federal constitution, as construed in *Penoyer v. Neff*, 95 U. S. 714.

It appearing, therefore, by the bill itself, that the contract which lies at the basis of the whole proceeding, viz. the personal contract of Wilkes McClave to indorse the note, cannot be enforced by reason of the want of jurisdiction over his person, I am of opinion that no decree against the administrator can be made upon the bill, even if it had been prayed for, and as to him also the bill must be dismissed. Where it appears on the face of the bill that the defendants were, at the time of the institution of the suit, resident in a foreign country, and that the suit does not relate to any of the subjects in respect of which the court is warranted in exercising jurisdiction against persons so resident, a demurrer for want of equity will be allowed. 1 Daniell, Ch. Prac. (6th Am. Ed.) 550. An order will be advised sustaining the demurrer, with costs.

(55 N. J. E. 10)

BRADLEY CURRIER CO., Limited, v.
BERNZ et al.

(Court of Chancery of New Jersey. Nov. 5,
1896.)

BUILDING CONTRACTS — PAYMENT — CONDITIONS
PRECEDENT—WAIVER.

1. Contractors to erect buildings for B., having purchased materials from B. C. Co., which were used on the buildings, gave B. C. Co. an order addressed to B., which required him to pay B. C. Co. \$515, "due them for windows, blinds, and doors furnished for your buildings, 9th St., city." Query, whether the order impliedly directed payment from an indicated fund, so as to be an equitable assignment of the fund pro tanto, or was merely an order drawn generally upon the payee, which must be accepted by him before suit can be maintained against him.

2. Where the owner of buildings in process of erection, under contract which provided for payment to the contractors when the buildings should be completely finished, takes possession, and rents the buildings, prior to their completion, protesting, however, when asked to pay part of the contract price due only at completion, that the buildings are not completed, his taking possession is not a waiver of his right to withhold payment until the buildings shall be duly finished.

3. If a building contract provides that payment to contractors shall be made upon the certificate of an architect, in absence of fraud or waiver of the certificate, the owner may demand the production of such certificate, as a condition precedent to payment.

4. Where the contract provided that if the contractors should, at any time during the progress of the work, refuse or neglect to supply a sufficiency of materials and workmen, the owner should have power to provide them after notice to the contractors, and deduct the expense from the contract price, held that, if the contractors refuse or neglect to complete the buildings, neither they nor those claiming under them can require the owner to complete the work, to the

end that he may be compelled to account for the contract price, less the expense of the completion.

(Syllabus by the Court.)

Bill by the Bradley Currier Company, Limited, against Otto Bernz and others, for discovery. On demurrer to bill. Sustained.

The bill alleges: That a firm of builders, Koellhoffer & Koenig, agreed with the defendant Bernz to well and sufficiently erect and finish "buildings" for Bernz according to drawings and specifications prepared by Brade, architect, providing the needed materials for the carpenter work, for \$2,975, to be paid as follows: \$1,000 when the buildings shall be raised and sheathed, \$900 when the buildings shall be inclosed, partitions set, and floors laid, and \$1,075 when the buildings shall be "all completed as per the contract and specifications"; provided that in case of each payment a certificate shall be obtained, signed by the architect, to the effect that the work has been done in accordance with the drawings and specifications, and that he considers payment due; and provided, also, that at each payment the contractors shall produce to the owner a release of all persons who shall either have furnished materials or have done work on the buildings, or who shall have a lien on the buildings and land, with an affidavit, by said contractors, that no person or persons other than those named in the release has any lien upon the buildings and land for work done or materials furnished for the erection thereof. That Koellhoffer & Koenig proceeded, under the contract, with the erection of the buildings, and the complainant furnished them windows, blinds, and doors, which they used in their work, worth \$515, for which they gave the complainant this order: "Newark, N. J., Oct. 1, 1892. Mr. Otto Bernz—Dear Sir: Please pay to the order of the Bradley & Currier Co., Limited, the sum of five hundred and fifteen dollars, due them for windows, blinds, and doors furnished for your buildings, 9th St., city. Yours, respect., Koellhoffer & Koenig,"—which order was served by the complainant on Bernz, October 3, 1892. That on the 10th of November, 1892, the complainant demanded payment for the blinds, doors, and windows so furnished, from Koellhoffer & Koenig, and, payment being refused, caused notice to be served upon Bernz, that there was due to it \$515 for the blinds, etc., aforesaid; that payment thereof had been refused by the contractors; and that he (Bernz) was required to withhold that amount from Koellhoffer & Koenig, and pay it to the complainant. That in October, 1892, Koellhoffer & Koenig "substantially finished the buildings and the work to be done by them in accordance with the contract, and delivered up to the said Otto Bernz possession of said buildings; and the said Otto Bernz entered into possession thereof, and during the said month of October, and since that time, and prior to the commencement of this action, leased the said buildings to different tenants, and from the time of said

leasing has received the profits and rents thereof." That the complainant has demanded of Bernz payment of the \$515, but Bernz has refused to pay, "claiming that the said Koellhoffer & Koenig had not entirely completed their said contract," and "that some work remained to be done." That Bernz also refused later, upon the demand and notice of the complainant, to proceed under a clause of the contract which gave him power to notify the contractors to proceed to complete their work, and, upon their failure to comply with the notice, to complete it himself, and, after taking the cost of so doing from the moneys that might be due to the contractors under the contract upon the completion, pay the complainant its \$515 from the residue. That the work remaining to be done is of "very trifling amount, and in no way detracts from the full use of the said premises, or from the income received by the said Otto Bernz therefor." That Bernz and his attorney at law, to whom he has referred the complainant, upon the complainant's demand, have refused to state the amount due from Bernz to Koellhoffer & Koenig, or to disclose what orders, notices, or other claims have been presented against the amount due, and have refused to pay the money into court upon a bill of interpleader. That, upon inquiry of Koellhoffer & Koenig, the complainant has ascertained that the only claims for materials and labor unpaid are \$19.73 due to one Goeller, and \$51.69 to the Newark Lumber Company, a corporation of this state. That \$1,175, or some part of it, more than sufficient to pay the \$515 and the amounts due Goeller and the Newark Lumber Company, is due from Bernz to Koellhoffer & Koenig. And that the architect, Brade, did not superintend the erection of the buildings, and did not give certificates for the two payments which Bernz made, and, when the complainant applied to him to ascertain if the work was complete, replied that he did not superintend the building, and had not given, and would not give, a certificate. The bill prays (a) that Bernz, Goeller, the Newark Lumber Company, and Koellhoffer & Koenig, who are the defendants, may answer; (b) that Bernz and Koellhoffer & Koenig may make discovery of the names of the persons who have done work or furnished materials, and remain unpaid, and the amounts and nature of their claims, and of the moneys paid by Bernz, and to whom paid; (c) that Bernz may be required to complete the building, if it is not already completed; (d) that he may be required to pay the complainant's order for \$515; and (e) that the complainant may have such other and further relief as shall seem meet and proper, and in accordance with equity. To the bill, the defendant Bernz demurs, for the reason that the bill has not made a case for discovery or relief in equity, because: (1) It does not allege that the order for \$515 was accepted by Bernz, or that he agreed to pay the amount of it, or that there is any contract between Bernz and the complainant by which Bernz is to pay it. (2) It does not

show that any money is due to Koellhoffer & Koenig, (a) by their completion of their contract, (b) by their procurement of the releases of materialmen and workmen, and an affidavit of Koellhoffer & Koenig, as the contract requires. (3) It does not allege a fraudulent arrangement between Koellhoffer & Koenig and Bernz, in pursuance of which Koellhoffer & Koenig have not completed the buildings, or have failed to procure release and affidavit as aforesaid. (4) It does not allege that the failure to procure a certificate from the architect is the result of arrangement between Bernz and the architect or Koellhoffer & Koenig, or arises from any dishonest or fraudulent practice. (5) It does not show that the failure of Bernz to proceed after notice to Koellhoffer & Koenig to complete the work was the result of arrangement with Koellhoffer & Koenig, or defeats the complainant in its recovery. (6) It does not show that the conditions precedent to payments have been fulfilled. (7) It shows that, if the complainant has any remedy, it is at law.

Elwood C. Harris, for complainant. Elias F. Morrow, for demurrant.

McGILL, Ch. (after stating the facts). The complainant grounds its right of action upon two claims,—one, in virtue of the order of October 1, 1892, which directs the defendant Bernz to pay it \$515, which is due to it for materials furnished to Bernz's buildings; and the other, in virtue of demand and notice under the third section of the mechanic's lien law (Revision, p. 668).

1. It is observed that the order does not expressly direct payment of the \$515 out of a particular fund. It states that the money is due to the complainant for materials furnished for Bernz's buildings; but does that statement imply that the order is intended to be paid out of a particular fund, arising from the erection of those buildings, or is it merely a specification of the consideration which supports the order? There can be no doubt that if the order, being founded on a valuable consideration from the payee, is drawn upon a particular fund due at the date of the order, or thereafter to become due from Bernz to the drawers, it operated as an equitable assignment, pro tanto, of the fund, and, upon its presentation to Bernz (although he did not accept it), fixed the portion of the fund assigned, in his hands, subject to the appropriation directed, and that, upon the funds being or becoming available, it will be enforceable in a court of equity. *Bank of Harlem v. City of Bayonne*, 48 N. J. Eq. 246, 21 Atl. 478, affirmed on appeal 48 N. J. Eq. 646, 25 Atl. 20, and cases cited. But if the order was drawn generally upon the drawee, to be paid by him on the credit of the drawers, and without regard to the source from which the money to be used for its payment was to be obtained, it did not operate as an assignment, and the payee of the draft cannot have an action against the drawee, un-

less the latter duly accepts the order (*Brill v. Tuttle*, 81 N. Y. 457; 3 Pom. Eq. Jur. § 1284), in which cases the action will be at law. To support an action in equity, for the purpose of enforcing payment of the money mentioned in the order, then it must appear not only that the order was drawn upon a particular fund, but also that, when the bill was filed, such fund had become available, so that, in absence of the assignment, it would be recoverable in an action by the assignors. The assignee takes their place and right as to the portion of the fund assigned, and cannot enforce the assignment before the assignors could have sued for the fund. As presently stated, I conclude that, when the bill in this suit was filed, there did not exist a fund available either to the contractors or to their assignee. It is manifest, then, that it is not necessary to the disposition of this demurrer that I shall decide whether the order considered is an equitable assignment, or a mere money draft, which must be accepted before it can be sued upon.

2. Where the statutory requisites exist, notice given according to the statute works an assignment pro tanto to the workman or materialman of the rights of the contractor against the owner. *Wightman v. Brenner*, 28 N. J. Eq. 489; *Kirtland v. Moore*, 40 N. J. Eq. 110, 2 Atl. 269; *Reeve v. Elmendorf*, 38 N. J. Law, 125. But if, when the notice is served on the owner, there be nothing owing to the contractor, and he is without right against the owner, the notice is without legal effect. *Craig v. Smith*, 37 N. J. Law, 549; *Kirtland v. Moore*, supra. "The test," said Vice Chancellor Van Fleet in the last-cited case, "is whether a suit for the money demand will lie by the" contractor against the owner. If it will not, the owner "is not liable to a suit by the workman or materialman."

3. The bill admits that the buildings here involved were not completely finished. Its allegation is that they were "substantially finished," and that that which remains undone "is of very trifling amount, and in no way detracts from the full use of the said premises, or from the income received by the said Otto Bernz therefor." It seemingly relies upon possession and use of the buildings by Bernz as a waiver of the completion of the "very trifling" remaining work. Its allegation is that the contractors "delivered up to the said Otto Bernz possession of said buildings, and the said Bernz entered into possession thereof," and, since taking that possession, has leased the buildings to various tenants, and has taken the profits and rents therefrom; but further on it adds the allegation that, when the complainant demanded of Bernz its \$515, he refused to pay, upon the ground that the contractors had not yet completed their work, and that some work yet remained to be done. In *Bozarth v. Dudley*, 44 N. J. Law, 312, Mr. Justice Magie said: "When a contract for erecting a building has not been so performed that a recovery can be had thereon, a recovery in assumpsit upon the common counts for work and mate-

rials furnished in the erection will only be permitted when the owner has actually accepted the building erected. * * * Such acceptance by the owner may be express or implied from his conduct. It seems well settled that mere occupancy of the building by the owner, while appropriate, is neither presumptive nor conclusive evidence of acceptance. The reason is obvious. The building belongs to the owner of the land on which it stands. As was said by Lord Campbell in *Munro v. Butt*, 8 El. & Bl. 738: "The owner cannot be appropriately said to take possession of that which is thus affixed to his own land." In the case to which Mr. Justice Magie thus refers, Lord Campbell added this: "If, indeed, the defendant had done anything, coupled with the taking possession, which had prevented the performance of the special contract, as if he had forbidden the surveyor from entering to inspect the work, or if, the failure in complete performance being very slight, the defendant had used any language or done any act from which acquiescence on his part might have been reasonably inferred, the case would have been very different." Here the only allegation is that the contractors delivered up possession, and that Bernz entered. He entered upon his own property. It is not alleged that he obstructed the completion of the buildings, nor that he took possession without expecting that completion in the future. On the contrary, it is a significant circumstance that soon after, when the complainant demanded its money, he refused to pay, protesting that the work was not complete. It may be that the completion of the work was unduly delayed, and that possession pending completion was taken, so that income should become available, and some return be had for the cost of the land and expenditures on the buildings, without any intention to waive the completion contracted for. As Lord Campbell intimates, something more than mere entry into possession by the owner is necessary to show the waiver contended for. Here, instead of having an additional circumstance in proof of waiver, we have the owner's protest that his buildings are not finished, and that, consequently, the last payment upon them is not due. I do not think that waiver of the completion has been shown.

4. The point made by the complainant, that the defendant Bernz should be compelled to proceed under a clause of his contract which permits him to do so, and notify the contractors to complete their contract work, and, in event of their failure, to do it himself, and after deducting, from the contract price remaining unpaid, its cost, account for the balance, to the end that its demand may be paid, has been dealt with adversely to this insistence in *Bernz v. Marcus Sayre Co.*, 52 N. J. Eq. 275, 284, 30 Atl. 21, 22, by the court of errors and appeals, upon the ground that such a clause in a contract similar to the one here involved conferred upon Bernz a privilege available to him if he wished to exercise it, which did not supersede or qualify the other provisions of

the contract, and did not impose upon him any obligation or duty. And so, also, the same case deals with the duty of producing the architect's certificate as a condition precedent to the maintenance of an action for money under the contract, unless it is waived by the owner. It does not appear that such a certificate was waived in this case. The facts that the first payments were made without it, and that the architect did not in fact superintend the building, may be attributable to dereliction upon his part, or to fault of the contractors. They do not prove the owner's waiver of the certificate. The bill does not charge fraud, nor does it allege facts upon which a charge of fraud could properly be predicated. If there be no fraud available for claimants, there is nothing to raise question as to priorities among them, and show the necessity of the discovery asked for. No case for the interference of equity is presented. The demurrer will be sustained, and the bill will be dismissed, with costs.

(55 N. J. E. 116)

STATE (STATE BOARD OF HEALTH,
Prosecutor) v. MAYOR, ETC., OF
JERSEY CITY et al.

(Court of Chancery of New Jersey. Oct. 26,
1896.)

PUBLIC NUISANCE—DEFECTIVE SEWERS—BILL TO
ABATE—SUFFICIENCY—CONSTITUTIONAL LAW.

1. In a bill to abate a nuisance, where it was alleged that a sewer, which had been laid in the channel of a natural brook, carried not only ordinary sewage, but "also the waters from the drainage area of the brook, * * * which waters are corrupted by the mixing of sewage therewith," the phrase "waters from the drainage area of the brook" means the waters which, if collected naturally, would form the brook.

2. In a bill to abate a nuisance, it was alleged that Jersey City has under its control a sewer which is the sole outlet for the drainage of a large district of that city; that the sewer was laid in the channel of a natural brook down in a ravine, and at first ended on the meadow lands in the city of H., only slightly above the level of high water in the Hudson river; that the sewage was "discharged at the foot of the ravine close to the H. city line, and created a public nuisance in the H. meadows"; that the sewer was afterwards extended across the meadows, and connected with another, emptying into the H. river; that, owing to the slight fall, in case of a heavy rain the water could not escape through the extension sewer as fast as it came down the ravine, causing the sewer to break and discharge the water and sewage on the H. meadows in great quantity; that the cities had failed to take any action for the proper drainage of the affected district; and that stagnant water was collected and retained, constituting a nuisance dangerous to health. *Held*, that the bill showed a nuisance in the city of H., having a source outside its limits, and hence within Act May 24, 1894, § 2, which in such a case confers jurisdiction on the state board of health to intervene to abate the nuisance.

3. A bill to abate a public nuisance caused by the discharge of sewage on low lands in a city, where it was allowed to collect in stagnant pools, alleged that the original outlet for the waters discharged from the sewer, as well as for the surface waters of this part of the city, was by a natural water course, discharging into a cove of the Hudson river; that one of de-

fendants, a railway company, had constructed its road across this creek, and extended the shore line of the cove out into the river by filling for their yard; that the parties responsible for the nuisance were city officers, who had failed to keep certain sewers in repair, and defendant railway company, "who have filled up the ancient water course through which the surface water and the waters of the brook (in whose channel the sewer was constructed) were wont to pass in its natural flow." *Held*, that the allegations were sufficient to hold the railway company in part liable for the nuisance.

4. Where a contract is made by commissioners who are acting in behalf and for the benefit of a city, the contract inures to the benefit of the city, and its authorities may enforce it, though the commissioners have fully discharged their office.

5. Act May 24, 1894, p. 495, § 2 (Gen. St. pp. 1646, 1647), which authorizes the state board of health to intervene to abate a public nuisance within the territorial limits of a city, whenever such nuisance "shall have a source or origin outside of the limits," is constitutional.

Bill by the state, on the relation of the state board of health, against the mayor and aldermen of Jersey City, and others, to abate a public nuisance. Certain defendants demur to the bill. Overruled.

Charles L. Corbin, for complainant. Flavel McGee, for demurrants.

PITNEY, V. C. The bill is filed under the second section of Act May 24, 1894, p. 495 (Gen. St. pp. 1646, 1647). It alleges the existence of a nuisance within the territorial jurisdiction of Hoboken, which has its origin within the territorial jurisdiction of Jersey City, and alleges, and attempts to show, that the Morris & Essex Railroad Company and the Delaware, Lackawanna & Western Railroad Company are in part responsible for its existence. The railway companies have demurred. I shall refer to them as one company. The location of the nuisance is in the extreme south-westerly part of the city of Hoboken, in the lowlands at the easterly foot of the Palisade Bluff, just to the north of the easterly end of the tunnel of the railway company. No map is annexed to the bill, but, by consent of parties, a map of the locus was furnished to the court as a part of the bill, and both parties relied upon the familiar general knowledge of the court and counsel of the geography and topography of the neighborhood.

The details of the nuisance are set forth as follows: That Jersey City has under the charge of its municipal government, as a part of its drainage system, a sewer called the "Ravine Road Sewer," which is the sole outlet for the drainage and sewage of about 300 acres of that part of Jersey City lying on what is called the "Heights," and formerly a part of Hudson City, with a population of about 30,000. This sewer was constructed in the year 1870 or 1871, and ran down a steep ravine, which was the channel of a brook or stream called the "Show-hank Brook," and at first ended and emptied on the low meadow lands in the westerly part of the city of Hoboken, which meadow lands are, notoriously, only slightly above the level of high water in the Hudson river, and about a

mile distant therefrom. That this sewer carried not only ordinary sewage, but "also the waters from the drainage area of the brook, partly in Jersey City, and partly in the town of West Hoboken, which waters are corrupted by the mixing of sewage therewith." I stop here to notice a criticism made by counsel of the railway company upon this language. He contends that it does not amount to an allegation that the natural waters of the brook are carried in the sewer, but only that the surface waters are carried therein. I cannot agree with him in this. The words "the brook" there used refer to Showhank brook, which has just been mentioned as being the name of the brook running through the channel in which the sewer was laid. Now, it is common knowledge that, when a district of country which lies at the head waters of a small natural brook has been altered by the building of paved streets and sidewalks and dwellings on each side, the result is oftentimes to very much diminish, if not entirely destroy, the natural springs which feed the brook, but that when rain falls, instead of soaking in the ground, and forming reservoirs to supply the springs, it runs off immediately and rapidly. Such rain water is, nevertheless, brook water, and properly styled the "waters of the brook." So that the phrase "the waters from the drainage area of the brook" means the waters which, if collected naturally, would form the brook.

The bill proceeds to state that, as the town grew, the sewage discharged by this sewer increased, and spread over the southwesterly part of Hoboken. The language used is, "discharged at the foot of the ravine, close to the Hoboken city line, and created a public nuisance in the Hoboken meadows." I think that that is a sufficient statement that it created a nuisance within the territorial limits of Hoboken.

The bill then proceeds to state that this nuisance became so great that legislation was had in 1875 (P. L. 1875, p. 621) to provide for the continuation of the Ravine Road sewer in the city of Jersey City and the city of Hoboken, and commissioners were appointed to extend the Ravine sewer, and connect it with the sewers then existing in Jersey City; that, in pursuance of that act, the commissioners appointed under it constructed an extension of the Ravine Road sewer from its original terminus southerly across lands in the city of Hoboken, to a street in Jersey City called "Jersey Avenue," then along Jersey avenue (southerly) until it crossed Thirteenth and Fourteenth streets, and there connecting with sewers in those streets which had their outlet in the Hudson river. The map shows a sewer connecting with sewers in those streets, and their connection with the Hudson river. The bill alleges that this remedy proved inadequate; that the extension from the end of the Ravine Sewer at the foot of the bluff was nearly level, and the extension from there to the Hudson river was nearly level, so that in case of a heavy rain the water could not escape through the extension sewer as fast as it came down the steep slope in the ravine, and the re-

sulting pressure caused the sewer to break and deliver the water and sewage on "the Hoboken meadows and lowlands" in great quantity, where it remained stagnant. Criticism is made upon this language; but I understand it clearly to indicate the meadows and lowlands in the city of Hoboken, lying near the foot of the slope, and at the end of the Ravine Road sewer as it was originally constructed, and that point is a short distance north of the embankment of the railway company.

The bill then states that the nuisance thus created has been of a notorious character, and has been recognized as a constant and growing injury to the health of the people of Hoboken and Jersey City, and that various attempts have been made to remedy it by legislation; that authority had been given to Jersey City to enlarge and rebuild the sewer, and enter upon the streets of Hoboken for that purpose; that in 1890, by an act (P. L. 1890, p. 85), the three defendants Harrison, Butts, and Connolly were appointed commissioners to rebuild the sewer extension on lands wholly within the territory of Jersey City, and that several supplements have been passed giving them further and increased powers; that certain repairs have been made from time to time on the extension of the sewer by Jersey City and by Hoboken, but have been so unskillfully and inadequately made that the sewer has broken again under the pressure caused by heavy rains, and for several years no serious attempt has been made to abate the nuisance. In the meantime, a large and increasing population has occupied the territory in Jersey City, draining into this sewer, and many lateral sewers have been built by the authorities of Jersey City, connecting with it, and it is the sole outlet for a population of 30,000 people. The bill then alleges that the municipal authorities of Jersey City and Hoboken, whose territories join near the foot of the hill, and thence to the Hudson river, have both failed and refused to take any action for the drainage of the territory affected by this nuisance, and have permitted the streets and adjoining lots to remain low and sunken and undrained, and the natural water course and outlet therefrom to be obstructed, so that stagnant pools of water are collected and retained, breeding disease, and constituting a nuisance dangerous to health, etc. Now, it seems to me that this sets out a nuisance existing within the territorial limits of the city of Hoboken, and one which has a source of origin outside of the limits of Hoboken. The case is thus brought within the second section of the statute of May 24, 1894, and jurisdiction is conferred upon the state board of health to intervene in the manner they have. In my judgment, it is not necessary that the source of the nuisance should be wholly in one jurisdiction, and the nuisance itself wholly in another jurisdiction. The act does not provide that all the sources or causes of the nuisance shall be in one, and the nuisance itself wholly in another; but it says simply

that "whenever any nuisance shall have a source, or origin outside of the limits," etc. No demurrer is filed by the city of Hoboken; and I think it plain that none would lie, because it is certain that, in addition to the water and sewage coming down from Jersey City Heights, there is a certain quantity of water falling on the territory of Hoboken itself, which must tend to increase and prolong the continuance of the nuisance after a rain; and, for the water falling upon its own territory, the city of Hoboken is, of course, responsible. But it is not necessary to express a final opinion on that subject, for reasons presently to be stated.

The bill next states the connection of the railway company with this nuisance. It proceeds to state that "the ancient outlet for this part of the city of Hoboken [by which I understand it means the natural outlet], and for the waters of Showhank brook flowing through the ravine water course, was a channel or creek discharging into Harsimus cove, of the Hudson river." Now, criticism of this language was made by counsel for the railway company, to the effect that it does not say that this "channel or creek" was the outlet for the waters of this part of the city of Hoboken, and for the waters of Showhank brook flowing through the ravine. I think that criticism is put too high; that we must supply, by construction, the words "waters of," in the first part of the sentence, and read it this way: "The ancient outlet for the waters of this part of the city of Hoboken, and for the waters of Showhank brook, flowing through the ravine water course;" and that, reading the whole sentence together, it means that Showhank brook reached the Hudson river by a natural water course, discharging into Harsimus cove, and that that natural water course also took off the waters which fell on that part of the city of Hoboken immediately adjoining it. The point of the débouché of this "channel or creek" into Harsimus cove was, as stated by the bill, at a point in or near the present line of Henderson street, about 300 feet south of Newark street, in Hoboken. That point is about halfway from the mouth of the railway tunnel and the present docks or piers. The intermediate space has been filled in and used by the railway company as a terminus. The line of the railway from the mouth of the tunnel to the river is nearly parallel with the line between Hoboken City and Jersey City. The railway itself is located mainly within the limits of Jersey City, while its passenger station and passenger yard are mainly in Hoboken. The bill proceeds to say that the Morris & Essex Railway Company constructed their railroad across this creek, and extended the shore line (of the cove) out into the Hudson river, by filling for their yard. Now, it is argued that this language does not show any interference with the creek by the railway company, and that, so far as appears, that creek may still be open to the flow of water. But I cannot accept

this criticism. Besides, we have, further on, this language: "The parties responsible for this injury and nuisance are the mayor and aldermen of Jersey City, who have collected sewage, and discharged the same at the foot of the ravine, and have neglected to keep the sewer in repair, and the Morris and Essex Railway Company, and the Delaware and Lackawanna Railroad Company, its lessee, who have filled up the ancient water course through which the surface water and the waters of the brook were wont to pass in its natural flow." This is a distinct allegation that the water course had been filled up and obstructed by the railway company. Now, it seems to me that while it might be admitted for the purposes of the argument that the city of Jersey City would have no right, as against the riparian proprietors, to use the creek in its natural course as an outlet for its sewage (see *State v. Bergen County*, 46 N. J. Eq. 173, 18 Atl. 465), yet the complete obliteration of the creek and stoppage of all flow of water through it, so that the waters naturally flowing through it are stopped and held back on the Hoboken meadows, does have the effect of aggravating and protracting the nuisance described in the previous part of the bill. This is a sufficient allegation to hold the railway company in part liable for the nuisance.

The bill then proceeds to state that the railway company, in 1868, entered into an agreement, in writing (which is set out word for word in a schedule to the bill), with certain commissioners authorized to drain certain lowlands lying in the city of Hoboken and the township of Weehawken, who founded their authority upon an act to provide for the drainage of certain lowlands lying in the city of Hoboken, in the township of Weehawken, approved April 4, 1866 (P. L. 1866, p. 941), which agreement, after reciting that the commissioners had laid sewers and made ditches for the purpose of draining a certain portion of the lowlands of Hoboken, up to and adjoining the lands of the railroad company in Hoboken, and that it was desirable that the drainage should be continued permanently over the lands owned and occupied by the railroad company in the city of Hoboken to the Hudson river, provided that the railroad company, in consideration of the sum of \$1,216.25 to it paid, covenanted and agreed that they would make, keep, and maintain a proper and sufficient opening for the drainage of the said lowlands over and across the lands of the party of the second part to the sluiceway as now erected (defining the size and character of the drain), "and that they will keep said opening, sluiceway, or drain in good repair and condition, so as to effectually drain the said lowlands from the sewers and drains as laid by the parties of the first part to the Hudson river." Here it is to be observed that in the preamble it is recited that the commissioners had "laid sewers" and "made ditches" for the purpose of draining certain portions of the lowlands, and the clause just recited declares that the

railroad company shall keep the said opening, sluiceway, or drain in good repair, so as effectually to "drain the said lowlands from the sewers and drains as laid by the parties of the first part." Note that the words "sewers and ditches" are used in one place, and "sewers and drains" are used in another place. Now, I understand the distinction to be that sewers are closed or covered waterways, and ditches are drains which are or may be open, and so arranged as to take surface water. Now, it is argued that this language does not, by its proper force, provide for the taking of any surface water from the lowlands. I cannot accede to that construction. I think it was intended to take water both from sewers proper and from open ditches or drains.

Then follows a provision in the agreement that the railroad company may change and remove the sluiceway, but that it shall always maintain a proper opening from the sluice to the Hudson river, or to some communication therewith, "so that the said ditches and sewers," as laid by the parties of the first part, "so long as they shall be kept up and maintained by the said parties of the first part," shall have free communication and outlet over and across said lands of the said parties of the second part to the Hudson river, so as to effectually drain the lowlands first aforesaid. But then followed this provision: "But this agreement shall only be binding on said parties of the second part so long as the said parties of the first part shall keep up and maintain the said sewers and drains so laid by them aforesaid." Now, it is contended that there is no sufficient allegation in the bill that the sewage in question in the bill or the lands in question are those mentioned in the contract. I cannot agree to that contention. I think that the map and geography of the neighborhood show plainly that the waterway which the railroad company agreed to construct and maintain led directly from the lowlands here in question. The drain which the agreement recited the commissioners had created ended near the lands of the railroad company. The map shows just where the lowlands mentioned in the agreement are situate, and that they were located just at the place where the nuisance is alleged now to exist. As I have already said, the contract provides for the carrying of surface water as well as sewage water proper; and, besides, it is common knowledge that ordinary sewers do carry surface water.

The bill then proceeds to state that the railroad company constructed a ditch in accordance with the provisions of the contract, and afterwards substituted an underground structure therefor, and that they have maintained imperfect outlets, and have not fully and adequately provided for the drainage, and have not kept a proper and sufficient opening for the drainage and sewers, as required by the contract, but have narrowed the channel, and permitted it to become out of repair, and have obstructed the same in part by their filling

and inadequate drainage pipes, and that the mayor and council of the city of Hoboken have negligently permitted the outlet to be so narrowed and partly changed, and have not enforced said contract against the railroad company. The point of this last allegation is that the contract was made by commissioners who were acting in behalf and for the benefit of the city of Hoboken; that, although those commissioners are now functus officio, yet that the contract inures to the benefit of the city of Hoboken, and the municipal authorities of that city have the right to enforce it; and that they have failed to do so. But I think that, so far as the railway company is concerned, the bill is faulty in not alleging that the conditions under which the continuance of the artificial water course was to be maintained,—namely, the continued maintenance of the ditches and sewers in Hoboken,—still continued. There is a failure to allege that, and therefore the bill does not state with sufficient clearness and explicitness any contractual default of the railroad company; and, if the case against the railroad company rested upon that agreement only, I should be inclined to the opinion that the objection on that ground was fatal. But the real object of the introduction of the agreement into the case was to show that the city of Hoboken was in part responsible for this nuisance, because it did not use the power which it had to relieve the place in question of such part, at least, of the waters there collecting as fell within its territorial jurisdiction; and, as the city has not demurred, I think that the allegation stands as against the city. Undoubtedly, reading between the lines, and taking all the circumstances together, the inference is a fair one that this artificial channel which the railroad company agreed to maintain was a substitute for the natural water course through which the Showbank brook and the other waters falling on that part of Hoboken found their way to the river.

But the principal point made by the counsel of the railroad company, and urged with earnestness in various shapes, is that the object of the bill is either to compel a specific performance of the agreement, or to provide a scheme for the drainage of this part of Hoboken over the lands of the railway company, without paying for the land, and thereby taking private property for public use without just compensation. But I think that neither of those matters is involved within the scope of the bill. The prayer of the bill is that the duties of the several defendants with respect to the abatement of the nuisance may be defined; and that they and their officers and agents may be decreed to perform such duties; and that they may be respectively enjoined from continuing the nuisance; and that the authorities of Jersey City may be enjoined from discharging sewage or water polluted therewith upon lots or streets in the territory of the city of Hoboken, or any part thereof; and that the authorities of the city of Hoboken

may be enjoined from maintaining pools of stagnant water on the lots and streets in the said city adjacent to the Ravine Road sewer terminus, at or near the city line; and that the railroad company may be enjoined from obstructing the flow of the waters which have their ancient outlet across their lands; and that there may be other relief. Now, I think that this statement of the prayer of the bill is in itself an answer to most of the very elaborate causes of demurrer set out in the pleading, and to much of the very able, learned, and elaborate argument of the learned counsel of the railway company.

A vigorous attack, in argument, was made upon the constitutionality of the legislation which authorizes this suit. This legislation has been before the court of errors and appeals several times,—once, in *Hutchinson v. Board*, 39 N. J. Eq. 589, where the decision below had been in favor of the board of health, and against the appellant, and the appeal was argued for the appellants by the late Mr. Gummere, whose appearance on that side of the cause insured the taking of every possible point against the appellees, and the decree below was affirmed; again, in *Butterfoss v. Board*, 40 N. J. Eq. 325, where a decree against the defendant was also sustained. In none of these cases was it suggested that the legislation was unconstitutional, and I am unable to see the least ground for the contention. It is within the jurisdiction of this court to abate nuisances, and the question at the hearing will be whether the nuisance is thoroughly established, so that the complainant's right is not in doubt upon the facts; but for present purposes the nuisance is admitted. Neither can I see the least reason to doubt the power of the legislature to invest the several boards of health, whether state or local, with the power to act in behalf of the public to abate nuisances which are an injury to the health of the public at large. The demurrer is overruled, with costs.

(65 N. J. E. 101)

OCEAN CITY R. CO. v. BRAY et al.

(Court of Chancery of New Jersey. Oct. 26, 1896.)

INJUNCTION — CONSTRUCTION OF RAILROAD — CERTIORARI.

1. A railroad company will not be enjoined from proceeding to construct a road, on the strength of an award in condemnation proceedings for a right of way, where it was enjoined prior to the condemnation proceedings, as that is enough to put it in contempt unless its action is justified by the award.

2. It is beneath the dignity of the court to entertain a suit of a landowner to enjoin the construction of a railroad, the land not being worth more than five dollars.

3. A landowner should not be aided by injunction to prevent construction of a railroad, his purpose being merely to prevent competition with another road.

4. Injunction to prevent interference with the construction of a road by a railroad company will not be granted, where there is doubt as to

its title to the right of way under condemnation proceedings, because, before award of damages by commissioners, a certiorari removing the appointment of the commissioners and the proceedings to the supreme court was allowed, without any statement whether it should operate as a stay of proceedings, and because there is doubt whether Act Feb. 25, 1880 (Supp. Revision, p. 831), providing that certiorari to remove proceedings by commissioners appointed to assess damages for land required for construction of a railroad shall not stay proceedings by the commissioners, is not unconstitutional, even if construed merely as requiring the certiorari to recite that it is to operate as a stay, if such is to be its effect.

Suit by the Ocean City Railroad Company against Thomas Bray and others for an injunction. Heard on bill, supplemental bill, and answer to the original and supplemental bills, and also cross bill. Injunction refused.

The contest in this cause is over a right of way for a railway across a wholly unoccupied, unused, and worthless island in one of the inland, shallow, tidal waters of Cape May county. The object of the railroad company is to cross this inland water, including the island, and reach the sand beach on the ocean. The defendant Bray bought the island, confessedly, at the instance and with the money of another railroad company, which already has a railway line running to the point in question, for the purpose of obstructing the complainant in the prosecution of its enterprise. The parties interested in complainant's railroad, before they were duly incorporated, in anticipation of their incorporation, procured a license for the right of way from a person whom they supposed to be the owner. Ascertaining afterwards that this party was not the owner, they made application to the Proprietors of West Jersey to obtain title from them; but the old railway company was more diligent, and procured the title to be vested in one Wright, who conveyed to the defendant Bray, who holds it entirely in the interest of the old railway company. In the meantime the complainant had duly organized its railroad company under the statute, and taken partial possession, and commenced construction of its road across the island. The defendant Bray, with the aid of the servants of the old railway, attempted to obstruct it by force. Each party then applied to this court for injunctive relief. Defendant Bray obtained an absolute injunction against the complainant further proceeding. That injunction, on motion, was dissolved, but was continued, first by the chancellor, and then by an order of the court of errors and appeals, and is now standing against the complainant. The complainant at about the same time—all in the month of June last—applied to another judge of the court for an injunction against Bray and the old railway. On that an order to show cause was granted, but no proceedings were had under it, on account of the previous injunction obtained by Bray against the complainant. The complainant then instituted proceedings to condemn its right of way, treating Bray as the owner, and for

that purpose applied to the justice of the supreme court in whose circuit the lands lie for the appointment of commissioners. The justice fixed a day, and notice was given to Bray. He appeared by counsel and opposed the application on various grounds. The objections were all overruled, and the commissioners were duly appointed. After the complainant's counsel had left the presence of the judge, and so in his absence, counsel for Bray applied to the judge for a certiorari removing the order of appointment and proceedings to the supreme court, and he allowed it simply, without stating in writing whether it should or should not operate as a stay of the proceedings. The complainant, relying on the act of February 25, 1880 (P. L. p. 51; Supp. Revision, p. 831; Gen. St. p. 2851), proceeded before the commissioners to assess and appraise the damages. The defendant Bray appeared under protest, and was heard upon the question of value. Two of the commissioners made an award fixing the damages and value at \$1.69. This amount was tendered to Bray, who declined to receive it, and then, upon an order of the judge who made the appointment, that amount was paid into court. The defendant Bray did not appeal from this award, but several days afterwards applied to a judge of the supreme court, other than the one who had allowed the first certiorari, for another certiorari to remove the award to the supreme court, which was also allowed simply, without any written expression as to whether it should operate as a stay or not. Counsel for the complainant moved each of the judges who had allowed the certiorari for a special order declaring that they should not operate as a stay, and each declined to make such order. After the making of the award, and a sufficient time had elapsed for an appeal, and after the allowance of the second certiorari, the complainant filed its supplemental bill in this court, setting up the facts which had occurred since the filing of the original bill, and asked for an injunction against Bray and his associates from interfering with their possession of the premises. Bray answered, and combined in his answer a cross bill, in which he prayed an injunction against the complainant remaining in possession, or doing any acts upon the land on the strength of the award. Both applications were heard at one time.

Robert H. McCarter, for complainant. Samuel H. Grey, J. H. Gaskill, and H. M. Snyder, for defendants.

PITNEY, V. O. (after stating the facts). I decline to grant the injunction to the defendant Bray, on three grounds:

First, he already has an injunction against the acts of the complainant, sufficient to put it in contempt of the court unless its action is justified by the award, and defendant can test that question by a motion to punish for contempt.

Second, the value of the land in controversy, from Bray's standpoint, is beneath the dignity of this court. No question was made but that the award was a fair one, as to value, and the affidavits show that the value of the property does not exceed five dollars; and apparently it is incapable of beneficial use, except for a second railroad. Dr. Story (Story, Eq. Pl. § 500), after stating the familiar reasons why the court will not entertain suits for trifling matters, says: "In England the rule of the courts of equity is not to entertain a bill under the value of ten pounds sterling, or forty shillings per annum in land, except in special cases, such as in cases of charity, in cases of fraud, and in cases of bills to establish a right of a permanent and valuable nature." He cites numerous authorities in the notes to support this position, and I have taken the trouble to examine them, so far as they relate to law. In the old book, *Cursus Cancellarie*, published in 1723, in stating the grounds which will constrain the court to refuse to entertain a suit, it is said (page 9): "Or if it be for land not worth forty shillings a year, or for anything else under the value of ten pounds, those are regularly disallowed here; and sometimes upon notice taken thereof by the court upon motion, or upon affidavit only, before the cause comes to a hearing, it is dismissed; but, if not, when it comes to a hearing it is dismissed,"—and then cites several cases from Cary's Reports. Among them, I refer to *Townly v. Osney*, Cary (16mo. Ed. 1820) p. 106, where the report is: "That it appeared, as well by the plaintiff's bill, as that Osney one of the defendants hath made oath, that the lands in the bill is not worth forty shillings per annum; therefore dismissed generally, and not without costs." And again, in *Morgan v. Richard, Carey*, p. 121: "Ap Richard maketh oath that the lands complained of are under forty shillings by the year; therefore dismissed." Both these cases were decided in 21st and 22d Eliz. In *Babb v. Dudeney, Toth.* 155 (see 1 Eq. Cas. Abr. 75), the court declined to grant a partition because the matter was but nine pounds a year. For other cases, both ancient and modern, see 4 Chit. Eq. Dig. (4th Ed.) p. 3242; *Swedesborough Church v. Shivers*, 16 N. J. Eq. 452; *Allen v. Demarest*, 41 N. J. Eq. 162, 2 Atl. 655; 1 Daniell, Ch. Prac. pp. 328, 329. In the case in hand it is further to be observed that the construction of the railway upon the island will increase, rather than diminish, the value of the strip taken.

In the third place, I think the court ought not to help the defendant, because he is asking the extraordinary aid of the court for an inequitable purpose. And I refer in support of that position to *Railway Co. v. Speelman and Mayer v. Railway Co.* (Md., June 23, 1887) 10 Atl. 77, 293. One of the headnotes is: "A court of equity will not lend its aid to an assignee of the lease of land through which a railroad company seeks to condemn a right of way, and enjoin it from so doing, when it is

shown that the assignee is the president of a rival road, and denies the power of the first company to condemn the land under its charter, but will leave him to his remedy at law."

With regard to the injunction asked for by the complainant railroad company, it, also, is in no position to ask the aid of the extraordinary power of the court. It is not asking for the enforcement or administration of any primary equitable right, but for its protection in the enjoyment of a legal right, and in such case the rule applies that its legal right must be clear. And, how fully soever I may appreciate the inequitable conduct of the defendant, I must not be moved by that consideration to grant to the complainant aid to which it is not clearly entitled; and, if any doubt is seriously thrown upon its title by the allowance of the two writs of certiorari, I must deny its prayer for interim relief, and leave it to its remedy at law. Complainant relies upon the act of 1880, above referred to. In turn, the defendant denies the constitutionality of that act, and claims that the writs of certiorari operate, *ex proprio vigore*, as a stay. The practice seems to be well settled for judges of the supreme court, in allowing writs of certiorari, to state in writing, whenever they see fit to do so, whether they shall or shall not operate as a stay. So that their power to declare whether they shall or shall not so operate seems to be well settled. Now, conceding, as, of course, I must do, that it is beyond the power of the legislature to take away the right of the supreme court to allow a writ of certiorari, with all its consequences, including the stay of all further proceeding under the proceedings removed, yet I am of the opinion that it is within the power of the legislature to so far regulate the use of the writ, and the practice under it, as to compel the judge of the supreme court who allows the writ to expressly declare that it shall operate as a stay, if he so intends; and, the legislature having that power, I am inclined to think that it is possible to give effect to the act in question, within the limits of the constitution, by construing it as imposing upon the judge allowing the writ that duty. But this is a mere suggestion of my own, and I cannot be at all sure that the supreme court will ever adopt it. Indeed, the latest utterances of that court to which my attention has been called, found in the report of the case of *Green v. Mayor, etc.*, 42 N. J. Law, 118, 121, 122, are against the construction which I have suggested.

I am informed that the ground on which the second writ was allowed was that the judge was in doubt whether the effect of the first writ was not to absolutely stay further proceeding under the appointment of commissioners. With regard to the effect of the second writ, my impression is that it could not affect the complainant's right to proceed under the award. If the title once vested under the award, then the mere allowance of a certiorari to remove the award to the supreme

court would not, as it seems to me, have the effect of divesting its title. That result would only be attained by an actual setting aside of the proceedings, including the award. In other words, the title would vest by the signing and filing of the award, subject to being divested by judgment setting it aside. But with regard to the first writ, removing the proceedings before the award was made, I am unable to see how the effect of that can be avoided, and come to the conclusion that so much doubt is thereby thrown upon the complainant's title that I must refuse to grant an injunction protecting it in the premises, and leave it to its rights at law.

(55 N. J. E. 200)

RUSLING v. BRODHEAD et al.

(Court of Chancery of New Jersey. Nov. 10, 1896.)

PARTNERSHIP—CONTRACT—SUIT AGAINST SURVIVING PARTNERS—NECESSARY PARTIES.

A firm agreed to give R., for a valuable consideration, a fourth interest in the profits which it might make in a certain contract by it for work, he to furnish necessary capital for the work up to a certain sum, *pro rata* with the firm. After performance of the work, one of the partners, a nonresident, died, and thereafter full payment for the work was made to the survivors. *Held*, that R. could maintain a suit against the survivors alone for an account of the profits and a decree for payment to him of a fourth part thereof; as R. did not, by his agreement, become a member of the firm, and presence of the representatives of deceased was not indispensable to the ascertainment of the merits, or to prevent injustice to them; no representatives being appointed within the state, and foreign representatives not being subject to suit in their representative capacity outside of the state in which they are appointed.

Suit by George M. Rusling against Calvin E. Brodhead and another. Heard on demurrer to the bill.

R. V. Lindabury, for demurrants. James P. Northrop and R. Floyd Clark, for complainant.

STEVENS, V. C. It appears by the bill that in June, 1894, Calvin E. Brodhead, Robert P. Brodhead, and Daniel O. Hickey were co-partners in business, and that as such they made the following agreement with complainant: "For and in consideration of the sum of one (1) dollar in hand received, the receipt of which is hereby acknowledged, we, Brodhead & Hickey, hereby agree to and do hereby sell and assign to Geo. M. Rusling, his heirs or assigns, a one-fourth interest in any and all of the net profits which may arise for the doing of the work under any contract which we may or shall obtain and accept from the Hudson River Railroad & Terminal Company, or their successors or assigns, for the building of a tunnel through Bergen Hill, near Edgewater, New Jersey, and any other work pertaining or belonging thereto. And the said Geo. M. Rusling hereby agrees to furnish his proportion of the capital necessary for carrying on the said work, up to the sum of four

thousand dollars (\$4,000) for said proportion, pro rata with Brodhead & Hickey, as may be required. Executed this 23rd day of June, 1892, in duplicate. Brodhead & Hickey. G. M. Rusling." After this agreement was made, Brodhead & Hickey obtained the contract to which it related, and had completely performed it on or about July 1, 1894. On July 12, 1894, Hickey, one of the partners, died. He was, at the time of his death, a citizen of and resident in the state of New York. The bill alleges that no personal representative of his estate has been appointed "within the jurisdiction of this court." It also alleges that on September 15, 1894, "Brodhead and Hickey, as co-partners, received * * * full payment for all work done under the contract." The complainant prays, as against the surviving members of the firm, an account of profits, and a decree for payment to him of one-fourth part of them. Both of the surviving partners demur on the ground that the personal representative of Daniel C. Hickey ought to be made parties. As the foreign representatives of Hickey's estate are not liable to be sued in their representative capacity in the courts of this state (*Durle v. Blauvelt*, 49 N. J. Law, 114, 6 Atl. 312), the complainant has not called upon them to answer, and has not prayed process against them. The question is whether they are, notwithstanding the complainant's inability to bring them into court, so indispensably necessary to the prosecution of the suit that no decree can be made against the surviving partners alone. The agreement of June 23, 1892, is somewhat peculiar. It does not create an ordinary partnership between the parties, although it contains some of the elements of a partnership. It is not an agreement between A., B., and C. to share profits and bear losses, but an agreement by the firm of A. & B. on the one hand to give to C. on the other, for a certain consideration, one-fourth of the profits which that firm may make in a specified venture. It does not provide that A. shall become, even temporarily, a partner of this firm, or of any new firm to be created pro hac vice. Its language is, in substance, this: We, the firm of Brodhead & Hickey, do sell and assign to Geo. M. Rusling a fourth interest in the net profits which may arise from the doing of any work under any contract which we (the firm of Brodhead & Hickey) shall obtain, etc. There are these things to be noted in the agreement. It was intended (1) that the contract which the parties hoped to secure should be taken by the firm of Brodhead & Hickey alone; (2) that Rusling should not have any right of control over or management of the firm's affairs; and (3) that Rusling should furnish capital, up to \$4,000, pro rata, not with the individual members of the firm, but with the firm itself. The paper is signed only in the firm name. The agreement is not unlike that which was before the court in *Hargrave v. Conroy*, 19 N. J. Eq. 231, and in *Walker v. Hirsch*, 27 Ch. Div. 460,—cases in which it was held that no true

partnership existed between the parties. Now, if the complainant was not a member of the firm of Brodhead & Hickey, but one merely who, by reason of his agreement, had some claim upon it, even though that claim was of such a character that an account was necessary, there would seem to be no substantial objection to allowing him to proceed against the surviving partners, just as any other claimant might do. According to a perfectly well settled rule, on the death of a partner, the surviving members are the proper persons to get in and pay its debts. 2 Lindl. Partn. 591. They alone sue and are sued in a court of law. They alone represent the partnership. They are, presumably, more familiar with its affairs than any one else. If they can protect the interests of the firm in a court of law, why can they not in a court of equity? It is no doubt true that in equity, the representatives of a deceased partner are ordinarily deemed necessary parties; but the question here is whether they are, in cases situated as this is situated, so indispensably necessary that the case must fail if they be not present. I do not think they are. It is well settled that persons out of the jurisdiction need not be made parties, unless their presence is indispensable to the ascertainment of the merits of the case, or unless their interests will be prejudiced by the decree. Story, Eq. Pl. § 81; Daniell, Ch. Prac. (6th Ed.) *150. Judge Story thus states the rule in regard to partners: "If one of the partners be resident in a foreign country, so that he cannot be brought before the court, and the fact is so charged in the bill, the court will ordinarily proceed to make a decree against the partners who are within the jurisdiction, with this qualification, however: that it can be done without manifest injustice to the absent partner." Tested by this rule, the personal representatives of Hickey may be dispensed with. Their presence is not necessary to the ascertainment of the merits of the case. They had nothing to do with the making or performance of the contract, and, so far as appears, they were entire strangers to it. The surviving partners are fully capable of protecting the firm interests, and no injustice will be done to the estate of the deceased partner because on a settlement of the affairs of Brodhead & Hickey, either in court or out of it, the representatives of the Hickey estate not having been parties to this suit, and not being bound by the decree, will be at liberty to question any account the surviving partners may present to them, and have it corrected if it should appear to be erroneous, just as they would be able to question any other act of the surviving partners done in the execution of their trust. On the other hand, the refusal of the court to proceed would amount to a denial of justice. The complainant and one of the defendants reside here, and the work under the contract was performed here. To allow the demurrer would be to declare that, although the surviving partners have in hand the profits of the contract,

and are legally accountable for them to the complainant, yet that, because certain other persons, who know nothing about the matter, and who cannot be brought into court, are not present, the complainant is remediless. None of the cases cited by complainant go to this length. They are cases in which it was held either that the presence of those interested, but not made parties, was indispensably necessary to the ascertainment of the merits, or cases—notably that of the leading case of *Shields v. Barrow*, 17 How. 130—in which manifest injustice would have been done to absent parties by a decree directly affecting their rights. The demurrer should be overruled.

(55 N. J. El. 747)

BRINTON v. SCULL et al.

(Court of Chancery of New Jersey. Nov. 4, 1896.)

PRINCIPAL AND AGENT—EVIDENCE OF AGENCY—SPECIFIC PERFORMANCE—ENFORCEMENT AGAINST THIRD PERSON—CONSTRUCTIVE NOTICE.

1. On an issue as to the authority of P. and C. to act as defendant's agents in the sale of certain land, C. testified that defendant gave them the price and terms of payment, and that at a subsequent interview defendant said there ought not to be any difficulty in selling the property for the stated price, and P., who corroborated C. as to this conversation, replied that they had a purchaser in view. Two days later P. and C. gave complainant a written contract of sale as defendant's agents, and on the next day informed defendant, who told them he had forgotten to notify them that he had raised the price. Defendant refused to see complainant, but wrote a letter addressed to P. and C., stating that he "had notified the other agents" of the increase of price, "but neglected to notify you," and subsequently sold the land to a third person, refusing to convey to complainant at the price named in the contract made with P. and C. *Held* sufficient to establish the agency.

2. A contract for the sale of land as follows: "Received of J. the sum of \$25 on account of purchase price of \$2,000" on certain described land, "the property of E., which lot is this day sold by us, as agents for the said E., to the said J., for the price of \$2,000, * * * [Signed] P. & C., Agts."—will be specifically enforced, the agency of P. and C. being established.

3. A memorandum of sale, recorded without being acknowledged or proved, is ineffectual as constructive notice to a subsequent purchaser.

4. Specific performance may be decreed against a third person who purchases land and pays a part of the price before notice of a previous contract by the vendor to convey to complainant, if the latter pays to such purchaser the sum advanced by him as part payment.

Bill by J. Percy Brinton against Enoch B. Scull and others for specific performance of a contract to convey land. Decree advised in favor of complainant.

The bill in this case is filed to compel the specific performance of an agreement claimed to have been made by the defendant Scull, through his agents, Porter & Crowley, with the complainant, on the 27th of September, 1895, for the sale of a tract of land situate on the east side of Chelsea avenue, and designated as "No. 11, in block 12, of the Chelsea Beach Company," as shown on that com-

pany's plan on file in the Atlantic county clerk's office. The complainant alleges: That Scull had employed Messrs. Porter & Crowley to act as his agents for the sale of this lot. That he fixed the price at \$2,000, prescribed the terms of payment, and directed them to make the sale. That on the 27th day of September, 1895, the complainant agreed with Scull, through Porter & Crowley, acting as his agents, for the purchase of this lot, by a contract in the form of a receipt, which is marked "Exhibit C 1," and is in words and figures as follows: "Atlantic City, N. J., Sept. 27th/95. Received of J. Percy Brinton the sum of twenty-five Dollars (\$25.00) on act. of the purchase price of two thousand Dollars (\$2,000.00) on Lot no Eleven (11) in section No twelve (12) as per plan of Chelsea in Atlantic City said Lot situate on the East side Chelsea Ave. Beginning at a point two hundred and seventy-five feet south of Pacific ave, the size of the aforesaid Lot being (50x125) the property of E. B. Scull which Lot is this day sold by us as Agents for the said E. B. Scull to the said J. Percy Brinton for the said Price of (2,000) two thousand Dollars to be paid all Cash if desired or one-half to remain on purchase money mortgage settlement to take place within (20) days and apportionment to day of settlement. Porter & Crowley, Agts. Witness: H. S. Scull." Indorsed on the contract is the following certificate: "Recd. Oct. 1st, A. D. 1895, and recorded in the clerk's office of Atlantic county, at Mays Landing, in Agreement Book No. 3 of the said county, on page 211. Lewis Evans, Clerk." On the same day that he got this agreement, the complainant paid Porter & Crowley \$25 in cash on account of the purchase money of the lot, and on the next day Porter & Crowley notified Scull of the contract thus made. Shortly after the contract was made, the complainant tendered performance of it to Scull by offering to pay to him the balance of the purchase money, which he refused to accept, stating as his reason that he had advanced the price of the lot prior to the time of the sale by Porter & Crowley to the complainant, but had neglected to notify them of his intention to raise the price. Scull refused to convey to the complainant, but on the 4th of December, 1895, he did convey the lot in question to the defendant E. Bartine Johnson by deed dated November 16, 1895. At the time when this deed was made, Johnson had full knowledge of the outstanding unperformed prior contract to convey to the complainant, and with this knowledge Johnson accepted the deed from Scull to himself. The complainant claims that this conveyance was a subterfuge by which Scull hoped to get the title into the hands of a stranger, and thus defeat the complainant's contract, and he alleges that Johnson is not a bona fide purchaser, etc. The defendants Scull and Johnson both file answers. Scull admits that he owned the land, but denies that he ever in any way appointed Porter & Crowley his agents

for the sale of it. He denies giving them any authority to make the contract with the complainant; declares that he had no notice of it until a day or two after it had been executed, and that on receiving notice of it he repudiated it, and also the claim of Porter & Crowley of any right to make it as his agents. He admits that Porter & Crowley made known to him the making of the agreement after it had been made, and that the complainant tendered himself ready to pay the balance of the purchase money, and that he refused to take it, and that he stated that he had advanced the price as above narrated. He avers that the conveyance to Johnson was no subterfuge, but a sale in good faith; that he had put the sale of the lot in the hands of I. G. Adams, and also of A. H. Phillips & Co., at the price of \$2,000; and he states that all he said to Porter & Crowley touching the matter was in reply to an inquiry of Crowley, to whom he answered that he was the owner of the lot, and the price was \$2,000. He says he heard nothing further from Crowley until after the agreement with the complainant was made. In the meanwhile he says he had notified Adams & Co. and Phillips & Co. that he had advanced the price of the lot to \$2,500, and immediately upon receiving word that Porter & Crowley had sold the lot for \$2,000 he informed them that the price was \$2,500; that a few days afterwards the complainant requested him to convey the lot for the \$2,000, which he refused to do; and that the sale to the defendant Johnson was made by Adams & Co., who had received \$100 on account, and given a receipt therefor, before the complainant knew that Johnson desired to purchase it. The defendant Johnson answers by the same solicitor as the defendant Scull, and claims that he is a bona fide purchaser for value; that he had paid \$100 on account, and received an agreement of sale from Adams & Co., as agents for Scull, two or three days before he had any word from Porter & Crowley that they had sold it to the complainant, and that this information was the first knowledge that he had of any transaction between Scull, Porter & Crowley, and the complainant.

J. H. Brinton and L. M. Garrison, for complainant. C. L. Cole and Joseph Thompson, for defendants.

GREY, V. C. (after stating the facts). In so far as the bill charges the conveyance to Johnson to have been a subterfuge and a fraud, there has been no proof submitted upon the part of the complainant which tends to establish this charge. There seems to be no dispute that the complainant entered into the bargain for the purchase of the lot with Porter & Crowley, believing them to be the agents of the defendant Scull, in good faith, and that he received the above memorandum of the sale, and made a payment on account of the purchase money, and tendered to the defendant Scull the residue of it. The form

of the agreement is, in substance, the same as a contract made by an agent for sale of lands, of which specific performance was decreed in *Reynolds v. O'Neil*, 28 N. J. Eq. 224. See, also, *Lewis v. Reichy*, 27 N. J. Eq. 240. The defendant Johnson appears to have made his bargain with Adams & Co. for the purchase of the lot as agents of Scull in ignorance, at the time he made the bargain, of the previous contract made by Porter & Crowley, as agents of Scull, with the complainant. This contract of the defendant Johnson was marked "Exhibit D 1," and is in the words and figures as follows: "November 16th, 1895. Received of E. Bartine Johnson the sum of one hundred dollars to secure and on account of purchase of lot No. 11, block 12, on map of the Chelsea Beach Company, situate on the easterly side of Chelsea avenue, and beginning two hundred and seventy-five feet southerly of Pacific avenue, and extending southerly fifty feet, and of that width extending eastwardly at right angles with Chelsea avenue and parallel with Pacific avenue one hundred and twenty-five feet. Price of said lot two thousand five hundred dollars; four hundred dollars to be paid within thirty days from the date of this agreement, and the balance, two thousand dollars, to be secured by a purchase-money mortgage payable at any time within three years. Papers to be dated November 16th, 1895. Taxes to be prorated. E. B. Scull." On this contract Johnson had actually paid \$100 on account before he heard of the complainant's contract; but before he paid any further purchase money, or took his deed, he was fully notified of the previous contract to convey the lot to the complainant, and of the complainant's assertion of his claim to the lot under that contract, and Johnson thereafter proceeded with the performance of his contract with actual notice of the complainant's prior equity.

The incidental facts which lead to the foregoing conclusions are not disputed, and appear in the proofs offered by both parties. The essential difference between the parties lies in the broad denial of the defendant Scull, the owner of the lot, that he ever in any way authorized Porter & Crowley to act as his agents for the sale of the lot in question. This denial is explicit and unqualified as set out in the answer, and the defendant Scull declares that he repudiated the contract made by Porter & Crowley with the complainant as soon as he heard of it. An examination of the testimony shows that the only witnesses who testified to this point are the real-estate agents, Porter & Crowley, and the defendant Scull. Mr. Scull's letters, however, to Messrs. Porter & Crowley and to the complainant, immediately after the happening of these transactions, throw great light upon this disputed question. Crowley testifies that about April 11, 1895, he called upon Mr. Scull about the sale of some lots of land owned by him, including the lot in question as one, and that Scull, at his invitation, named the price at which he would sell these lots, and

agreed that Porter & Crowley might sell any of his lots at the price prescribed by him, and that he would allow them the usual commission of 2 per cent. on the price at which the sale should be made. Mr. Scull admits that Crowley asked him if he owned this lot, and the price he asked for it, and that he told him \$2,000 was the price, but says he has no recollection of giving prices on the other properties. Mr. Scull, though examined relative to the conversation, does not deny Crowley's statement that he (Scull) assented to the sale of the lot by Crowley at the price he had named; and, when asked what else Crowley said, Scull replied, "I don't recollect of anything particular." Mr. Scull, it is to be observed, does not contradict the statement of Crowley that he arranged that Porter & Crowley might sell his lot, and that he would pay them a commission for effecting the sale. Indeed, Mr. Scull, in substance, admits this, for, when asked relative to the only conversation which he says he had with Crowley before the sale, whether he authorized him to make a sale of the lot, he replied: "Not particularly; but if Mr. Crowley had made a sale of the property before the advance in the price, why, I should have accepted the sale, if the other conditions of the sale were agreeable." The arrangement of Mr. Scull with Porter & Crowley that they might sell his lot was not questioned by him at any time while the transactions were being carried on upon the ground that they had no power to sell. Scull himself testified that he would have accepted any sale made by them if they had secured for him the higher price he demanded. In August, 1895, Crowley said that he asked Scull if there was any change in the price, and that Scull told him there was not. Mr. Scull admits this to be, in substance, a true statement of the conversation, and says that the next thing "he [Crowley] came to me, and said he had sold it." Another interview between Scull and both Porter & Crowley was had about September 25, 1895, when Crowley said Scull told him there was no change in the Chelsea avenue lot; that he would take \$2,000, and, if it would help the sale, would let \$1,500 remain on mortgage, if necessary,—whatever would suit the purchaser; and, speaking to Crowley, said, "You had not ought to have any trouble to sell that lot at that price, as it is cheap." Porter, who was present, confirms this statement, further adding that Scull said to them, "Why haven't you sold that piece of ground of mine on Chelsea avenue there?" Porter answered, "We have a purchaser in view for it," and Scull replied, "He hoped he would sell it, he was anxious to sell it." When the substance of this testimony was restated to Mr. Scull, and he was asked if it was true, he merely replied, "It is not." So it is difficult to understand whether Mr. Scull denies the meeting with the parties, or the part of the conversation restated to him; but, taking this denial to have been made in its broadest sense, it puts Mr. Scull in direct contradiction of both Porter and Crowley, so that the credibility of one party or the other

must be passed upon as hereinafter considered. Previous to the time when this conversation took place, the complainant had opened negotiations with Porter & Crowley for the purchase of the lot. On September 27, 1895, two days after this interview, the complainant agreed to the purchase, paid \$25 on account of the purchase money, and took from Porter & Crowley the receipt, Exhibit C 1, which is the above memorandum in writing of the sale. The next morning—September 28th—Mr. Crowley informed Mr. Scull that he had sold the lot for \$2,000 to Mr. Brinton, the complainant. Scull told him he had forgotten to notify him that he had changed the price of the lot to \$2,500, but that, as Brinton had paid \$25 on account, he might have it for \$2,250. Crowley then asked Scull to meet Brinton to explain this change increasing the price, which Scull declined to do, but said he was willing to write a note, explaining that Crowley had the lot for sale, but that Scull had changed the price. Scull declares that the object of this note was to assure Brinton that it was Scull, and not Crowley, who had changed the price. In this conversation between Crowley and Scull, when the sale was reported, it is plainly manifest that Crowley was asserting to Scull himself, not only that Scull had previously given to Porter & Crowley authority, as his agents, to sell the lot at a named price, but that they had actually exercised this authority by making a contract of sale at that price, and taking from the purchaser a part of the purchase money. Now, if these real-estate agents had in fact assumed an agency for Scull that had no existence by his authority, the entirely natural thing for Scull to have done when this was first brought to his knowledge, would have been to have denied their right to act for him. Mr. Scull evidently perceived the force of this situation, for in his answer he makes a direct allegation that, "upon receiving notice that such an agreement had been made, he immediately and unqualifiedly repudiated the same, and the authority of Porter & Crowley to execute the same as his agents." But when Mr. Scull was giving his evidence he did not testify that at the time he received notice of the making of the agreement by Porter & Crowley he denied their power as his agents to make the sale. His own testimony shows that when Crowley notified him of the agreement with the complainant he recognized their right as his agents to make the sale, if only they had obtained the increase in the price which he wanted, but of which he had neglected to notify them. While Crowley was in the office, the letter of September 28, 1895, addressed to Porter & Crowley, was written. This letter is dated September 28, 1895, and has been marked "Exhibit C 2." It is addressed to Porter & Crowley, and in this Mr. Scull explains that he had raised the price to \$2,500, and he states in terms that he "had notified the other agents, but neglected to notify you." Here is Mr. Scull's own definition of the relation which Porter & Crowley bore to him touching this lot. He speaks of them as

agents whom he had neglected to notify of the increase in the price, and this letter was written by his own clerk in his own office, was handed to him by the clerk, was by him handed to Crowley at the time when he was first notified of the agreement made with the complainant, and also at a period in the transaction when his self-interest had not yet been aroused to deny his authorization of Messrs. Porter & Crowley. What was said and done at this time by Mr. Scull is much more truly indicative of his relation to Messrs. Porter & Crowley than are his declarations and denials post litem motam. Mr. Scull, while giving his testimony, denied that Exhibit C 2 is the letter which he gave Crowley on being notified of the agreement with the complainant, and declared that the real letter then given was written by Crowley, and signed by him (Scull). Miss Scull, who was her father's clerk at the time, was, as her father and Crowley both testify, present in the office when Crowley came there. Miss Scull was a witness as to this very letter, but she did not testify, in support of her father's evidence, that Crowley wrote a letter, which her father signed. When shown this letter, Exhibit C 2, Miss Scull denied that she wrote it; but she also denied that she wrote another letter, Exhibit C 5, which her father swears she did write, and upon a comparison of the two letters, each with the other, and both with the book entries, which are admitted to be in Miss Scull's handwriting, I am compelled to believe that the letter, Exhibit C 2, was in fact written by Miss Scull, as her father's clerk, and given to Crowley by Mr. Scull, under the circumstances detailed in Mr. Crowley's testimony. Mr. Scull's manner in giving his testimony, and his denials of self-evident facts, have led me to hesitate to accept his statements where they are in direct contradiction of the testimony of other witnesses and of documentary proofs. None of the language used while the parties were acting indicates that Porter & Crowley were deemed by Scull to be possible purchasers themselves, or that Scull authorized them, as brokers, to find a possible purchaser, and bring him to Mr. Scull for acceptance. Not only were Porter & Crowley given by Mr. Scull the price, the terms of payment, and other incidents necessary to enable them to sell the lot for him, but, besides this, Mr. Scull asked them why they had not sold the lot for him, and he was told they were about to sell it, and, afterwards, that they had sold it. He designated them as his "agents" in the letter taking the responsibility for the increased price, and on the stand while under oath admitted that he would have recognized their sale if the higher price had been obtained by them. As above shown, his objection was never that they were not his agents, but that they, as his agents, had not obtained for him the higher price he wanted for the lot. His denial of their authority to act as his agents is an afterthought adopted to protect his more profitable bargain made with Johnson after notice of the agreement with the complainant.

Considering all the proofs offered, I think the complainant has shown that the defendant Scull had employed Porter & Crowley as his agents to make sale of the lot. Accepting the relation of Scull and Porter & Crowley to have been that of principal and agent, as above shown, Mr. Scull had empowered them to sell this lot at a named price, and upon specified terms. Before they had any different instructions, they had, as Scull's agents, made a contract in writing, binding upon him, in accordance with the direction given them. It is no answer to excuse performance to say he had, unknown to his agents, and to the complainant, who contracted with them, raised the price of the lot, but had forgotten to give the agents notice of the fact. So far as the defendant Scull is concerned, I think the complainant is entitled to a decree for specific performance upon complying with the terms of the contract of September 27, 1895. The equitable effect of the agreement with the complainant was to make the complainant the equitable owner of the lands. Mr. Scull became the trustee holding the legal title for the complainant's benefit. *Hoagland v. Latourette*, 2 N. J. Eq. 254; *Haughwout v. Murphy*, 22 N. J. Eq. 546. The title to the lot is presently in the defendant Johnson. There is no proof to show knowledge, or even warning, brought to Johnson of the complainant's contract of purchase, previous to the making by Johnson of his preliminary agreement of November 16, 1895, with Scull, and his payment of \$100 on account. The complainant's memorandum of sale was, indeed, recorded in Atlantic county clerk's office on October 1, 1895, about a month and a half before Johnson obtained his memorandum of the sale on November 16th from the defendant's other agents, I. G. Adams & Co.; but, as the complainant's memorandum was neither acknowledged nor proved, there was no authority to record it, and the record of it, when made, was wholly ineffectual as constructive notice to the defendant Johnson of the sale to the complainant. The record was not offered by the complainant to prove constructive notice, but as a link in the chain of proof which brought to Johnson actual knowledge of the complainant's prior purchase before Johnson had taken his deed or made any payment beyond the \$100 paid on November 16th. Johnson testifies that notice of the complainant's purchase was brought to him by a boy about two days after he had received his own agreement, and paid \$100 down. This must have been about November 18th. Because of this information, Johnson went to Mr. Rogers of I. G. Adams & Co., and had a search made, which disclosed the complainant's agreement; so that, although the record and search were inefficient as constructive notice, the copy of the complainant's agreement was shown to Mr. Johnson, thus giving him actual notice of the complainant's prior equity before he had paid any more

than the \$100, or had taken his deed. The rule is well established that a purchaser with notice of a prior equity superior to the rights of his grantor takes the place of the grantor, and is bound to do that which he was bound in equity to do. Such a purchaser can be compelled specifically to perform the agreement by conveying the land in the same manner and to the same extent as the grantor would have been compelled to do had he retained the legal title. *Young v. Young*, 45 N. J. Eq. 41, 16 Atl. 921; *Haughwout v. Murphy*, 22 N. J. Eq. 547. And to be a bona fide purchaser without notice the defendant must not only have agreed to purchase without notice of the complainant's previous agreement, but he must also have actually paid the purchase money, and taken his deed without such notice. *Dean v. Anderson*, 34 N. J. Eq. 503. If he has paid part only, before notice, he will be protected only to the extent of his actual payment. *Haughwout v. Murphy*, 22 N. J. Eq. 548.

As against the defendant E. Bartine Johnson, the complainant is entitled to specific performance of the contract of September 27, 1895, when he shall have paid to the defendant Johnson the \$100 which had been by him expended before he had notice of this prior contract outstanding in favor of the complainant. This \$100 the complainant is entitled to deduct from the balance of the purchase money to be by him paid or tendered to the defendant Scull under this agreement for sale dated September 27, 1895, as the residue of the purchase money for the lot.

I will advise a decree against the defendants for the specific performance of the complainant's agreement upon the terms above stated.

(178 Pa. St. 477)

IN RE JEREMY'S ESTATE.

(Supreme Court of Pennsylvania. Nov. 11, 1896.)

WILLS—NATURE OF ESTATE DEVISED.

Testator gave his residuary estate to his wife for life, and after her death "the estate to be held in trust for my two nieces, * * * share and share alike. To be held in trust until both are of legal age." *Held*, that the nieces took an absolute estate in remainder, vesting beneficially on their majority.

Appeal from orphans' court, Allegheny county.

Appeal by Theodore R. Jeremy from a decree of the orphans' court distributing a fund in the hands of the Fidelity Title & Trust Company, executor of George G. Jeremy, deceased. Affirmed.

The trial court rendered the following statement and opinion:

"By holographic will, Mr. Jeremy provided, inter alia, as follows: 'Third. I give, devise, and bequeath all the rest, residue, and remainder of my estate, both real and personal,

to my beloved wife, Kate Jeremy, for and during her natural life. Fourth. After the death of my wife, Kate Jeremy, the estate to be held in trust for my two nieces, Bessie and June Jeremy, daughters of my brothers, Will M. and Alford H. Jeremy, share and share alike. To be held in trust until both are of legal age.' Mr. Jeremy was not learned in the law. He left a widow, Kate Jeremy, since deceased, and one son, who was not mentioned in the will, and who insists that Bessie and June Jeremy have no beneficial interest beyond their majority, and that, consequently, there was intestacy in respect of the remainder after that event.

"Had this testator's disposition of his residuary estate stopped with the words 'share and share alike,' there could have been no doubt but that his nieces would have taken an absolute beneficial interest in the remainder. His declared purpose was to dispose of 'all' his residuary 'estate,' and therefore of 'all' that he had, both in quantity and quality. *Busby v. Busby*, 1 Dall. 226. 'I give, devise, and bequeath all the rest, residue, and remainder of my estate, both real and personal,' said testator, 'to my beloved wife, Kate Jeremy, for and during her natural life,' and 'after the death of my wife * * * the estate to be held in trust for my two nieces, * * * share and share alike.' This plainly made a complete disposition of 'all' the residuary estate. No active trust having been expressly imposed upon the trustees, nor implied after both cestuis que trustent had attained majority, the trust must have become executed, and the legal and equitable estate vested in them. There is no mention of ulterior object, no limitation of the beneficial use intended for these nieces, and no intestacy. Had any limitation been intended, there was the appropriate place, and a slight change would have made it, but the clause was left absolute in its terms. Did the testator intend by the following clause to cut down the estate so given to an interest during the minority of both his nieces? If so, they may never realize any benefit whatever, notwithstanding the testator's express declaration that the 'estate' should 'be held' for them 'after' his wife's death; for she might survive the majority of both. The testator cannot be supposed to have intended so glaring an absurdity. While there is no doubt that, of two contradictory clauses in a will, the first must yield to the second, yet the clearly-expressed intent of a testator is not to be overborne by modifying directions that are ambiguous and equivocal, and may justify either of two opposite interpretations. Such directions are to be so construed as to support the testator's distinctly announced intention. *Hiestand v. Meyer*, 150 Pa. St. 501, 24 Atl. 749. This testator's distinctly announced intention, in the first instance, was, as has been seen, that his widow and nieces should have his whole residuary estate. The purpose of the trust declared for his nieces was simply to point out the mode of holding their estate. Their bene-

ficial interest was not dependent on the trust, but was vested. The trust itself must, by operation of law, have ended at their majority, and their estate became absolute 'after' the widow's death. The following clause, out of which the question here arises, was probably suggested by the afterthought that on the nieces attaining their majority they would be capable of taking care of their estate, and there need be no further trust, and was but an expression of what the law would have implied. Giving to the clause a construction most favorable to the heirs, it raises but a bare implication, as against an absolute gift to these nieces, and must, in accordance with the well-settled rule, yield. *Seltz v. Pier*, 154 Pa. St. 467, 25 Atl. 799. But, even if a limitation of the trust till the majority of the nieces had been incorporated in the first instance, they would, under the authorities, in the absence of a gift over, have taken an absolute beneficial estate in remainder by implication. Thus, in *Wilks v. Williams*, 2 Johns. & H. 125, where there was a bequest after a life estate of a residue in trust 'until' the legatee attain 21 years, it was held that an absolute estate passed; and similar language used in *Newland v. Shephard*, 2 P. Wms. 194; *Peat v. Powell*, 1 Eden, 479; *Atkinson v. Paice*, 1 Brown, Ch. 91; and *Hale v. Beck*, 2 Eden, 229,—was construed in the same way. No Pennsylvania decision exactly in point has been found, but the principle upon which these cases rest—the creation of an absolute estate by implication—has been repeatedly recognized and applied. Thus, introductory words have been carried down to the body of the will to show an intent to give an absolute estate (*Schrivver v. Meyer*, 19 Pa. St. 87), and the absence of a gift over to imply a fee (*Dillworth v. Gasky*, 131 Pa. St. 343, 18 Atl. 899). So in *Busby v. Busby*, *supra*, the principle was recognized that 'a giving over on a dying before twenty-one shows an intention that if the party attain twenty-one he shall have a fee simple.' So in *Cassell v. Cooke*, 8 Serg. & R. 268, the court said: 'Let any man ask himself this question: What did the testator mean when he said, "If my son George be removed by death before he be of age, his part shall fall to my two daughters"? His answer most assuredly would be, he intended by these words that if he arrived at that age he should have the power of disposing of it as he pleased, and if he died without disposition, leaving heirs, it should descend to them; that the limitation over depended on one contingency,—his death within age.' This was not a construction by conjecture, but one arising from the words themselves, on most necessary implication. In the present case the evidence of intention to give an absolute estate is at least as strong as in the cases cited. There was not only a bequest in trust till majority, without any gift over, but this followed a distinctly announced intention on the part of testator to dispose of his whole estate, and words which were admittedly sufficient to carry it. In these cir-

cumstances, it is apparent that there was no intestacy, and distribution must be made accordingly."

A. Leo. Well and C. M. Thorp, for appellant. J. S. & E. G. Ferguson and Alexander Gillilan, for appellee.

PER OURIAM. We find no error in this record. For reasons given at length by the learned president of the court below, he was clearly right in holding that there was no intestacy, and that distribution must be made accordingly. The decree is affirmed on his opinion, and the appeal is dismissed, at appellant's costs.

(178 Pa. St. 91)

LANCASTER COUNTY NAT. BANK v.
GARBER.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

NEGOTIABLE NOTE—FRAUD—SUSPICIOUS CIRCUMSTANCES.

1. Plaintiff acquired an accommodation note, indorsed by defendant, which note had been altered and misused by the maker. Defendant notified plaintiff that he would not pay it. Defendant subsequently indorsed another note for the same maker, which the latter used in taking up the altered note, contrary to agreement with defendant. *Held*, that the test of plaintiff's right to recover on the second note was whether it had been taken in good faith, which was a question of fact for the jury.

2. The mere fact that a negotiable note is acquired under suspicious circumstances will not invalidate it in the hands of the holder, unless the circumstances are such that bad faith can be reasonably inferred.

Appeal from court of common pleas, Lancaster county.

This was an action by the Lancaster County National Bank against Andrew Garber for the recovery of the amount of an accommodation note for \$1,350. From a verdict in favor of the defendant, the plaintiff appealed. Reversed.

On September 12, 1893, Andrew Garber, the defendant, as accommodation indorser, indorsed a note for \$1,650 for Henry Binkley, the maker, payable in 80 days at the Columbia National Bank, of Columbia, Pa., and this note was discounted for Binkley by the said Columbia National Bank. On October 16, 1893, this note was protested for nonpayment. On October 18, 1893, Garber indorsed for Binkley a note for \$1,400, to be used for the purpose of taking up said protested note in the Columbia National Bank, and the difference was to have been paid in cash. This note was marked "Renewal" on its face by Garber, and, at Binkley's request, was made payable in six days. After indorsement by Garber, and without his knowledge or consent, this note was fraudulently altered. The word "Renewal" was erased or taken out by some chemical, and the "six" was altered to "sixty." Instead of being used by Binkley for the purpose of taking up the protested note in the Columbia National Bank, it was indorsed

by Binkley and E. H. Kauffman, and discounted at the Lancaster County National Bank, of Lancaster, Pa., the plaintiff. Garber, having heard that the Lancaster County National Bank held a note upon which he was indorser, called at the bank in November, 1893, and, upon being shown the note, informed the bank that the note was fraudulently altered from a "six" to a "sixty" day note, and that the word "Renewal" had been removed from the note, and further informed the bank that the note was given as a renewal of a note in the Columbia National Bank, and that the note had been fraudulently misused. Garber, at two different interviews with F. H. Breneman, president of the Lancaster County National Bank, in November, 1893, notified the said bank that he was relieved of any liability on the October 18, 1893, note, on account of the alterations, and that it was a forgery; and he notified the bank that he would not pay the note, or make any provision for its payment. In the meantime Garber and Binkley, at the request of the cashier, called at the Columbia National Bank, and renewed the September 12, 1893, note, which had been protested, and this renewal became due on January 17, 1894. On January 15, 1894, Garber, defendant, indorsed a note for \$1,350 (the note in suit), payable in 60 days, of which Henry Binkley was maker, for the purpose of meeting the note in the Columbia National Bank coming due January 17, 1894. Garber marked this note "Renewal," in red and in black ink. Garber was at this time jurymen at Lancaster, and could not take the note to the Columbia National Bank. So he gave it to Binkley's son, who had come after it, to take to the Columbia National Bank. This note was also fraudulently misused. Binkley, after getting E. H. Kauffman to indorse this note, along with Kauffman, took this note to the Lancaster County National Bank, which received it in renewal and reduction of said note of October 18, 1893, and delivered up the said altered note to Binkley and Kauffman.

Atlee, Brown & Hensel, for appellant. Brinton, Brinton & Coyle, for appellee.

FELL, J. The maker or indorser of a negotiable note cannot defend against a bona fide holder without notice on the ground that there was fraud in the procurement or use of the note; and the mere fact that the note was acquired under suspicious circumstances will not invalidate it, in the hands of the holder, unless the circumstances are such that bad faith on his part can be reasonably inferred. The test of liability is not whether the note was taken under circumstances which would give rise to suspicion, but whether it was taken in good faith. It was held in *Phelan v. Moss*, 67 Pa. St. 59, that the existence of suspicious circumstances alone would not defeat the right to recover, but that bad faith

must be proved. In *Moorehead v. Gilmore*, 77 Pa. St. 118, it was said by Sharswood, J.: "The latest decisions, both in England and this country, have set strongly in favor of the principle that nothing but clear evidence of knowledge or notice, fraud or mala fides, can impeach the prima facie title of a holder of negotiable paper taken before maturity. * * * It is of the utmost importance to the commerce of the country that it should be sternly adhered to, however hard it may be in its application in particular cases." *Phelan v. Moss* has been approved and followed in *Bank v. McCoy*, 69 Pa. St. 204; *McSparran v. Neeley*, 91 Pa. St. 17; and the more recent case of *Bank v. Morgan*, 165 Pa. St. 199, 30 Atl. 957. The defendant relied upon proof that he had indorsed the note in suit at the request of the maker, Henry Binkley, to take up a note held by the Columbia National Bank, on which they were both liable; that Binkley, in violation of the agreement as to the use of the note, had transferred it to E. H. Kauffman, who presented it to the plaintiff, the Lancaster County National Bank, for discount; and that it was discounted with the understanding that the proceeds, together with a small sum paid by Kauffman, should be used in payment of an overdue note held by the bank. The overdue note was signed by Binkley as maker, and by the defendant Garber and E. H. Kauffman as indorsers. The proof as to this note was that it had been indorsed by the defendant for the accommodation of the maker, and by him altered from a note at 6 to a note at 60 days, and transferred to Kauffman in payment of a debt then due. The bank had discounted it without notice of the alteration or misuse, but had been subsequently notified by the defendant that it was an altered note, and that he would not hold himself liable as indorser. The note bore no evidence of alteration. It was discounted in the ordinary course of business, and the entire good faith of the plaintiff in regard to it has not been questioned. The learned judge instructed the jury that it was the duty of the plaintiff, under the circumstances, to make inquiry before discounting the second note, and that, having failed to do so, it was not an innocent holder for value without notice; and the right to recover was made to depend upon the alteration of the first note, and notice thereof. The error of this instruction is that it raised an issue as to the wrong note, and made the existence of circumstances which the judge considered sufficient to excite suspicion conclusive against the plaintiff's right to recover. The issue was as to the last note, and the test of the plaintiff's right to recover was whether it had been taken in good faith. This was a question of fact for the jury. The first, second, third, and fourth assignments of error are sustained, and the judgment is reversed, with a venire facias de novo.

(177 Pa. St. 585)

HARRISBURG, C. & C. TURNPIKE-ROAD CO. v. HARRISBURG & M. ELECTRIC RY. CO.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

CONSTITUTIONAL LAW — EMINENT DOMAIN — PAYMENT OR SECURITY FOR DAMAGES — JUST COMPENSATION.

A statutory provision authorizing railway companies to lay their tracks upon or across a turnpike pending an appeal from the award of viewers, merely upon payment into court of the amount of such award, thereby acquiring title to the desired use (Act May 14, 1889, § 17), is invalid, under Const. Pa. art. 16, § 8, which requires that "just compensation" shall be "paid or secured" before private property can be taken, injured, or destroyed by any corporation; since "just compensation" is the amount which may be finally ascertained by a jury upon trial of the case on appeal.

Appeal from court of common pleas, Cumberland county.

The Harrisburg, Carlisle & Chambersburg Turnpike-Road Company was incorporated by an act of assembly approved the 31st day of March, 1807, and the several supplements thereto. Its eastern terminus is on the western bank of the Susquehanna river, at the Harrisburg Bridge, and the road runs to Chambersburg. The Harrisburg & Mechanicsburg Electric Railway Company was incorporated the 17th day of May, 1892, under the act of May 14, 1889, providing for the incorporation and government of street railways in this commonwealth. By an amendment made the 8th of November, 1893, certain extensions and branches were made to the route designated in the charter. Under the charter and amendment, the said railway company claimed to have the authority to construct an electric railway from a point in the city of Harrisburg, Dauphin county, to the village of West Fairview, to the boroughs of New Cumberland and Mechanicsburg, and through those of Shiremanstown and Camp Hill, in Cumberland county. To reach these points, it passes over country roads in the township of East Pennsboro, Upper and Lower Allen, and Hampden. The total length of the road proposed is about ten miles, less than three of which are in boroughs. It proposed to cross the turnpike road in the construction of its railway. The turnpike road company, believing that this would render its road unsafe and dangerous to travel, filed a bill in equity praying for an injunction to restrain the railway company from entering upon or crossing the turnpike road. A preliminary injunction was granted on the 3d day of September, 1895, which, on hearing, was continued until final hearing. This took place on November 7, 1895; and, while the court directed the injunction to continue until further order, it stated that it would be dismissed if the railway company would obtain the right to enter upon and occupy the turnpike road, as provided for under the seventeenth section of the act of May 14, 1889. A petition was subsequently presented to the court, setting forth that it had been impossible to agree with the

turnpike-road company as to the amount of damages to be paid for crossing its road; and viewers were appointed, and report was made of the amount of damages which would be sustained by the turnpike-road company. A motion to quash these proceedings, and exceptions filed to the report of the viewers, were overruled, and the report confirmed. The damages were paid into the court. On March 16, 1896, the attorneys for the railway company offered in evidence the record and proceedings in the proceedings to assess damages, and moved for the dissolution of the injunction granted 3d September, 1895. This offer was objected to on behalf of the turnpike-road company, but the objection was overruled, and the injunction dissolved. Complainant appealed. Reversed.

E. B. Watts, E. J. McCune, John Hays, and W. F. Sadler, for appellant. A. G. Miller and J. W. Wetzell, for appellee.

WILLIAMS, J. There is no room for doubt that the general purpose and character of the act of May 14, 1889, entitled "An act to provide for the incorporation and government of street-railway companies in this commonwealth," are within the constitutional powers of the legislature. There may be particular provisions that are not. This appeal challenges the constitutionality of a provision found in the seventeenth section, and raises a question not heretofore considered. The eighth section of the sixteenth article of the constitution was intended to protect private property against the exercise of the right of eminent domain in a harsh or hasty manner. It provides that "just compensation" shall be made to the owner for all property taken, injured, or destroyed by any corporation, "which compensation shall be paid or secured before the taking, injury, or destruction shall be permitted." The machinery by which just compensation may be ascertained has been provided by law, and it includes an appraisal made by viewers appointed by the proper court, an appeal by either party therefrom, and an ascertainment of the amount of the just compensation by a jury upon a trial after the forms of the common law. Security for the payment of the just compensation to which the property owner is entitled must therefore be security for the amount that may be recovered, upon the trial of the appeal from the appraisal, before a jury. This is a plain constitutional requirement, and the legislature can neither dispense with it in whole or in part. The provision of the act of 1889, now complained of, authorizes the corporation, when an appeal has been taken from the award of viewers by the property owner, to pay into court the amount of the unsatisfactory award, and thereupon to take possession of, or proceed to injure or destroy, the property of the appellant. The section declares that the right to build and use the desired crossing over the plaintiff's turnpike "shall vest" in the railway company up-

on the payment into court of the amount of the award, and the money shall remain in court to "await the final judgment on said appeal." If the verdict should be much more than the award, the plaintiff has no security for its payment, and may have no means for its collection. The title to the crossing having "vested" when the money was paid into the court, the crossing became a part of the line of the railway, subject to incumbrance by mortgage or otherwise, and subject to alienation. It might well happen that, when a judgment was finally entered on the verdict in favor of the property owner ascertaining the amount of compensation due him, the corporation would be found to be insolvent, the line of railway with all its appurtenances incumbered to its full value, or transferred to a purchaser, and the plaintiff left without security or any responsible party to whom to look for the larger part of his just compensation for the injury sustained by him. This is a result that the constitutional provision was intended to guard against, and would effectually prevent if it was fully enforced. The act of 1889 is unconstitutional in so far as it undertakes to confer an absolute right on the corporation to injure the property of the plaintiff by its crossing, without payment or security for the payment of a just compensation, as it may be finally ascertained upon the disposition of the appeal.

The decree was erroneous, and must be reversed, but it is not necessary that the injunction shall be restored if the defendant will promptly give the security that should have been given before making the crossing. The decree is reversed, and the record remitted, with direction that the injunction be restored unless the defendant corporation shall within 10 days after notice of this order give security, to be approved by the court below, for the payment to the plaintiff of such sum as may be found due upon the disposition of the appeal from the award of the appraisers now pending, as the damage sustained by, or the compensation due to, the plaintiff by reason of the crossing of its turnpike road by the railway of the defendant at grade; injunction not to issue if such security be given; costs to be paid by the defendant.

(178 Pa. St. 71)

PLONK v. JESSOP.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

CONTRIBUTORY NEGLIGENCE.

Defendant had sent workmen to plaintiff's house to put in some gas fixtures and introduce gas. The workmen were about to leave, when indications of a leak were discovered, and plaintiff told them that they ought to fix it. They looked for the leak, but, failing to locate it, left, assuring plaintiff, "Everything is all right." Plaintiff again noticed the smell of gas, and searched for the leak with a light, as he had seen the workmen do. Entering the attic, an explosion occurred, and plaintiff was injured. He admitted on the trial that he knew of the explosive character of the gas. *Held*, that the

question of contributory negligence should be submitted to the jury, as it was not a conclusion of law that plaintiff necessarily had reason to suppose that he would find anything more than a leak that might be safely searched for with a light.

Appeal from court of common pleas, York county.

This was an action of trespass by John W. Plonk against Samuel N. Jessop, a plumber and gas fitter, to recover damages occasioned to the plaintiff, through the alleged negligence of the defendant, by an explosion of illuminating gas in the house of the plaintiff, whereby he sustained very severe injuries. At the trial, upon completion of plaintiff's testimony, a compulsory nonsuit was entered, on the ground of plaintiff's contributory negligence. The court subsequently overruled a motion to take off the nonsuit, and plaintiff appealed. Reversed.

H. L. & G. G. Fisher, for appellant. Cochran & Williams and Niles & Neff, for appellee.

MITCHELL, J. The plaintiff testified: That when indications of a leak in the pipe were discovered he told defendant's workmen that they ought to fix it. They "started to go upstairs to find the leak," and when they came out "they said everything was all right." Later in the day, plaintiff, smelling gas in the hall, "lit a match, the same as the plumbers did, and laid it along the pipes," then "got a taper and lit that, and started along up the pipes, clear up to the attic," where the explosion took place by which he was injured. The place and cause of the leak were apparently attributable to the failure of a previous gas fitter to put a cap on the end of the pipe in the attic; but the defendant's men having seen, from the rapid movement of the indicator in the meter, that there was an important leak somewhere, and having left the work without having located it, yet assuring plaintiff that everything was right, there was sufficient evidence to submit to the jury, of defendant's negligence. But, the plaintiff having admitted that he knew or had heard that gas would explode if brought in contact with a light, the learned judge below entered a nonsuit, on the ground of contributory negligence. In so doing he failed to give sufficient weight to the circumstances, and to the plaintiff's explanation that he did as the plumbers did, "because I saw them hunt in the same way, with matches and a taper." The knowledge of the explosive character of gas certainly may be presumed to be general among persons who have it in their houses, and plaintiff admitted such knowledge. But how far a smell of gas indicates a leak that may safely be searched for with a match or candle, and at what point it means danger of explosion in so doing, is a question requiring judgment and some experience. Plaintiff had seen indications of a leak, had seen it searched for by defendant's men with matches and a light,

and had then been told that everything was right. When, after that, he smelled gas, it could not be said, as a conclusion of law, that he necessarily had reason to suppose that he would find anything more than a leak that might be safely searched for with a light as he had seen done by defendant's men earlier in the day. He may have been negligent in going into the attic as he did, but we think it is for a jury, and not the court, to say so. Judgment reversed and procedendo awarded.

(178 Pa. St. 64)

GROSS v. STROMINGER.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

CONSTRUCTION OF WILL—LIFE ESTATE—REMAINDER.

1. Testator devised all his property to his wife for her natural life, with power to sell the same, invest the proceeds, and use all the interest arising therefrom; and, if this should not be sufficient to keep her in comfort, to use the principal. This provision was followed by the words, "She to have full control of said money, the same as I would have if I was living." Whatever was left after her decease was to be divided among his children, etc. *Held*, that the quoted words did not enlarge the preceding gift into an absolute estate, so as to defeat the bequest over.

2. An executrix and life tenant under a will cannot defeat the intention of the testator with regard to the remainder-men by taking securities which represent the estate in her own name, and not as executrix.

Appeal from court of common pleas, York county.

Action of assumpsit by Rachel E. Gross, administratrix of the estate of Margaret Strominger, deceased, against Rankin Strominger, administrator de bonis non cum testamento annexo of Henry Strominger, deceased. From a judgment for plaintiff, defendant appeals. Reversed.

Henry Strominger, by his will, devised all his estate, real, personal, or mixed, to his wife, Margaret, for her natural life, and appointed her his executrix. He further provided that she might sell all such estate, invest the proceeds, and use all the interest, and, if such interest was not sufficient for her personal wants, she might take of the principal sufficient to make her comfortable, she to have full control of such money "the same as I would have if I was living." Testator then devised whatever was left at her decease, after her debts and funeral expenses were paid, to six of his children and one grandchild. Margaret Strominger died intestate, and the fund remaining of Henry Strominger's estate, consisting of securities in the name of Margaret Strominger, was claimed by Rachel E. Gross, as administratrix of said estate of Margaret Strominger, and by Rankin Strominger, as administrator d. b. n. c. t. a. of the estate of said Henry Strominger. An issue was made up, and the court of common pleas awarded the fund to Rachel E. Gross as administratrix, upon the ground that the will vested an absolute estate in Margaret Stromin-

ger, and that the securities, being in her name, could only be collected by her administratrix. From such decree this appeal was taken.

James Kell and N. M. Wanner, for appellant. E. W. Spangler, for appellee.

McCOLLUM, J. The fund in dispute is identified by the case stated as proceeds of the sale by the executrix of the real estate of the testator. It is what remains of his estate after deducting therefrom the cost of the comfortable maintenance he intended his widow and executrix should have from it. The sale was made by her under the power with which she was clothed by his will. He obviously trusted her with the management of the estate for the accomplishment of his declared purposes, and these were that she should have her support from it, and preserve the remainder for distribution in accordance with his directions. In plain terms he gave her the residue of his real and personal estate "during her natural life," authorized her to sell the same if she desired to do so, to "put the money derived therefrom upon interest," and to "use all the said interest if required for her own subsistence." To meet a possible contingency, he provided that, if the interest was not sufficient "for her own personal wants and comfort," she might "take of the principal sufficient to make her comfortable." Immediately following the provisions for her support, and in the second sentence of the will relating to it, he directed that whatever was left at her decease should be divided between his children and grandson named therein. The testator's wife was manifestly the primary object of his bounty. Whatever was necessary for her support he intended she should have. If the income of the estate was sufficient to afford her a suitable maintenance, it was his intention that the principal of it should go, at her decease, to the children and grandson, unimpaired. A construction of the privilege which makes it operate as an absolute gift to the wife of the residue of the estate would defeat the plain purpose of the testator, and take from the children and grandson named in the will that which he intended they should have at her decease. There is no warrant in the language of the testator for such a construction. The words, "she to have full control of said money the same as I would have if I was living," are properly applicable, and should be limited to that which the testator had already devoted to the maintenance of his wife, and cannot be justly considered as enlarging the preceding gift. The mere fact that the securities which represent the balance of the estate were taken in her name has no particular significance. It was not within her power to defeat his intention respecting the remainder of the estate by any such act. It being conceded that the securities in question constitute such remainder, the right of the children and grandson to it is as clear as it would be if the securities had been taken in the name of the life tenant as executrix.

A careful consideration of the will has satisfied us that there is nothing in it which requires that the manifest intention of the testator shall be disregarded in construing it, or which furnishes an adequate warrant for the judgment entered upon the case stated by the learned court below. Judgment reversed, and judgment now entered upon the case stated in favor of the defendant, with costs.

(177 Pa. St. 630)

WOOD v. BOYLE.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

LIBEL—PRIVILEGED COMMUNICATIONS—PRIVILEGE FROM ARREST ON CIVIL PROCESS—JUDGMENT—DEATH OF PLAINTIFF.

1. A publication attacking a person in his private, individual capacity is not rendered privileged by the fact that he occupies an official position, and is engaged in public business.

2. A publication that plaintiff, "without a following in politics, has set up as a political boss; without brains or capital or credit, he has appeared at the head of a gigantic business enterprise, requiring liberal bank balances and a large mental endowment,"—is personal and libelous.

3. Words declaring that plaintiff "is invariably associated with enterprises which do not succeed, because they ought not to succeed," are libelous.

4. A sentence declaring, "We dare say that his scheme to steal a pipe line from the poor producers, * * * to give it to opulent refiners," etc., "will fail," are actionable, being an accusation of gross fraud.

5. The defendant in a criminal case is not privileged from arrest on civil process while attending court to answer the criminal charge.

6. Judgment may be entered upon a verdict in favor of a plaintiff who has died after verdict and before judgment, so that the judgment be had within two terms after verdict. *Stroop v. Swarts*, 12 Serg. & R. 76, distinguished.

Appeal from court of common pleas, Warren county.

This was an action of libel by A. D. Wood against P. C. Boyle. From a judgment for plaintiff, defendant appeals. Affirmed.

Allen & Sons, Lindsey & Parmlee, Wilbur & Schnur, Eugene Mullen, and H. McSweeney, for appellant. J. W. Lee, Clarence Walker, and Samuel T. Neill, for appellee.

GREEN, J. We are clearly of opinion that in every point of view, and in every way of reading the publication in question, it was plainly and grossly libelous in itself. Nor is there the slightest reason or excuse for the attack upon the plaintiff in the contention now made,—that he was an official person, engaged in a business of a public character, and therefore the publication was privileged. It was not his official character, or the conduct of his official business, that was impeached. On the contrary, the publication was a coarse, brutal, malevolent, and purely personal attack upon the plaintiff, in his private, individual, and personal capacity. The words used are not in the least degree ambiguous. Their meaning is perfectly clear and plain, and they do not require the help of any innuendo. The full proof of

this is the mere citation of some of the words of the libel. Thus: "Without a following in politics, he has set up as a political boss; without brains or capital or credit, he has appeared at the head of a gigantic business enterprise, requiring liberal bank balances and a large mental endowment." Every word of this is private and personal only. It is an assertion that the plaintiff (that is, the individual) was a person "without brains," that he was "without credit," and that he was "without capital." There could not be a more personal accusation than is contained in these words. There is nothing official about it. When it was added, in the immediately following words, and as a part of the same sentence, that "he appeared at the head of a gigantic business enterprise, requiring liberal bank balances and a large mental endowment," it was clearly implied that he was entirely unfitted for such a position, because he was without brains or capital or credit. These deficiencies are, of course, purely personal, and would, if true, disqualify him, as an individual, from the occupancy of such a place in the business world. Another sentence of the article is no better than the last in this respect: "He never yet has succeeded in anything he has undertaken involving the peace and prosperity of the community, for the excellent reason that he is invariably associated with movements that ought not to succeed." That is, the plaintiff, as an individual, was invariably associated with enterprises which did not succeed because they ought not. Whether they were disreputable or fraudulent or immoral makes but little difference. In any view of the words, they, and consequently he, were subject to just reproach and condemnation. If he was a person of that character, he was to be despised and condemned by all good citizens, and, especially, he was unworthy to be employed in the management of any business enterprise. Another sentence of the article is still worse: "We dare say that his scheme to steal a pipe line from the poor producers, in order to give it to the opulent refiners and arrogant exporters masquerading as the United States Pipe Line, will fail, as it properly should." Granting that this was not a literal charge of larceny, in that the subject was not a tangible chattel, yet it was an accusation of very gross fraud, practically amounting to an attempt to divest the title of the real owners to a valuable property, and give it to others, without consideration. In moral character, it was as evil an act as the embezzlement of corporate money by a person having it in his custody. It is not necessary to pursue this branch of the discussion. In many of the adjudged cases the publications adjudged to be libelous were far less offensive than this. Thus, in *Hayes v. Press Co.*, 127 Pa. St. 642, 18 Atl. 331, we held that the following publication was libelous: "Hotel Proprietors Embarrassed. A judgment was entered by the Third National Bank against J. F. and W. N. Hayes, of the St. George Hotel, on a promissory note dated August 6th, and payable on demand, for \$1,500." While the mere state-

ment of the entry of a judgment was a matter of public information, and appeared upon the records of the courts, the mere use of the word "embarrassed" in the same connection was held to be libelous. The present chief justice, delivering the opinion, said: "Written or printed words which are injurious to a person in his office, profession, or calling, or which impeach the credit of any merchant or trader, by imputing to him insolvency, or even embarrassment, are libelous. The law carefully guards the credit of merchants and traders. Imputations of their solvency, or suggestions that they are in pecuniary difficulties, etc., are, as a general rule, actionable. *Odgers, Sland. & L. 19, 29, 80, 81, and authorities there cited.* * * * The office of an innuendo is to aver the meaning of the language published, but if the common understanding of mankind takes hold of the published words, and at once, without difficulty or doubt, applies a libelous meaning to them, an innuendo is not needed, and, if used, may be treated as useless surplusage. * * * The publication as a whole, including the headline, was in no sense privileged." If the mere implication from the use of the word "embarrassed" makes a publication libelous, with how much greater force does that conclusion follow from words which directly charge against a citizen that he is without brains, credit, or capital! How much more severely do they impugn his business capacity, and his business standing and character in the community! In *Collins v. Publishing Co.*, 152 Pa. St. 187, 25 Atl. 546, we held that any publication injurious to the social character of another, and not shown to be true or to have been justifiably made, is actionable as a false and malicious libel. It is needless to argue the direct application of that principle to the words of the publication in the present case. The words used in the case cited were, "Complaints from outside parties were sent to the department, one asking for his dismissal on account of intimacy with a well-known young local elocutionist." Of these words we said: "On their face, without more, the words complained of are defamatory and actionable. In the statements they are laid with an innuendo which, if true, intensifies and greatly aggravates their meaning." This is precisely true of the present case. The words used are far more damaging, scandalous, and defamatory, in themselves, than the words used in the last-cited case, and are therefore manifestly libelous in themselves, and the innuendo "greatly aggravates their meaning." Further argument on this subject is superfluous. Other and equally strong cases will be found in *Conroy v. Pittsburgh Times*, 139 Pa. St. 334, 21 Atl. 154; *Selp v. Deshler*, 170 Pa. St. 334, 32 Atl. 1032, and numerous decisions there cited. It is almost unnecessary to add that no attempt was made by the defendant to prove the truth of the matters contained in the libel, and it is most certainly true that the publication was not privileged. The truth of the innuendoes, and the question of damages, were submitted to the jury with entire correctness. So far as we can see,

the publication in question was a wanton, malicious, and utterly unjustifiable attack upon the personal and business character of the plaintiff, without the least cause or reason. The defendant has much reason to be thankful for the extreme moderation of the verdict. The views we have expressed dispose of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth assignments of error. They are all dismissed.

It is very doubtful whether a question of privilege in the service of the writ can be considered in error after a trial on the merits. But, if it can, the great preponderance of authority is that the defendant in a criminal case is not privileged from arrest on civil process while attending court to answer a criminal charge. There are a few contrary decisions in the lower courts, but none in this court, nor in any other court of last resort, English or American, to which we have been referred. In the case of *Key v. Jetto*, 1 Pittsb. R. 117, Judge Woodward, sitting at nisi prius in 1854, held that the privilege did not extend to defendants in criminal cases. In 1 Am. & Eng. Enc. Law, p. 724, there is an extensive collection of decisions of both English and American courts of last resort, in all of which it is held that the privilege did not extend to defendants in criminal cases. We see no good reason for departing from the current of authority on this subject. The first assignment is not sustained.

The eleventh assignment raises the question whether judgment could be entered on the verdict, where the plaintiff has died after verdict and before judgment. In *Chase v. Hodges*, 2 Pa. St. 48, it was held that the death of the defendant between verdict and judgment, if not more than two terms intervene, cannot be averred for error since the statute of 17 Car. II. c. 8; 1 Jac. II. c. 17, § 5. *Burnside, J.*, said, "The statute of 17 Car. II. c. 8, made perpetual by 1 Jac. II. c. 17, § 5, enacts that when either party dies between verdict and judgment the death shall not be averred for error, so that the judgment be had within two terms after verdict." The same ruling was made in *Murray v. Cooper*, 6 Serg. & R. 128. The English cases are to the same effect, and all that it is necessary to do is to enter the judgment within the two terms, which was done in this case, *nunc pro tunc*. The case of *Stroop v. Swarts*, 12 Serg. & R. 76, is not in point. There the wife did not die until after the judgment had been arrested for other cause, and hence there never was any judgment in the court below. Here the death of the party between verdict and judgment, under the statute, did not prevent the entry of judgment within the two terms. Hence the record was complete, and a valid final judgment was entered in the court below before the appeal was taken. Of course, such a judgment could not be reversed on appeal for such a reason. In *Griffith v. Ogle*, 1 Bin. 172, the situation of the record was precisely as it is here. The action was case for conspiracy. The plaintiff recovered a verdict for \$600 in October, 1802. Reasons for a new

trial and in arrest of judgment were filed, which were overruled in October, 1804. The plaintiff died in March, 1803, and the court below entered judgment on the verdict as of a term in which the plaintiff was living, and this court sustained the judgment. The eleventh assignment of error is not sustained. Judgment affirmed.

(178 Pa. St. 444)

HARRINGTON et al. v. FLORENCE OIL CO.

(Supreme Court of Pennsylvania. Nov. 11, 1896.)

EQUITY — JURISDICTION — PRACTICE — ACCOUNTING BETWEEN TENANTS IN COMMON.

1. It is too late, after issue has been joined by answer on a bill for an accounting, and a reference has been made to a master before whom a large amount of evidence has been taken, to raise for the first time, in final argument before the master, the question of the jurisdiction of a court of equity over the case.

2. Under Act Oct. 13, 1840, § 19 (Brightly's *Purd. Dig.*, Ed. 1885, p. 692), providing that in cases involving such account and claims as by common law and usage of the commonwealth have been settled by the action of account render a plaintiff may proceed either by bill in chancery or at common law, a court of equity has jurisdiction of an action for an accounting between tenants in common to adjust accounts growing out of expenditures made on the common property, which accounts were kept by the defendant.

Appeal from court of common pleas, Allegheny county.

Action by William Harrington, Alfred Harrington, and Charles Beecher, partners as Harrington Bros., against the Florence Oil Company. From the decree, defendant appeals. Affirmed.

Plaintiffs and defendant were the owners of an oil lease, developed and being operated, in the proportion of one-sixth in plaintiffs and five-sixths in defendant. Plaintiffs were engaged in the business of drilling oil wells, and from time to time contracted with defendant for the drilling of wells on the common leasehold. Settlements for such drilling were made from time to time, in which settlements the proportion of plaintiffs for all expenses of operation were adjusted. The oil belonging to plaintiffs was run separately to the credit of the plaintiffs in the pipe lines. This bill was filed for an accounting, plaintiffs claiming \$2,500 on account of a well drilled by them on the leasehold to a depth of 1,280 feet, and which was lost, as alleged, through the failure of defendant to furnish casing. The accounts produced before the master showed a balance in favor of defendant of about \$135. He struck out items of charge amounting to about \$267, and held defendant liable for five-sixths of the cost of the abandoned well, known as well "No. 6," finding that its loss was not due to any fault of plaintiffs. The facts relating to this are as follows: The well in question was drilled through the coal with a diameter of 13 inches, and cased with 10-inch casing.

The drilling then proceeded with a diameter of 10 inches to a depth of about 700 feet, at which it was usual to case with 8¼-inch casing. In this instance such casing was deemed unnecessary, and the drilling further proceeded with a diameter of 8 inches to a depth of 1,280 feet, when drilling ceased, and 6¼-inch casing was put in. A quantity of this casing, supposed to be sufficient, had been placed on the ground by defendant for this purpose, and plaintiffs proceeded to run the casing in the well, using what had been furnished, and ascertaining, when all had been used, that several lengths more were required. This was furnished after a delay of a few hours by the defendant. Meantime the operation of casing had been suspended, and the casing already in suffered to hang suspended and motionless, and, when operations were attempted to be resumed, found to be fast in the well, so that it could be neither cased nor drilled. An unsuccessful fishing job followed, and the well was abandoned.

On the legal question presented the conclusions of the master are shown by the following extract from his report:

"The defendant claimed before the master in its argument as follows, viz.: That the case was not properly within the jurisdiction of a court of equity, upon the ground that, where the real and substantial controversy has relation to a question of an alleged breach of contract and a claim of unliquidated damages resulting therefrom, and when the case involves no real dispute beyond this, a court of equity has no jurisdiction. There is no doubt, as a bald proposition of law it is correct, and the plaintiff would be required to look to an action at law for his remedy, if the law furnished him with an adequate remedy therefor. It is true that equity, as a general rule, will not assume jurisdiction in every case where an accounting is demanded or needed; nor because the case involves or arises from fraud; nor because a contribution is sought from persons jointly indebted; nor even to recover money held in trust, when an action for money had and received will lie; as well as many other principles which might be cited. It is also true, as a rule, that the question of want of jurisdiction can be raised at any state of the proceedings. Let us look for a moment as to how this case appears upon the record and before the master: July 10, 1892, bill filed. July —, 1892, bill served on defendant. July 14, 1892, defendants cause an appearance to be entered for them. September 23, 1893, defendants file an answer to said bill. October 30, 1893, general replication filed. December 2, 1893, master appointed. January 4, 1894, master met pursuant to notice. Parties plaintiffs and defendant appear. Testimony covering 340 pages, typewritten, taken. Arguments of counsel heard. No demurrer filed. The question of jurisdiction not having been raised by defendant until the argument before the

master, I feel that the principle laid down by the supreme court in the case of *Fidelity Co. v. Weitzel*, 152 Pa. St. 502, 25 Atl. 571, is safer to follow than to recommend the dismissal of the bill by reason of the turn taken. Cost and expense and merits of the case had been gone into by both parties. Justice Mitchell, in delivering the opinion of the court in the above-cited case, says: 'The jurisdiction in equity as to affirmative relief in this case is, to say the least, questionable. The bill charges the receipt by defendant of certain specific sums of money alleged to be the property of plaintiff's decedent, followed by the general and vague averment that other sums also came to the defendant's hands, etc., and then an averment of a demand for an account, and a refusal by the defendant on the ground he had no property of the decedent to account for. * * * As the bill, however, was not demurred to, and the case has been pursued to a final hearing, we do not deem it necessary to dispose of it now on that ground.' In *Adams' Appeal*, 113 Pa. St. 449, 6 Atl. 100, Mr. Justice Sterrett, in delivering the opinion of the court, says: 'While it is true that manifest want of jurisdiction in equity may be taken advantage of at any stage of the cause, the court will not permit an objection to its jurisdiction to prevail, in doubtful cases, after the parties have voluntarily proceeded to a hearing on the merits; but will administer suitable relief. Story, Eq. Jur. § 464. As was said in *Railroad Co. v. Cooper*, 33 Pa. St. 278, if the court in which suit is brought has jurisdiction in the cause of action, both at law and in equity, it may proceed to give relief, unless the bill be demurred to on the ground that the proper remedy is at law.' In *Drake v. Lacoe*, 157 Pa. St. 17, 27 Atl. 538, the defendants submitted as a matter of law that the bill was to recover a specific sum of money, and could not be sustained. Upon this question the master said: 'It is true that under the view taken by the master the plaintiffs' bill is practically a bill to recover a specific sum of money, for which the plaintiffs have their remedy at law. Had this objection been taken to the bill on demurrer before it was answered, it might have been sustained; but, the defendants having denied the material allegations of the plaintiffs' bill, and having had a full hearing on the merits, and heavy expense and cost having been incurred, it seems to the master too late to sustain this objection now.'

'Exceptions, inter alia, were filed by defendants to this ruling that he had erred in not dismissing the bill. The court sustained the exceptions and dismissed plaintiffs' bill. Upon an appeal taken to the supreme court, that court overruled the court below, sustained the master, and entered a decree in favor of plaintiffs for the amount found to be due by the master. A bill will not be dismissed for want of jurisdiction, after reference to a master, involving heavy costs. Edgett v.

Douglass, 144 Pa. St. 95, 22 Atl. 868; *Evans v. Goodwin*, 132 Pa. St. 136, 19 Atl. 49; *Adams' Appeal*, supra; *Adams v. Beach*, 1 Phila. 178. Will an account render lie between tenants in common in Pennsylvania? The statute of 4 Anne, c. 16, § 27, provides that account render lies between tenants in common without any appointment as bailiff or receiver. 1 Am. & Eng. Enc. Law, p. 130. This statute was enacted by, and still is in force in, this commonwealth. Rob. Dig.; *Norris v. Gould*, 15 Wkly. Notes Cas. 187. The act of 13th October, 1840 (section 19, *Brightly's Purd. Dig.*, Ed. 1885, p. 692), expressly provides that courts shall have 'the powers and jurisdiction of courts of chancery in settling * * * such account and claims as by the common law and usages of this commonwealth have been settled by the action of account render,' and the plaintiff may 'proceed either by bill in chancery, or at common law.' 'Under act 13th October, 1840, courts of equity have concurrent jurisdiction with courts of law in all cases where an action of account render would lie.' *Reeside's Ex'r v. Reeside*, 49 Pa. St. 322; *Frisbee's Appeal*, 88 Pa. St. 146; *Adams' Appeal*, 113 Pa. St. 449, 6 Atl. 100; *Norris v. Gould*, supra. 'And it may be said in general that in all cases where an action of account render would be the proper remedy, the jurisdiction of equity is undoubted.' *Baker v. Biddle*, *Baldw.* 394, *Fed. Cas. No. 764*. 'While account render will not lie by one tenant in common against another for mere occupation of the property held in common, yet it does lie where one tenant in common receives the money or something else from another person to which both tenants are entitled.' *Norris v. Gould*, supra. The reason is, the tenant cannot be charged even by implication as bailiff or receiver when he has received nothing, which is the case when he merely occupies the common freehold. 'In determining whether assumpsit or account render or a bill in equity is proper, the question is not, as it is sometimes supposed, whether the jury can as conveniently settle the account as auditors, but it adheres to the right of the defendant to render his account before he can be molested by an action to refund. And where the duty is not direct, but one of outlay in business which, from its nature, requires an exhibit of the sums expended before the duty can arise, the legal requirement is to render an account, and assumpsit will not lie until the balance be ascertained. The right to render an account and settle exists in the very nature and equity of such a duty.' *Reeside v. Reeside*, supra. Notwithstanding the right to raise the question of jurisdiction at any stage of the proceedings, and, notwithstanding the view of the master that, if a demurrer had been filed by defendant, and which might have been sustained, defendant having availed itself of its right to file an answer, by which the parties were put to their proofs upon the merits of the case, entailing heavy expense and costs, and having proceeded to final argument of the case before the

master before raising this question, and believing that substantial justice can be done the parties upon the merits of the case, the master declines to recommend a dismissal of the bill upon this ground, believing that the authorities cited are ample in justifying this ruling. Under the act of 4 Anne, c. 18, and in force in this commonwealth, the provisions of the act of October 13, 1840, and the act of 13th June, 1840, relating to the equity jurisdiction of the courts of this commonwealth, the master rules that a bill in equity of this character will lie for an account render. In this case it is true that each party ran their own share of the oil to their own credit, and sold the same. If each party had kept account of their share of the expenses of the operation upon the lease, then possibly there might have been some claim that no such accounting could be required. The defendant, however, undertook to keep the accounts pertaining to this leasehold, charging all expenses to it, and carried the same upon its books under the head of 'Robb Lease Acct.' It furnishes exhibits from its books showing this account, as well as statements showing expenses of 'Robb Lease' from March 28, 1892, to November 1, 1892; also statements of credits to 'Robb Lease' between June 29, 1892, and November 3, 1892, and Harrington Bros. in account with Florence Oil Co. The defendant made all purchases connected with and pertaining to the lease, kept accounts of the same, paid the bills, while the plaintiffs were at work in the field drilling the wells, and furnished plaintiffs statements from time to time, deducting plaintiffs' proportion of said expenses from their drilling account. Under this state of facts, it appears to the mind of the master that this is such a case as a bill for account render would prevail; and, under the foregoing cited acts of assembly and authorities, as master, I conclude as a question of law that equity has jurisdiction in this case to compel an accounting, and therefore, upon this ground also, overrule defendant's request to dismiss the bill for want of jurisdiction upon this point. Independently of the act of October 13, 1840, *supra*, the equity powers conferred by the act of June 13, 1840 (section 39), extends the equity jurisdiction of the courts of this commonwealth 'to all cases over which courts of chancery entertain jurisdiction on the grounds of fraud, accident, mistake or account.' The bill, in the seventh clause, charges 'that the accounts between your orators [plaintiffs] and the defendant as tenants in common of the said leasehold remain unsettled, and that the defendant claims compensation from your orators for their share of expense of caring for the wells on said leasehold so as aforesaid drilled and completed (which your orators are willing to pay so far as the same is just and lawful), pray,' etc. And the answer 'that the share of the plaintiffs of the expense of operating the said leasehold was deducted from time to time, in settlements made for drilling done by them,' tends strongly to show an agency, a fiduciary rela-

tion existing on the part of defendant to the plaintiffs, most certainly with relation to the cost and expense of operating the leasehold, and for this reason I hold, as a matter of law, that plaintiffs are entitled to an accounting. The master is of the opinion that the plaintiffs and defendant should bear the loss of well No. 6 in proportion to their interests in said leasehold; that is, plaintiffs should bear the one-sixth part thereof, and defendant the five-sixth part thereof."

Walter Lyon, Charles H. McKee, and John F. Sanderson, for appellant. F. R. Stoner and J. M. Stoner, for appellees.

PER CURIAM. For reasons given by the learned master, whose findings of fact and conclusions of law appear to have been approved by the court below, we are satisfied there is no error in this decree. The questions involved have been so satisfactorily disposed of that neither of them requires further discussion. Decree affirmed, and appeal dismissed at appellant's costs.

(178 Pa. St. 23)

DAULER et al. v. CAMPBELL et al.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

WAGERING CONTRACTS—TRANSACTIONS IN STOCKS—STAKEHOLDERS—EQUITY JURISDICTION.

1. Where plaintiffs deposited money with third persons as stakeholders, for the purpose of being used as margins in the mere purchase and sale by the defendant of differences in the market prices of stocks and grain, without any actual purchases or sales, these were mere wagering contracts, and illegal; and the money could be recovered back while in the hands of the stakeholders, and before having been paid to defendant.

2. Where money coming from several different parties has been deposited with bankers to one joint account, and there have been many transactions with such money, and a contest arises over the resulting balance, equity has jurisdiction on the ground of inadequacy of legal remedy, of mutual accounts, of community of interest in a joint fund which requires a division, and of the prevention of a multiplicity of suits.

Appeal from court of common pleas, Bedford county.

Bill in equity by George H. Dauler, Robert C. McNamara, Amos H. Taylor, William Hartley, James Boor, J. M. Hedding, J. M. Shoemaker, and Edwin H. Middleton against John H. Hartley and William Hartley, Jr. (doing business as bankers under the firm name of J. G. Hartley & Co.), J. M. Campbell, George W. Kirk, and George W. Kirk, operator for J. M. Campbell, to recover of defendants J. G. Hartley & Co. certain money belonging to plaintiffs, deposited with them to the credit of J. M. Campbell, to be used as margins by said Campbell in the purchase and sale of differences in the market prices of stocks, grains, etc. From a judgment for plaintiffs, defendant Campbell appeals. Affirmed.

A. A. Stevens, J. H. Jordan, Alexander King, and L. C. McQuiston, for appellant. S. P. Wolverton and John M. Reynolds, for appellees.

GREEN, J. The controversy in this case is over a fund in the hands of J. G. Hartley & Co., one of the defendants. The money in their possession is claimed by J. M. Campbell, another defendant, who is the appellant, and it is also claimed by the plaintiffs. Hartley & Co. make no claim to it whatever, and, so far as the contending claimants are concerned, they are mere stakeholders. This fact has been found by the master, and the finding has been confirmed by the court, and is in entire accord with the whole of the testimony. There are certain fundamental facts which are altogether without question, and which must be regarded as established facts in the case. One is that Campbell never placed a dollar of the money with Hartley & Co. Another is that the present plaintiffs actually furnished the whole of the money in dispute, and considerably more besides. In point of fact, the money was deposited with Hartley & Co., by George W. Kirk, but Kirk received the whole of it from the plaintiffs. It was deposited under an arrangement made between the plaintiffs and Kirk, who was a broker in stocks and grain, but who was totally irresponsible; and it was deposited in the name of Campbell, not because it was Campbell's money, but in order that it might be used as margins upon transactions in the purchase and sale of stocks and bonds, in a purely speculative manner, and not with any intention to make actual purchases and deliveries of the stocks and grain dealt in. It was expressly agreed that the money deposited to the credit of the account called "J. M. Campbell" should not be drawn out on checks of J. M. Campbell without the consent of the plaintiffs. It was well said in the opinion of the learned court below that from Campbell and Kirk, down to the last customer, they did not pretend to own a dollar's worth of commodities in which they assumed to be dealing. Nothing was actually bought or sold in Bedford or elsewhere, but it was a mere matter of wagers, of bookkeeping, and the adjustment of balances. The master finds, in answer to the plaintiffs' request, that Campbell "acknowledged that he took the trades himself, and did nothing towards investing the funds he received in the articles which were supposed to be bought and sold. The business was therefore all confined to the little circle made up of Campbell, Kirk, and their customers at Bedford." Turning to Campbell's testimony, we find he said: "I was receiving orders from different people. Some would buy; some sell. Now, all that I needed to go into the market to buy from any brother broker would be the difference between buying and selling. Q. You didn't trouble your mind about any purchase? A. I never bought anything directly in the Exchange, unless they wanted the stock. Q. You understood these transactions here were

simply transactions on the differences? A. I presume they were." The case, then, substantially presents, in its leading and dominating features, a deposit of money by the plaintiffs with third persons, who are stakeholders, for the purpose of being used as margins in the mere purchase and sale by the defendant Campbell, of differences in the market prices of stocks and grain, without any actual purchases or sales of stocks or grain in specie. Under all our decisions, these are mere wagering contracts, and are illegitimate transactions; and the money being still in the hands of the stakeholder, and not paid over to the person who made, or who claimed to have made, the transactions, the question is, can money deposited for such uses, but not actually paid over, be recovered back? Upon that question, the authorities cited in the report of the master, the opinion of the court below, and the argument for the appellant, are most full and conclusive, and they are very numerous. In fact, they are not controverted. A very brief reference only will be necessary.

In the note to *Godsall v. Boldero*, 2 Smith, Lead. Cas. (8th Ed.) pt. 1, p. 319, the doctrine is thus stated: "But it is held, in general, that, so long as the money staked on the result of a wager remains in the hands of the stakeholder, it belongs to the person from whom it came, and may be withdrawn by him, notwithstanding the loss of the bet, and without the consent of the other party to the contract. * * * A notice not to pay will operate as a countermand of the authority implied by the original deposit, and a subsequent payment will be no defense to an action for money had and received." In *McAllister v. Hoffman*, 16 Serg. & R. 147, we held that money bet upon an election, and deposited with a stakeholder, who, after the event of the election is known, has notice not to pay it over to the winner, may be recovered back by the loser. Said Gibson, C. J.: "The result of the authorities, undoubtedly, is that the loser may withdraw his stake at any time before actual payment to the winner." In *Conklin v. Conway*, 18 Pa. St. 329, we held the same doctrine. An action lies against a stakeholder for money deposited by plaintiff with him on a bet, and which the stakeholder has not paid over, or which he has paid to the other party after demand by plaintiff and notice of withdrawal of the bet, or that it had failed through a dispute as to the mode of its decision. To the same effect is the case of *Forscht v. Green*, 53 Pa. St. 138. In *Harper v. Young*, 112 Pa. St. 419, 3 Atl. 670, we applied the same principle to a case in which the defendant gave a note to pay money lost by another at play, although the note was in the hands of an innocent holder for value. A fraud was also practiced upon the defendant, to induce him to give the note, but we held that the gambling character of the transaction still remained, and avoided the note. In a per curiam opinion, we said: "The undoubted evidence proves the note in contention was given

in a gambling transaction. The fact that a fraudulent device was superadded to induce the giving of the note did not destroy the gambling nature of the scheme. The note was made payable to the order of the person who won the money in gambling, and in payment of the debt thereby incurred. * * * The foundation of the transaction, and also the consideration of the note, both rested on the one gambling operation. Such being the case, and although the note is negotiable in form, it is void, even in the hands of a good-faith and innocent holder for value." In *Gaw v. Bennett*, 153 Pa. St. 247, 25 Atl. 1114, we went one step further, and applied the same rule to a note given to a stockbroker by a customer, for whom he had bought and sold stocks at various times, resulting in a loss, for the amount of which the customer gave his promissory note. The present chief justice, delivering the opinion, after commenting upon the evidence and the function of the jury in connection therewith, said: "On the contrary, we think the testimony tended to prove that the intention of both parties was merely to wager upon the prospective price of said stocks, settle the difference, and pay the gain or loss. In other words, their transactions throughout were in fact repeated acts of gambling in the stocks referred to in said accounts, and the jury were warranted by the evidence in so finding. * * * In this state the law relating to gambling contracts has been finally settled in a long line of cases, among which are the following: [Citing a large number of cases.]" No difference is made in these cases between those in which the wager was void, under the statutes against horse racing and gaming, and those which resulted from wagering stock transactions. *Fareira v. Gabell*, 89 Pa. St. 89, was one of the latter kind, and that case is thus referred to in the further course of the opinion above cited: "Also, that notes given to a broker to cover losses in stock gambling operations are void; that money advanced by a broker to pay such losses cannot be recovered, nor can the broker's commissions be recovered, because the whole transaction is unlawful." *Griffiths v. Sears*, 112 Pa. St. 523, 4 Atl. 492, was another instance of the same kind. We there held that a bond given by way of margin, to secure a settlement of differences in a stock gambling transaction, is void for want of a good and legal consideration.

It is not necessary to multiply the references. They are all in the same direction. If, then, actual obligations founded upon the settlement of real transactions in the stock market, which have resulted in loss, where the dealing was upon the basis of margins for speculative operations, are void, how much stronger is the present case, where a mere deposit of money was made with a stakeholder, and it had not been paid over, and where, also, there never were any real transactions of purchase and sale, but only a dealing in differences. We are very clearly of opinion, both

upon principle and authority, that the moneys deposited with Hartley & Co. were within the control of the plaintiffs at any time before they were paid over to Campbell, and therefore they can be recovered in this proceeding.

Some minor questions are raised in the paper book, the principal one being the question of jurisdiction. We have no doubt upon that subject. The money deposited with Hartley, though coming from several different persons, was entered in one joint account, called, "J. M. Campbell." A number of transactions were made, and a considerable part of the money deposited was paid out. The contest is over the resulting balance, but, in order that the balance could be ascertained, the accounts would have to be adjusted, and the balance struck. But that could not be done in a separate common-law action by each depositor. There could be no adequate remedy except by making all the persons interested parties to the proceeding, and having the accounts adjusted, so that the rights of each one could be determined; and as to that each depositor would be entitled to be heard, not only as against Campbell and against Hartley & Co., but as to each other. The accounts are also mutual, representing numerous items of deposit on the one side, and still more numerous transactions on the other. On the ground, therefore, of inadequacy of the legal remedy, and of mutual accounts, and community of interest in a joint fund which requires an ascertainment and division into several separate interests, and the prevention of a multiplicity of suits, the jurisdiction of equity is undoubted. The fourth head of equity jurisdiction under the act of 1836 is: "The determination of rights to property or money claimed by two or more persons, in the hands or possession of a person claiming no right of property therein." While this source of jurisdiction is generally exercised by a bill of interpleader, that remedy is not exclusive, and we know of no reason why the jurisdiction undoubtedly conferred by the act should not be exercised under another bill, which is more adapted to all the facts of the case. Injunction and discovery were also needed for the purposes of an adequate remedy.

The other questions raised are without merit, and do not need discussion. We are of opinion that the decree of the learned court below was entirely correct, and that it should be affirmed. The assignments of error are all dismissed. Decree affirmed, and appeal dismissed, at the cost of the appellant.

(178 Pa. St. 460)

IN RE NOBLE'S ESTATE.

Appeal of IRWIN.

(Supreme Court of Pennsylvania. Nov. 11, 1896.)

GUARDIAN AND WARD—ACCOUNTING BY GUARDIAN—MINGLING OF FUNDS—INTEREST.

1. A guardian, being authorized by statute to invest the funds of his ward, under direction of

the court, and without risk to himself, in the classes of securities therein specified, when he fails to make such investment, and mingles the funds with his own, is chargeable with interest from the time such funds are received, without regard to investments actually made.

2. The rule allowing a guardian six months for the investment of funds of his ward before interest is charged is no longer applicable.

3. Where a guardian has mingled the funds of his ward with his own, it is proper to compound the surplus interest chargeable against him thereon at the end of each triennial period.

4. A guardian who retains funds after his ward reaches majority is chargeable with interest thereon.

Appeal from orphans' court, Allegheny county.

Exceptions by Mary E. Noble to the final account of James H. Irwin, her guardian, during her minority. From the decree rendered, on settlement of the account, the guardian appeals. Affirmed.

Appellant was appointed guardian of appellee in 1884. It was admitted that he deposited in bank and invested the funds of his ward with his own. Some four years after his appointment, he assigned to himself, as guardian, certain mortgages, which he thereafter treated as the property of his ward. He made but one triennial report, which was in 1888. On the hearing of the exceptions of the ward, a decree was entered surcharging the guardian's account, to which he filed the following exceptions: "(1) That it charges interest on amounts received by guardian from the date to such receipt, and does not allow a reasonable time for investment. (2) That it charges interest on money necessarily expended during the year, and does not allow guardian to retain, free from interest, a reasonable sum for such expenditure. (3) That it does not allow credit for commissions when earned, viz. when the money was received according to the usual and common practice. (4) That it does not allow credit for interest lapses, viz. interest on Kirkpatrick mortgage for \$3,720, from May 15, 1895, to October 21, 1895, amounting to \$96.78, and interest on Creese mortgage for six months, the period reasonably allowed for the reinvestment of the amount thereof, \$2,780, realized from sale of the Creese farm; the uncontradicted evidence being that both the above mortgages were properly assigned to guardian on the record, and that the legal title thereto was in the said guardian. (5) That it charges interest to January 31, 1896, the account having been filed January 3, 1896, and the ward coming of age October 21, 1895, and the uncontradicted evidence being that, shortly prior to the ward coming of age, she requested the guardian to invest the money in his hands for her, which he proceeded to do; that afterwards she withdrew the instruction, and demanded the balance due her in cash, which cash balance the uncontradicted evidence shows was laying idle in hands of guardian, awaiting settlement with the ward, as follows: \$3,720 from May 15, 1895; the balance from October 21, 1895. (6) That, in any event, the guard-

ian should have been allowed a reasonable period prior to his ward coming of age to collect the money due her, and such period should not have been less than six months. (7) That the court erred in charging interest on interest."

The exceptions were overruled, the following opinion being rendered by Hawkins, president judge:

"(1) It is essential to the safe and orderly administration of trusts, not only that investments should be in the securities prescribed by law, but that a visible impress of the trust should be stamped upon them, for the obvious reason that every departure from the prescribed course must give enlarged scope to incompetency and rascality, and gratuitously introduce an element of hazard and uncertainty, which must add complication to settlement, and impose unnecessary burden upon the cestui que trust. Investments in the mode prescribed by law imply safety, and furnish a ready means of settlement; whereas mingling the trustee's individual with the trust funds always raises embarrassing difficulties in tracing them. In many cases, such as investment in trade or in speculation, these difficulties are insurmountable. In all of them the cestui que trust is put at the disadvantage in making investigation. The assets are subjected to the risk of reprisal by the trustee's creditors; and the trustee is afforded the opportunity of shifting the burden in the event of loss from himself to the trust. This result is in no sense chargeable to the cestui que trust, for he has no option in the matter, but to the gratuitous act of the trustee outside of the course prescribed by law. A rule applicable to the administration of every trust is that any departure from the ordinary course is at the trustee's risk. The policy of the law is to insure safety, facilitate investigation, and take away from the trustee, as far as possible, the opportunity of abuse. Thus, cestui que trust may repudiate an unauthorized investment, or elect between profits realized in trade and interest. So, on the same principle, a bailiff who takes a note, or an executor who deposits trust fund in his own name, may be held personally responsible. *McAllister v. Com.*, 30 Pa. St. 536. But, where the identity of the fund has been lost by a breach of trust, even the opportunity of election is taken from the cestui que trust. A confusion of goods has taken place, and conversion by the trustee to his own use implied. Such investments were characterized in *Morris v. Wallace*, 3 Pa. St. 319, as a 'legal fraud, liable to all the consequences as such, without regard to the intention, the integrity of the trustee, or the honesty and good faith of the particular transaction,' and bear interest from the time of conversion. The present guardian brought himself within the reason of this rule. He admittedly mingled the trust fund with his own. True, he claims to have invested them; but he is unable to produce the securities, or show when the investments

were made. The cestui que trust is thus deprived of even the opportunity of election, and is forced to treat the trustee as having assumed the added character of debtor with its incidents. The doctrine of rests, if it be not obsolete, can have no application to such a case, for it is predicated of the fact that no interest had been earned. The evidence here falls to show whether or not interest had been earned. If it was in fact, the cestui que trust was entitled, and ought not to suffer from the uncertainty resulting from the fault of her trustee. *Landis v. Scott*, 32 Pa. St. 503. The six months' rule of rests invoked by accountant grew out of the circumstances of its time, but is inapplicable in the present, even in cases of legal investment. 'The time,' said Mr. Justice Woodward, in *Witmer's Appeal*, 87 Pa. St. 120, 'should be such as the circumstances of each particular case would show to be reasonable,' and was there fixed at two months. But, in view of the facility with which trust funds may now be deposited at interest until permanent investment can be had, it is, at least, questionable whether rests in the ordinary sense should be allowed at all. Because this particular trustee is peculiarly responsible is no reason why he should escape liability for interest. His cestui que trust was entitled to the securities prescribed by law, as well as the personal responsibility of her trustee, and to the enjoyment of the earning power of the trust estate. His escape will not only work injustice to her, but 'will be taken for a precedent' which will encourage the already too prevalent and hurtful idea that trustees may convert trust assets to their own use.

"(2) The complaint made by accountant, that he should have been credited with commission on the principal as of the day of its receipt, has no merit. Such compensation is made for active services and responsibility in collection and investment, while here the guardian's services were formal in character. The services required were mainly legal, and for these his attorney has been liberally paid; and the funds, when received by the trustee, were not invested in the mode prescribed by law, but mingled with his own. *Landis v. Scott*, supra. No question was suggested as to the sufficiency of the compensation.

"(3) Nor has accountant reason to complain that interest was compounded on surplus income. The expenditures which he was authorized to make were fixed by order of court, and rests of three years each were allowed on the income which was not required for that purpose. Had this surplus been realized on authorized securities, good management would have suggested that it should have been invested, rather than allowed to have lain dead; but, when it is considered that this surplus fund was mingled with the guardian's own fund, it must be presumed he had the benefit of it, and should account.

"(4) There was no reason why this accountant should not have returned the admitted

balance in his hands after his ward reached her majority; and if, as is clear, she was entitled, but was deprived of its use, the guardian should in justice make her compensation. The practice of retention of funds ought, on account of the temptation to use them as an instrument of coercion, to be discouraged, if not prohibited. There have been cases in which dependent and helpless relatives have been forced by their necessities to acquiesce in rank injustice. In most cases the fraudulent purpose is incapable of direct proof, and the obvious remedy is to take away the temptation."

Petty & Friend, for appellant. Hays & Noble, for appellee.

PER CURIAM. There is nothing in this record that would justify us in sustaining either of the assignments of error. The questions involved have been fully considered and correctly disposed of by the learned president of the court below; and, on his opinion, the decree is affirmed, and appeal dismissed, at appellant's costs.

(177 Pa. St. 633)

BATES v. CULLUM.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

STATUTE OF LIMITATIONS — NONRESIDENTS — EVIDENCE.

The act of May 22, 1895 (P. L. 112), declaring that defendants in civil suits in which the cause of action arose in Pennsylvania, who shall have become nonresidents after such cause of action has arisen, shall not have the benefit of the statute of limitations during the period of such residence without the state, applies to actions in which the cause of action arose prior to the passage of the act, and the issue upon the statute of limitations was pending and undetermined at the time it went into operation; and it is error at the trial of such issue to exclude evidence showing the nonresidence of defendant.

Appeal from court of common pleas, Warren county.

This was an action by F. Bates, cashier, in trust for the Exchange Bank of Titusville, Pa., against H. B. Cullum, upon the opening of a judgment entered by virtue of a warrant of attorney against said Cullum. From a judgment for defendant, plaintiff appeals. Reversed.

Samuel T. Neill, for appellant. W. M. Lindsey, Jas. O. Parmlee, and Edward Lindsey, for appellee.

STERRETT, C. J. In June, 1881, judgment was entered against defendant by virtue of a warrant of attorney contained in an unsealed note for \$4,000, payable one day after the date thereof, November 10, 1873. On defendant's application, the court, in January, 1893, made a decree opening the judgment for the purpose of enabling him to interpose the statute of limitations, and awarded an issue in which it is provided that "the judgment note shall stand

for a declaration, and defendant shall plead the statute of limitations, and no other plea, within ten days; the plaintiff on the trial to be at liberty to show any matter in bar of the running of the statute, subject to the usual rules as to notice of special matter." On appeal to this court, the action of the court below, in thus opening the judgment and awarding the issue, was affirmed. *Bates v. Cullum*, 163 Pa. St. 234, 29 Atl. 870. By agreement of the parties, the cause was tried January 27, 1896, by the court without a jury. On the trial, evidence relating to the merits of the claim, and also tending to prove that within a few weeks after the note in question was given defendant left the state of Pennsylvania, and ceased to be a resident thereof, and thenceforth continued to reside without the state, etc., was offered by the plaintiff, and received under objection. In connection with the evidence of defendant's nonresidence, etc., he also cited and relied on the act of May 22, 1895 (P. L. 112), which declares: "That in all civil suits and actions in which the cause of action shall have arisen within this state the defendant or defendants in such suit or action, who shall have become non-residents of the state after such cause of action shall have arisen, shall not have the benefit of any statute of this state for the limitation of actions during the period of such residence without the state." Referring to the evidence that was received under objection, the learned trial judge, in his opinion, says: "All this evidence should have been excluded, and we accordingly now sustain the objection, exclude the evidence from consideration, and seal bill of exceptions for plaintiff. The plaintiff's evidence having been excluded, that offered by the defendant may be treated as withdrawn." As to the act above quoted, he says: "The language of the act before us does not seem to require a retrospective construction; at least not such as to compel us, on ascertaining a fact by the trial of an issue, to enter a different judgment from that which we should have entered had the fact been judicially ascertained at the time of the order awarding the issue." He accordingly held that "no fact appears by which the running of the statute of limitations was prevented," and, having found that the note in suit "was due more than six years before the judgment was entered" thereon, he enforced the bar of the statute, and entered judgment for the defendant. Hence this appeal, in which the correctness of the learned judge's rulings are challenged.

If the act, properly construed, is applicable to suits and actions, such as this, in which the cause of action arose in this state prior to the passage of the act of 1895, etc., and is not unconstitutional on that or any other ground, it is impossible to justify the action of the court below in excluding the evidence of defendant's "residence without the state" for more than 20 years as a fact "in bar of the running of the statute." One of the terms of the issue awarded by the court is that on the

trial thereof the plaintiff shall "be at liberty to show any matter in bar of the running of the statute." The trial did not take place until January 27, 1896, more than eight months after the act was passed. All that was adjudicated prior thereto was the authority of the court to open the judgment and award the issue on the terms therein specified. The issue was pending and undetermined when the act went into operation. The learned counsel for defendant in their argument candidly "admit that the weight of authority is in favor of the power of the legislature to repeal and pass laws changing the methods of procedure, and relating solely to the remedy pending litigation"; but they claim "that the peculiar situation of this case" renders those authorities, as well as the act itself, inapplicable. For reasons above suggested, we are unable to see wherein either the act or the authorities referred to are not strictly applicable to the case in hand. The language of the act is clear, specified, and imperative. It applies to "all civil suits and actions in which the cause of action shall have arisen within this state." It affects all defendants "who shall have become nonresidents" "after said cause of action shall have arisen." This language is clearly retrospective, at least as applied to the cause of action and residence of the defendant. Whether our statute of limitations should or should not continue to run in favor of persons who had abandoned their residence in this state was purely a legislative, and not a judicial, question. The defendant had no right, in or under the statute, that could interfere with the power of the legislature to declare that he and all others similarly situated should not have the benefit thereof "during the period of" their "residence without the state." As was said in *Campbell v. Holt*, 115 U. S. 628, 6 Sup. Ct. 209: "No man promises to pay money with any view of being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says time shall be no bar, though such was the case when the contract was made." We are of opinion that the act of 1895 is neither unconstitutional nor inapplicable to the facts of this case, and that the learned court erred in holding otherwise, and excluding plaintiff's evidence. Judgment reversed, and record remitted for further proceedings in accordance with this opinion.

(173 Pa. St. 128)

BOROUGH OF SHAMOKIN v. SHAMOKIN ST. RY. CO.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

STREET-RAILWAY COMPANIES—IMPROVEMENTS OF STREETS—CONTRACTS.

1. Where a street-railway company, in laying its tracks, has failed to conform to the grade of the streets, according to an express condition of the grant of the right to use such streets, the municipality may change such tracks to the proper grade, and recover the cost thereof from the company.

2. A borough granted to a street-railway com-

pany the right to use a street, on condition that it would maintain and keep in repair a certain portion thereof, and would join with the borough in any improvement by "repairing or macadamizing," and bear the expense thereof as to such portion. Subsequently, the borough served notice upon the company to join in paving the street with asphaltum, but the company paid no attention thereto. The borough then paved the entire street at its own expense. *Held*, that the company was liable for its share of the preliminary work on the street, but not for the actual laying of the asphaltum, as in using such pavement the borough had exceeded the contract.

Appeal from court of common pleas, Northumberland county.

This was an action of assumpsit by the borough of Shamokin against the Shamokin Street-Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

W. H. M. Oram and John Quincey Adams, for appellant. S. P. Wolverton, C. M. Clement, and Samuel Heckert, for appellee.

WILLIAMS, J. This is an action on a contract. The terms of the contract are to be found in the provisions of an ordinance of the borough of Shamokin, granting leave to the defendant company to occupy certain streets in said borough with its line of street railway. This ordinance was duly accepted by the company, and under its authority the line of street railway was built upon the several streets to which it related, including Shamokin street. By the acceptance of this ordinance, the defendant company undertook to lay its track upon the grade of the streets it should occupy; to "maintain and keep in repair a roadbed four and a half feet in width, from the center of their track, on either side of said center" on all such streets; to use the same material in making such repairs that the borough might use for the same purpose, or such other material as the borough should approve; and that the company would, on being notified so to do for fifteen days before the work was to begin, join with the borough in the improvement of any street by repairing or macadamizing as the borough might elect, and repair or macadamize the nine feet of roadbed provided for by the ordinance at its own cost. No notice that the track was not laid upon the grade of the streets was required to be given to the company. The right to build was granted upon the express condition that this should be done. If the track was not so laid, it was without any right in the street, and was an unauthorized obstruction to the public travel over it. A notice was required only when action was to be taken by the borough for the repairs or macadamizing of a street over which the defendant's line passed; and the object of the notice was to make it practicable for the borough and the railway company to proceed with the proposed improvement at the same time, so that the work might be done in the most convenient, economical, and expeditious manner. The breaches of this contract for which the plaintiff claims, in its statement of its cause of action, to recover in this case, are

the failure to repair and to pave after notice. Evidence was offered tending to show that the street-railway track on Shamokin street was not laid on the proper grade; that the street was out of repair; that the borough decided to repair it, and to pave it with asphaltum; that notices were given to the defendant company of the condition of its track, and of the street, and of the purpose to pave with asphaltum; that these were disregarded by the company, in consequence of which the work was all done by the borough. Upon this state of facts, the plaintiff asked to recover from the defendant company the cost of the work done by it, which it was the duty of the defendant, under the terms of its contract, to have done. The answer made by the defendant does not deny the contract, nor that the work was done as charged in the statement, but alleges that the borough adopted a mode of pavement for Shamokin street not contemplated by the contract, and for which the defendant is not liable.

The defense is substantially this: "You asked us to do more than we were bound to do, and for that reason we will do nothing. It is true, we were bound to put our track on the grade of the street, to repair the street, to pave it with macadam, but, when all the preliminary work was done, you put down asphaltum, instead of macadam. This not only relieves us from the cost of the asphaltum, but releases us from the obligation to do what our contract required us to do." The learned trial judge seems to have adopted this view of the defendant's liability, as the rulings complained of in the several assignments of error rest on the fact that the pavement was not such as the contract provided for. We agree with the learned trial judge that it was not in the power of the borough to change the contract, and increase the liability of the defendant, without its consent. The attempt to do this must, of course, fail. But the effort to impose an additional liability cannot operate to release the defendant from its contract. That remains in full force. By its express terms, the defendant was bound to place its track on the grade of the street. It was served with a notice, to which it was not entitled, requiring this to be done, but it left the work for the borough to do. For this it is clearly liable. It was served with a notice to repair and pave Shamokin street. To this it was entitled. As to all the work contemplated by it except the putting down of asphaltum, it was bound under its contract. It did nothing. All that was rightly done by the borough after the notice to repair and pave was served, except that which was rendered necessary by the adoption of the asphaltum in place of macadam, is within the spirit and the letter of the contract; and, for the proper share of the expenses incurred in so much of the work done, the plaintiff is entitled to recover. The action of the borough was a determination that the street needed repair and a pavement. This was binding on the railway company. If a macadam pave-

ment had been adopted, the railway company would have been bound to join in putting it down to pay the cost to the borough, with a penalty of 20 per cent. added. But the borough substituted another kind of pavement, which the defendant had not contracted to be liable for. In so far it exceeded its authority under the contract, and to the extent of this excess, it cannot relieve the borough treasury by calling on the defendant, under the terms of the ordinance. The assignments of error relating to this question are sustained; the judgment is reversed; and a *venire facias de novo* awarded.

(177 Pa. St. 580)

LEHMAN v. GIVEN.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

WARRANTY OF TITLE—INTENTION.

When the vendor of land executes an agreement under seal to refund to an alienee of the vendee the money paid for a part of the land "in the event of its being legally decided that the title to said land * * * is invalid, and the land is recovered by any one having a superior title," such alienee is entitled to recover for the loss of any portion of the land, the same as upon a formal warranty, where it is obvious that it was not the vendor's intention to make the covenant to refund dependent upon failure of title to all of the tract purchased by the alienee.

Appeal from court of common pleas, Cumberland county.

Action of assumpsit, brought by J. C. Lehman against Amelia S. Given, now Amelia S. Beall, surviving executrix of Sarah H. Given, deceased, to recover certain moneys alleged to be due under an agreement signed by said Sarah H. Given. Verdict for plaintiff for \$417.40, with point reserved. Opinion and decree of the court filed directing that the verdict be set aside, and that judgment be entered in favor of the defendant non obstante veredicto. Plaintiff appealed. Reversed.

S. M. Leidich, F. E. Beltzhoover, and W. F. Sadler, for appellant. John Hays, R. M. Henderson, and J. Webster Henderson, for appellee.

MCOLLUM, J. On the 15th of June, 1879, Sarah H. Given, the decedent, conveyed with covenants of general warranty 484 acres of land to George W. Paxton for the consideration sum of \$4,000, and on the 8th of March, 1880, Paxton conveyed 805 acres of the same to J. C. Lehman for \$5 per acre. Lehman, in part payment of the land he bought of Paxton, gave his note to the latter for \$720, and Paxton transferred the note to Mrs. Given on account of the purchase money due from him to her. Before the note matured, it was known to Lehman and to Mrs. Given that the heirs of John Griswold claimed all, or a portion, of the land. Lehman therefore refused to pay the note without an agreement from Mrs. Given to refund the money in case the Griswold heirs succeeded in establishing their claim. To meet and remove Lehman's objec-

tion to the payment of the note, Mrs. Given executed and delivered to him a paper, of which the following is a copy: "Whereas, I sold and conveyed to George W. Paxton a tract of mountain land in South Middletown township, who sold the same to J. C. Lehman, and received from him in part payment thereof a note for \$720, which said Paxton transferred in part payment of the purchase money for the land as aforesaid sold by me to him: Now, therefore, in consideration of the payment of the note to me by the said J. C. Lehman, I hereby covenant and agree to refund the moneys paid to me by said Lehman in discharge of said note in the event of it being legally decided that the title to said land conveyed by me to said Paxton is invalid, and the land is recovered by any one having a superior title to the same. Witness my hand and seal the 8d of April, 1882. S. H. Given." This paper was under seal, and witnessed by Samuel Given; and Lehman, relying upon the promise contained in it, paid the note. The suit brought by the Griswold heirs for the recovery of the land resulted in the establishment of a good title in them to 77½ acres of the land conveyed by Mrs. Given to Paxton, and included in the latter's deed to Lehman. Mrs. Given had notice of the suit, and appeared by her counsel in opposition to the claim of the plaintiffs in it.

This action was brought upon, and to enforce the agreement or promise of April 3, 1882. The plaintiff was defeated in the court below on the ground that he was not entitled to have the \$720, or any part thereof, refunded, until that portion of the land included in Mrs. Given's deed to Paxton was recovered from him by a party "having a superior and better title to the same." In other words, it was held that a recovery by such a party of all the Given land which Paxton conveyed to him was a condition precedent to a suit for all or any part of the money he paid "in discharge of the note." Was this a correct interpretation of the agreement? The answer to this question must rest upon a consideration of the language of the agreement in connection with the subject-matter of it and the surrounding circumstances. Mrs. Given's deed of the land to Paxton contained a warranty of title, and the protection it afforded extended to his alienee. The note which Mrs. Given held represented the price of 144 acres of the land, and \$1,525 was the price of the whole of it. Mrs. Given wanted the money called for by the note, and Lehman wanted protection to the amount of it against the claim of the Griswold heirs. Under these circumstances the agreement in question was executed, and the note was paid. If, prior to this transaction, there had been a recovery by the Griswold heirs of one-half the land, such recovery would have constituted a complete defense to an action on the note. It is quite certain that the plaintiff was a loser by the transaction if the agreement on which he parted with his money was correctly construed by

the court below. Without the agreement, he might have recovered in an action on the warranty of title the price of the land taken from him, while in an action on the agreement as interpreted by the court below he can recover nothing until he loses all the land, and then his right to recover is limited to less than one-half the price of it. It is obvious that such results were not contemplated by the parties. It was not their intention to make the covenant to refund dependent upon a failure of title to the whole tract conveyed by Mrs. Given to Paxton, and yet the language of the agreement admits of an interpretation that would make it so. The learned court below did not so construe it, but limited the right to recover upon it to a failure of title to that portion of said land which Paxton conveyed to Lehman. The recognition of the right of the plaintiff to maintain a suit upon the agreement without proof of an adjudication that the title to all the land conveyed by Mrs. Given to Paxton was involved was consistent with the intention of the parties, but the limitation of it was not. The agreement was in the nature of a warranty of title, and may be regarded as a substitute for it with a restriction of liability to the amount paid on the faith of it. We conclude, therefore, that the plaintiff was entitled to recover for the loss of the 77½ acres the same that he would have recovered in an action for the breach of a formal warranty of title. This conclusion accords with the obvious intention of the parties to the arrangement under which the note was paid, and is supported by the decisions of this court. *Cox v. Freedley*, 33 Pa. St. 124; *Milner's Appeal*, 61 Pa. St. 283; *Lacy v. Green*, 84 Pa. St. 514; *Meigs v. Lewis*, 164 Pa. St. 602, 39 Atl. 505; *Mining Co. v. Jones*, 108 Pa. St. 55; *McCrelish v. Churchman*, 4 Rawle, 28; *Bredin v. Agnew*, 3 Watts & S. 300; and *Wright v. Smyth*, 4 Watts & S. 527. We cannot say that the court below erred in its instruction in regard to interest. Judgment reversed, and judgment now entered upon the verdict in favor of the plaintiff and against the defendant for \$417.40, with interest from February 4, 1896.

(178 Pa. St. 17)

BROWN v. PETTIT et al.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

BANKS AND BANKING — DISCOUNTING OF FRAUDULENT PARTNERSHIP NOTE.

One of the members of a firm executed a note payable to the firm, indorsed it with the firm name, without the knowledge of his partner, and forged the name of a third party as second indorser. He presented the note to a banker for discount, and directed the proceeds to be credited to his personal account, which was accordingly done. The firm had at the same time an account upon the banker's books. No part of the proceeds were used for partnership purposes. *Held*, that the circumstances were sufficient to put the banker upon inquiry as to the maker's authority to use the firm's indorsement for his own accommodation, and that the

firm was not liable. *Haldeman v. Bank*, 28 Pa. St. 440; *Miller v. Bank*, 48 Pa. St. 514,—distinguished.

Appeal from court of common pleas, McKean county.

Action of assumpsit by J. L. Brown against John S. Davis and Webb Evans, partners as Davis & Evans. John S. Davis having died pending the suit, William H. Pettit, administrator, and Mary A. Davis, administratrix, were substituted as defendants. From a judgment in favor of plaintiff, defendants appeal. Reversed.

John S. Davis and defendant Webb Evans were partners in business at Kane, in McKean county, Pa., in 1892 and 1893; and J. L. Brown, the plaintiff and appellee, was at the same time doing a private banking business at Wilcox, Elk county, Pa. At the time of the transaction out of which this case arose, and for at least a year before and after, Webb Evans, one of the defendants, had an open account upon the books of plaintiff's bank, and the firm of Davis & Evans had also an open account upon the same books. In December, 1892, Webb Evans arranged with the plaintiff to borrow several thousand dollars upon notes which the latter agreed to discount. Evans alleged at the time of the making of this arrangement that the loan was for the firm of Davis & Evans. On the 17th of January, 1893, Evans presented at the banking house of Brown, the plaintiff, a note, of which the following is a copy, except the date: "Wilcox, Elk Co., Pa., Dec. 1st, 1893. \$1,250. Four months after date I promise to pay to the order of Davis & Evans twelve hundred and fifty dollars, at the banking house of J. L. Brown, Wilcox, Pa., without defalcation Value received. [Signed] Webb Evans." This note was indorsed, "Davis & Evans," and "Joshua Davis." The written portion of the body of the note, and the indorsement "Davis & Evans," were in the handwriting of Evans. The indorsement "Joshua Davis" was a forgery. John S. Davis, the partner of Evans, was wholly ignorant of the transaction until after the note in suit, which was a renewal of the original note discounted January 17, 1893, became due,—April 4, 1894. The proceeds of this original note were, at Evans' request, placed to his individual account on the books of the bank, and were used by him for his individual purposes. No part of the proceeds was used in the business of the firm of Davis & Evans. The written portion of the body of the note in suit, of which the foregoing is a copy, and the indorsement "Davis & Evans," were also in the handwriting of Evans, and the indorsement "Joshua Davis" was a forgery. The appellee brought suit April 10, 1894, against the firm of Davis & Evans upon the note of which a copy is given, and defense was made by Davis on the ground that the appellee was not a bona fide purchaser without notice. A jury was called September 13, 1895, and by direction of

the court a verdict for the defendants was rendered. Upon motion of the appellee the verdict was set aside and a new trial granted, the judge being of opinion that he had erred in not submitting to the jury the question of the appellee's bona fides in the transaction. On March 10, 1896, the death of John S. Davis was suggested, and Mary A. Davis and William H. Pettit, administrators, substituted as defendants. Again, on April 24, 1896, a jury was called in the case, and, after having an argument, under instructions of the court a verdict was returned for the plaintiff.

W. P. Weston, Bonton & Gallup, and J. M. McClure, for appellants. Wm. Wallace Brown, T. A. Lamb, A. P. Huey, and F. P. Schoonmaker, for appellee.

GREEN, J. In this case the undisputed facts were that Webb Evans was the maker of the note in his own name, made it payable to the order of his firm, Davis & Evans, indorsed the name of the firm on the note, and requested the plaintiff to place the proceeds of the discount to his personal credit on the books of the bank. As between Webb Evans and the firm of Davis & Evans, on the face of the paper, disregarding the forged indorsement of Joshua Davis, the proceeds of the discount should have been placed to the credit of Davis & Evans. That firm, as well as Webb Evans, had an account on the books of the bank, and, in ordinary course, should have had credit for the proceeds. Had Webb Evans indorsed the note in his own name after the indorsement of Davis & Evans, then the face of the paper would have presented an apparent title in Webb Evans, and in its ordinary commercial aspect the paper, with the personal request of Webb Evans to have the proceeds placed to his credit, would not have been out of the usual course. But, with the apparent title to the note being in Davis & Evans, a request by the maker to have the proceeds placed to his individual credit was out of the usual course; and we think, under the authorities, the bank became subject to a duty of inquiry. It seems to us that these facts bring the case within the ruling in *Cooper v. McClurkan*, 22 Pa. St. 80, and *Tanner v. Hall*, 1 Pa. St. 417, and distinguish it from the other cases cited for the appellee. In *Cooper v. McClurkan* the facts are briefly stated in the opinion thus: "McClurkan & Fleming were partners in trade, and Fleming drew a bill of exchange of the partnership on himself, and negotiated it to the plaintiff; and now, in a suit upon it, McClurkan defends on the ground that it was not a partnership transaction. This appears to be well taken, for the case, without other evidence, stands just as if Fleming had given the indorsement of his partnership on his own note as security for his own debt, which he could not do. 1 Pa. St. 417." This is precisely what was done by Webb Evans.

He gave his own note to his firm for the amount of the note. He then indorsed the firm name on the note, and therefore pledged the liability of the firm for his own debt, and this he could not do. The proper thing for him to do, in ordinary commercial usage, would have been to deposit the note, or its proceeds if discounted, to the credit of the firm. When he did not do that, he departed from the usual course, in requesting the bank to place the proceeds to the credit of his private account, and thereby made a manifest misappropriation of the firm's money to his own use. The responsibility of the bank, in such circumstances, is thus shown in the opinion of Lowrie, J., in the case just cited. He says: "The plaintiff says he is a bona fide holder, without notice of the character of the paper. Is he without notice? He is not if the proper inquiries usually made by a prudent man would have led him to the knowledge of the fact that the acceptor or principal debtor had himself drawn the bill, or, in other words, made the contract that is intended to pledge the partnership as surety for himself. Common prudence demanded that the authenticity of the signature of the drawers should be ascertained, and this led directly to the fact that it was made by Fleming himself, and common sense would indicate that Fleming had no right to bind his partner as his surety. It is urged that in borrowing money co-partners may give to their negotiable paper what form they please, and that, therefore, they ought to be liable here notwithstanding the form. The premise is true, but the conclusion needs for its support the proof that the co-partners did borrow the money. If they did, then Fleming is an accommodation acceptor, and the drawers are bound, as the real debtors. Without this proof we must take the apparent transaction to be the true one, and regard Fleming as borrowing money for himself, and attempting to pledge his partner as his surety; that is, we must decide the case according to the evidence." Every word of this is directly applicable to the case at bar, only with increased force, because here the paper was the direct obligation of Webb Evans alone to his firm, and was palpable notice to the bank that it was his private debt to his firm. When he indorsed the firm's name, and asked the banker nevertheless to place the proceeds to his individual credit, it was a direct and immediate application, with the knowledge and consent of the banker, of the firm's money to the personal use of the maker.

Tanner v. Hall, 1 Pa. St. 417, is in the same line. We held there that an indorsement by a partner of his separate accommodation note with the name of his firm is a sufficient indication of the nature of the transaction to make it the duty of the bank which discounts it to inquire into his authority to use the firm name for the occasion, unless there are circumstances from which the authority can be implied. Gibson, C. J., stating the facts, said: "Hall

drew the note in question in favor of H. Cochran & Co., procured their indorsement of it, indorsed it with the name of his own firm, had it discounted at the Lumberman's Bank, and had the proceeds of it put to the credit of his personal account. * * * But that Hall had drawn ostensibly for his separate accommodation sufficiently indicated that his firm's indorsement was also for his separate accommodation, and made it the duty of the bank to inquire into his authority for the act, as it would have been bound to do had he indorsed the name of the firm on the note of a stranger. The bank, then, and the present holder, are affected with knowledge that the transaction was a separate one; and we have the naked case of a note indorsed with the name of a firm, in a transaction out of the line of its business, from which the conclusion is unavoidable that it was discounted on the faith of an indorsement which was void for want of previous authority or subsequent confirmation." The present case is stronger than this, because there was no intervening third party, outside of the firm, who had made a genuine indorsement for the accommodation of the maker. Here the transaction was direct. The partner made his own note to his own firm, and then indorsed the firm name, and, with the knowledge and participation of the bank, took the proceeds to his own use. It was affirmatively testified by the other partner that he knew nothing of the transaction; that the firm got no part of the proceeds, directly or indirectly; and it was not shown that there was any course of dealing by which indorsements of the firm name by Webb Evans on paper such as this was ever sanctioned or approved by the firm. The nature of the transaction, directly informed the bank that the firm indorsement was made by Evans for his private use, and that knowledge put them upon inquiry. In the case of *Miller v. Bank*, 48 Pa. St. 514, Agnew, J., in commenting on *Tanner v. Hall*, and pointing out the difference between the two cases, said: "The case of *Tanner v. Hall* differs widely from this. There Hall drew his separate note for his own accommodation to the order of another firm, who indorsed it. Then he indorsed the name of his own firm, and procured it to be discounted. It was held that the form of the note and the circumstances sufficiently indicated to the bank that the note was for his individual accommodation, and thus put the bank upon notice."

The case of *Haldeman v. Bank*, 28 Pa. St. 440, is cited for the appellee with much confidence, and is claimed to rule this case. But a very slight examination of the facts of that case shows it to be radically different from this. The draft was drawn in the firm name, in favor of Haldeman, who was one of the partners. Ostensibly, therefore, and on the face of the paper, it purported to be the obligation of the firm to one of its own members. Upon such paper the payee was apparently the owner of the paper, and, in regular course of business, would be entitled to have the pro-

ceeds of the draft. There was nothing to give notice to the bank that the transaction was out of the usual course, or was, or was intended to be, a fraud upon the firm. It was upon these grounds that the case was ruled. Said Knox, J., in delivering the opinion: "The case depends upon the question whether the bank was bound to inquire as to the authority of Haldeman to draw the draft in the firm name. It is not pretended that the bank had actual notice that the discount was for Haldeman's separate use, but it is alleged that the form of the draft was sufficient to put the bank upon inquiry. The draft was made payable to Peter Haldeman's order. Was this an indication that it was not drawn by the firm in the usual course of its business? Certainly it was not, for, although it may not be the ordinary form in which bills are drawn, it is by no means an unusual transaction, when the object of drawing a draft is to raise money for a firm, that it should be made payable to the order, and indorsed by one of the members, of the firm. * * * Where a draft or bill drawn in the name of the firm by one of the partners is offered for discount, the presumption is that drawing the draft was a partnership transaction, even although it was made payable to the order of one of the members of the firm. Actual knowledge that a bill or note purporting to be drawn or made by a firm was given without the consent of some of the partners is a good defense as to the nonconsenting partners, but the presumption that the paper is what it purports to be cannot be overthrown upon a mere matter of form in inserting the name of one of the members of a partnership as payee." The case of *Ihmsen v. Negley*, 25 Pa. St. 297, is also of the same character, as is fully explained in the opinion in the last case cited. We think the assignments of error are all sustained. Judgment reversed, and venire de novo awarded.

(177 Pa. St. 571)

JACK v. KINTZ et al.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

MARRIED WOMEN'S SEPARATE ESTATE—HUSBAND'S CREDITORS—BURDEN OF PROOF—WITNESSES.

1. The acts of 1887 and 1893, enlarging the capacity of married women to contract, and to acquire and dispose of property, do not affect the rule that where a married woman claims, as against her husband's creditors, property which was conveyed to her during coverture, she must prove that such property was purchased with her own means, or that it was a gift to her from her grantors.

2. A husband is a competent witness to prove that property conveyed to his wife during coverture was purchased with her own money.

Appeal from court of common pleas, Cumberland county.

This was an action of ejectment by W. D. Jack against Elmer E. Kintz and Susan Brubaker to recover possession of a certain tract of land. From a judgment for plaintiff, defendants appeal. Reversed.

On the 4th of January, 1888, Milton K. Brubaker, the owner of the property in dispute, in conjunction with his wife, conveyed the same to their married daughter, Mrs. Minnie M. Albright, who, on the 24th of March following, conveyed it to Susan Brubaker. Subsequently the property was levied on as the property of J. R. Albright, the husband of Minnie M. Albright, and sold at sheriff's sale, for a debt of the said Albright, which was in existence at the time of the conveyance to his wife. The title under the sheriff's sale had passed to W. D. Jack at the time this action was brought.

G. Wilson Swartz and F. E. Beltzhoover, for appellants. E. M. Leidich and W. F. Sadler, for appellee.

McCOLLUM, J. There are but two questions involved in this appeal. The first is whether a married woman who receives a conveyance of land is required, in a contest with her husband's creditors respecting the possession and ownership of it, to prove that she paid for it with her own money, or that it was a gift to her from her grantors. In the case before us the defendants claim to have a good title to the land in dispute by virtue of the deed of it from John R. Albright and Minnie M. Albright to Susan Brubaker, and the plaintiff's claim to have a like title to it, based on a judicial sale of it as the property of John R. Albright. It appears to be conceded that Milton K. Brubaker was the owner of the property on the 4th of January, 1888, and that he and his wife, Susan Brubaker, on that day made and delivered a deed of it to their married daughter, Minnie M. Albright, who, on the 24th of March, 1888, united with her husband in a conveyance of it to her mother. The consideration named in each deed was \$6,500, and each was subject to the payment of \$2,000 of that sum to Milton K. Brubaker on or before the 15th of April, 1889. After the deed was made to Minnie M. Albright, and before the deed was made to Susan Brubaker, Annie K. Flemming obtained a judgment against John R. Albright for \$7,889, and on this judgment an execution was issued, by virtue of which the land in dispute was seized and sold by the sheriff. If John R. Albright owned the land when the judgment was obtained, his title to it was divested by the sale, and the plaintiff is the present owner of it. In other words, the plaintiff has whatever title Albright acquired by the deed from Brubaker to his wife. It is a familiar and well-settled principle that in a contest between a married woman and the creditors of her husband concerning the ownership of property which she claims to have purchased during coverture she must "prove distinctly that she paid for it with funds which were not furnished by her husband." *Gamber v. Gamber*, 18 Pa. St. 363. This principle or rule "applies to purchasers of real estate as well

as personal." *Keeney v. Good*, 21 Pa. St. 349; *Walker v. Reamy*, 36 Pa. St. 410; *Barringer v. Stiver*, 49 Pa. St. 129. The rule thus established has been upheld in a long line of cases, and distinctly recognized and enforced in the recent case of *Bollinger v. Gallagher*, 170 Pa. St. 84, 32 Atl. 569. As it appears from the circumstances connected with and surrounding the transaction in question, and apart from the Fleming judgment, that the grantee had actual notice of the husband's equity, we cannot say that the learned court below erred in holding that, in the absence of evidence that the property was purchased by Minnie Albright with her own means, the plaintiff was entitled to recover. We do not think that the rule we have considered is in any degree affected by the act of June 3, 1887, or by the act of 1893. These acts enlarge the capacity of a married woman to contract, and to acquire and dispose of property, but they do not remove the burden which rests on her of proving title to the property she claims against her husband's creditors.

The remaining question is whether the learned court below erred in rejecting the offer contained in the sixth specification. It was an offer to prove by John R. Albright that his wife, Minnie M. Albright, paid for the property with her own money. The only objection to it was that the person by whom it was proposed to prove it was not a competent witness. If there was any warrant for the objection, it must be found in clause "e" of section 5 of the act of May 23, 1887. We are unable to find anything in the record, in the evidence submitted, or in the offers of evidence made on the trial, which brings John R. Albright within any of the excluding clauses of section 5. He is not a "surviving or remaining party to the thing or contract in action" or to the suit, and he has no interest adverse to any right of the deceased party, who was at most, according to the record, an intervening purchaser, who devised the property to the plaintiff's vendor. The suggestion that, if Minnie M. Albright was the owner of the property, her husband has an estate by the curtesy in it, which he is interested in maintaining, overlooks the fact that whatever title he had in it passed to her mother by the deed in which he joined. We think that John R. Albright was a competent witness as to all relevant matters, and that the conclusion we have reached in respect to his competency is in accord with the decisions of this court, among which we may mention *Brown v. Carey*, 149 Pa. St. 134, 23 Atl. 1108; *Dickson v. McGraw*, 151 Pa. St. 98, 24 Atl. 1043; *Gerz v. Weber*, 151 Pa. St. 396, 25 Atl. 82; *Smith v. Hay*, 152 Pa. St. 377, 25 Atl. 562; *Tarr v. Robinson*, 158 Pa. St. 64, 27 Atl. 859; and *Smith v. Rishel*, 164 Pa. St. 181, 30 Atl. 239. We cannot say that, in the absence of evidence showing or tending to show the purchase of the property by Minnie M. Albright with her own means, it was error to reject the offer of her deed to her mother.

We sustain the sixth specification, and overrule the first, second, third, fourth, and fifth. Judgment reversed, and venire facias de novo awarded.

(177 Pa. St. 473)

LONG et al. v. HARVEY et al.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

DISPUTES BETWEEN CHURCH PARTIES—LAWS OF THE CHURCH—REMOVAL OF OFFICERS—INJUNCTION.

1. In adjudicating disputes between warring church parties, the court can look into the rules of a church organization to ascertain the church law; and, if that be not in conflict with the law of the land, all that can be done is to protect the rights of parties under the law they have made for themselves. *Krecker v. Shirey*, 30 Atl. 440, 163 Pa. St. 551, followed.

2. Officers of a church are presumably elected by a majority of the members, and their removal can be effected only in compliance with the rules and discipline of the church.

3. Church officers cannot be enjoined from exercising the functions of their offices, in favor of others elected by a majority of the members in a manner unwarranted by the laws of the church.

Appeal from court of common pleas, Centre county.

This was a proceeding in equity to enjoin and restrain the respondents from exercising the offices of trustees and elders of the church of the Disciples of Christ, at Howard, in said county, and from preventing J. Z. Long and N. G. Fletcher from performing the duties of trustees of said congregation, and from preventing sister churches at Eagleville and Lock Haven from assuming temporary supervision and jurisdiction of the church at Howard. The court appointed D. S. Keller, Esq., master to report facts, and suggest a decree. He took testimony, and heard argument of counsel, but died before reporting. Clement Dale, Esq., was appointed in his stead, who, without hearing argument, made a report, suggesting that the injunction be granted. The president judge approved the report, and made decree substantially as suggested. The two associate judges filed dissenting opinions. Respondents appealed from the decree of the president judge. Reversed.

Wilbur F. Reeder, for appellees.

DEAN, J. The plaintiffs' bill in this case avers as follows: In 1832 a religious association or congregation was organized at Howard, Centre county, Pennsylvania, denominated "Disciples of Christ." At the commencement of these proceedings, it numbered 60 persons, and was not incorporated. One R. C. Leathers made a report to the Pennsylvania conference for the year 1889, that there were but 15 members in good standing composing the congregation. That this report dropped from the rolls of the congregation a majority of its members, without notice or hearing, and without warrant. On February 7, 1890, the majority appealed to an impartial tribunal (not named), and

asked the elders to join in choosing said tribunal, which they (the elders) refused to do. Then a majority of the congregation, acting through a committee, appealed to the elders of a sister church at Eagleville, to hear and determine the complaint which had created schism. The elders of the Eagleville church entertained the appeal, and called in elders of the sister congregations of Lock Haven and Williamsport, and together they heard the complaint on June 13, 1890, and rendered a decision, recommending the calling of a meeting of the congregation at Howard on June 25, 1890, following. Due notice of the meeting was given. On the day named, defendants closed and locked the doors of the church, and prevented the meeting in the church. Those members who had complained and appealed then organized a meeting outside and in front of the church, presided over by Rev. Ryan, of Williamsport. At this meeting, J. Z. Long, one of plaintiffs, was elected a trustee in place of H. L. Harvey, then a trustee, and one of these defendants. N. G. Fletcher, theretofore and then a trustee, and one of plaintiffs, was approved, as was also A. J. Gardner, one of defendants. A. J. Gardner and R. C. Leathers were deposed as elders, and the congregation, for the time being, was placed under the supervision and jurisdiction of the elders at Eagleville and Lock Haven. Notwithstanding their deposition, the old board of trustees continued to act, and the old board of elders persisted in holding on to their offices, and, by force and violent demeanor, prevented the elders of Eagleville and Lock Haven churches from assuming and exercising the jurisdiction and supervision conferred upon them by the 25th of June meeting, and persisted, by force and threats, to debar a majority of the congregation from engaging in worship in the church. That the 25th of June meeting was constituted and held by competent authority of the denomination, and all its proceedings were regular under the usages of the church, and that the exercise of authority by defendants was wrongful. The prayers for relief were that Harvey, the two Gardners, and Leathers be enjoined from acting as trustees or elders, and from preventing Long and Fletcher from assuming the offices to which they had been elected, and that they be further enjoined from preventing the elders of Eagleville and Lock Haven from assuming supervision of the congregation; and, further, that they and each of them be enjoined from excluding a majority of the congregation from worshipping in the church. The answer of defendants denies that those who appealed, called on the elders of the Eagleville and Lock Haven churches, and held the meeting of 25th of June, are a majority of the congregation; on the contrary, aver that they compose but a small minority; that O. T. Noble and A. M. De Haas, neither of them members of the congregation, but acting as a committee for the meeting, attempted to take possession of the church property, and turn it over to the minority composing the meeting, thus ousting the regular organization, and put-

ting a wholly irregular one in control. They admit they resisted this unauthorized interference. They further aver that one Rev. W. L. Hayden, of Bellefonte, came with the sheriff at the hour of public worship, on the 10th of August following the meeting, and read a lecture or proclamation to them, commanding them to surrender possession of the church to the minority, which they refused to do. They further aver that the action of the 25th of June meeting, with the elders of the churches of Eagleville and Lock Haven, and clergymen from other congregations, was wholly unauthorized, and unknown to the rules and discipline of the church; that there exists no other power to adjust differences in a Disciples congregation than the elders and the congregation, and the congregation alone can depose officers duly elected; that this was a regular and fully organized congregation, with a duly-elected pastor, Rev. G. W. Headley; that the defendants, the duly-elected officers, representing a majority of the congregation, do not exclude any, but invited all the members to worship in said church. They therefore pray that the bill be dismissed, at plaintiffs' costs. The court appointed the late D. S. Keller, Esq., master, to report facts and suggest decree. He took much testimony, and heard full argument by counsel, but died before reporting to the court. Clement Dale, Esq., was appointed in his stead, who, without hearing the argument, made report. He suggested for decree that defendants be enjoined from acting as officers, or otherwise interfering with the occupation of the church, and that some person be appointed to give two weeks' notice of a congregational meeting of the members now in good standing, for the purpose of electing two elders, three deacons, and three trustees, to serve for two years, and thereafter the elections to be conducted according to the usages of the church; the same person appointed to give notice to preside at the election; after the election, the terms of present incumbents' office to end. The president judge approved the report of the master, made in substance the decree suggested by him, and appointed A. M. De Haas, one who sided with plaintiffs, to give notice and preside at the meeting of the congregation. The two associate judges filed a dissenting opinion, dismissing the bill, at the costs of plaintiffs. We have before us now the appeal from the decree of the president judge awarding the injunction.

Our power of adjudication in disputes between warring church parties is limited. In such cases we can look into the rules of a church organization only to ascertain the church law, and, if that be not in conflict with the law of the land, all we can do is to protect the rights of parties under the law they have made for themselves. Our Brother Williams has so fully discussed this subject, and so clearly stated the rules that must govern courts in such litigation, in the late case of *Krecker v. Shirey*, 163 Pa. St. 551, 30 Atl. 440, that we need not repeat them.

Each party here claims to be a majority.

When this trouble arose, the defendants were in office. Presumably, they were put there by a majority, and there is no evidence even offered to rebut this presumption. It is admitted that their term of office was indefinite, and they could only be deposed by a majority of the members. Assuming that a majority of the members demand the removal of these officers, what method should they legally adopt to effect their purpose? The law is settled that it must be done in compliance with the rules and discipline of the church. "A majority of a church organization may direct and control church matters consistently with the particular and general laws of the organization or denomination to which it belongs, but not in violation of them." *Sutter v. The Church*, 42 Pa. St. 503. The master finds as a fact that every Disciples congregation is practically independent. Other congregations of the same denomination may advise, but there is no superior tribunal of appeal. Both parties concede that they recognize no rule of conduct in cases of dispute except the New Testament. Alexander Campbell, the Disciples' greatest preacher, if not their founder, says: "It [the church] knows nothing of superior or inferior church judicatures, and acknowledges no laws, no canons or government, other than that of the Monarch of the universe and its laws." Daniel Sommer, an authority in the church, discusses the whole subject; and, while he favors an appeal to other churches for advice and aid in allaying church dissensions, he comes to this conclusion: "The question is often asked, have we no right to appeal from the decision of a church? Certainly, the right of appeal is as free as the air we breathe. For our own justification, we may appeal to one church or a dozen, to one man or a hundred. But, among religious people who are strictly congregational in their church government, there is no authority in any tribunal that may be thus selected, especially a tribunal chosen by only one party. The decision of such a tribunal may have a moral weight, but it has no legal authority. There is nothing official about committees, even if mutually chosen. * * * As each family is a separate government by itself, so is each congregation. No other family on earth has a right to come in and dictate to me and my family, and no other congregation on earth has the right to come in and dictate with reference to the affairs of the congregation where I hold my membership." Many other authorities were put in evidence before the master. The decided weight of them tends to establish the rule in this particular denomination that each congregation is absolutely independent of any legal control by any other congregation, or by the clergy or officers of such other congregation. What are the admitted facts here? Against the protests of defendants, delegations from the Eagleville and Lock Haven churches, two ministers, one from Bellefonte and one from Williamsport, met with members of this congregation outside the church, and, by a

vote, deposed these defendants, and elected in their places part of these plaintiffs, and approved and continued in office part of them. Where, in the rules of the church organization, exists the semblance of authority for this proceeding? The master does not point it out, and we have failed to find it in the evidence. It is said that Leathers and one of the Gardeners were present at one of the hearings before the 25th of June, and had notice of the meeting. This is denied. But assume it to be true; both objected to the meeting when held, and refused to take part. We decline to consider the arguments bearing on the fairness and desire for peace displayed by the respective parties. Discussion of this subject would neither determine the existence of authority in the meeting, nor the want of it. In the exercise of such a high authority as was attempted here, parties must point us to a clear, "Thus saith our church law." We are of opinion that the meeting of 25th June was wholly without authority to depose the old officers, or to elect new ones.

But it is asked: "If the members represented by these plaintiffs be in a majority, how shall they obtain the rights of a majority?" We reply: "By exercising them as members of the congregation, and as the majority for more than 60 years has exercised them." The reply to this, perhaps, is: "Those in possession will exclude us from lawful participation in congregational government." We are averse to assuming that any of the members of this congregation, now that their lawful course of action is pointed out to them, will act with lawlessness; but, if peace among members of a Christian church be impossible, then the courts are open to the wronged members, as members, and such remedy as the law warrants will be afforded. But the courts cannot sustain wholly unlawful attempts to right even wrongs. The decree of the court below is reversed and set aside, and the bill is dismissed, at costs of plaintiffs.

(177 Pa. St. 606)

BLOOD v. CREW LEVICK CO.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

VENDOR AND PURCHASER—ASSUMPTION OF MORTGAGE—LIABILITY OF GRANTEE—PAROL AGREEMENT—RES JUDICATA—AFFIDAVIT OF DEFENSE.

1. The acceptance by a vendee of a conveyance in fee with stipulation that he shall pay certain incumbrances on the property amounts to an express covenant to pay them; and his liability on such covenant is not affected by a parol agreement with the vendor that he shall not be liable. *Blood v. Crew Levick Co.*, 33 Atl. 344, 171 Pa. St. 328, followed.

2. The averment in an affidavit of defense that a bill in equity, filed in the same court by the same plaintiff against the defendant upon the same cause of action, "was so proceeded in that it was by the court dismissed," is not sufficient to raise the question of *res judicata*.

3. Where a vendee has covenanted to pay a mortgage upon the property conveyed as part of

the purchase money, the existence of cross demands against the vendor is no defense to an action to recover the amount due upon the mortgage.

Appeal from court of common pleas, Warren county.

This was an action of assumpsit by Clara S. Blood, executrix of the estate of A. R. Blood, deceased, for the use in part of the Brown Oil Company, against the Crew Levick Company. From a judgment for plaintiff, defendant appeals. Affirmed.

On the 29th of April, 1889, A. R. Blood, who owned some oil-producing lands, both freehold and leasehold, sold them to the Brown Oil Company, and received negotiable notes of the Brown Oil Company, secured by purchase-money mortgage on the lands sold. Blood, prior to May, 1891, bought these lands back from the Brown Oil Company, and agreed to take up their outstanding notes, and pay or extinguish their debt on the mortgage. Before he had done so, however, he sold the property to the defendant "under and subject" to the lien of this Brown Oil Company mortgage to him. He also inserted in the deed to defendant an agreement or condition that the conveyance should be accepted by defendant upon the express agreement and understanding that it should pay this mortgage debt of the Brown Oil Company. This action was brought for the purpose of obtaining payment of the outstanding notes which were unpaid at the time of its commencement.

Allen & Sons and Theodore F. Jenkins, for appellant. H. E. Brown and Samuel T. Neill, for appellee.

WILLIAMS, J. The judgment now appealed from was entered for want of a sufficient affidavit of defense. The original and supplemental affidavits of defense are, therefore, to be examined to see if they set forth any ground of defense good against the Brown Oil Company. Looking at them as constituting together a statement of the defendant's case, we find four lines of defense alleged. These are: First, a denial of liability under the covenants contained in the deed under which the defendant acquired title to the freehold estate; second, the existence of a parol understanding or agreement between A. R. Blood, the vendor, and the defendant, that the defendant should not be "personally liable" for the payment of any part of the mortgage of the Brown Oil Company; third, an adjudication in favor of the defendant upon the question of its liability, resulting from the dismissal of a bill in equity filed in the same court by the same plaintiff against the defendant. The fourth is the existence of cross demands against A. R. Blood for the nonpayment of incumbrances upon the property conveyed by him to the defendant, not assumed in any manner by it, and some of which had been proceeded upon

by the holders, to the great loss, as it is asserted, of the defendant.

Is either of these a good defense against the use plaintiff in this case? The first is effectually disposed of by the case of *Blood v. Crew Levick Co.*, 171 Pa. St. 328, 33 Atl. 344, in which we held that the acceptance by the defendant from A. R. Blood of the deed for the properties conveyed in fee, with its stipulations relating to this and other incumbrances, amounted to an express covenant to pay them, which would support an action in the name of the covenantor for the use of the holder of the mortgage. We are agreed that the deed was correctly interpreted in that case, and that the question of the liability of the defendant upon its express covenant is not an open one. Since that case was decided, substantially the same question has arisen in the court of errors and appeals of New Jersey in the case of *Green v. Stone*, 34 Atl. 1099. In that case a vendee had covenanted to pay a mortgage covering the property purchased by him. Its amount was taken into consideration, as in this case, as part of the purchase money, and was to be paid directly to the holder of the mortgage. Proceedings for foreclosing the mortgage were entered upon, and the property brought to sale. It did not bring enough to pay the mortgage debt, and the purchaser was held liable to the holder of the mortgage on his covenant for the residue of the mortgage debt. A parol agreement was set up in that case, as in this, that the purchaser was not to be personally liable on his covenant; but, in the absence of fraud or mutual mistake, the court declined to reform the covenant sued on. The reason for this holding is very plain. When a grantor conveys land by his deed upon terms and conditions stated therein, the grantee, by accepting the deed, consents to its conditions. He is bound by them as fully as he could have bound himself by signing and sealing the covenants and conditions contained in the deed, and they may be enforced by the persons in whose behalf they are made with substantially the same effect.

The second line of defense is equally unavailing. It is not alleged that anything was omitted from or added to the deed by fraud, accident, or mistake. It is not alleged that it was incorrectly read or explained to the defendant. It is, in substance, an averment that the defendant understood the stipulation that it was not to look after the individual notes secured by the mortgage as relieving it from its express covenant to pay the mortgage itself. This construction was not adopted in *Blood v. Crew Levick Co.*, *supra*, and cannot be sustained. The parties dealt at arm's length. The amount of this mortgage was part of the purchase money which the defendant agreed to pay for the property it purchased. It was to be paid, not to Blood, but to his creditor; and this was expressly provided for by the covenant in the deed. In the absence of any definite

allegation of fraud or mistake, it is elementary law that the written covenant must prevail.

The allegation of "res adjudicata" does not rest on any such statement of the case, or of the point decided in the equity proceeding, as would enable us to determine whether the court below was in error or not. It may well be that the bill was dismissed because the plaintiff's remedy was thought to be at law, and in just such a form of action as we now have before us. The averment in the affidavit of defense is "that the said bill was so proceeded in that it was by the court dismissed." This does not show us what was decided, or the reason for which the bill was not entertained.

This brings us to the fourth and last line of defense, viz. the existence of cross demands against A. R. Blood. If this action was brought for the recovery of purchase money belonging to A. R. Blood, and payable to him as owner, a cross demand could be properly set up against him. But, while it is for purchase money for property sold to the defendant by Blood, it is for the use of one to whom so much of the purchase money as is now in controversy was appropriated at the time of the purchase, and to whom, by the covenants in the deed, the defendant undertook to make payment. The amount of this mortgage debt was a part of the purchase money to be paid for the property conveyed, and it was to be paid directly to the holder of the mortgage, who is now asking payment. It is alleged that there were other incumbrances upon the property that the vendor agreed to remove, and that he has not done so. The defendant was at the time content to take the vendor's covenant of general warranty as the security for the payment of these known incumbrances, and upon this basis to enter into the covenant to pay the plaintiff's mortgage. There has been no change in the situation since. Nothing is now known that was not fully known at the time, and that did not enter into the transaction, when the covenant on which this action rests was made. A party may debar himself by his own agreement or by his conduct from insisting upon a set-off. *Ardesco Oil Co. v. North American Oil & Min. Co.*, 66 Pa. St. 375; *Reed v. Penrose's Ex'x*, 36 Pa. St. 214. The defendant is in that situation. It is not now satisfied with the covenants of general warranty of its vendor as security against the incumbrances he assumed to pay. It thinks it should have more protection than it provided for itself when its own covenant was entered into. If so, its remedy is against its vendor. It may be that the covenant to pay this mortgage was an improvident one. It may be that the warranty of A. R. Blood is an inadequate protection for the defendant against incumbrances the existence of which it knew at the time it accepted the deed for the freehold properties, but the payment of which it did not assume. This is not our question.

The point we are to consider and determine is whether the failure of Blood to pay the debts which he promised to pay is any just reason for relieving the defendant from its express covenant to pay this mortgage, made with full knowledge of all the circumstances, and upon such security for Blood's performance as was at the time satisfactory. Upon this question our judgment is in harmony with that of the learned judge of the court below. The judgment was rightly entered, and is now affirmed.

(173 Pa. St. 485)

**BUCHANAN v. SUPREME CONCLAVE
IMPROVED ORDER OF
HEPTASOPHS.**

(Supreme Court of Pennsylvania. Nov. 11, 1896.)

INSURANCE—FRATERNAL ASSOCIATIONS—NONPAYMENT OF ASSESSMENTS—RIGHTS OF BENEFICIARY.

Where a person holding a benefit certificate in a fraternal society becomes insane, and his daughter, to whom the certificate is payable on his death, requests the proper officer of said society to notify her of any assessments, nonpayment of an assessment will not work a suspension of the certificate, in the absence of the requested notification.

Appeal from court of common pleas, Allegheny county.

Action by Mabel L. Buchanan against the Supreme Conclave Improved Order of Heptasophs to recover on a benefit certificate. Judgment for plaintiff, and defendant appeals. Affirmed.

The trial court (Slagle, J.) rendered the following opinion on refusing a motion for a new trial: "This was an action upon a benefit certificate issued to D. H. Buchanan, and made payable to the plaintiff, his daughter. A verdict was rendered in favor of plaintiff. A motion for a new trial was made by defendant, for which a number of reasons have been assigned. We think there was sufficient evidence for submission to the jury of the questions of fact, and only two of the reasons assigned need to be considered. The fourth assignment is as follows: 'Witnesses for plaintiff having testified that D. H. Buchanan did not, to their knowledge, receive his copy of the Advocate in September, 1894, the court erred in charging the jury that mailing the said Advocate at Baltimore to the proper address of D. H. Buchanan was prima facie evidence that he received it, but that that evidence might be rebutted.' The court did not instruct the jury as stated. It was contended by plaintiff that the notice published in the Advocate was not the notice required by the constitution of the order; that it was a notice addressed to the conclaves, and should have been addressed to the members. The court held that the notice was sufficient in form. It was further contended that there was not sufficient evidence of mailing. The court submitted the question to the jury as follows: 'Now, was this

placed in the post office, properly addressed to Mr. Buchanan at the place of his residence, of which the order had notice upon their records? If so, then notice was given.' Counsel for plaintiff contended that they might show that it had not been received. It would probably have been better to have said that it was immaterial whether it had been received or not, the court having practically instructed the jury that there was no evidence to rebut the presumption that it had been received, and may have fallen into an error in saying, 'However, if, under all the evidence in the case, you are not satisfied that this notice was not properly sent and received, the defendant has not made out a case of suspension.' But this certainly could have done no harm, as the case was submitted to the jury on the question which is the subject of the fifth assignment, as follows: 'The court erred in its charge to the jury in stating that Mabel Buchanan, the plaintiff, had an interest in the benefit certificate sued on, and that she was entitled to notice of the calling of assessments, for the nonpayment of which D. H. Buchanan was suspended, if said D. H. Buchanan was mentally incapable of receiving or of understanding the meaning or effect of said notice, there being no provision in the law of the defendant entitling the plaintiff to any such notice in this case.' This is not in the language of the court, but is substantially correct. There was some evidence of the incapacity of Mr. Buchanan at and before the assessment of September, 1894, was made, and that it continued until his death. It was also in evidence that before the assessment was made Mabel Buchanan, the beneficiary, had written to the financial officer to whom all assessments were payable, referring to her father's condition, stating that he was careless, and liable to neglect them [the assessments]; that she had at various times paid them; and asking, 'If you find Mr. Buchanan won't pay them, please let me know, so that I can make an effort to do so.' In view of this evidence the court instructed the jury that Mabel Buchanan had an interest in that certificate. It is true that it is one that was subject to the voluntary control of her father. Therefore she had certain rights, and, if her father was insane, or incapable of attending to business, she had a right to keep this certificate alive; and, when she notified the proper officer, if she did, of her intention to keep it alive notwithstanding what her father might do, she had a right to do it. If he was capable of acting, no action of hers would keep it alive, because he had the power to destroy her rights at any time. But, if he was incapable of acting, she would have the right to say to this officer of this society, 'My father is not capable of attending to this matter, and I will pay these assessments until he is.' The conclusion of the whole matter was stated as follows: 'Now, if her father was in such actual condition as to make him incapable of acting in this matter, she, as the beneficiary, had a right to pay the assessments, and, when she asked to be informed of any assessments

that were due I think it was the duty of the officers to notify her before any suspension was made; and, if they neglected to do it, then they could not work any suspension of this certificate.' This is the substantial testimony in the case. There is abundant authority for the position of the plaintiff's counsel that where the certificate of a beneficial association provides that a failure to pay any assessment within a certain time shall render it null and void, time is of the essence of the contract, and failure to pay within the time designated renders the certificate null and void; and that, where there is no provision of the contract which declares expressly or by necessary implication that sickness or insanity or similar incapacity shall excuse the payment of any assessment on the day it is due, the courts will not grant relief against such contingency. This is simply to hold that every one is bound by his contract deliberately made. However, the reasons for this seemingly hard rule are indicated in *Bac. Ben. Soc.* § 384, where he says neither insanity, sickness, nor absence is an excuse for non-payment of assessments, the payment being an act that can be performed by the member or by some other person. This marks the distinction between this case and those to which he finds the rule to have been applied. The statement of the text is possibly too broad, but certainly any one related to the member or interested in his estate may come to his relief under such circumstances, and especially when he is named as his beneficiary under his certificate. The beneficiary has an interest in the certificate, and, although it does not become absolute until the death, it is an actually existing interest until annulled under the rules of the order. So long as it remains in force, it belongs to him exclusively. Upon the death of a member it passes to the beneficiary as his own, and not as representative of a member. *Hamill v. Supreme Council*, 152 Pa. St. 537, 25 Atl. 645. If the plaintiff, having knowledge of the assessment, had offered to pay it to the proper officer, there can be no question but that he would be bound to accept it. When the offer was made in advance, good faith required that the beneficiary should have the opportunity to preserve her rights, not against the voluntary act of the member, but against neglect caused by his inability to act. She was, therefore, entitled to notice upon proper request made. No notice was given, and it appears from the evidence that neither the plaintiff nor her mother had knowledge of the assessment; and, if plaintiff had actual knowledge of the assessment, it would be fatal to her claim. This gives pertinency to the testimony of the plaintiff and her mother that they did not see or know of the notice by publication. The only other question is as to the party to whom the request for notice was made. Plaintiff's request was sent to the financier of the local conclave. He is the only officer with whom individual members come in contact. To him all assessments are paid, and the order should be bound by his acts. The question in

this case seems to be new. We think the law ought to be and is as given to the jury, and a new trial must therefore be refused."

J. A. Langfitt and S. A. Will, for appellant.
A. M. Robb and Young & Trent, for appellee.

PER CURIAM. We find no error in this record. For reasons given by the learned trial judge in his opinion refusing a new trial, the judgment should not be disturbed. Judgment affirmed.

(177 Pa. St. 638)

In re BOROUGH OF KANE.

Appeal of KANE et al.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

TRUSTS—APPOINTMENT OF TRUSTEES—VACANCIES—AMENDMENT TO PETITION—PRACTICE.

1. A trust will not be declared void in a proceeding instituted merely for the purpose of securing the appointment of trustees to fill existing vacancies.

2. Where a declaration of trust provides that in case of the death, resignation, or refusal to act of either of two trustees, "or of both of them," a successor may be appointed by the court upon the application of the remaining trustee, but fails to provide any method of appointment in case both offices are vacant, trustees may be appointed in the latter case by the court upon the application of *cestuis que trustent*, under the act of June 14, 1836.

3. Where a petition for the appointment of trustees has been presented by a borough, the affidavit to a motion to amend may be signed by the solicitor of the borough, even though he was not one of the signers of the original petition.

Appeal from court of common pleas, McKean county.

This was a petition of the borough of Kane for the appointment of trustees for certain lands which had been held in trust for the borough. The petition was opposed by the heirs of one of the late trustees. The court of common pleas appointed trustees as prayed for, from which order this appeal was taken. Affirmed.

The affidavit to a motion to amend the petition in this case was signed by Neil C. MacEwen, the solicitor of the borough of Kane, who was not one of the signers of the petition itself. The other facts appear in the opinion of the court.

A. P. Huey and Jack & Roberts, for appellants. MacEwen, Berry & Edgett and R. S. Stone, for appellee.

STERRETT, O. J. The facts of this case are fully set forth in the amended petition of the appellees, including the declaration of trust, a copy of which is made part thereof. The only questions that need be noticed are those relating to the regularity of the appointment of trustees to fill the vacancy occasioned by the death of William Biddle and Thomas L. Kane, the trustees named in said declaration of trust. In their petition, presented in February, 1895, the burgess and town council of the borough

of Kane, appellees, represent that on September 25, 1868, the McKean & Elk Land & Improvement Company and William Biddle and Thomas L. Kane united in a declaration of trust in regard to certain lands therein described. Among other things, that declaration recites, in substance, that said company had conveyed to said Biddle and Kane, as trustees, three certain tracts of land, containing about 700 acres, reserving the waters and water rights, and provides that said trustees shall hold the same, subject to said reservation, "for the benefit and advantage of the borough of Kane and of the inhabitants thereof," to be solely and exclusively used and occupied as and for public parks under such rules, etc., as said trustees and their successors may from time to time make for the benefit of said cestuis que trustent, etc.; that said trustees may, whenever they deem it proper, subject to the approval of the court of common pleas of McKean county, convey said lands to the proper authorities of the borough of Kane, to be held on same trusts; and that the water rights shall be held in trust, to be conveyed to the Kane Gas & Water Company, or to such other corporation or persons as to said trustees may seem most advantageous for said borough, for the purpose of supplying it with water. The declaration of trust further provides that, "in case of death, resignation, or refusal to act of either of said trustees, or of both of them, or any successor appointed as hereinafter stipulated, the remaining trustee for the time being, and so often as such vacancy shall occur, shall apply to said court by petition, * * * requesting the said court to nominate and appoint a suitable person to act with him in place of said trustee." It is further averred in the petition that the borough of Kane and the inhabitants thereof are the beneficiaries named in said declaration of trust; that Thomas L. Kane died about 1883, without having conveyed the lands in accordance with said declaration, and thereupon the title vested in the surviving trustee, William Biddle, who, in the year 1887, died, without having had a co-trustee appointed, and without having executed said trust; that, by reason of the premises, vacancies in the office of trustee existed; and praying the court to appoint new trustees as provided in the declaration of trust, and section 5 of the act of May 23, 1855 (Purd. Dig. 1856, pl. 57). The petition is properly signed, and sufficiently verified. It was afterwards amended by allowance of the following properly verified averment, viz.: "The borough of Kane, and inhabitants thereof, represented in this petition by the burgess and town council of said borough, are the cestuis que trustent mentioned in said declaration; the said borough * * * being the organized municipal territory and its inhabitants in said declaration mentioned as 'the borough of Kane and the inhabitants thereof.'" The appellants, contending that the alleged trust is void, and claiming to be part owners of the title through Thomas L. Kane, one of the original trustees,

resisted the amendment, and especially the decree appointing new trustees to fill said vacancies. One of their objections was that the borough was not organized when the trust was created. Without referring at greater length to the provisions contained in the declaration of trust, or to the averments in the petition as amended, it sufficiently appears that Thomas L. Kane, through whom appellants claim title, by his voluntary act and deed united with others in creating the alleged trust; that the office of trustees thereby created has become vacant by reason of the death of both the original trustees without the appointment of a successor to either, and without the execution of said trust by them, or either of them, etc.; that this proceeding was not instituted for the purpose of declaring the trust void, but merely for the purpose of securing, in an orderly way, the appointment of trustees to fill said existing vacancies. While the declaration of trust does not, in terms, specify the form of application in case of a vacancy occurring by the death or default of both trustees, it does provide in general terms for application to court by petition. This was evidently an oversight, for the same clause providing for the application of a co-trustee, etc., recites the case of "death or refusal to act of either of said trustees, or both of them." But there is no difficulty on that score. If the declaration of trust is not sufficient to warrant the application in form as presented, ample authority will be found in the act of June 14, 1836. There is no merit in the objection to the form of the application.

The objection to the amendment of the petition is also purely technical, and devoid of merit. It is not pretended that the averments contained in the amendment are either inaccurate or untrue. The nature of the amendment is such that the affidavit as to its truth could be made quite as well by the borough solicitor as by any other officer or citizen of the municipality. The amendment was not improperly allowed, and with that upon the record no reasonable objection to the appointment of trustees to fill the existing vacancy remained. If the appellants think it worth while to contest the validity of the trust, they cannot be prejudiced by our affirmance of the decree now before us. It is unnecessary to notice the motion to quash, etc., further than to say that it is denied. Decree of September 9, 1896, affirmed, and appeal dismissed, with costs, to be paid by the appellants.

(173 Pa. St. 342)

WILLIAMS v. GUFFEY et al.

(Supreme Court of Pennsylvania. Nov. 9, 1896.)

OIL AND GAS LEASES—CONSTRUCTION.

An oil and gas lease for "the full term of twenty (20) years" provided that in case gas was obtained in sufficient quantities, and utilized, the consideration should be \$500 for each and every well drilled per annum; that one well should be completed within six months, and, in case of failure, the lessees should pay \$73 per

annum in full for such yearly delay, until the well should be completed; that failure to complete one well in such a period, or pay such rental, rendered the lease void; and that "if oil and gas, or neither, is found on this property within (2) two years from date, then this lease to expire and be of no effect." Held that, where the lessees permanently ceased to use a gas well drilled on such land before the expiration of the 20 years, they were not liable for the annual rent thereafter.

Appeal from court of common pleas, Allegheny county.

Action by Vin E. Williams against J. M. Guffey and A. W. Mellon to recover rent alleged to be due under a lease to defendants by Gottlieb Minsinger, who afterwards conveyed the leased land to plaintiff. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

The lease provides that "in consideration of the stipulations, rents, and covenants hereinafter contained, on the part of the said parties of the second part, their executors, administrators, and assigns, to be paid, kept, and performed, has granted, demised, and let unto the said parties of the second part, their executors, administrators, and assigns, for the sole and only purpose of drilling and operating wells, and storing, transporting, and conveying petroleum oil or gas through, over, and from all that certain tract of land situated in Hempfield township, Westmoreland county, and state of Pennsylvania; * * * to have and to hold the said premises, for the said purpose only, unto the parties of the second part, their executors, administrators, and assigns, for, during, and until the full term of twenty (20) years next ensuing the day and year above written." After providing for the delivery, in pipe lines, of the one-eighth of the petroleum oil discovered, the lease provides: "It is further agreed that if gas is obtained in sufficient quantities, and utilized, the consideration in full to the party of the first part shall be five hundred (\$500) dollars for each and every well drilled on the premises herein described, per annum, payable within sixty days after completion of such well, and thereafter yearly in advance, at Third National Bank, Pittsburg, Pa." After providing for the completion of one well within six months from the date of the lease, and, in case of failure, to pay \$73 per annum in full consideration for such yearly delay, until the well should be completed, and providing that failure to complete one well within said period, or pay the above rental, "renders this lease null and void, and to remain without effect between the parties hereto," the lease provides: "If oil and gas, or neither, is found on this property within 2 (two) years from date, then this lease to expire and be of no effect." The defendants did commence and complete one well on the premises, and found gas, within two years from the date of the lease, in sufficient quantities, and utilized the same, and continued to produce and utilize gas from the

well so completed, from the time of completion thereof until the 1st day of July, 1893. And plaintiff claims that, by reason thereof, there became due and payable to the plaintiff on the 21st day of November, 1893, and yearly thereafter, on the 21st day of November, the sum of \$500. The defendants paid the rentals due under said lease which were payable thereon November 21, 1889, November 21, 1890, and November 21, 1891, but failed to pay any further rentals; and this suit was for the rentals payable November 21, 1892, and November 21, 1893, amounting to \$1,000. No oil was found on the premises. In July, 1892, the defendants ceased to operate said well, claiming that the gas was exhausted. The property still remained in possession of the defendants until January or February, 1893, when it was dismantled, the property of defendants removed from the premises, and the lease tendered back to the plaintiff, which he declined to accept.

The following points were submitted in writing: "Defendant requests the court to charge the jury that, under the evidence in this case, their verdict must be for defendants." Refused. "The plaintiff asks the court to charge that, under all the evidence in the case, the plaintiff is entitled to a verdict for all the rental claimed in plaintiff's statement, with interest to date." Refused.

The charge of the court is as follows:

"This is an action growing out of a lease which in this region is of a kind very common,—an agreement giving to the lessee or his assigns the right to drill for oil or gas, providing that wells shall be drilled within a certain time, or that in the event of failure to do so, that certain penalties should ensue. It is not with such a clause of the lease that we have to do in this case. A well was drilled on this farm, and gas was produced in quantities which held the parties to have the well equipped for the utilization of the gas, and it was connected with the pipe lines and used for a time. The rent or amount of money that was to be paid annually for the use of this well was fixed by this clause in the lease: 'It is further agreed that if gas is obtained in sufficient quantities, and utilized, the consideration in full to the party of the first part shall be \$500, for each and every well drilled on the premises herein described, per annum, payable within sixty days after completion of such well, and thereafter, yearly, in advance, at the Third National Bank, in the city of Pittsburg.' Under the terms of this lease, the parties had a right to drill for oil or gas. Under the terms of this lease, if they found gas, they were to pay for the wells, under this clause, \$500 per annum. The first payment had to be made within 60 days after the completion of the well; and for subsequent years they had to pay \$500 for each well, in advance. It was for that well. It was not for rent of the premises generally. It was for the use of that well. The rental for this farm, under this

lease, or the amount that was to be paid under this agreement, was not limited to the payments made for these wells used for the purpose of gas. If the parties had gone on after the gas had been discovered, and discovered a profitable oil well, the owner of the farm would still have been entitled to his royalties, under another clause in this lease, in oil. This was, then, an agreement to pay for the use of the wells,—the gas wells. The prerequisite to the payment on any gas well was that gas should be found in sufficient quantities to utilize. This one well was drilled, and it was utilized. No others were drilled, and it is only with this well which you have to do. The rental for this well was paid down to November, 1891; and in November, 1891, a payment of \$500 was made, being the payment in advance for the year terminating in November, 1892. Down until that time there is no question. The rent was paid to November, 1892. Was this well utilized after that time? The defendant has undertaken to show you that the gas ceased to be used from that well in June or July, 1892, and that its connection with the pipe lines—that is, the means by which it was carried to the market—had been severed, and the connecting pipe taken out, which led over to another farm, some time in July, 1892. They say that at that time they ceased to use it, and that it was their intention permanently to do so. The severance of the connection and the taking up of the line leading to the other farm ended its use as a gas well permanently. In December the tubing was directed to be drawn, and, in the following spring some time, the derrick was taken down, and the tubing removed from the premises, and there is no evidence that anything has been done on the farm since. If you believe the testimony of the witnesses in the case, the well had no gas in it whatever that was discernible when the tubing was drawn. Now, gentlemen, if these defendants, or those acting under the lease because of any assignment, in July, permanently ceased to use this as a gas well, then there can be no recovery in this action. If they simply suspended the use of it, intending to resume, and continued to hold it thus until December, experimenting with it in the hope or expectation that the gas would return in sufficient quantities, and so continued down until December, when they found that the gas had departed altogether, then they would be liable for the rental of \$500 coming due November 21, 1892, with interest from that date down to the present time. But in case they had permanently ceased its use before the 20th of November, and were not at that time holding it with the intention of holding it as a gas well, then there could be no recovery in this action. The defendants would have the right within a reasonable time afterwards, under this lease, to remove their casing and such other machinery as they had, in a reasonable manner. They would

have a right to a reasonable time in which to get the property away, considering the nature of the property and the difficulty of taking it away.

"The learned counsel representing the plaintiff has requested the court to charge you 'that, under all the evidence in the case, the plaintiff is entitled to a verdict for all the rental claimed in plaintiff's statement, with interest to date.' This point is refused. The learned counsel representing the defendants has requested the court to charge you 'that, under all the evidence in this case, the verdict must be for the defendants.' This point is refused. The question of fact is for you, gentlemen, and you will pass upon that under the evidence, as in any other case, finding in favor of the party to whom the weight of the evidence belongs. You will take the case, gentlemen, and dispose of it."

To which charge of the court counsel for plaintiff requests an exception. Exception allowed, and bill sealed.

The assignments of error are as follows: "(1) The court erred in refusing to instruct the jury as requested by the plaintiff, which request was as follows: 'The plaintiff asks the court to charge that, under all the evidence in the case, the plaintiff is entitled to a verdict for all the rental claimed in plaintiff's statement, with interest to date.' (2) The court erred in charging the jury as follows: 'Under the terms of this lease, if they found gas, they were to pay for the wells, under this clause, \$500 per annum. The first payment had to be made within sixty days after the completion of the well; and for subsequent years they had to pay \$500 for each well, in advance. It was for that well. It was not for rent of the premises generally. It was for the use of that well.' (3) The court erred in charging the jury as follows: 'Now gentlemen, if these defendants, or those acting under the lease because of any assignment, in July, permanently ceased to use this as a gas well, then there can be no recovery in this action.' (4) The court erred in charging the jury as follows: 'But in case they had permanently ceased its use before the 20th of November, and were not at that time holding it with the intention of holding it as a gas well, then there could be no recovery in this action.'"

White & Childs, for appellant. Willis F. McCook, for appellees.

PER CURIAM. The learned trial judge was clearly right in refusing to withdraw the case from the jury by giving the binding instructions recited in the first specification of error. We find no error in either of the excerpts from the charge recited in the three remaining specifications respectively; nor do we think there is any question in either of them that calls for discussion. The assignments of error are accordingly dismissed, and the judgment affirmed.

(178 Pa. St. 331)

**NATIONAL PREMIUM BUILDING &
LOAN ASS'N v. SEIBERT.**

(Supreme Court of Pennsylvania. Nov. 9,
1896.)

PLEADING—AFFIDAVIT OF DEFENSE—SUFFICIENCY.

In an action by a building and loan association to recover the balance due on a mortgage on a leasehold executed by one S., and taxes and water rents, it appeared by plaintiff's statement and the affidavit of defense that S. owed defendant \$500, and assigned the lease to defendant subject to its terms, and "to the payment of the money owing upon the mortgage of" plaintiff, which defendant assumed to pay; that the mortgage was foreclosed, and the property sold for less than the sum due; that the mortgage was for \$2,300, but at the time S. received only \$1,800; that afterwards S. received from plaintiff \$500, which he paid to defendant, and defendant reassigned the lease to him. The affidavit of defense stated that at the date of the reassignment there were no arrearages due plaintiff; that the remaining \$500 was not paid to S. until after the reassignment; that defendant had no knowledge of the matters in plaintiff's statement showing items alleged to be due on account of said mortgage, taxes, etc.; and that he never was a stockholder in plaintiff's association, and never had any contract relations with plaintiff association under and whereby he might or could become indebted to it. *Held*, that the affidavit of defendant was sufficient to carry the case to the jury.

Appeal from court of common pleas, Allegheny county.

Action by the National Premium Building & Loan Association against Nicholas Seibert. From an order discharging the rule to show cause why judgment should be entered against defendant for want of sufficient affidavit of defense, plaintiff appeals. Dismissed without prejudice.

Omitting the exhibits, plaintiff's statement is as follows: "Nicholas Seibert, defendant in this suit, is indebted to the National Premium Building & Loan Association, No. 3, of Allegheny City, the plaintiff in this suit, in the sum of two thousand and seventy-seven $\frac{41}{100}$ dollars, being a balance due and owing upon a certain mortgage made by a certain Fred. C. Schwartz to the said plaintiff, dated July 18, 1892, recorded in Mortgage Book, vol. 623, p. 242, and city and county taxes and water rents assessed for the years 1894 and 1895 upon the premises mortgaged in said mortgage; also one and a half year's rent from January 1, 1894, to July 1, 1895, due under the lease described in said mortgage; which rent, taxes, and water rents said plaintiff was compelled to pay, and did pay, to preserve its rights to said lease; which said rents, taxes, and water rents the said Fred. C. Schwartz, by said lease, covenanted to pay, but neglected to do so. That the said Nicholas Seibert, defendant, became personally liable to pay said balance owing upon said mortgage and said rent, taxes, and water rents by reason of an assignment of said lease made by said Schwartz to said defendant, dated June 2, 1893, in which it was stipulated as follows, to wit: 'Subject to all the terms, conditions, stipulations, and cove-

nants therein contained,' and also 'subject to the payment of the money owing upon the mortgage of the National Premium Building & Loan Association, No. 3, of Allegheny City, dated July 18, 1892, which said Seibert assumes to pay.' That the said assignment of said lease was accepted by said defendant by an instrument in writing dated June 2, 1893, signed by him, the said defendant, and wherein he expressly accepted said assignment, and covenanted and agreed 'to fulfill the terms of the original lease, and perform the conditions, stipulations, and covenants therein contained as fully as though he were the original lessee'; which covenants he has failed to perform. That the said mortgage became due and collectible on June 17, 1895, by reason of the default made for upwards of six months by said Schwartz and Seibert to pay the weekly dues, etc., secured thereby; and on a writ of fieri facias at No. 227, July term, 1895, issued on a judgment entered on the bond accompanying said mortgage, the said leasehold was sold at sheriff's sale to said plaintiff for ten dollars on July 2, 1895, which sum was applied to the costs on said writ. That the said defendant has been twice notified that all the plaintiff wanted was its money, and that the defendant could have the lease assigned to him on payment of what the property cost plaintiff, but the defendant never offered to do so. That the said Seibert received the whole proceeds of said mortgage. Plaintiff attaches copies of said mortgage, lease, assignment, and acceptance thereof by said defendant, and also an itemized statement of its claim, and makes the same part hereof."

The affidavit of defense is as follows: "Nicholas Seibert, the defendant in above-entitled case, being duly sworn, deposes and says that he has a full, just, and legal defense to the whole of plaintiff's claim and demand filed in this case, the nature and character of which defense is as follows, to wit: That defendant is not, and never was at any time, a stockholder in said plaintiff association, and that he has not at any time ever had any contract relation with plaintiff association under and whereby he might or could become indebted to it. That he is informed and verily believes that, as alleged in plaintiff's statement, Frederick C. Schwartz, by articles of agreement dated July 1, 1892, with Mary E. Schenley, obtained a lease on certain premises situate on Cedar avenue, Allegheny City, Pa. That on July 18, 1892, said Frederick C. Schwartz, a stockholder in said plaintiff association, executed his bond and mortgage to plaintiff association upon said leasehold, conditioned for the payment of the sum of \$2,300, as shown by said mortgage referred to and made part of plaintiff's statement. That of said sum of \$2,300 said plaintiff association paid to the mortgagor therein named only the sum of \$1,800 at the time the same was executed and delivered. That on June 2, 1893, by assignment of said Frederick C. Schwartz to defendant, the said leasehold became vested in defendant,

(178 Pa. St. 356)

RAMLACK v. WOLF.

(Supreme Court of Pennsylvania. Nov. 9, 1896.)

NEGOTIABLE INSTRUMENTS — PAYMENT — QUESTION FOR JURY.

subject to the payment of the mortgage hereinbefore mentioned. That on March 31, 1894, an agreement in writing was entered into between Frederick C. Schwartz and defendant in words as follows, to wit: 'I agree hereby to transfer the foregoing described property to Frederick C. Schwartz upon payment of \$500.00, and other conditions as we may agree upon to me by Frederick C. Schwartz. Frederick C. Schwartz to pay all liens against property. March 31, 1894. Nicholas Seibert.' That the said Frederick C. Schwartz obtained the sum of \$500 consideration expressed in said agreement from the said plaintiff association, and the said agreement was consummated, and said leasehold transferred to said Frederick C. Schwartz, with the knowledge of the said plaintiff association of such reassignment; and the said Schwartz thereupon and thereafter made and continued to make the payments required by the constitution and by-laws of the said plaintiff association, and that at the time of said reassignment there were no arrearages due on the stock in said plaintiff association, which stock stood in the name of the said Frederick C. Schwartz, and carried the mortgage loan referred to. That the foreclosure proceedings referred to in plaintiff's affidavit of claim was made without legal notice to defendant. That defendant has no knowledge of the matters alleged in plaintiff's statement showing items alleged to be due on account of said mortgage and taxes, etc., and rents alleged to have been paid by said plaintiff association, and defendant demands proof thereof. That said mortgage was given as collateral to a bond accompanying the same, executed by the said Frederick C. Schwartz, and defendant is informed, and verily believes, that said plaintiff association, as a matter of law, has no right of action against him based upon the said mortgage and assignment of said leasehold to him, mentioned and specified in plaintiff's statement of claim. That the assignment to him of said leasehold is not such as would in any way make him personally liable to plaintiff association for the amount of said mortgage, or for any part thereof, or for any sum or sums that may accrue thereupon; and that, if plaintiff association paid the moneys, to wit, taxes, etc., and rents as alleged in plaintiff's statement and affidavit of claim, such payment was not made by said plaintiff association for the use of defendant, nor with his knowledge, nor under his instructions or directions."

A. E. Weger, for appellant. S. A. & Chas. M. Johnston, for appellee.

PER CURIAM. We are not convinced there was any error in refusing to enter judgment against the defendant for want of sufficient affidavit of defense. On the contrary, we think the averments of fact contained in the affidavit are sufficient to carry the case to a jury. The appeal is therefore dismissed, at plaintiff's costs, but without prejudice, etc.

In an action by an indorsee of a note against the payee, as indorser, plaintiff, his clerk, and plaintiff's immediate indorser testified that plaintiff took it in payment of an existing indebtedness, and the evidence showed that the consideration for it was a note of such immediate indorser, which was given up, an account, and a certain sum in cash, all aggregating the amount of the note. *Held*, that whether the note was received as payment by plaintiff was a question for the jury.

Appeal from court of common pleas, Allegheny county; Ewing, Judge.

Action by G. J. Ramlack against Joseph Wolf on a note executed to defendant, and by him indorsed and transferred to J. J. McGuire, who indorsed and transferred it to plaintiff. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This action was brought by the holder against the payee of the following note: "\$2,000. Pittsburg, Pa., July 12th, 1893. Four months after date I promise to pay to the order of Joseph Wolf two thousand dollars, at the Freehold Bank, without defalcation, for value received. Adolf Hollander. Indorsements: Joseph Wolf. J. J. McGuire." The plaintiff came into possession of the note on August 29, 1893, just one week before J. J. McGuire, the last indorser, who delivered it to him, confessed judgments amounting to ten thousand dollars (\$10,000), upon which executions issued immediately, and swept away his entire property. The defendant contended that the note in question was obtained from him, and put in circulation, by fraud and undue means on the part of J. J. McGuire. His contention in that regard is clearly stated in the charge of the court to the jury, as follows: "They allege on the part of the defendant that the note was given under these circumstances: They say that Hollander was about to buy a half interest in the liquor business of McGuire, who had a wholesale license, and was carrying on business in the city of Pittsburg, and that this indorsement was given on the note of Hollander, as collateral security, to be good only, and to be used only, in case the liquor license that McGuire had got, to run from the 1st of May [1893], should be transferred to the firm composed of McGuire & Hollander, and that, that license never having been transferred, the consideration failed, and that McGuire was bound to hand it back." The defendant's testimony in support of the allegation of fraud was amply sufficient to be submitted to the jury. Not only did the court of quarter sessions never transfer the liquor license to the proposed new firm, but J. J. McGuire evaded making an application for such transfer, and eventually confessed the judgments above mentioned, upon which his whole business was swept away. And the

court affirmed the defendant's first point, to the effect that, if they sustained his contention in regard to the fraud in circulating the note, "then the plaintiff cannot recover, unless he has shown a purchase for value, before maturity, without notice of the fraud."

The opinion on motion for new trial in the court below was as follows (Ewing, P. J.):

"In this case, under the evidence, which was uncontradicted, there was necessarily a verdict for the plaintiff for that part of the note covered by the thousand-dollar judgment note surrendered by Ramlack, and for the cash paid, and the only question is as to the bill for merchandise which was credited with the balance of the note. The charge fully instructed the jury that, if they found the contention of the defendant to be correct,—that he was an accommodation indorser, and that the note had been improperly used by McGuire,—to enable the plaintiff to recover the amount of this bill, on which the note had been credited, the note must have been taken in payment, and not merely as collateral; and it seems to us that what was payment was fully and sufficiently explained to the jury. We would have been entirely willing that the jury should have found for the defendant as to that balance. But the plaintiff said the note was taken in payment of this bill. His clerk said so, and McGuire said so. In addition, it was not the ordinary taking of a note for the amount of a bill. It is a much stronger case than if the note had been given for the precise amount of the bill. In this case the circumstances, uncontradicted, were that the note was offered by McGuire; it was accepted as payment of the thousand dollars, and that thousand-dollar judgment note was given up; the bill for merchandise was then added to the thousand-dollar note, and the difference, making up the two thousand dollars, was paid in money. These circumstances strengthen the testimony on the part of the plaintiff that the note had been taken in payment, and we are unable to say that the jury was wrong in its finding."

Assignments of error:

"First. The court erred in its answer to the defendant's third point; said point and the answer thereto being as follows, viz.: '(3) If the jury finds from the evidence that the note was obtained from the defendant, Wolf, or put in circulation, by fraud or undue means on the part of J. J. McGuire,—the plaintiff and his witnesses having testified that said note was given to the plaintiff, Ramlack, in part for an antecedent debt and account for beer, etc., amounting to \$889.51,—then the plaintiff cannot recover on the note for the amount, but the defendant is entitled to a deduction of \$889.51 from the amount of the note. Answer. This point is refused, except as affirmed in the general charge.' See *Bardsley v. Delp*, 88 Pa. St. 420; *White v. Phileas*, 106 Pa. St. 173. Second. The court erred in its answer to defendant's fourth point; said point and the answer thereto being as follows, viz.: '(4) If the jury find from the evidence that the note was ob-

tained from the defendant, Wolf, or put in circulation, by fraud or undue means on the part of J. J. McGuire, and if the note was given by J. J. McGuire to the plaintiff in part for a previous note for \$1,000, unless the jury are satisfied that said note was not the ordinary promissory note, but a better and more valuable security, the plaintiff cannot recover the full amount of the note sued on, but the defendant is entitled to a deduction of \$1,000 therefrom. Answer. Refused, except as answered in the general charge.'

"Plaintiff's testimony showed that the only consideration passing from him to McGuire was:

Cash paid	\$ 110 49
The surrender of an old note for....	1,000 00
Amount due on a book account.....	889 51
	<hr/> \$2,000 00

"Defendant contended there was nothing in the testimony of the plaintiff to justify the court in submitting to the jury to find that the note was taken in payment of the book account of \$889.51. The court was asked, in the defendant's third point, to instruct the jury that, if the defendant's contention as to the fraudulent issuing of the note was sustained, then there could be no recovery against the defendant for the amount of the book account. This was refused. And the court, in its charge, submitted to the jury to find whether or not the plaintiff took the note in payment of the book account, or only as collateral security therefor."

William Yost, for appellant. John S. Robb, for appellee.

PER CURIAM. A careful consideration of this record has failed to convince us that there was any substantial error in the trial. On the contrary, the instructions complained of in the assignments of error appear to be correct. The case depended on questions of fact, which were properly submitted to the jury, and by them found in favor of the plaintiff. For the reasons given in the court's opinion on the motion for a new trial, we think the judgment should not be disturbed. Judgment affirmed.

(178 Pa. St. 78)

In re FULTON'S ESTATE.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

EVIDENCE — BOOK ENTRIES — SEPARATE BOOKS — SEPARATION OF ITEMS — ORPHANS' COURT.

1. A separate account book, which is not one of original entries, and which contains no charges except against a decedent, is not admissible to prove a claim against his estate.

2. Where, in a claim against a decedent's estate, it appears that there have been complicated business dealings between the claimant and decedent, involving both personal and real estate, and no final settlement has ever been reached, the matters cannot be separated; and, as the orphans' court cannot deal adequately with the whole account, none of the items can be allowed separately.

Appeal from orphans' court, York county.

This was a claim of J. S. Miller against the estate of A. C. Fulton, deceased. From the de-

cree of the orphans' court allowing certain items of the claim, James S. Fulton, one of the heirs at law, appeals. Reversed.

George S. Schmidt, Cochran & Williams, and N. M. Wanner, for appellant. N. S. Ross and Edward Chapin, for appellee.

MITCHELL, J. The first question raised is on the proof of the claim of Dr. Miller for medical services to the decedent. The book produced contained a large number of entries, beginning more than six years before the presentation of the claim. The auditor disallowed all that appeared to be barred by the statute of limitations, all lumping charges, a large number of items not self explanatory, and allowed the rest. The learned judge below sustained an exception by the claimant, and allowed all the charges within six years, except those containing a lump sum for items not particularly specified. There were other questions raised both as to the claim itself and the mode of proof, but, in the view we take of the case, it is not necessary to notice them.

How far books of original entry may be received as evidence of service of a professional character has not been settled in this state. The earlier cases are full of expressions that such entries are evidence at all only from necessity, and that the custom to which such necessity gave rise extended only to goods sold and labor performed, and that it was exceptional and dangerous in character, and would not be extended. *Crouse v. Miller*, 10 Serg. & R. 155; *Curran v. Crawford*, 4 Serg. & R. 3; *Churchman v. Smith*, 6 Whart. 146, 151. In *Hale's Ex'rs v. Ard's Ex'rs*, 48 Pa. St. 22, the question as to attorney's charges was left undecided, but it was said by Strong, J.: "None of the entries were such as the law admits to be evidence of indebtedness to the persons who made them. Books of original entries are evidence to prove a claim for goods sold and services rendered, if made in the regular course of business; but as they are evidence made by a party for himself, and very often incapable of being tested by other proof, they are to be guardedly received, and only to prove a sale and delivery, or labor for the alleged debtor, for which the law implies a promise to pay." How far, if at all, subsequent practice has enlarged the strict limits thus laid down, we do not need to consider, for reasons to be stated presently. Nor is it necessary to enter upon a discussion of the self-sustaining character of the charges in dispute. It has been held that the charges need not be such as to be understood by the general public if they are intelligible to persons in the business, but, where they are not intelligible to the common understanding, it would seem to be necessary to support them by other evidence as to their meaning and character. *Hough v. Doyle*, 4 Rawle, 291. But there is an insuperable objection in the present case, that the book is not one of entries in the regular course of business. It is a separate book, containing no charges ex-

cept against the decedent. This is explained to have been at the decedent's request, but the claimant was not a competent witness to prove such request. No precedent has been shown for the admission of such a book, and the analogies are all against it. While the question does not seem to have arisen in this form, yet all the authorities hold that the books must show that they are kept in the regular routine of business. That is one of the greatest safeguards of the reliability of such evidence. Thus, alterations or interlineations will discredit the book, and, unless explained, will keep it from the jury. *Churchman v. Smith*, 6 Whart. 146. Its general character may be impeached by showing irregularities in other accounts than the one in issue. *Funk v. Ely*, 45 Pa. St. 444. Unconnected slips of paper, showing charges, are not admissible as a book of original entries. *Thomson v. McKelvey*, 13 Serg. & R. 126. Entries even in a regular book are not evidence of the sale of an article not in the party's business. *Shoemaker v. Kellog*, 11 Pa. St. 310; *Stuckslager v. Neff*, 123 Pa. St. 53, 16 Atl. 94. And in *Smith v. Lane*, 12 Serg. & R. 80, it was said by Tilghman, C. J.: "It is a great objection to these books that they do not contain a daily entry of the general transactions at the will." After a diligent search of the Digests, I have not found any precedent on this exact point; but two cases in New Jersey are instructive as showing the general judicial view in that state to be in accord with our own. In *Wilson v. Wilson*, 6 N. J. Law, 96, the disputed entries were for cash paid, advanced, or lent, and some of them were written on one of the last leaves of the book, with blank leaves between them and the other accounts. Ford, J., was of opinion that none of the cash entries were admissible; and Kirkpatrick, C. J., while not going so far, concurred in excluding the separate entries at the end of the book. In discussing the subject of book entries at some length, he said: "A book of daily entries, containing accounts with different people touching matters in which a man is known to deal or be employed, and which, according to the custom of the country, are usually made matter of accounts, has been admitted as evidence for the jury under all the circumstances of the case, while a detached paper, which might have been made up for the occasion, has been wholly rejected. * * * Now, these last entries appear to me to be no part of the book, properly speaking, but to stand precisely in the situation of a detached paper, and to derive no credit at all from their being written within the cover of the book, seeing they are written upon pages wholly detached from the daily entries and accounts." And in *Swing v. Sparks*, 7 N. J. Law, 59, the same learned judge mentioned among other objections to entries, that they were "all the account against Johnson, in one continued series, without a single intervening charge." We are of opinion that the regularity of the account as to its place in the ordinary books of the business is as necessary as its regularity in other respects, and

that this book, failing in that requirement, must be rejected altogether.

The second question relates to the rejection of the appellant's claim of set-off and credits. The decedent and Dr. Miller had very close and complicated business connections. The evidence shows real estate held in common or in trust; many payments or advances of money on account of such real estate; transfers and satisfactions of judgments; and very numerous checks passing from each of the parties to the other. Through this tangled mass the auditor has gone with great intelligence and exemplary industry, and we should not think of questioning or reviewing the results he arrived at, approved, as they are, by the court below, were it not entirely clear that the scope of his inquiries was too much restricted by considerations of jurisdiction to enable him to do full justice to the parties or terminate the litigation. He separated, so far as was practicable, the matters involving personal and real estate; and, as to the latter, he reported: "The matter of ascertaining the respective interests of the decedent and the claimant in said real estate, and the adjustment of the same, requires other proceedings, and to such proceedings, the auditor is of opinion, should be referred for adjudication and settlement all the checks, payments, and other matters arising out of or pertaining to said real-estate transactions." The court, reaching the same conclusion, said: "No final settlement is shown to have taken place between them; and, on the contrary, what evidence there is on the subject shows there was not. Claims and counterclaims, set-off and counter offsets, were introduced *ad infinitum*; and the introduction of checks or papers showing receipt of money by one from the other was immediately followed by the counter productions of other liabilities to offset it. * * * It was shown that the decedent built houses on ground jointly purchased by claimant and decedent, and paid for the same with his own checks, and that at the same time the claimant was transferring funds or making payments to the decedent. These matters have not been adjusted, and, until they are, the orphans' court cannot entertain jurisdiction of them. * * * I decline, therefore, to allow the claims of set-off, without prejudice to the parties, however, to ascertain and adjudicate the same in the proper forum." The difficulty with this proposed separation of the claims and the offsets is that it is not practicable. The parties made no such separation, and the court cannot do it now. The appellee's own evidence shows that, apart from the item of medical attendance, his claims are for items in a long, complicated, and unsettled account. The auditor, with great ability, showed that two items, the slate quarry claim and the Klinedinst claim, were capable of separate statement and settlement; but he could not show that the parties had ever so stated or settled them. On the contrary, the evidence is that they never did so, and there is

nothing to enable the court to say that, when the whole account is stated, the balance due by decedent on these two items may not be offset by a balance due to him on others. The effect of the adjudication is to allow appellee to enforce payment of part of an admittedly unsettled account, and to turn over the other side to another suit for what may be due to him. This cannot be done. The matters are closely interwoven, and were never separated by the parties. They must go together to a common settlement now. The orphans' court could not deal adequately with the whole account, nor can we in this proceeding. None of the items, therefore, can be allowed separately.

This is a regrettable controversy. The decedent and the claimant stood not only in the double professional relations of counsel and physician to each other, but in close business and personal association. For this reason, probably, their business matters were confined to their own knowledge, and conducted without regard to business formality or prudence; and the sudden death of Mr. Fulton left them so mixed that no tribunal now is likely to be able to say with confidence that it had reached a solution certainly correct. It is a case for amicable adjustment, by reference to one or more arbitrators, to take up the whole account in the same capable manner that the learned auditor took up the part that he thought within his jurisdiction, and reach as equitable a result as is now possible. Failing to agree on this, however, the parties must be left to their remedies on the matters as a whole. Decree reversed, account to be restated in accordance with this opinion.

(19 R. I. 644)

HARTWELL v. TEFFT.

(Supreme Court of Rhode Island. Nov. 21, 1896.)

WILLS—CONSTRUCTION—MEANING OF "ISSUE"—STATUS OF ADOPTED CHILDREN.

The word "issue," used in a will, where nothing appears to limit its legal import, includes all descendants, and under the statute of adoption (Pub. Laws 1868, c. 627), which gives adopted children the legal status of descendants, except that they shall not be capable of taking property expressly limited to the heirs of the body or bodies of the parents by adoption nor property from their lineal or collateral kindred by right of representation, an adopted daughter is entitled to a bequest, the use of which is given to her mother by adoption during her life, the principal to be paid on her death to her "lawful issue."

Bill in equity filed by Frederick W. Hartwell against Mary Abby Tefft. Decree for defendant.

Bassett & Mitchell, for complainant. Willard B. Tanner, for respondent.

STINESS, J. The will of Dexter Thurber, late of Providence, left a fund to trustees, to pay the income, in stated proportions, to children and grandchildren, and upon their death

to pay their respective portions to their lawful issue; and, if any of them should die without leaving lawful issue, then a gift over. The testator left a granddaughter, Emma Thurber Brown, who married Lyman B. Tefft. She died leaving no issue of her body, but, after the death of the testator, she joined her husband in a petition to the municipal court of Providence for the adoption of the respondent, Mary Abby Tefft, the child of her husband by a former wife, as their child, pursuant to Pub. St. R. I. c. 164, which petition was granted, and a decree entered. Mrs. Tefft having died, this bill is filed to ascertain whether the fund goes to her adopted daughter, under the bequest to her lawful issue.

Our statute for the adoption of children (Pub. Laws 1866, c. 627) says: "A child so adopted shall be deemed, for the purposes of inheritance by such child and all other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock, except that he shall not be capable of taking property expressly limited to the heirs of the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation." The argument for the complainant is that, in using the word "issue," the testator had in mind "heirs of the body" of his granddaughter, and so the case is really within the exception of the statute. The argument is based both upon a strict construction of the word "issue," and the fact that the will was made in 1858, before the statute for the adoption of children. A codicil was added in 1865, another in 1867, and a third in 1869. The last two codicils were after the statute, and as they do not revoke the will, but expressly declare that they are to be a part and portion of the will and codicils, they are a republication of the will as of the later date. A part of the argument is thus disposed of, although the fact remains that the adoption did not take place until after the testator's death. It was, however, in his lifetime, and before the last two codicils to his will, a possibility which is presumed to have been known to him, and in view of such possibility his will must be construed.

The meaning of the word "issue," in a will, where, as in this case, nothing appears to limit its legal import, was carefully considered in *Pearce v. Rickard*, 18 R. I. 142, 26 Atl. 38. Following the well-settled current of authority, it was held that the word, so used, includes all descendants; and as the statute gives to an adopted child the status of a descendant, and all the legal consequences and incidents thereof, the same as though he were born in lawful wedlock, there could be no question in such a case as this, were it not for the exception of a limited estate. The question, then, is whether this fund is within the exception. In Maine, under a statute similar to ours, it was held, in *Warren v. Prescott*, 84 Me. 483, 24 Atl. 948, that the exception relates

only to an inheritance as an heir of the body. The reasoning is that, where an estate is limited to one and the heirs of his body, it must go to those to whom it is expressly limited, and that an adopted child, although he is to be regarded as a child, and heir, and a lineal descendant of his adopting parents, does not answer the description of an heir of the body, and so he cannot take the property out of the line to which it was limited. An adopted child is put, by the statute, into the status of a child, issue or lineal descendant, but not that of an heir of the body. Hence, as to a legacy, when a legatee dies before the testator, leaving an adopted child, such child answers the description of a lineal descendant, who may take the legacy under a statute which prevents legacies from lapsing when the legatee leaves lineal descendants. The reasoning seems to be conclusive. It is the same result that was reached in *Sewall v. Roberts*, 115 Mass. 262, although the reasoning in the latter case is not so fully and clearly set forth as in the former. The court holds that the words "heirs of the body" are used in the exception in their primary, technical sense, with which the words "children" and "issue" are not equivalent terms. See, also, *McGunnigle v. McKee*, 77 Pa. St. 81. Several cases have been cited which appear to take a different view, but we think they are clearly distinguishable from the case at bar. For example, in *Jenkins v. Jenkins*, 64 N. H. 407, 14 Atl. 557, under a similar devise and statute, the court said that the property was not expressly limited to the heirs of the body or bodies of the parents by adoption, but being a devise of land, and the statute of adoption of children not having been passed until after the death of the testator, he must have intended an heir in fact, and not one created for the purpose by subsequent legislation and judicial proceedings. A statute of New Hampshire defined the word "issue" to mean the lawful lineal descendants of the ancestors, and so the statute for the adoption of children could not operate to act retrospectively upon the will, already effectual, so as to turn a devise into a different channel from that selected by the testator. Here the statute was passed before the death of Dexter Thurber. In *Keegan v. Geraghty*, 101 Ill. 26, the question was whether an adopted child could take by inheritance from a child of one of the adopting parents by a subsequent marriage, the adopted child not being a sister in fact. It was held that she could not. The statute of Pennsylvania is very different from ours. It provides that an adopted child shall have all the rights of a child and heir of the adopting parent. Hence in *Schafer v. Eneu*, 54 Pa. St. 304, it was held that, in a devise of land to one and her children, an adopted child could not take, especially in view of the fact that the will took effect in 1851, and the statute of adoption was not passed until 1855, when vested interests had attached. These cases will suffice to show the distinctions. But even upon the assumption that the words are

sufficient, if they had related to realty, to create an estate tail, the result would be the same in this case, because the gift was of personality, which, under such conditions, becomes an absolute gift. *Bailey v. Hawkins*, 18 R. I. 573, 27 Atl. 512, and 29 Atl. 65; *Albee v. Carpenter*, 12 Cush. 332. An absolute gift of a fund to Emma Thurber Brown would, of course, now go to her adopted child. Our opinion is that the case is not within the exception of the statute, and that the adopted daughter, having the same status as a child born in lawful wedlock, and hence the same as "lawful issue," is entitled to take the fund under the bequest.

(19 R. I. 631)

TOWN OF BRISTOL v. BRISTOL & WARREN WATERWORKS.

(Supreme Court of Rhode Island. Nov. 19, 1896.)

CONSENT DECREE—VACATION.

A consent decree can only be set aside by consent.

Action by the town of Bristol against the Bristol & Warren Waterworks. Motion to revoke a consent decree, and to set down the same for hearing on bill and answer. Denied.

Comstock & Gardner, for complainant. James M. Ripley, Arnold Green, and Benj. M. Bosworth, for respondents.

PER CURIAM. The decree which the respondents by their motion seek to have revoked, having been entered by consent, cannot be set aside or revoked except by consent. 2 *Daniell*, Ch. Prac. (6th Am. Ed.) *973, *1459, and notes; 5 *Enc. Pl. & Prac.* 990. Moreover, it appears that the motion is also to set down the cause for hearing on bill and answer. By stipulation of the parties, the bill was amended so as to incorporate the letter of Mr. Bosworth; and we find no denial of this letter, or any statement of circumstances which can change the construction necessarily given to it on the hearing of the demurrer. Whatever reason may have moved the respondents to refuse to appoint an arbitrator; or whatever expectation of procedure they may have had in mind after the demurrer had been disposed of, the letter was still a refusal which entitled the complainant to come into equity, and thereby their right to proceed in equity attached. Motion denied.

(19 R. I. 618)

HANDY v. WALDRON.

(Supreme Court of Rhode Island. Oct. 20, 1896.)

**FRAUD—MATERIALITY OF REPRESENTATION—NEG-
LIGENCE OF BUYER.**

1. To entitle the buyer to recover damages for misrepresentations by the seller, it is not necessary that he should have relied solely on the representations. It is sufficient if the rep-

resentations had a material influence in inducing him to make the purchase.

2. The failure of the buyer to make inquiries of persons to whom the seller referred him as to the dividends declared upon the stock, purchased is not, as a matter of law, negligence, so as to prevent recovery for misrepresentations by the seller in regard thereto.

Action by George E. Handy against Edwin M. Waldron. There was a verdict for plaintiff, and defendant moves for a new trial. Denied.

Geo. T. Brown, for plaintiff. Edward & Angell and E. P. Allen, for defendant.

PER CURIAM. We think that the verdict is sustained by the evidence. It is not necessary that the plaintiff should have relied solely on the representation of the defendant that the stock was paying 10 per cent. dividends right along, etc. It is enough that it had a material influence on the plaintiff in inducing him to purchase the stock. *Insurance Co. v. Matthews*, 102 Mass. 225; *Grinnell, Deceit*, § 48, and cases cited.

The question whether or not the plaintiff was guilty of negligence was for the jury, on all the facts shown by the evidence; and hence the defendant was not entitled to the instruction that if the defendant told the plaintiff of a number of persons of whom he might inquire about the stock, and the plaintiff failed to make such inquiry, he was not entitled to recover for any representations made to him by the defendant. *Grinnell, Deceit*, § 51, and cases cited. New trial denied, and case remitted to the common pleas division, with direction to enter judgment on the verdict.

(19 R. I. 623)

SMITH v. EDGEWOOD CASINO CLUB
et al.

(Supreme Court of Rhode Island. Nov. 18, 1896.)

LEASE—WAIVER OF FORFEITURE—INJUNCTION.

1. A forfeiture of a lease for breach of a covenant of the lessees not to sublet without the lessor's consent is waived by the lessor's acceptance and retention of a check for rent accruing after the breach, with knowledge thereof.

2. A lessor cannot, after waiving a forfeiture of the lease for breach of a covenant of the lessee not to sublet, maintain a bill against the lessee and his subtenant to enjoin the one from permitting the occupation of, and the other from continuing to occupy, the premises; the subletting being a completed transaction at the time the bill is filed.

Bill by Henry E. Smith against the Edgewood Casino Club and another for an injunction. Dismissed.

Wood & Fitch, for complainant. James M. Ripley and Richard E. Leyman, for respondents.

MATTESON, C. J. The bill sets forth that the complainant is the owner in fee of a certain lot of land situated on Shaw avenue, in that part of Cranston called "Edgewood," with a building on the lot, known as the "Edgewood Casino"; that on, to wit, June 25, 1894, he

leased the same, by written lease, for seven years, to the respondents the Edgewood Casino Club; that these respondents, on the same day, entered into possession of, and have since been in the quiet and undisturbed enjoyment of, the premises; that the lessees covenanted in the lease not to underlet the premises, or any part of them, without the consent in writing of the lessor, but that, disregarding their covenant, they have underlet the premises to the respondent Root, who has entered into possession of them, and established a kindergarten school therein, and still continues in the occupation of them. The bill expressly waives the forfeiture incurred by the lessees in respect of their breach of the covenant, and prays that the club may be compelled to perform the negative covenants contained in the lease, and may be restrained by injunction from subletting the leasehold premises, or any part thereof, or permitting the occupation of them contrary to the lease, and that the respondent Root may be restrained from continuing in the occupation of any portion of the premises without the consent in writing of the lessor, and for general relief.

We do not think that the complainant makes a case for equitable relief. The letting to Mrs. Root by the club was a completed transaction at the time of the filing of the bill. *Ireland v. Nichols*, 46 N. Y. 413. There is no suggestion in the bill of any other contemplated breach of the covenant by the lessees, for the prevention of which an injunction of the court is needed.

The testimony shows that, after knowledge of the breach of the covenant, the complainant received from the club a check for rent accruing subsequently to the breach, which he has retained to the hearing of the cause. We think that this acceptance of the check, coupled with its retention, must be regarded as a waiver of the forfeiture. But in addition to this, as has been stated, the bill expressly waives the forfeiture incurred by the lessees by the breach of their covenant. The complainant, by insisting on the forfeiture, would have had a complete and adequate remedy at law, by an action of ejectment, to recover possession of the premises from the lessees and their tenant, and an action for damages against the club for breach of their covenant. But his waiver of the forfeiture was in effect a ratification of the act of the club in underletting the premises to Mrs. Root, and rendered their action and her occupation legal. *Ireland v. Nichols*, 46 N. Y. 413; *Shattuck v. Lovejoy*, 8 Gray, 204. An injunction must be denied, and the bill dismissed.

(84 Md. 299)

SALFNER v. STATE.

(Court of Appeals of Maryland. Nov. 19, 1896.)

SELLING GOODS WITHOUT LICENSE—SUFFICIENCY OF EVIDENCE—CRIMINAL LAW—ARRAIGNMENT.

1. Defendant carried on a general merchandise business in the city of Baltimore, under a license from the clerk of the court of common pleas. He sold oil in Baltimore county, without previous orders, from a tank wagon. Code,

art. 56, § 35, provides that no person shall barter or sell or shall offer for sale any merchandise without first obtaining a license. Section 36 provides that, when any person shall propose to sell or offer for sale any merchandise, he shall obtain a license from the clerk of the circuit court of the county, or, if in the city of Baltimore, from the clerk of the court of common pleas; and that such a license shall be good as a license to offer for sale in any part of the state, but shall not authorize the carrying on of any store in any other city or county than that in which the license was issued. *Held*, that such sales from the wagon in Baltimore county were from a fixed place of business, and were a violation of the statute.

2. A party accused of a misdemeanor need not be arraigned, but it is sufficient if a plea be entered to the indictment, or the record show that he waived a plea.

Appeal from circuit court, Baltimore county.

Walter M. Salfner was convicted of selling goods, wares, and merchandise without having a license, and appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, PAGE, BOYD, FOWLER, and ROBERTS, JJ.

O. Parker Baker, for appellant. Atty. Gen. Clabaugh and John T. Ensor, for the State.

McSHERRY, C. J. The appellant was indicted by the grand jury of Baltimore county for selling goods, wares, and merchandise without having a license. An agreed statement of facts was entered into between the state's attorney and the traverser's counsel, wherein the following facts appear: That the traverser had, during the period of time covered by the indictment, a trader's license, which had been issued by the clerk of the court of common pleas of Baltimore city, where the traverser resided and conducted a store; that the traverser was in the habit of selling oil from a tank wagon throughout portions of Baltimore county, where he had no fixed place of business; and that this oil was taken from his stock in trade in the Baltimore city store, and was sold from the wagon in Baltimore county to such persons as desired to purchase it without having been previously ordered by them; and that these were the sales mentioned in the indictment. Under the agreement, the case was tried before the court, sitting as a jury. A demurrer to the evidence was filed. This, we understand, was intended to raise the question as to the legal sufficiency of the admitted facts to establish guilt. No notice was taken of this demurrer by the lower court, and a verdict of guilty was entered, whereupon a motion in arrest of judgment was filed, and was overruled, and final judgment was entered. The first and second grounds assigned in arrest of judgment assert the insufficiency of the evidence to sustain a conviction, and the third is general or not specific. From the judgment of conviction, the traverser has appealed.

It has long been held in this state, under Act 1785, c. 87, § 6 (now codified in section 2, art. 5, of the Code), that, in prosecutions for the recovery of any "penalty, fine or damages," an appeal will lie to this court upon questions of law apparent on the face of the record. *Queen v. State*, 5 Har. & J. 233; *Rawlings v. State*,

1 Md. 127; Keller v. State, 12 Md. 322. The state's attorney and the counsel of the traverser having entered into and filed an agreement of facts, as already stated, the case went to trial on those facts before the court, without the aid of a jury. It thereupon became the duty of the court to declare the law upon the facts admitted. Such an agreement has been treated as taking the place of a special verdict, and its effect is, as in cases of special verdict, to place the facts on the record as part thereof; and, on the facts thus presented, it became the duty and was the province of the court to decide as in case of demurrer. On appeal the whole record comes up, and this court can review the conclusions of law founded by the lower court upon the admitted facts. This method of procedure is confined by the terms of the act of 1785 to prosecutions for the recovery of penalties, fines, and damages, and does not extend to or include any other class of criminal proceedings. The act of 1892 (chapter 506), regulating appeals in criminal cases, and placing them upon the same footing with appeals in civil cases, has not repealed section 2 of article 5 of the Code; and, not having done so, the record now before us brings up the propriety of the appellant's conviction. We proceed, then, to inquire whether, under the facts disclosed by the record, there is any error of law apparent. Before, however, considering the merits of the case, it will not be amiss to dispose of a preliminary and purely technical question, which has been urged under the general reason assigned in arrest of judgment.

The record as printed does not show that the traverser was arraigned upon the indictment, or that he pleaded thereto; and this failure to arraign and omission to plead is assigned as a fatal error. Under a writ of diminution, the record has been corrected, and it appears that there was a plea of not guilty, though there was no arraignment. It is unnecessary that a party accused of a misdemeanor should be arraigned; but it is indispensable that a plea should be entered to the indictment, or that the record should show he waived a plea. In Keller's Case, 11 Md. 525, though there was an agreed statement of facts, there was a plea of not guilty. The agreement before us is not, in form, a case-stated. When questions of law are submitted under an accurately drawn case-stated, there is always an agreement that the court shall enter a judgment the one way or the other, as, upon the facts, the law may be found or held to be. At least, this is so in civil cases. *Tyson v. Bank*, 77 Md. 412, 26 Atl. 520; *Burgess v. Pue*, 2 Gill, 291. And the omission of such a stipulation has been held, in civil cases, as depriving the court of authority to enter a judgment at all. Waiving this, the whole contention on the merits is that, under the admitted facts, the appellant was guilty of no violation of the license laws.

By section 35 of article 56 of the Code, it is provided that "no person * * * other than the grower, maker or manufacturer, shall barter or sell, or otherwise dispose of, or shall offer for

sale, any goods, chattels, wares or merchandise, within this state, without first obtaining a license." Section 36 declares that, "when any person * * * shall propose to sell or barter, or dispose of, or offer for sale, anything mentioned in the preceding section, * * * he shall apply to the clerk of the circuit court for the county in which he proposes to carry on such selling or bartering, or disposing of goods, wares, chattels or merchandise; * * * and a license to offer for sale, issued by said clerk of court of common pleas, or by the clerk of the circuit court for any county, shall be good and sufficient as a license to offer for sale in every part of the state; provided, that such license shall not authorize the holder thereof to open or carry on any store or fixed place of business for such selling or offering for sale in any other city or county than the city or county in which such license shall be issued. * * *" Section 35 prescribes who shall take out a license to barter and sell, or to offer for sale; and sections 36 prescribes where the license shall be taken out, and where it shall be operative. The person seeking a license is required to make application to the clerk of the circuit court for the county in which such license was issued. The design of this legislation is obvious. It was intended to prevent bartering and selling in the ordinary way in any store or fixed place outside of the limits of the city or county in which a license was issued, while leaving the trader at liberty to solicit or to offer for sale anywhere within the state. It restricts the carrying on of business in a fixed place to the locality covered by the license, but does not prohibit selling by sample when deliveries are subsequently made. When stock in trade owned by a licensed trader is taken from his store, and is carried about in a wagon or on a car beyond the limits covered by his license, and sold and delivered therefrom, this is selling in a fixed place of business; not, it is true, in the sense that the wagon or car is stationary like a house, but in the broader sense employed in the statute, that the wagon or car is a regularly established place, where bartering and selling of goods, wares, and merchandise therein contained are conducted precisely in the same way as though the wagon or car were a store. The proviso would have little or no significance if, despite its terms, such bartering and selling as the appellant is admitted to have engaged in from his wagon in Baltimore county, where he had no license, were legitimate. We find no error in the judgment of conviction. Judgment affirmed, with costs above and below.

(84 Md. 273)

BRADFORD et al. v. STREET.

(Court of Appeals of Maryland. Nov. 19, 1896.)

EXECUTORS AND ADMINISTRATORS—PRESENTATION OF CLAIM—ACTION BY TRUSTEE—PETITION.

1. Code Pub. Gen. Laws, art. 93, § 83, prohibits an administrator from discharging any claim, otherwise than at his own risk, unless it be first passed by the orphans' court, or be proved in the manner prescribed by the succeed-

ing sections. Section 107 provides that, "if a claim be exhibited against an administrator" which he shall think it his duty to dispute, he may retain assets proportioned to the amount of the claim, etc. Section 118 provides for the registration of claims, which registration shall be notice to the administrator. Section 116 provides that no administrator shall be bound to take notice of any claim against his decedent, unless it shall be exhibited legally authenticated, or unless it shall have been passed by the orphans' court and entered by the register on his docket, etc. *Held*, that the quoted words in section 107 do not require a physical exhibition of a particular claim which has passed the orphans' court, but it is sufficient to bar action thereon, if not brought within the statutory time, if the administrator knows what the claim is, and payment of it is demanded. *Coburn's Adm'r v. Harris*, 53 Md. 367, distinguished.

2. In an action by one purporting to be a trustee of another person, to recover from defendants "for money payable by" defendants' intestate in his lifetime to plaintiff's beneficiary, the circumstances under which plaintiff was appointed trustee, and the powers with which he was vested, should be stated in the narr.

Appeal from circuit court, Cecil county.

Action by Joseph Street, trustee of Henry H. Bradford, against George W. Bradford and Nancy T. Bradford, administrators of J. Thomas Bradford, deceased. From a judgment in favor of the plaintiff, defendants appeal. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRYAN, PAGE, ROBERTS, and BOYD, JJ.

Geo. L. Van Bibber and Albert Constable, for appellants. Herman Stump, John S. Young, and A. L. Crothers, for appellee.

BOYD, J. This suit was brought against the administrators of J. Thomas Bradford by Joseph M. Street, who is described in the pleadings as "trustee of Henry H. Bradford," to recover a sum of money alleged to be due the latter by J. Thomas Bradford in his lifetime. There was a demurrer to the declaration, which was overruled by the court below, and which is brought before us by this appeal; but we will not stop to discuss it, and will proceed at once to the consideration of the important and controlling question in the case, which involves the construction of section 107 of article 93 of the Code of Public General Laws.

The defendants, in addition to other pleas, filed three special pleas, numbered 4, 5, and 6. The fourth and fifth alleged that Henry H. Bradford filed in the orphans' court of Harford county the claim sued on; that it was passed by that court as a valid and subsisting claim against the estate of J. Thomas Bradford; that afterwards the said Henry H. Bradford, while he still had title to it, exhibited said claim to the defendants, who disputed and rejected it; and that neither Bradford nor the plaintiff, as his trustee, commenced suit for the recovery of the claim within nine months after such dispute and rejection. The sixth set up the same defense, but alleged that the claim was authenticated by the affidavit of Henry H. Bradford,

etc. The orphans' court of Harford county did pass the claim, as alleged in the pleas, and there was evidence tending to show that shortly afterwards George W. Bradford, one of the defendants, told Henry H. Bradford that he would never pay the claim unless he was made to pay it, as it had already been settled. This refusal to pay the claim was repeated on several occasions. It is contended, however, on the part of the appellee, that the claim was not exhibited to the defendants as required by the statute, and that, although it was passed by the orphans' court, the claim itself, as thus passed, must be presented to the administrators before there can be said to be such a dispute or refusal to pay as will require suit to be brought within nine months. Section 107 of article 93 provides that, "if a claim be exhibited against an administrator, which he shall think it his duty to dispute or reject, he may retain in his hands assets proportioned to the amount of the claim, which assets shall be liable to other claims, or to be delivered up or distributed in case the claim be not established; and if on any claim exhibited and disputed as aforesaid, the creditor or claimant shall not, within nine months after such dispute or rejection, commence a suit for recovery, the creditor shall be forever barred," etc. The question, then, is, what is the meaning of the phrase "if a claim be exhibited against an administrator," as used in that section? It cannot mean, as contended by the appellee, that there must be a physical exhibition of the particular account, note, bond, or other claim that was before the orphans' court. Such a construction would defeat the manifest object of the law. After a claim is passed by the orphans' court, an administrator cannot ignore it, unless he chooses to assume the risk of paying it himself. The object of the law should be, and is, to have as speedy settlements of estates of deceased persons as practicable. If the construction of the appellee be correct, one claiming to be a creditor could prevent the settlement of an estate for years by simply having his claim passed by the orphans' court, and then refusing to present it to the administrator. If it is under seal, the administrator might not be safe in distributing the money for 12 years, or even more, as the alleged debt might have matured after the death of the decedent. That might compel the administrator either to pay, in whole or part, a claim he believed to be his duty to dispute, or else delay the settlement until he was certain the claim was barred by the statute of limitations. The creditor cannot be injured, for he can sue at any time within nine months after the claim is disputed or rejected, and, when he knows that suit must be brought to determine the question, he would ordinarily sue at once, if at all, if his claim is an honest one. There is, therefore, no reason for assuming that the legislature intended to give to the language used such a meaning as that contended for by the appellee.

But an examination of other sections of our testamentary laws, as embodied in article 93 of the Code, throws some light on this subject. An administrator is prohibited by section 83 from discharging any claim against his decedent, otherwise than at his own risk, unless it be first passed by the orphans' court granting the administration, or be proved in the manner prescribed by the succeeding sections. Those sections state, in considerable detail, what is necessary proof of the various claims mentioned. When the claim has not been passed by the orphans' court, the administrator has the right to examine the proof to ascertain whether it is in conformity with law, as he is not authorized to pay it unless it is properly proven. There should, therefore, be a physical exhibition of a claim so authenticated before the administrator can reject it, within the meaning of section 107, so as to produce the consequences that follow the failure to sue within nine months. But such is not the case with claims passed by the orphans' court. Section 113 requires the register of wills to enter in a suitable book all claims against a decedent in regular order as they are passed by the orphans' court or register of wills, giving date of the passage, the name of the creditor, the character of the claim, and the amount thereof; "If an open account, the interest due thereon up to the date of the passage shall be stated separately; and if a note, bond, bill obligatory, judgment, or other evidence of debt, the date thereof, and the date from which interest begins to run, shall also be stated, and other particulars of such claim." It then adds that "the entry of a claim upon such book shall be taken as notice to the administrator of its existence." Section 110 provides that "no administrator shall be bound to take notice of any claim against his decedent unless the same shall be exhibited to such administrator legally authenticated, or unless such claim shall have been passed by the orphans' court and entered by the register upon his docket, or unless a suit shall be pending against such administrator for such claim." If, therefore, the claim is passed by the orphans' court, and entered on the book of the register, the administrator must take notice of it, and cannot thereafter pay out all the assets of the estate without assuming the risk of having to pay out of his own funds such claim or its proportionate amount. There is, therefore, a manifest distinction between the two classes of claims, and a good reason exists why, in the one case, the claim itself should be exhibited to the administrator, while it is unnecessary and useless when the claim has been passed by the orphans' court.

In this case the record shows that the administrator knew the amount of the claim, and what it was for, and the evidence was abundant to authorize the court to submit to the jury the question whether the claim sued on was rejected by the defendants. If the defendants' testimony is correct, it was not only rejected, but a good reason given for rejecting it, namely,

that it was already paid. We are of the opinion, therefore, that it was not necessary to actually present the account, after it had been passed by the orphans' court; and, if the jury believed that payment was demanded by the owner of the claim, and refused by the defendants, or one of them, it was barred, unless suit for its recovery was commenced within nine months after its rejection. There is nothing in any of the decisions of this court in conflict with that conclusion. The case of *Coburn's Adm'r v. Harris*, 53 Md. 367, relied on by the appellee, differs widely from this. The report of that case states that "it appeared, from the evidence in the case, that the claim in question had not been sworn to by the creditor and his clerk, nor had it been passed by the orphans' court, when it was presented to the administrators and disputed by them," etc. It is true that the prayer sustained in that case read that, "unless the claim, after being authenticated by the oath of the plaintiff, or after being passed by the orphans' court, was presented to the administrators for payment, * * * and was disputed or rejected by said administrators, and the plaintiff failed to bring suit to recover on said claim within nine months after such dispute or rejection," it was not barred; but there was no question in that case as to whether the claim was presented to the administrators, but only whether it was so presented after being authenticated under oath, or being passed by the orphans' court. The point decided was that, inasmuch as the claim had not been passed by the orphans' court, or properly authenticated as required by the statute, the administrators could not pay it, and therefore could not reject it, within the meaning of the section of the Code now under consideration. The court did not determine there must be a physical exhibition of the claim itself after it was passed by the orphans' court. After referring to several sections of the Code the court said: "Yet, unless so authenticated, it is not in a form entitled to be paid; and therefore, when section 108 [107 in Code of 1888] provides for the consequences which shall follow the rejection of a claim when exhibited against an administrator, it imports that the claim shall be exhibited in such form as that the administrator may be protected in paying it. The rejection or refusal to pay a claim not authenticated is not such a refusal or rejection as is contemplated by the Code, and imposes no obligation on the creditor to sue thereon within nine months. It stands as if it never had been exhibited." As the claim in this case was passed by the orphans' court, and as there was evidence that it had been rejected and payment refused by the administrators more than nine months before the suit was instituted, the plaintiff's third prayer should have been rejected, as it instructed the jury that their verdict on the issues joined on the fourth, fifth, and sixth pleas above referred to must be for the plaintiff. The third prayer of the defendants was intended to present the same question. The only difficulty we have about it is from the fact that this suit was

brought by Joseph M. Street, trustee of Henry H. Bradford, and there is no evidence in the record to show how or when he became trustee, or what his powers as such trustee were. If he is such a trustee as to have this claim vested in him, so as to enable him to sue for it, then this prayer may have been erroneous on technical grounds. If Bradford made the demand for payment while he still owned the claim, his trustee would be bound by that demand; but, if he did not make it until after his trustee acquired title, then his demand would not prejudice the trustee. Being left in such uncertainty as to those facts, we cannot pass upon that prayer, but the case must be reversed for error in granting the third prayer of the plaintiff.

Without dwelling on the demurrer to the declaration, it is sufficient to refer to what we have said above concerning the failure to allege how the plaintiff was appointed trustee, and as such became owner of the claim sued on. This should be stated in the narr. It may be that the plaintiff is trustee of Henry H. Bradford, but whether he can sue and recover from the defendants "for money payable by the said J. Thomas Bradford in his lifetime to the said Henry H. Bradford" depends upon the circumstances under which he was appointed and the powers with which he was vested. As the case must be reversed for the reason already given, the declaration can be corrected, if the case is tried again. Judgment reversed, and new trial awarded, with costs to appellants.

(34 Md. 235)

STATE v. SECOND NAT. BANK OF
HOBOKEN.

(Court of Appeals of Maryland. Nov. 20,
1896.)

STATUTE—CONSTRUCTION—TAX ON AUCTION SALES
—SALES NOT CONSUMMATED.

Under Code Pub. Local Laws, art. 4, §§ 74-80, imposing a duty or tax on real estate sold at auction in the city of Baltimore, each time any such real estate shall be "struck off," the duty is not collectible on a sale of land under a decree of foreclosure, where the purchase money is not paid, and a resale becomes necessary; there being, by fair construction, but a single sale.

Appeal from circuit court of Baltimore city.

Appeal by the state from an order entered in the case of the trustees of the Samuel Ready School for Female Orphans against John Rost and others, sustaining an exception of the Second National Bank of Hoboken, defendant. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BOYD, FOWLER, and ROBERTS, JJ.

Geo. R. Gaither, Jr., for appellant. J. Alex. Preston and C. W. Nash, for appellee.

McSHERRY, C. J. The Code of Public Local Laws (article 4, relating to Baltimore city) contains the following provisions:

"Sec. 74. All real estate * * * which shall at any time be exposed to sale at public

auction within the city of Baltimore * * * shall be subject, each and every time they or any of them shall be struck off, to duties at the following rates.

"Sec. 75. All real estate, * * * goods and effects of deceased persons or insolvent debtors, or property sold under an order or decree of any court, at the rate of fifty cents on every one hundred dollars."

"Sec. 77. The duties shall be calculated on the sums for which the property or goods so exposed to sale shall be respectively struck off, and shall, in all cases, be paid by the person making the sale."

"Sec. 79. The duty imposed on all sales of land, tenements and hereditaments or of any interest therein, at public auction in the city of Baltimore, shall be a lien on the said property when sold as aforesaid.

"Sec. 80. Every purchaser of lands, tenements or hereditaments, or of any interest therein, purchased at public auction in the city of Baltimore, shall be bound to pay the auction duty on such sale and be entitled to claim the said payment as a credit on his purchase as aforesaid."

In October, 1895, a decree was passed by the circuit court of Baltimore city for the sale of certain mortgaged premises, and the sale was made in November following by the trustees named in the decree, and this sale was finally ratified in January, 1896. The purchaser paid to the trustees the sum of \$1,000 when the property was knocked down, but he defaulted on the balance of the purchase money, and in February a petition was filed for authority to resell the property at the purchaser's risk. With the consent of the purchaser, a resale was ordered, and was subsequently made and ratified. The price realized at the resale was less than the amount bid at the original sale. An audit was then stated, wherein the duty of one-half of 1 per cent. on the gross amount of the original sale was allowed, under section 74 of article 4 of the Code of Public Local Laws, and wherein, also, a further allowance was made of one-half of 1 per cent. on the gross amount of the purchase money bid at the resale. To the allowance of the duty on the sum bid at the original sale, the Second National Bank of Hoboken, a creditor of the mortgagor, filed an exception, which the court below sustained, except as to the sum of \$5; that being the amount of the one-half of 1 per cent. on the sum of \$1,000 paid to the trustees by the first purchaser. From the order sustaining the bank's exception, the state, claiming a duty on the amounts bid at both the original sale and the resale, has appealed.

The question thus presented is a narrow one. Concisely stated, it is this: Is the state of Maryland entitled, under the statute quoted above, to a tax or duty on the sale originally made, which sale turned out to be ineffective, because the purchase money never was paid, and also entitled to a further or additional tax or duty on the resale, which was ordered

and was had merely to enforce the one that had not resulted in realizing the purchase money bid? We think the learned judge below rightly solved this question against the claim of the state. It is obvious that the tax or duty is intended to be collected only when there has been a sale that is a consummated sale; and while, under a judicial resale, the property is in fact again put under the hammer, it is put there, not as a new, distinct, independent procedure, but as a means, and solely as a means, to realize the money which the original but defaulting purchaser failed to pay. The resale takes place under the original decree, supplemented by an order. It is made by the same trustees, in the same proceedings, and with a view to pay off the same indebtedness for the payment of which the property was sold in the first instance; and the money realized by it is always applied precisely as would have been applied the money bid at the original sale, had that money been paid by the first purchaser. The resale is simply an execution of the decree for a sale. Its very name imports that it is not such a new sale as to be a distinct proceeding.

When the statute declares that the tax shall be paid each and every time the property shall be "struck off," the term "struck off" must be understood in its usual and accepted sense, and not in a narrow, contracted, or literal one. "In common parlance, and in the language of the auction room, property is understood to be 'struck off' or 'knocked down' when the auctioneer, by the fall of his hammer, or by any other audible or visible announcement, signifies to the bidder that he is entitled to the property on paying the amount bid according to the terms of the sale." *Sherwood v. Reade*, 7 Hill, 439. In all sales made under a decree in equity, the court is the vendor, acting for and in behalf of all the parties to the cause. The trustee is the mere agent of the court, and the contract of sale is never regarded as consummated until it has received the sanction of the court. *Schindel v. Keedy*, 43 Md. 413; *Cunningham v. Schley*, 6 Gill, 224. If a judicial sale is set aside, it cannot be pretended that the tax is payable on the amount bid when the property was, in a limited sense, "struck off," because, being set aside, though the property was struck off, there was in fact no sale. And if, even though the property has been "struck off" and the sale has been reported, the court refuses to ratify the sale, there is, by reason of the refusal of the court to sanction the sale, no sale at all, then the mere striking off of the property by the auctioneer does not, in a judicial sale, at least, create a liability to pay the duty. A literal adherence to the words of the statute would require that the tax be paid every time the property might be "struck off" in judicial sales, though the sales were set aside, if the interpretation of the term "struck off" insisted on for the state were adopted; and, as in such sales the court is the vendor, the tax would, under section 77, be payable, not out of the

fund (because when the sale is vacated there is no fund), but by the court,—“the person making the sale.” This obviously was never contemplated. The “each and every time” named in section 74 manifestly has reference to each and every time there is a completed and consummated sale and a payment of the purchase money. The design of this legislation was to raise revenue by the imposition of a tax or duty on sales, and not on ineffectual efforts to sell, and hence the term “struck off” must be treated as signifying a consummated sale. This seems to be clear from the other provisions quoted above from the Local Code. The tax is required to be paid by the person making the sale, and is declared to be a lien on the property sold. The purchaser, by section 80, has the right to deduct the tax from the purchase money, but not to deduct a tax due on some other antecedent purchase. In the case at bar, if a double tax or duty were imposed, its payment would in fact be thrown on a junior creditor. The lien is given for the tax due, and, though the vendor is required to pay the tax, it is a lien on the property, and may be discharged by the vendee out of the purchase money which he owes; but the statute nowhere gives him authority to deduct from the purchase money the amount of the tax or duty on some other sale, at which he was not the purchaser. Concurring with the court below, we affirm the order appealed from. Order affirmed.

(84 Md. 186)

**FAUST v. TWENTY-THIRD GERMAN
BLDG. ASS'N OF BALTI-
MORE CITY.**

(Court of Appeals of Maryland. Nov. 19,
1896.)

**TAXATION—MORTGAGES—BUILDING AND LOAN AS-
SOCIATIONS—LEGISLATIVE POWER—
EXCESSIVE TAXATION.**

1. Acts 1896, c. 120, §§ 146a-146f, imposing a tax on all "mortgages," prohibiting covenants that the "mortgagor" shall pay the tax levied on the "mortgage debt," and requiring that any person "lending money on mortgage" shall take an oath that the mortgagor has not been required to pay the tax, does not apply to mortgages given by members of a building and loan association, to whom is advanced the matured value of their stock, to secure the payment of interest on such matured value and all dues and fines.

2. The legislature may make the levy of a tax and the assessment directly, without the intervention of any officer.

3. A tax of 8 per cent. on the interest payable on a mortgage, one-fourth of the amount for the state and three-fourths for the counties, is not excessive; the existing state tax being 17½ cents on \$100, while the counties are authorized to levy all needful taxes.

Appeal from the circuit court of Baltimore city.

Action by Jacob Faust against the Twenty-Third German Building Association of Baltimore City. There was a decree for defendant, and plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, PAGE, ROBERTS, and BRYAN, JJ.

R. Bernard & Son, for appellant. George R. Willis, for appellee.

BRYAN, J. The questions in this case concern the taxation of mortgages. The appellant draws in question the meaning and validity of certain sections of chapter 120 of the Acts of 1896. He maintains that the sections from 146a to 146f, both inclusive, do not apply to building or homestead associations, and that they are unconstitutional, null, and void. Without at present giving our attention to the proceedings by which these questions are presented, we will examine the sections which have been mentioned: Section 146a enacts that "all mortgagees or assignees holding mortgages of record in this state shall annually pay a tax of eight per centum upon the gross amount of interest covenanted to be paid each year to said mortgagee or his assigns by the mortgagor, to be collected by the proper authorities as other taxes for county and state purposes in the several counties, and municipal and state taxes are collected in Baltimore city." Section 146c enacts that after the passage of the act all covenants shall be void which provide that the mortgagor shall pay any or all taxes, assessments, public dues or charges levied or to be levied by law on the mortgage debt created or secured by such mortgage, or on the interest covenanted to be paid. Section 146d enacts that when, after the passage of the act, any person or corporation shall lend money on mortgage on property in this state, their agent or attorney shall take an oath, to be indorsed on the mortgage, that the mortgagee has not required, and will not require, the mortgagor to pay the tax levied on the interest covenanted to be paid. And section 146f enacts that, whenever any mortgagor pays the tax required to be paid by the mortgagee, he shall be entitled to have the amount so paid deducted, with interest, from the mortgage debt. The language of the last three sections is significant of the purpose of the legislature. It speaks of "mortgage debt," and of "lending money on mortgage." The terms used are appropriately applicable to the conditions existing between debtor and creditor; to a transaction wherein money is received by one party, and a contract is made by him to repay it to the other party. Now, in a building association mortgage the contract is not of this nature. These mortgages were first authorized in this state by the act of 1852, c. 148, which is substantially embodied in the Code, art. 23, §§ 95-102, inclusive. The building association is authorized to advance to any of its members the sum which he would be entitled to receive, upon the dissolution of the corporation, for any number of shares which he holds, and to take from the member who receives the advance a mortgage on real or leasehold property to secure the payment of the weekly dues on the shares, and all fines and penalties which may be incurred, and also interest on the sum advanced. The payments of dues and interest are to continue until the shares are worth the sum of money ad-

vanced upon them. The association is reimbursed for its outlay by its ownership of the stock, which, in the natural course of its business, if successful, will gradually enhance in value until it equals the sum advanced upon it. But the mortgagor never covenants for a payment of the sum of money advanced. He and the other stockholders are engaged in a joint enterprise, which, according to reasonable expectation, will raise the value of the stock to an amount which is fixed and settled when the association is formed. Some members wait until this consummation is reached, and then receive the money for their shares; but the borrowing member receives his money at the time of the loan, and pays interest on it until the end is attained. The difference is very marked between a transaction of this kind and the ordinary contract between debtor and creditor. In *Robertson v. Association*, 10 Md. 397, this court considered the nature of building association mortgages, and it decided expressly and distinctly that the sum advanced to the mortgagor by the association could not be regarded as a debt. *Robertson* had executed a mortgage in which it was recited that a loan of \$460 had been made to him by the building association, and he covenanted to pay interest on this sum, and to pay his fines and weekly dues, but there was no covenant to repay the sum of \$460. The court said: "It is obvious that the sum actually due according to the covenants in the mortgage cannot be ascertained by estimating the sum (\$460) named in the mortgage as if it were a debt secured, or money to be repaid; there being no covenant in the mortgage, or any obligation on the mortgagor, requiring him to repay that sum, or any part of it, as such." In a subsequent part of the opinion it is said: "The sum of \$460 was paid to the mortgagor by the society as the ascertained value, in advance, of his shares of stock in the corporation. And although, in the preliminary part of the mortgage, it is recited to be 'a condition precedent to the money below named being loaned to him that these presents should be executed,' yet the consideration is stated to be \$460 'in hand paid by the corporation to the mortgagor,' while the mortgage contains no covenant or obligation whatever for the repayment of said sum, or any part of it. This court cannot regard the principal sum named in the mortgage as in any sense a loan." *Robertson's Case* has always been regarded in this state as settling the true character and nature of these mortgages. In *Rice's Case*, 50 Md. 312, it was held that these words in the assessment act of 1876, "mortgages upon property in this state and the mortgage debts respectively secured thereon," did not apply to building-association mortgages. We therefore think that the sections of the act of 1896, c. 120, which we have been considering, were not intended to include building-association mortgages. The legislature did not intend to take away the exemption granted to them by article 23, § 99, of the Code, amended by the Act of 1894, c. 321.

The power of the legislature to tax mortgages and mortgage debts has been frequently exercised, and it has been recognized by the decisions of this court. If any doubts have heretofore existed, they are set at rest by section 51 of article 8 of the constitution, as amended by the act of 1890, c. 426. The amendment is in these words: "But the general assembly may by law provide for the taxation of mortgages upon property in this state and the debts secured thereby in the county or city where such property is situated." The tax is fixed by section 146a at 8 per cent. on the gross amount of interest covenanted to be paid to the mortgagee, and one-fourth of this amount is to be paid to the state, and the remainder to the counties or the city of Baltimore, according to the location of the mortgaged property. It will be noticed that the legislature made the levy of the tax and the assessment of the taxed property by its own act, without the intervention of any officer. Except as restricted by the bill of rights and the constitution, it has the absolute power of taxation over all the property within the state. It has also the power to provide all the means and appliances necessary and proper for the collection of taxes. For manifest reasons of convenience, it usually exercises these powers through agencies and instrumentalities created by itself. But no possible reason can be alleged why it cannot exercise its powers directly, without resorting to intermediary functionaries. The constitution does not forbid it, and no other department of the government can interfere to prevent it. In *State v. Mayhew*, 2 Gill, 487, it was regarded as unquestionably within the competency of the legislature, as settled by reason and long usage. And in *State v. Sterling*, 20 Md., at pages 516 and 517, it was said: "The duty of ascertaining taxable values, and of assessing and collecting the taxes thereon, necessarily rests in the discretion of the legislature, and it may perform that duty by its own legislative acts, or through the agency of such officers or tribunals as it may appoint for that purpose. *State v. Mayhew*, 2 Gill, 487. The legislative power to assess and compel the payment of state taxes to be made directly to the state treasurer, without other official assistance, implies power to determine the value of the property to be assessed, and consequently a power of discrimination in selecting and fixing the taxable values. These powers have been so long exercised without objection that they cannot be brought in question now without contravening in that respect the settled policy of the state. *Tax Cases*, 12 Gill & J. 117; *State v. Mayhew*, 2 Gill, 487." The tax levied cannot be considered as excessive or unjust. Eight per cent. on the interest, even if it should be 6 per centum, would be 48 cents on the \$100 of principal,—one-fourth of this amount for the state, and three-fourths for the counties or

the city of Baltimore, as the case might be; the state's portion being 12 cents, and the portion allotted to the counties or the city of Baltimore being 36 cents. The existing state tax, by article 81, § 22, of the Code, is 17½ cents on the \$100; while the county commissioners are authorized by article 25, § 7, to levy all needful taxes on the assessable property within the county liable to taxation, and it is well known that the tax rate is, or may be, always much greater than 36 cents on the \$100. Of course, in some instances the mortgage debt might not be worth 100 cents on the dollar. And therefore it was wise and provident on the part of the legislature to make an adjustment of the tax in such manner as not to impose on any holder of a mortgage debt a greater burden than his fair proportionate contribution to the support of the government. The adjustment shows on its face a studious effort to discharge a public duty in a spirit of justice and moderation. The assessment and levy were made in the legitimate exercise of the powers of the legislature in relation to subjects confided to its discretion, and it is our duty to declare them valid.

We have given our views on the foregoing subjects because we were requested by counsel to do so, and because we thought that we would thus contribute greatly to the public interest and convenience. We know that the mode of proceeding in this case has the sanction of high authority, but we do not wish to be understood as deciding that it is to be regarded as a precedent in future cases. To state the case briefly, a member of a building association files a bill in equity against the corporation to enjoin it from complying with the provisions of the Acts of 1896, c. 120, which relate to the taxation of mortgages, alleging that they are unconstitutional and void. The act, by sections 184, 185, and 186, provides the manner in which a person who may think that his property has been improperly assessed for taxation may bring his case before the courts for decision. Section 186 gives him a right of appeal to this court. The statute thus affords ample means of protection to those who may consider themselves injured by proceedings under it. A fair hearing is prescribed, and the state and the party assessed are both represented. And, in proceedings which have heretofore been instituted to enjoin the collection of taxes which have been assessed and levied, the injunction has been prayed against the officer attempting to make the sale. In this way the public interest is represented in the litigation. To be sure, in this case the attorney general argued the questions at the bar in behalf of the state; but the state's interests could not be effectually protected unless it was represented by some public officer, as a party to the cause, who would have the right to make defenses in the pleadings, and to support them by offering testimony. This has been the usual

course of proceeding. As we concluded to give our opinion on the questions argued in this case, we do not consider it necessary to say more. There is no necessity at this time to argue this point, and we do not intend to give a judicial decision upon it. We have made these remarks in order to let it be known that we hold ourselves untrammelled, if the question should come before us again. Decree reversed and cause remanded.

(55 N. J. E. 1)

LUNDY v. SEYMOUR.

(Court of Chancery of New Jersey. Oct. 31, 1896.)

EXECUTION SALE—FRAUD—PRELIMINARY INJUNCTION—LACHES.

Under a writ of fieri facias issued upon a judgment three years after its recovery, a sheriff levied upon and advertised for sale four distinct parcels of land belonging to the defendant in execution, one of which parcels was alone of sufficient value to have thrice paid the judgment, and the other parcels were of value more than enough to pay the judgment several times; and in absence of the defendant, who had no notice or knowledge of the intended sale, he sold the four parcels, in one lot, to the attorney of the plaintiff in execution, for one-fourth the amount due upon the judgment; and thereupon the attorney caused the sheriff's deed to be made to a third party, through whom and another the title to the whole property, subject to the inchoate dower right of a wife, of advanced years, now deceased, within four months and a half after the sale went to the attorney's wife, who, though she claims to be an innocent purchaser for value, does not by her answer disclose the circumstances of her purchase, or state the value she paid for the property, and who appears to have dealt with the property since the sheriff's sale as though she deemed the title of it to be subject to question. *Held*, that a preliminary injunction will issue to restrain the attorney's wife from prosecuting an action of ejectment against the defendant in execution to recover possession of part of the land, to the end that the status quo may be preserved until full proofs and final hearing shall be had, upon bond being given under rule 126; and this though the complainant has delayed his application to this court for 14 years after he was put upon inquiry concerning the sale, it appearing that during that time he suffered mental affliction which was more or less incapacitating, and it failing to appear that the defendant in this suit will suffer prejudice at the hearing, or that the court will be embarrassed or obstructed in administering justice, because of the delay.

(Syllabus by the Court.)

Bill by Robert Lundy against Julia B. Seymour to restrain a suit in ejectment. On order to show cause why an injunction shall not issue. Preliminary injunction allowed.

The defendant's husband was the attorney at law of one Ellen Underwood, and as such, for her, in March, 1879, recovered judgment in the Hudson county circuit court for \$372.72 against the complainant. In December, 1881, in virtue of a writ of fieri facias issued upon that judgment, he caused the sheriff of Hudson county to levy upon and sell four tracts of land belonging to the complainant, all of which were situate in the city of Jersey City, but were wholly distinct and separate from each other.

The first of them was a parcel upon which was erected a dwelling house, having a frontage of 100 feet on Central avenue, and running back therefrom about 111 feet. The second was a vacant city lot, 25 feet wide and 125 feet deep, which fronted upon the side of Central opposite to the side of that avenue upon which the first tract fronted. The third tract was about $5\frac{1}{4}$ acres of vacant meadow land, having a frontage on Tonnele avenue. And the fourth was a single vacant lot upon Summit avenue, 25 feet wide and 100 feet deep. The complainant values the whole property at \$28,000. The defendant in her answer says that at the time of the sale it was not worth more than \$8,000, and was incumbered by municipal liens. The value placed upon the first parcel by the tax assessor was \$2,500. The property appears to have been unincumbered, except by municipal liens for taxes, water rents, and assessments. It does not appear what such liens upon the second, third, and fourth tracts aggregated at the time of the sale; but it does appear that upon the first parcel, with interest, they amounted to about \$800. The complainant did not know of the sale, and was not present when it took place, on the 16th of March, 1882, three years after the recovery of the judgment against him. At the sale all four of the tracts of land were offered and sold together in one lot. Mr. Seymour bid for them \$100, and they were struck down to him at that price. He signed the conditions of sale, "R. B. Seymour, Atty." Subsequently he directed the sheriff to make a deed for the property to Charles H. Furst, and when the deed was delivered, on the 4th of April, 1882, he received it from the sheriff, and, after paying the sheriff's execution fees, deducting their amount from the bid of \$100, he receipted for the balance of the bid as the attorney of Ellen Underwood. In the month of July following, Furst and his wife, by their deed, which recited that it was made in consideration of \$3,000 paid to them by its grantee, conveyed the property to William B. Scott, of Kingston, N. Y., who, with his wife, on the 22d of the next month (August, 1882), made three deeds to the defendant in this suit, the wife of Mr. Seymour. By one of those deeds they conveyed to her the first parcel of land, reciting \$2,000 consideration paid, and by another they conveyed to her the second and fourth parcels, reciting \$2,600 consideration paid, and by the remaining deed they conveyed the third parcel, reciting \$3,000 consideration paid. In the deeds thus made by Furst and Scott the only covenants are against incumbrance or impairment in title by the acts of the grantors. In the spring of 1882 the complainant leased the first parcel of land, with the dwelling house, to a man named Walker, for \$15 a month, and collected one month's rent. Later, by letter from Bradford, Pa., to which place he moved immediately after renting the property, he demanded of Walker further payments of rent, and was informed that he was not entitled to them, because a man named Seymour was the owner of the property.

The exact date of this communication does not appear. From that time until May, 1887, the defendant collected the rents of the property, but did not pay any taxes or assessments. She did pay the water rents, which annually amounted to \$12.50, through the year 1886. In 1887 the complainant's wife took possession of the first tract, and lived in the dwelling house till her death, in 1895. While in possession she erected a small store upon part of the property, which she rented for \$10 a month, and permitted another store to be erected by a tenant upon another part of the property, for which she received \$3 a month. The complainant moved from Bradford, Pa., to Newark, N. J., in 1883, and resided there till 1889, when he moved to the city of Bayonne, N. J., and lived there till 1890, when he went to the state of Wisconsin, and remained there till after his wife's death, when he returned to Jersey City, and took possession of the first tract of the property. It does not appear that any one has been in possession of the second, third, and fourth tracts, or has exercised any ownership over them, since 1882. Nor does it appear to what extent those tracts are, or at the sale were, incumbered by municipal liens. It is represented that from the time the complainant left Jersey City, in 1882, till within a few months, he has suffered from some mental and physical affliction, which to some extent has incapacitated him from attending to his affairs; but upon the subject of this affliction the affidavits are so general and vague as to leave the character of the affliction in obscurity, and render it a factor of doubtful and uncertain substance. In July, 1896, Mrs. Seymour commenced an action of ejectment to recover possession of the first tract of land. The complainant insists that the conveyances by Furst and Scott were voluntary and without consideration, and now asks an injunction which will restrain the further prosecution of the ejectment suit pending the determination of this cause, the object of which is to set aside the sheriff's deed and the subsequent conveyances of Furst and Scott, or, treating the complainant as trustee of the property, to compel a conveyance of it by her to him upon equitable terms. Mr. Seymour died before the ejectment suit was brought. Mrs. Seymour claims to be an innocent purchaser for value, but fails in her answer to disclose the particulars of the transaction by which she acquired her title, or the value that she gave for the property.

W. B. Williams, for complainant. Frank M. Hardenbrook, for defendant.

McGILL, Ch. (after stating the facts). If the assessor's valuation of the first parcel of land be taken as correct, and from it be deducted \$800 for the municipal liens, the clear value of that land will appear to have been \$1,700 at the time of the sale. Taking the \$2,500 from the \$8,000 which the defendant admits the four parcels to have been worth in 1882, we have \$5,500 as the value of the remaining three parcels; and if we subtract

from that sum the same proportion of value for unpaid municipal liens as was taken from the value of the first parcel, say one-third, the clear value of the second, third, and fourth parcels was \$3,667, making the clear value of the whole land \$5,367, or about 54 times as much as it was sold for at the sheriff's sale. Or, in view of the fact that the defendant claims to be a purchaser from Scott for value, taking as the value of the land, above incumbrances, the aggregate of the considerations recited in the three deeds to her, which deeds were delivered four months and a half after the sheriff's sale, the sum would be 76 times the price bid at the sheriff's sale. Or, taking the consideration mentioned in the deed from Furst to Scott to be the value, it was 30 times the price bid at the sheriff's sale. Whatever valuation is taken, it is clear that there was a startling discrepancy between the price bid and the true value of the property. Upon the presentation of this circumstance, the mind naturally turns to ascertain the attitude of the parties concerned in the sale when it was made, in order to find an explanation of the sacrifice. It finds that Mr. Lundy, though aware that he had been sued, had no knowledge of the sale; that the sale took place three years after the entry of the judgment; that after it, exhibiting an unconsciousness of his loss of title, Mr. Lundy leased the property and collected some rents. It further finds that the sheriff levied upon and sold four perfectly distinct and separate parcels of land in bulk, the first of which parcels was alone of sufficient value to pay the entire judgment more than three times, for about one-fourth the amount of the judgment, and that the attorney who represented the judgment creditor attended the sale, and bid in the whole four tracts in one lot for that sum. The combination of circumstances affecting the sale, then, shortly stated, is this: A sale of four distinct parcels of land in one lot, one of which parcels was of more than sufficient value to have paid the judgment, for a price so grossly inadequate as to shock all sense of propriety and justice, to the attorney of the plaintiff in execution, three years after the entry of the judgment, in the absence of the defendant in execution, who was unaware that his property was being sold. The sheriff's conduct, in which the plaintiff's attorney appears to have at least acquiesced, remaining, as it does, unexplained, exhibits an abuse of the discretion, which the law vested in him, to determine the quantity of land necessary to be sold, and whether it should be sold in bulk or in parcels. The land, being in detached, independent parcels, each of considerable value, clearly should have been sold in parcels. *Johnson v. Garrett*, 16 N. J. Eq. 31; *Schilling v. Lintner*, 43 N. J. Eq. 444, 11 Atl. 153; *Holmes v. Steele*, 28 N. J. Eq. 173; *Tiernan v. Wilson*, 6 Johns. Ch. 411. In the last-cited case Chancellor Kent said: "The very circumstance of advertising and selling the whole supposed interest of the plaintiff in both lots together, and for so small

a demand, was calculated to excite distrust as to the title, and to destroy the value of the sale. It was a perversion of the spirit and policy of the power with which the sheriff was intrusted." When the consequence of such an abuse of discretion is detriment to the defendant in execution, equity will interfere, as in the case of abuse of trust. Cases above cited. Here the inadequacy of the price bid for the land, shocking, as it does, the conscience, in itself is strong evidence of fraud; and when it is coupled with the now apparent abuse of the sheriff's discretion, the complainant's lack of knowledge of the sale, and his subsequent mental enfeeblement, and the subsequent devolution of the title to the property sold upon the wife of the attorney who participated in the unjust sale, and her hesitating assertion of her title, it becomes, I think, convincing evidence of fraud. 2 Pom. Eq. Jur. § 927; 1 Story, Eq. Jur. 256; *Wintermute v. Snyder*, 3 N. J. Eq. 489, 496; *Gifford v. Thorne*, 9 N. J. Eq. 702, 740; *Weber v. Weitling*, 18 N. J. Eq. 441; *Kloepping v. Stellmacher*, 21 N. J. Eq. 328; *Phillips v. Pullen*, 45 N. J. Eq. 836, 18 Atl. 849. But to now, before full proofs, speak more conservatively, the situation savors, at least, strongly enough of fraud to induce this court to interfere by preliminary injunction, and preserve the status quo until the facts shall be fully developed by those proofs and final hearing. It is true that the defendant insists that she is an innocent purchaser for value, but she does not disclose the particulars of her purchase, and explain to a just satisfaction how the value she gave was paid, or what it was. I think that it was incumbent upon her to do so. She was the wife of the attorney who acquiesced in the sale of the complainant's property, composed of several lots, in bulk, and who bid in the property, when so sold, for \$100, and afterwards directed the sheriff to make the deed to Mr. Furst, and, when the deed was delivered, took it into his possession. She took her title through deeds in which neither Mr. Scott nor Mr. Furst covenanted against other incumbrances or defects of title than their own acts might have occasioned, which were executed within 4½ months after the sheriff's sale. Besides, in 1887, after she had been in the possession of the property for 5 years, without struggle, as if conscious that she had an untenable title, she surrendered her possession to the complainant's wife, who thereafter held it for eight years. The insufficiency of her excuse for this surrender—that the dower right of the complainant's wife had not been sold—is manifest when it is remembered that such right was inchoate, and did not entitle Mrs. Lundy to possession. I think that the natural inference from her situation justifies the proposed issue of injunction, if for no other reason than the maintenance of the status quo, until full production of proofs and a final hearing can be had, and especially so when it is remembered that under rule 126 she will be protected from damage by a bond.

The remaining objection to the issuance of the injunction is that the laches of the complainant disentitles him to the assistance of a court of equity. In *McCartin v. Traphagen*, 43 N. J. Eq. 323, 338, 11 Atl. 156, Vice Chancellor Van Fleet said: "Great delay is a good bar in equity. Courts of equity have from the earliest times, upon general principles of their own, even where there was no analogous statute bar, refused relief to stale demands. More than one hundred years ago Lord Camden said: 'A court of equity, which is never active in relief against conscience or the public convenience, has always refused its aid to stale demands where the party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth the activity of a court of equity but conscience, good faith, and reasonable diligence. Where these are wanting the court is passive and does nothing. Laches and neglect are always discountenanced, and therefore from the beginning of this jurisdiction there was always a limitation to suits in equity.' *Smith v. Clay*, reported in a note to *Deloraine v. Browne*, 3 Brown, Ch. 339." But the neglect or delay which will induce the court to withhold relief is not mere lapse of time which does not amount to a bar by a statute of limitation. In the case last cited, Vice Chancellor Van Fleet continues in this language: "He who delays asserting his rights until the proofs respecting the transaction out of which he claims his rights arose are so indeterminate and obscure that it is impossible for the court to see whether what seems to be justice to him is not injustice to his adversary should be denied all relief, for by his laches he has deprived the court of the power of ascertaining with reasonable certainty what the truth is, and thus of doing justice." So, in *Tynan v. Warren*, 53 N. J. Eq. 321, 31 Atl. 596, Vice Chancellor Green said: "I do not understand that mere delay in bringing a suit will deprive the party of this remedy, unless such a neglect has so prejudiced the other party, by loss of testimony or means of proof, or changed relations, that it would be unjust to now permit him to exercise his right." To the same effect are the cases of *Daggers v. Van Dyck*, 37 N. J. Eq. 130; *Van Houten v. Van Winkle*, 46 N. J. Eq. 384, 20 Atl. 34; *Hall v. Otterson*, 52 N. J. Eq. 535, 28 Atl. 907. In this case the complainant's delay in seeking his remedy in equity has been more than 14 years. When his tenant wrote him that a man named Seymour owned the property, and that he would not pay the complainant more rent, he should have acted, if he was in the possession of his mental faculties, and had been put upon an inquiry which would have disclosed the necessity of this suit. It appears that he was then in Pennsylvania, suffering from some mental and physical affliction. What that affliction was, does not appear. Whether it did in fact incapacitate him is not shown, save by the opinions of affiants, which are not supported by statements of facts. How long it lasted is left obscure. If he pos-

sessed capacity to care for his property, his inattention to it has very much the appearance of an abandonment of it, and a waiver of his remedy in equity. Indeed, upon the case as he presents it, if it had been made to appear that the delay has been prejudicial to the defendant, through change in position, loss of proof, or other cause, or has obscured the path of the court so as to leave it in uncertainty, I would hesitate to act. But I do not perceive that the delay has caused any substantial detriment. It is true that Mr. Seymour is dead, but the defendant does not claim that by his death she has lost evidence. Whatever value the defense of laches may have when the proofs are fully developed for the final hearing is not apparent now, and I do not think that, merely because of the lapse of 14 years since the sale, I should practically deny the complainant an opportunity to come into equity, by refusing the injunction he now seeks. I will grant the injunction upon the complainant paying the costs of the term lost in the ejectment suit, and giving bond, with sufficient sureties, in the sum of \$1,000, conditioned for the payment to the defendant of all such damages and costs as may be awarded to her, either at law or in this court, in case the decision shall be against the complainant.

(59 N. J. L. 224)

CONSOLIDATED TRACTION CO. v. ISLEY.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1896.)

STREET RAILWAYS—NEGLIGENCE.

Whenever the question whether a pedestrian using a highway has used ordinary care to avoid a collision with a vehicle is one about which a difference of opinion may reasonably be entertained, the judgment of a jury thereon must, upon error, be a finality.

(Syllabus by the Court.)

Error to circuit court, Hudson county; before Justice Lippincott.

Action by Clara Isley against the Consolidated Traction Company. Judgment for plaintiff. Defendant brings error. Affirmed.

A. Q. Garrettson, for plaintiff in error.
Warren Dixon, for defendant in error.

GARRISON, J. Every substantial assignment of error in this cause is disposed of by the decisions of this court in the cases of *Railway Co. v. Block*, 55 N. J. Law, 605, 27 Atl. 1067, and *Connelly v. Railway Co.*, 56 N. J. Law, 700, 29 Atl. 438.

Despite these conclusive declarations of the law with respect to the status of surface roads occupying the highways, cases continue to be tried below, and to be argued before this court as if such vehicles had some rights that were in law paramount to those of other users of the highways. It ought not to be necessary, in view of these adjudications, to make repeated announcements of the law upon this subject. In the case in hand the sole question was whether a person using

the street as the plaintiff was, used that degree of caution that an ordinarily prudent pedestrian would use, in view of all the surrounding circumstances.

Inasmuch as this question was one about which a difference of opinion might reasonably be entertained, the decision of the jury must, upon error, be a finality, and the judgment pronounced upon such verdict must be affirmed.

(54 N. J. E. 663)

WILDES et al. v. RURAL HOME-STEAD CO.

(Court of Errors and Appeals of New Jersey.
Nov. 17, 1896.)

CORPORATIONS—CONTRACTS—VALIDITY.

Where the stock of a cemetery company is almost without any market value, its exchange for an interest in land that may prevent disastrous competition is not so improvident as to shock the conscience, and lead, in equity, to an invalidation of the sale. 32 Atl. 676, reversed. (Syllabus by the Court.)

Appeal from court of chancery.

Bill by Frank W. Wildes and others against the Rural Homestead Company. Decree for complainant. 32 Atl. 676. Defendant appeals. Reversed.

William H. Speer, for appellant. Flavel Magee, for appellees.

GARRISON, J. The bill exhibited in this cause by certain stockholders of the Rural Homestead Company sought the vacation of a sale made to said company by one Samuel W. Bowers of his title to and interest in a certain tract of land, in consideration of 230 shares of the stock of said company.

The substantive charge of the bill was that the directors in office effectuated this sale to secure a continuance of their official positions.

The chancellor found this to be the scheme, and decreed the vacation of the sale.

In reaching this result one fundamental right is overlooked, viz. the right of Bowers, the purchaser of the stock. His claim to the status of a bona fide purchaser without notice was not successfully assailed. If, therefore, we agreed with the conclusion of the chancellor that the transaction was unconscientious on the part of the directors, it would in no wise tend to affect the title of Bowers to the stock. We do not, however, concur with the chancellor in his interpretation of the facts. The stock, at the time of the purchase in question, was so depressed that, with a par value of \$50, its selling value was \$5. The land in question, for statutory causes, was the only source from which the directors could fear competition to their cemetery. To exchange stock that was almost worthless, to suppress competition that might be most disastrous, does not, in my opinion, disclose an improvidence that should shock the conscience. On the contrary, such a deal appears to me to be, so far as the case shows, beyond reasonable criticism.

Leaving, therefore, the rights of Bowers out of the question, I am of opinion that there is no ground for annulling this sale.

The decree must be reversed.

GORE v. BRIAN.

(Court of Chancery of New Jersey. Oct. 29, 1896.)

MORTGAGES—SUBROGATION—MERGER.

1. O., an owner of land subject to two mortgages of \$2,500 each, transferred the land to a third party to hold subject to his control, and caused a third mortgage to be executed to complainant for \$1,100, which sum the latter had placed in O.'s hands for investment in first mortgage. Thereafter O. procured from defendant, through T., defendant's agent, a loan to take up the two \$2,500 mortgages, which O. represented as the only incumbrances on the property, it being understood that O. would give defendant new mortgages which would be first liens on the land. The new mortgages were executed, and before a search was made defendant drew a check to cover the \$5,000 loan to O., and O. then canceled the two \$2,500 mortgages. When the search was made it disclosed the \$1,100 mortgage, but when T. called O.'s attention thereto, the latter said it was satisfied, and in T.'s presence tore up what purported to be the original mortgage to complainant. Defendant subsequently became the owner of the equity of redemption in said land. *Held*, that defendant's mortgages were entitled to be subrogated to the two \$2,500 mortgages, and take precedence over complainant's incumbrance.

2. The fact that one entitled to be subrogated to the rights of a first mortgagee subsequently acquires the equity of redemption will not extinguish his right, by merger, in the absence of any intention to that effect.

Bill by Kate Gore against Hannah Brian to foreclose a mortgage. Defendant filed a cross bill for subrogation to the rights of a prior mortgagee. Decree for defendant.

The facts proved are these: One McCann was the owner of four lots in the city of Trenton; upon two of which lots he had made a mortgage for \$2,500 to one Schangle, and upon the other two lots another mortgage for \$2,500 to one Buckman. On August 24, 1889, McCann conveyed the four lots to one Steward, subject to the two mentioned mortgages. Steward took title to the lots at the request of John Caminade, to hold the same and dispose of them at the dictation of Caminade. At that time Caminade had in his hands for investment the sum of \$1,100, which he received from his mother-in-law, Mrs. Gore, the complainant, which sum she says he was to invest for her on first mortgage security. Instead of doing so he caused Steward to make a mortgage to Mrs. Gore for \$1,100, covering these four lots, which were already subject to the two mortgages already mentioned. On the same day, August 26, 1889, Steward conveyed all four lots to Caminade. About this time Caminade said to one Turford that he understood that he (Turford) had money to lend at 5 per cent. Turford replied that he had a party who had money to loan at that rate. Caminade then said that he had two mortgages on eight houses, upon which he was paying 6 per cent. interest, and that he would like to pay off these

mortgages and get the money at the rate of 5 per cent. The party who had money to loan was Mrs. Brian, who files her cross bill for subrogation. Turford said to Caminade that he would see Mrs. Brian, and, if the loan was satisfactory, they would make it at 5 per cent. Mrs. Brian was then staying at Ocean Grove. Caminade, after his talk with Turford, seems to have visited Mrs. Brian at that place. After her conversation with him, she came to Trenton and visited the property for the purpose of inspecting the proposed security. About this time Caminade proposed to Turford that, instead of giving one mortgage, for \$5,000, covering this whole property, he would like to give eight mortgages, each one covering one of the eight plots into which the four lots had been subdivided. His reason for this was that the incumbrances should be so placed as to render it easier to sell separate lots. Turford communicated Caminade's request to Mrs. Brian, and she assented. Indeed, she seems to have relied almost entirely upon Turford's judgment and vigilance in making the loan. There is no doubt that it was agreed by Caminade and Turford that the loan was to be put upon first mortgage, and that the proceeds were to be applied in liquidating the first two \$2,500 mortgages, which Turford supposed to be the only incumbrances then on the property. Turford says that he told Caminade to get searches, and he thinks that the searches were shown to him at the time the mortgages were executed. In regard to the latter statement he is clearly mistaken, for the searches which Caminade produced are under date of September 3d. On August 24th the eight mortgages were executed, each for \$625, amounting in all to \$5,000. On August 25th Mrs. Brian signed a check written out by Caminade. The amount for which this check was drawn was \$9,500, and not \$5,000, the amount of the eight mortgages. This is explained by the fact that Caminade, through Turford, had induced Mrs. Brian to make two other loans, one for \$3,500 to one Keihn, and another for \$1,000 to one Sample. The check under date of August 25th included all these sums. Caminade deposited this check for \$9,500 the same day. He had already in bank at that time \$2,843.83. On the same day the eight mortgages were deposited for record. On August 27th Caminade drew his check on this fund in favor of Buckman for the sum of \$2,562.50, the amount of one of the \$2,500 mortgages, together with interest. On September 2d he drew two checks on the fund in favor of Mrs. Schangle, one for \$2,500, and the other for \$62.50, the amount of her mortgage and interest. These mortgages were canceled of record on September 2d. Although Turford, as I think, had asked for a search in his first conversation with Caminade, no search in fact was forthcoming until September 3d. The money was paid over before any search was produced because Mrs. Brian relied upon Turford, and Turford, who had consulted Caminade as a lawyer in making previous loans, relied upon him implicitly to properly secure these loans to Mrs. Brian. When the search was produced it disclosed the

fact that the two \$2,500 mortgages had been canceled, but it also showed the existence of the \$1,100 mortgage which had been given to Mrs. Gore. When Turford called Caminade's attention to the existence of this mortgage, Caminade, according to Turford's account, said that the mortgage was satisfied. Turford says that Caminade showed him what purported to be the original \$1,100 mortgage, and tore it up, and threw it in the waste basket, saying that it was no good. Caminade then wrote upon the margin of the search, opposite the record of this mortgage, "Canceled September 3, 1892." The search shows these words, written in the handwriting of Caminade. This statement presents a skeleton sketch of the facts surrounding the principal transaction. There were subsequent transactions between Caminade and Mrs. Brian, by which Mrs. Brian became the owner of the equity of redemption in these lots. She loaned other moneys upon the security of the dwelling house of Caminade, and, when the house was advertised for sale by the sheriff, Caminade, to further secure Mrs. Brian, gave her a deed for not only the dwelling house, but for all this property. The interest so conveyed, however, does not appear to have been of any value.

W. D. Holt, for complainant. James J. Cahill and Robert S. Woodruff, for defendant.

REED, V. C. (after stating the facts). The question propounded is whether the mortgages of Mrs. Brian should be substituted for the two \$2,500 mortgages, and so take precedence of the \$1,100 mortgage of Mrs. Gore. At the time the agreement for the loan of the \$5,000 was made, the incumbrances upon the property were these: \$2,500 on two lots, \$2,500 on the remaining two lots, and \$1,100 on all four lots. Caminade was the equitable owner of the equity of redemption in the lots. He stated the purpose for which he wished the loan, i. e. to take up the two \$2,500 mortgages. He knew that Mrs. Brian only loaned on first mortgage, and the understanding was that, by the payment of these two first mortgages, the property would be clear of incumbrances, and therefore in a shape to be subjected to a new first mortgage, or a series of first mortgages. It is perfectly clear that, in violation of that understanding, Caminade concealed the existence of the \$1,100 mortgage when the mortgages were executed, and afterwards lulled Turford into security by pretending to destroy the Gore mortgage, on the ground that it had been paid. I had occasion to review the cases in this state dealing with the question of subrogation in deciding the case of Seeley v. Bacon, 34 Atl. 139. The distinction between what is termed "legal" and "conventional" subrogation was there restated. The former is a right to be subrogated to the position of a creditor, when the right arises from the mere fact of payment by one who is compelled to pay the debt to protect his own rights, or by

one who stands in the attitude of a surety for the debtor. Under the facts of this case, Mrs. Brian did not occupy this position when she paid the \$5,000. She must, therefore, rely upon what is termed "conventional subrogation," and conventional subrogation can only arise by reason of an express or implied agreement between the payor and either the debtor or the creditor. *North River Construction Co.'s Case*, 38 N. J. Eq. 433; *Railway Co. v. Wortendyke*, 27 N. J. Eq. 658; *Coe v. Railway Co.*, 31 N. J. Eq. 105. The doctrine of these cases is that the mere payment of a debt, by one not bound to see that it is paid, or by one who is not affected in his property rights by its nonpayment, will not entitle the payor to subrogation; nor will an understanding, existing in the mind of the payor, that he will be entitled to subrogation, so entitle him, unless this mental condition is produced by some conventional arrangement between the payor and either the creditor or debtor that this will be the consequence of the payment. If, therefore, Mrs. Brian had advanced this money to pay off the two \$2,500 mortgages, with no express or implied agreement with Caminade concerning the security for her loan, she would stand in the attitude of a stranger or volunteer, with no right to be substituted in the place of the two first mortgages. But she did not occupy this position. On the contrary, instead of being a volunteer in the transaction, she was requested by Caminade, both directly and through her agent, to advance the money to pay off the first mortgages. More than this, it was proved beyond doubt that it was understood clearly, between Caminade on the one hand and Turford and Mrs. Brian on the other hand, that the new mortgages should take the place of the old mortgages in respect to priority of lien upon the mortgaged premises. I cannot conceive a clearer case for conventional subrogation, unless Mrs. Brian has lost the advantage of her agreement by such neglect, in permitting the cancellation of the old and in receiving the new mortgage, as shuts her off from any equitable relief against the intervening \$1,100 mortgage.

In considering this aspect of the case, it must be kept in mind that, in this instance, as in the case of *Seeley v. Bacon*, supra, the \$1,100 mortgage was not taken after the record showed a satisfaction of the two original mortgages. These mortgages were on the property when the \$1,100 mortgage was executed. The security of the last mortgage will be exactly the same, after the restoration of the lien of the two \$2,500 mortgages, as it was before their satisfaction. By the decree prayed for, the parties will be placed in statu quo. In regard, therefore, to the respective equities of Mrs. Gore and Mrs. Brian, the case presents an aspect differing radically from what it would have exhibited had the \$1,100 mortgage been accepted on the faith of the satisfaction upon the record of the old mortgages. In measuring the conduct of Mrs. Brian and her agent, in respect to the degree of care em-

ployed by them in making the loan, this circumstance is of the very first importance. Seeley v. Bacon, *supra*. It would, of course, have been wise for Turford to have had a search before the money was paid, and to have seen that the \$1,100 mortgage was actually satisfied upon the record; but he had every confidence in the word of Caminade, who had been his legal adviser, and who then had a clear character for probity. Under the circumstances, it was not at all remarkable that he relied upon Caminade's word that the two mortgages would be paid off, and that, when they were paid, the property would be clear of all incumbrances. That was clearly the agreement between them, because, as already remarked, Caminade received the money upon the understanding that the mortgages securing it were to be first mortgages. His conduct at the time the search was prosecuted was an assertion that he had executed that agreement, and that the mortgages were first liens upon the property. It is unnecessary to invoke the authority of those cases which hold that, when money has been advanced under the influence of fraudulent representations in respect to the security, that then the lender will be entitled to subrogation; for, if the lender advanced money on the request of a debtor, and upon an agreement that it is to be secured by a first lien, in place of a lien already existing, which has to be extinguished by the use of the money loaned, it does not matter whether the agreement is the result of fraud or of a mere mistake of the debtor. *Sidener v. Pavey*, 77 Ind. 241; *Emmert v. Thompson*, 49 Minn. 388, 52 N. W. 31.

Nor does it matter that Mrs. Brian became subsequently the owner of the equity of redemption in this property. No merger ensued by reason of her ownership of the property, for it is obvious that it was not intended that the two mortgages should be extinguished. Merger is not favored in equity, and is never allowed, unless for special reasons, and to promote the intention of the party. 4 Kent, Comm. p. 102. It is entirely clear, under the circumstances of this case, that there was no merger. *Clos v. Boppe*, 23 N. J. Eq. 270; *Parker v. Child*, 25 N. J. Eq. 41, and cases cited; *Chilver v. Weston*, 27 N. J. Eq. 435; *Hop-pock's Ex'rs v. Ramsey*, 28 N. J. Eq. 413; *Andrus v. Vreeland*, 29 N. J. Eq. 394-396; *Mulford v. Peterson*, 35 N. J. Law, 127.

Nor do I think that there is any substance in the point that the two \$2,500 mortgages were paid by checks drawn upon a fund in bank to the credit of Caminade, which fund amounted to over \$12,000, and that therefore it was not proved that the specific \$5,000 loaned to pay off these mortgages was actually applied in their liquidation. The \$5,000 was paid to Caminade for the purpose named, and was deposited to create a credit in favor of Caminade in trust for Mrs. Brian for that purpose; and, when Caminade drew upon this credit the amount of \$5,000 for that purpose, it will be presumed that it was the money confided to

him by Mrs. Brian for that purpose. This is the rule adopted in following trust funds. The old notion that money had no earmarks, and therefore could not be followed by cestui que trust, was long since exploded. The latter doctrine is thus stated in 2 Perry, Trusts, 837: "Where trust money is mixed in the same parcel with the trustee's own money, it may be said that the trust money has run into the general mass, and has become absolved, and that the cestui que trust has no lien; but such cannot be the case. If a trustee purchased an estate partly with his own money and partly with trust moneys, it cannot be predicated that any particular part of the estate was purchased with money of the cestui que trust, but he will have a lien on the whole estate for the amount of the trust fund that was misemployed."

I am of the opinion that Mrs. Brian is entitled to be subrogated to the rights of the two first mortgagees.

(59 N. J. L. 275)

CONSOLIDATED TRACTION CO. v. HONE.

(Supreme Court of New Jersey. Nov. 5, 1896.)

DEATH OF MINOR—NEGLIGENCE OF FATHER— DAMAGES.

1. When a father sues as the administrator of his deceased son, who was killed by the neglect of the defendant, the fact that the death was in part occasioned by the contributory carelessness of the father cannot be set up in defense of the action.

2. The funeral expenses being part of the pecuniary damages resulting from the death of the son, and which had been paid by the father, can be recovered in the action by the father as the administrator under the statute.

(Syllabus by the Court.)

Error to circuit court, Hudson county; before Justice Lippincott.

Action by Henry Hone, administrator, against the Consolidated Traction Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Argued June term, 1896, before BEASLEY, C. J., and MAGIE and GARRISON, JJ.

Depue & Parker and Warren Dixon, for plaintiff in error. Thomas F. Noonan, Jr., for defendant in error.

BEASLEY, C. J. This is a suit brought by Henry Hone, as the administrator of the estate of his deceased son, who was a minor, and was killed by the carelessness of the servants of the plaintiff in error, the Consolidated Traction Company, in the management of one of their cars. The statute lying at the basis of the suit provides: "That whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable if death had

not ensued, shall be liable to an action of damages notwithstanding the death of the person injured," etc. Revision, p. 294. The following section directs that the action shall be brought by and in the name of the personal representatives of the deceased person, and that the amount recovered shall be for the exclusive benefit of the widow and next of kin of such deceased person; and that in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person, etc. From these extracts from the statute it will be at once perceived that in this suit, founded upon it, as in all others of the same class, but two questions are raised, and but two can be raised upon the record, viz.: First, could the deceased, if he had survived, have maintained an action? And, second, this being so, what pecuniary loss has fallen on his next of kin by reason of his death? These are the facts constituting the issue to be tried, and no subject for trial can be more clearly defined. Notwithstanding this, it is contended in this case by the counsel of this traction company that they have the right to defeat the action if they can show that the death in question was the result in part of the negligent conduct of the next of kin, although such negligent conduct is not to be imputed to the infant who is deceased. The plaintiff in the present case is not only the personal representative, but is likewise the next of kin, and it is insisted that, as the damages that may be received will inure exclusively to his benefit, he should, in justice, not be allowed to recover them if he was in fact the cause of their production. But it is to be remembered that the legal doctrine that bars a party injured by the unintentional misconduct of another by reason of his having himself been, in a measure, the occasion of the resulting damage, is rather an artificial rule of the law than a principle of justice, for its effect generally is to cast the entire loss ensuing from the joint fault upon one of the culpable parties, and oftentimes upon him who is but little to blame. Such a legal regulation has no claim to extension, and to apply it as is now insisted on would be to use it in a novel way. The question whether the deceased was negligent is within the issue formed by the pleading; while the question whether a third person, who in his individual capacity has no connection with the suit, was negligent, has nothing whatever to do with such issue. In the legal practice of this state it is the established course to exclude everything that is not embraced in the issue as the parties have framed it, and as it appears upon the record. On the trial of this case the inquiry whether the father of the deceased minor had by his want of care been instrumental in the production of the accident was a matter utterly irrelevant to the subject then submitted to judicial inquiry. The statute of Iowa re-

lating to this subject and our own are similar, and in *Wymore's Case*, 78 Iowa, 396, 43 N. W. 265, the court of that state expressed very distinctly what is deemed the correct view of this topic in these words: "If," says the opinion, "his parents, by their negligence, contributed to his death, that does not seem to be a sufficient reason for denying his estate relief. Such negligence would prevent a recovery by the parents in their own right. * * * It is claimed that, * * * since they inherited his estate, the rule that would bar a negligent parent from recovering in such case in his own right ought to apply. But the plaintiff seeks to recover in right of the child, and not of the parents. It may be that a recovery in this case will result in conferring an undeserved benefit upon the father, but that is a matter which we cannot investigate. If the facts are such that the child could have recovered had his injuries not been fatal, his administrator can recover the full amount of damages which the estate of the child sustained." The subject will be found illustrated by a reference to many cases in 4 Am. & Eng. Enc. Law, p. 88. My conclusion is that there is no fault to be found with the trial of this case in reference to this point.

Another objection is that proof was admitted to show that the father had paid the funeral expenses of his deceased son, and the amount of such payments. But as the father, who is next of kin, was legally responsible for such expenses, the payments in question constituted part of the pecuniary loss specified in the statute, and were consequently assessable as part of the damages to be awarded. The conduct of the trial was also, in this respect, unobjectionable. Let the judgment be affirmed.

(55 N. J. E. 168)

ALLAIRE v. KETCHAM et al.

(Court of Chancery of New Jersey. Nov. 18, 1896.)

BILL TO QUIET TITLE — JURISDICTIONAL FACTS — PEACEABLE POSSESSION — BOUNDARY LINE — EVIDENCE — RECORD TITLE.

1. Under Act 1870 (Revision, p. 1189; 3 Gen. St. p. 3486), which provides for a bill to quiet title "when any person is in peaceable possession of lands * * * claiming to own the same," etc., both actual and peaceable possession are, on complainant's part, jurisdictional facts, and, if denied by defendant, must be settled as the preliminary question.

2. On a bill to quiet title, it appeared that about 1856 complainant's predecessor in title cut hoop poles from the tract in controversy, up to the line claimed, his men working for three months; that in 1871 stakes were placed on the line, and trees marked, and that since that time complainant had stopped any trespassing on the land; that he stopped a sale of the land by defendants in 1884; that no wood had been cut therefrom for over 20 years, till 1894, when persons working under some or one of the defendants began cutting, and were immediately enjoined under the pending bill. *Held*, that complainant was the actual possessor of the premises.

3. Under Act 1870 (Revision, p. 1189; 3 Gen. St. p. 3486), which provides for a bill to quiet title, "when any person is in peaceable possession of lands * * * claiming to own the same," peaceable possession need be shown against defendant only.

4. Possession of complainant is peaceable, within Act 1870 (Revision, p. 1189; 3 Gen. St. p. 3486), where defendant setting up a claim of title has not interfered with complainant's possession by an act which is suable at law, and suit upon which will or may involve the title of defendant.

5. Under Act 1870 (Revision, p. 1189; 3 Gen. St. p. 3486), which provides for a bill to quiet title where acts of trespass committed under the direction of some or one of the defendants have been enjoined under such a bill, and the only answering defendant does not allege that she is responsible for the trespass and may be sued for it, and the bill is taken pro confesso against the other defendants, there appears no such interference with complainant's "peaceable possession" as would oust the jurisdiction under the act.

6. On the issue of the true location of a boundary line, a return from the board of proprietors, wherein the disputed line is located by reference to certain boundary lines of other tracts, which are proved to be well established and recognized, must prevail over a map on file in the surveyor's office showing a different location of the disputed boundary.

7. In a bill to quiet title, where the origin of the record title under which defendant claims is not shown, the title derived must depend in the first instance upon possession, and this must be shown.

Bill by Hal Allaire against Rebecca Ketcham and others to quiet title. Decree in favor of complainant.

H. H. Wainwright, for complainant. R. Allen, Jr., and James Steen, for defendants. Rebecca Fielder and William Fielder.

EMERY, V. O. This is a bill to quiet title under the act of 1870 (Revision, p. 1189; 3 Gen. St. p. 3486). The land in question is uninclosed woodland, situate in Wall township, Monmouth county; and the bill, in addition to the usual allegations, contained an allegation that the defendants, or some or one of them, were cutting the timber on the lands, and that those of the defendants who were cutting the timber, or causing it to be cut, were nonresidents of the state, and irresponsible. Upon filing the bill a preliminary injunction was issued, restraining the cutting of timber, or removal of any which had been cut, pending the hearing. The bill alleged peaceable possession of the premises, and has been taken as confessed against all of the defendants except Rebecca Fielder and her husband, William Fielder.

A preliminary question of some difficulty has been raised. The statute confers the right to file a bill in equity to quiet title "when any person is in peaceable possession of lands in this state * * * claiming to own the same," etc. Actual possession and peaceable possession are, on complainant's part, as has been settled, jurisdictional facts, and if denied, as has been done by the answer in this case, must be settled as the preliminary question. *Sheppard v. Nixon* (Err. &

App., 1887) 43 N. J. Eq. 627, 13 Atl. 617; *Yard v. Association*, 49 N. J. Eq. 306, 24 Atl. 729; *Beale v. Blake*, 45 N. J. Eq. 668, 669, 18 Atl. 300 (Pitney, V. C.). As to actual possession, the lands here in question are uninclosed woodland, and the proofs of actual possession in relation to such lands are to be such as are required by the character and situation of the lands. On the complainant's part it is proved that about 1856 complainant's predecessor in title, James P. Allaire, cut hoop poles from the whole tract up to the line claimed, his men working for three months, and that in 1871 stakes were placed on the line, and trees marked, and that since that time the complainant has stopped the trespassing by cutting wood on the lands by any person, so far as it has been brought to his knowledge by the persons whom he has employed to take charge of his lands. Other assertions of claim were made,—not extending, however, to acts upon the land itself,—such as stopping sale of the land by defendants in 1884. Except in these instances, no wood has been cut from the lands in dispute for over 20 years, and up to November, 1894, when persons working under some or one of the defendants named in the bill began cutting, and were immediately enjoined under this bill. So far as possession is required by the statute, I think the proofs show that the complainant was the actual possessor of the premises in dispute, and that this possession has been proved by acts of ownership such as were required by the nature and situation of the property. Has the possession been "peaceable," under the statute? If by "peaceable" is meant quiet and peaceable as to every trespasser, whether claiming title or not, then the possession cannot be said to have been altogether peaceable, for the trespassers whom complainant ordered off disturbed this peaceable possession. But I think the true construction of the statute is that the possession must be peaceable as against the defendant. And, further, it seems to me that in determining whether the possession, as to the defendant, is peaceable, the test must be whether the defendant setting up a claim of title has interfered with complainant's possession by an act which is suable at law, and suit upon which will or may involve the title of the defendant. This is the test applied by the courts to the term "peaceable," as connected with the acquitting of easements by continued and peaceable possession for 20 years. *Railroad Co. v. McFarlan* (Err. & App., 1881) 43 N. J. Law, 605. See opinion of Mr. Justice Depue, page 631. The situation here in reference to the meaning of the word "peaceable," in this statute, is analogous to that of the "peaceable" user in case of easements, and this construction carries out the object of the statute. And if the answering defendant, Mrs. Fielder, had admitted the cutting, or that it was done by her direction or under her order, as it now seems to me,

the present bill must have been held simply as an injunction bill, restraining trespass pending trial of the title at law. But Mrs. Fielder does not, either in her answer or in her evidence, as I read it, admit that the cutting in 1894, west of the disputed line, was done by her direction. The affidavits to the bill show that it was done by the direction of another defendant, Rebecca Ketcham, who lives out of the state, and against whom the bill has been taken pro confesso. Mrs. Ketcham's servants were enjoined from further cutting for her, upon filing the bill, and have since desisted. If this cutting was not done by defendant Fielder's orders, or under her direction, then she is not suable for the trespass; and so far as Mrs. Fielder, the answering defendant, is concerned, this cutting did not interfere with the peaceable possession of complainant. On the contrary, if the complainant, on being advised of the cutting under Mrs. Ketcham's order, procured an injunction against this, which was acquiesced in by Mrs. Ketcham, then the immediate procuring of this injunction may be taken as proof of another assertion of right of ownership by complainant against Mrs. Fielder. Unless Mrs. Fielder is liable to be sued for this act of trespass, and thus involve her title, I see no interruption of the peaceable possession of complainant. The burden of proving that she was responsible for the cutting, and may be sued for it, devolved upon Mrs. Fielder; and, in order to oust the jurisdiction under the act, this must appear affirmatively. I conclude therefore that, as the case appears, I have jurisdiction.

Upon the hearing it appears that the principal dispute between the parties is the location of the easterly line of a lot of woodland, which was devised by one Benjamin Jackson to his son Benjamin Jackson by will dated November 7, 1806. By this will the testator devised to Benjamin Jackson, the son, in fee, "twenty acres woodland that I took up, adjoining Painters Rhoad." This 20 acres woodland was the westerly portion of a tract of land containing 38.19 acres, which had been conveyed by Thomas Parker to the testator, Benjamin Jackson, by deed dated January 24, 1804; and this tract of 38.19 acres had been taken up by Parker by a return from the board of proprietors dated July 10, 1802. By his will, Benjamin Jackson devised to his daughter Rebecca Harris, for her natural life, 18 acres off this tract that he took up. The defendant Rebecca Fielder claims title to or interest in the 18 acres thus devised to Rebecca Harris for life, and, in reference to her title, one dispute is as to the location of the boundary between the 20 acres woodland and the 18 acres. The complainant claims that the boundary between these two portions of the original 38.19-acre tract is the line now visible on the ground, from the north end of the property, over a large portion of the property; this line having woodland on one side, and cleared land on the other, and being con-

tinued by marked trees to the southern boundary of the tract. The defendant claims that the true boundary is located 10 chains westerly of this line now dividing the woodland and cleared land. Upon the whole evidence, I am satisfied that the complainant's contention as to the boundary is correct. Speaking generally as to the evidence, the complainant establishes the line by two classes of evidence: (1) By the reference in the return for the 38.19 acres to certain boundary lines of other tracts which are proved to be well established and recognized boundary lines, and which cannot be satisfied, except by the location as claimed, by complainant. This location, however, is at variance with the map of the 38.19 acres on file in the surveyor's office, attached to the original survey, and which shows that the whole of the tract lies on the west side of a public road shown on the map; and this location, if true, would throw the whole tract 10 chains further to the west, thus making the 18 acres include the lands in dispute. But this location would ignore the beginning point, which is also indicated on the map, and which is the only fixed monument referred to in the return. No reference to the road is made in the return. The map is not referred to in the return, nor can it properly be used to correct its boundaries expressly given. So far as the boundaries are to be fixed by the record, the return must prevail over the map, under these circumstances, and the location of the entire 38.19-acre tract west of the road cannot be made. In the second place, I think the complainant has established that the line, as now existing, has, for 30 years and more previous to filing the bill, been practically recognized by the owners on each side of the line between the woodland and the cleared land as the limit of their respective lands. Defendant claims that about 1870-71 her husband, by her direction, cut several cords of wood from the lands in dispute, but the evidence does not show satisfactorily that the wood then cut was taken west of the line claimed by complainant. The line, at the southern portion of it, and below the cleared land, has woods upon both sides of it, being indicated in this portion by marked trees. The evidence as to the cutting of wood and to the previous cultivation of the land by defendant's father, before the present growth of wood, seems to locate the cutting and cultivation east of the line, and on lands not claimed by complainant. The assertion of ownership made by defendant by reason of giving permission to gather ice from an ice pond on the southern portion of the premises, like similar assertions made by the complainant, are of little or no weight in the present case, for the reason that the ice pond extends across the disputed line, and, even if complainant correctly locates the line, the permission of both was necessary, and seems in fact to have been obtained.

The complainant also contends that the defendant has not shown title to the lands west

of the alleged boundary line. The defendant claims that her record title goes back to Benjamin Jackson's will, but her record title, as proved, does not extend back so far. Rebecca Harris, the daughter of Benjamin Jackson, and to whom the 18 acres were devised, was the first wife of George Harris. After her decease, George Harris married Martha Stratton, and Rebecca Fielder was a daughter of the second wife. Rebecca Fielder's record title, as proved, begins with a deed dated March 4, 1834, from one Safety Layton, who describes himself as assignee of William Harris, and conveys to George Harris, by metes and bounds, a tract of land set off and allotted to him as his part of the land belonging to his mother, who was deceased. Whether William Harris was a son of Rebecca Harris does not appear by the evidence, and, even taking the devise of the 18 acres to have been to Rebecca Harris in fee, the origin of William Harris' record title is not shown; and title derived from him, therefore, must depend in the first instance upon possession, which has not been shown. Upon both of these grounds, therefore, I conclude that the defendant Fielder has not shown any title to the lands lying west of the line indicated, and which are portions of the lands mentioned in the bill. A decree will be advised, under the statute, to that effect; and, if necessary, the particular description of the lands to which adjudication extends may be inserted in the decree. Defendant was entitled, perhaps, to have the description made more definite in the bill; but, having proceeded to hearing without application for that purpose, the court may, by the decree, under the statute, specify the portion of the lands described generally in the bill to which the rights of the parties are settled. Form of decree to be settled on notice.

(55 N. J. E. 47)

FLETCHER v. NEWARK TELEPHONE CO.

(Court of Chancery of New Jersey. Nov. 19, 1896.)

CORPORATIONS—CONTRACT AS TO NEW STOCK—SPECIFIC PERFORMANCE—PARTIES.

1. A corporation was organized to take over the business and assets of another older corporation, and contracted with the older corporation and its stockholders, in consideration of receiving such business and assets, to issue to each of the old stockholders certificates of stock in the new company, upon surrender of those in the old, share for share. In a suit by a holder of a certificate of stock in the old company against the new company for specific performance of this agreement, *held*, that the suit could be maintained by a single stockholder without making the old company or either of its stockholders parties defendant, or declaring that the suit was brought for the benefit of such of the old stockholders as might come in and be made parties.

2. The general language, often used in this connection, to the effect that all persons having an interest in the subject-matter of the suit should be made parties, is not accurate. The true rule seems to be, that all persons who are parties to the interest involved in the issue, and

who must necessarily be affected by the decree, should be made parties.

3. Where a certain sum of money or other thing is due to a party, and no other person has any right or interest in that particular sum of money or thing, it is not necessary to make any other person a party to a suit to recover it, nor to declare that the suit is brought for the benefit of the complainant and other persons having similar claims, although there may be such other persons.

(Syllabus by the Court.)

Bill by Catherine Fletcher against the Newark Telephone Company for specific performance. On demurrer to bill. Overruled.

George Biller, for demurrant. William P. Martin, for complainant.

PITNEY, V. C. The bill, though inartisticly drawn and framed, states with sufficient clearness and precision the following facts: That the complainant is the holder of 730 shares in the capital stock of the Newark Mutual Telephone Company, which was organized in the year 1895, and became possessed of certain contracts, franchises, and properties, and that later on, owing to some doubt as to the strict legality of the organization of that company, the defendant, the Newark Telephone Company, was organized for the purpose of carrying on the same business which had been within the grasp of the Mutual Company, and entered into "a certain agreement with the Newark Mutual Telephone Company, and with the stockholders thereof," whereby the defendant agreed to take and absorb the entire business of the Mutual Telephone Company and its contracts with its subscribers for telephone service, and assume all of its contracts for such service, and its other contracts, franchises, properties, etc., and also agreed "to pay and deliver therefor, to the stockholders of the said Mutual Telephone Company, the stock of the Newark Telephone Company, share for share, and issue the same to the stockholders of the said Mutual Telephone Company upon surrender of their certificates of stock in the said Newark Mutual Telephone Company to the defendant." Though this language indicates a contract made by the defendant "with the stockholders" of the Mutual Telephone Company jointly or as a body, yet I construe it to mean, not a joint contract, but a contract with each one of the stockholders of the old company severally in their individual capacity. The contract was to issue stock to the stockholders of the old company, share for share, upon the surrender of their certificates of stock, which I construe to mean their certificates of stock severally. The contract could not well be made with the stockholders collectively or jointly for the exchange of certificates of stock with each individually. Such was the construction put upon the language of the contract by counsel for demurrant in his argument. The bill alleges, further, that the old company transferred, assigned, granted, and set over unto the defendant all of its properties, contracts, rights, choses in action, and

other assets, and fully performed the agreement before mentioned; and that the defendant company has issued and exchanged its stock (which I construe to mean certificates of its capital stock) to and with the stockholders of the old company, share for share, with the exception of the 730 shares held by the complainant, and about 1,000 in addition. The total number of shares of capital stock issued is not stated, nor the names of any other stockholders given. It alleges a tender of the certificate of stock held by the complainant to the defendant, and a demand of the issue of stock to her prior to the filing of the bill. The prayer is that the defendant may specifically perform its contract by issuing the certificate of stock to the complainant.

The demurrer is, generally, for want of equity, and, specially, for want of parties. The ground of want of equity was not pressed at the argument, but reliance was had entirely upon the want of parties. The contention was that all the stockholders of the old company must be made parties, either complainants or defendants, or that the complainant must sue on behalf of herself and all other stockholders who choose to come in. I think that the point is not well taken, and not supported by the authorities cited. The bill has only a faint resemblance to one where a suit is brought by creditors for a distribution of a fund held by defendant, either in trust or otherwise, for their benefit. In such case it is usually necessary to ascertain, first, the amount of the fund, and, next, the total amount due the creditors or other cestuis que trustent among whom it is to be divided. Hence such a suit must be brought for the benefit of all the creditors. That was the case in *Wetherbee v. Baker*, 35 N. J. Eq. 501, which was a suit by a creditor of a corporation against its stockholders to compel them to pay their subscriptions to its capital stock, in order to create a fund out of which the complainant could be paid his debt. Clearly, the complainant could get no preference by bringing his suit, but must share with all the creditors, and the amount to be contributed by the defendants was limited to the amount necessary to pay the outstanding debts, not exceeding, however, the amount of their unpaid subscriptions; so that it was necessary to determine the amount of outstanding debts, and take an account of the other assets of the corporation, in order to ascertain how much should be contributed by the stockholders, and what percentage should be paid to each creditor if the resultant fund should prove insufficient to pay in full. The language used by the learned judge on pages 506 and 507 clearly does not reach and cover the case here in hand. In *Cutler v. Tuttle*, 19 N. J. Eq. 549, Mr. Cutler bought property in trust for certain persons, to be ascertained, and the complainant, Miss Tuttle, sued him, claiming that she was entitled to the whole of the property, because she had furnished the whole of the purchase money. On the other hand, Daniel L. Tuttle claimed that

he was entitled to an interest in it, and was one of the cestuis que trustent. It was held that Daniel L. Tuttle should have been made a party, because his rights were liable to be affected by the decree. The language used (page 555) is this: "In the decision of the question upon which the suit must hinge, Daniel L. Tuttle's rights are involved, and must be passed upon by the court. His interests, to a certain extent, are also liable to be affected by the decree made in this suit." And in view of those facts, the learned judge used the general expression that "the rule requiring all persons interested in the subject of the controversy to be made parties to the suit grows out of the constitution of a court of equity," etc. The statement of the interest which Daniel L. Tuttle had in it shows that he referred to persons whose interest in the subject-matter would be affected by the controversy. So, with the other case relied upon by the demurrant,—*Heath v. Ellis*, 12 Cush. 601. There the bill was by a stockholder of a corporation, and its object was to recover from certain defendants the value of the assets of the corporation which had been taken possession of by them, and converted to their own use, under such circumstances as would compel them to account as trustees to the stockholders of the corporation as cestuis que trustent; and it was held that the suit must be brought in behalf of the complainant and the other stockholders, and it was put on the ground that it was a suit to enforce a trust for a class of persons. The learned judge said that it was a familiar rule of equity pleading "that all persons having a common interest and common object in the subject-matter of a bill ought to be made parties, or, if they are too numerous to render the joinder of all of them practicable, the bill should be brought by some in behalf of all, so that the rights of all may be duly adjudicated in the final decree"; and, of course, the ascertainment of the number of shares of stock, and how and by whom held, was necessary in order to determine the rights of the parties. The language there used, "all persons having a common interest and common object in the subject-matter of a bill," seems to me to be a better general statement of the rule than to say that "all persons having an interest in the subject-matter" should be made parties. But I think that neither of them is strictly accurate, as was pointed out by Chancellor Zabriske in *Van Keuren v. McLaughlin*, 21 N. J. Eq. 165, where, in commenting upon somewhat similar language used by the court of errors and appeals in the same case, at page 380, he cites with approval the language of Justice Story (*Story*, Eq. Pl. § 72) that "it is not all persons who have an interest in the subject-matter of the suit, but, in general, those only who have an interest in the object of the suit, who are ordinarily required to be made parties"; and Mr. Calvert's language in his treatise on Parties (page 10): "The propriety of a person being made a party depends upon his interest, not in the subject-matter, but in the object, of the

suit." A still better definition, perhaps, is that of Thomas, J., in *Bank v. Gardner*, 3 Gray, 308, thus: "The general doctrine in relation to parties in equity is often stated to be that all persons interested in the subject-matter of the suit should be made plaintiffs or defendants. This statement is too broad. It would be more accurate to say, persons interested in the object of the suit must be made parties; that is, persons who are parties to the interest involved in the issue, and who must necessarily be affected by the decree."

Now, the bill here is filed on behalf of an individual who has a contract with the defendant company to issue and deliver to her a certain fixed and definite number of shares of its capital stock. No other individual has any interest in that contract. No account of assets or shares need be taken. The contract was not that a certain number of shares should be delivered in bulk to the stockholders of the old company to be distributed among them. Such a transaction is unthinkable. Shares of stock are evidenced by certificates issued; and, where such general language is used in the bill as "shares of stock," the context requires us to construe it as "certificates of shares of stock." The contract was to deliver to the complainant a certificate for 730 shares of stock in the defendant company. The authorities are abundant for holding that where the sum of money or other thing due to the complainant is already ascertained, and no other person has any right or interest in that particular sum of money or thing so due, it is not necessary to make any other person a party. This distinction was referred to and recognized by Chancellor McGill in *Speakman v. Tatem*, 45 N. J. Eq. 388, 17 Atl. 818, where he holds the result to be that the line of cases referred to hold "that where one of several cestuis que trustent, entitled to a certain share of a certain sum, seeks to recover from the trustee his share of that sum, he need not make the owners of the remaining shares parties to the suit." He cites *Smith v. Snow*, 3 Madd. 10; *Hutchinson v. Townsend*, 2 Keen, 675; *Perry v. Knott*, 5 Beav. 293, — to which I add *Hares v. Stringer*, 15 Beav. 206; *Hughson v. Cookson*, 3 Younge & C. 578; *Lennaghan v. Smith* (1847) 16 Law J. Ch. 376 (Lord Cottenham); *Marryat v. Marryat* (1854) 23 Law J. Ch. 876 (see top of page 878). That was a bill by one cestui que trust against the trustees to administer the trusts of a will. A motion was made against the trustees to transfer into court certain shares of government stock. The motion was resisted by the trustees, on the ground that the persons beneficially interested in the property of the testator were not made parties to the suit, and had not been served with notice of the motion. Vice Chancellor Kindersley said: "If this had been a suit for the administration of trusts under a settlement, instead of a will, perhaps these persons might have been proper parties; but they are not so

in a case like the present." There it is to be observed that the complainants had a certain share of a fund. The case goes further than those referred to by the chancellor in *Speakman v. Tatem*.

The other stockholders in this case may be interested in the principle of the decision in this cause, but they are not shown by the bill to be interested in the result of the cause itself. The demurrer admits that the complainant is the holder of a certificate for 730 shares of the stock of the old company, and that the defendant promised to issue the same number of shares to her in the new company upon surrender of her certificate. The present case is somewhat similar to that of *Swedesborough Church v. Shivers*, 16 N. J. Eq. 453, where a test suit was brought by the church to establish a rent charge upon a particular piece of land, which was part of a larger piece which had been conveyed by the church, reserving a rent charge. Chancellor Green there says: "There is no want of proper parties. The bill seeks to recover only the rent charged upon the land owned by the defendant. That is defined by strict metes and bounds. The right of no other landowner can be affected by the decree. The bill does not ask an apportionment of the rent among the different owners, nor seek to settle any question of boundary or conflicting right."

Nor can I perceive any ground for holding that the old corporation is a necessary party to the suit. The bill alleges that it has stripped itself of all its property and franchises by assignment and transfer to the defendant, and that the contract here sued upon was made directly with the complainant and the defendant. But if by the true construction of the contract, or if the proof should finally be that the contract was made between the two corporations, but for the benefit of the individual stockholders of the old company, I should still be inclined to the opinion that the old company was not a necessary party, and that each stockholder could sue individually for the stock due to him, basing this right upon the contract made by the old corporation for his or her benefit. No relief is or can be, upon the facts, prayed against the old corporation, nor is it at all affected by the result of the suit. Presumably, its stockholders accepted the promise of the new company to issue certificates of stock to them, severally, as full satisfaction of all claims they held against the old company. And certainly, upon the statement of the facts contained in the bill, the performance of the defendant's contract with each of the old stockholders is a complete discharge of any claim the old company may have against the new company.

Upon the facts stated in the bill, I think that the complainant is entitled to specific performance of that agreement, and that the demurrer must be overruled. I will advise a decree overruling the demurrer, with costs.

(59 N. J. L. 343)

STATE (HOME FOR THE EDUCATION AND CARE OF FEEBLE-MINDED CHILDREN, Prosecutor) v. COLLECTOR OF THE TOWNSHIP OF LANDIS.

(Supreme Court of New Jersey. Nov. 5, 1896.)

TAXATION—EXEMPTIONS—HOME FOR FEEBLE-MINDED.

Under the act of 1894 (Laws 1894, p. 354), the prosecutor is entitled to exemption from taxation for every building used for the purposes of its creation, and also for so much of the land upon which each building is erected as is necessary to its fair use and enjoyment, not in any case exceeding five acres to a building.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of the Home for the Education and Care of Feeble-Minded Children, against the collector of the township of Landis, to review an assessment for taxes. Assessment set aside.

Argued June term, 1896, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Howard Carrow, for prosecutor.

VAN SYCKEL, J. The prosecutor owns 120 acres of land in the township of Landis. In the years 1894 and 1895, the assessor exempted from taxation 5 acres, with the buildings thereon, and assessed 115 acres, on which are erected some of the buildings necessary for the uses of the corporation. The 5 acres exempted would hold all the buildings erected upon the entire tract of 120 acres, but it does not appear that 5 acres can be so set off as to contain all the buildings on the tract.

By force of the fifth section of the act of 1894 (page 354), exemption is claimed, not only for the 5 acres and the buildings thereon, but also for the buildings upon the remaining 115 acres. The said fifth section exempts "all colleges, academies or seminaries of learning, public libraries, schoolhouses, buildings erected and used for religious worship, buildings used as asylums or schools for the care, cure, nurture, maintenance and education of feeble-minded or idiotic persons and children, provided such institutions are duly incorporated under the laws of this state, and the land whereon the same are situate, necessary to the fair use and enjoyment thereof, not exceeding five acres for each one, the furniture thereof and the personal property used therein," etc. In *State v. Ross*, 24 N. J. Law, 497, under the act of 1851 (page 272, § 5), exempting all colleges, academies, or seminaries of learning, and the lands whereupon the same are erected, the dwelling houses erected by the college of New Jersey for the accommodation of the professors and steward were held to be exempted, as well as all the college buildings. The act of 1894 exempts buildings used as asylums for the feeble-minded, and the land whereon the same are situate, necessary to the fair use and enjoyment thereof, not exceeding five acres for each one. Ev-

ery building used by the asylum is expressly within the act, and also the land on which each building stands is exempted, with two limitations: First, only so much land as is necessary to the fair use and enjoyment of the building shall be exempt; and, second, the land exempted with any building shall in no case exceed five acres.

The prosecutor is duly incorporated under the laws of this state, and is therefore entitled to exemption, not only for the buildings upon the five acres, but likewise for Ellis cottage, Crossland cottage, the barns, the McBurney cottage, Robinson cottage, Cattel cottage, another cottage, and the hospital, which are situated on the 115 acres assessed, and also so much land as is necessary to the fair use and enjoyment of each building, not exceeding in any case five acres. It is admitted that all of the buildings are necessary for the uses of the corporation to carry out the object for which it was established. The assessment certified must be set aside, and a new assessment will be ordered, in pursuance of the statute, unless the parties agree what the assessment shall be.

(59 N. J. L. 233)

CROUSE v. LEWIS.

(Supreme Court of New Jersey. Nov. 6, 1896.)

WRIT OF ERROR—DEFECT OF PARTIES—DISMISSAL.

A writ of error bringing up an order of distribution of moneys brought into the court below for distribution among lien claimants. Ordered dismissed, as it failed to join all such parties interested in the procedure.

(Syllabus by the Court.)

Error to court of common pleas, Monmouth county; Conover, Judge.

Action by Charles Lewis against Emilly Crouse. From the judgment, defendant brings error. Dismissed.

Argued June term, 1896, before BEASLEY, C. J., and MAGIE, GARRISON, and LIPPINCOTT, JJ.

A. C. Hanorne, for plaintiff in error. Aaron E. Johnston, for defendant in error.

BEASLEY, C. J. This writ of error brings up an order to distribute the money brought into court on a sale of the property by force of a judgment on a mechanic's lien. The writ must be dismissed, as all the parties in interest are several lien claimants, among whom the money was ordered to be distributed. Of course, they are all interested in the order thus made, and that order cannot, consequently, be altered without all such parties being summoned or brought in. The proper course was to issue the writ in the names of all those claimants, and then to proceed by summons and severance. The writ must be dismissed, as this court cannot, as the case stands, render any judgment in the premises.

(59 N. J. L. 369)

STATE (LAYTON, Prosecutor) v. OCEAN GROVE CAMP-MEETING ASS'N.

(Supreme Court of New Jersey. Nov. 5, 1896.)

CAMP-MEETING ASSOCIATIONS—ACTION FOR PENALTY—CERTIORARI.

The ninth section of "an act conferring certain powers of government on boards of trustees, boards of directors, or managers of any camp meeting association," etc. (Pamph. Laws 1894, p. 140), authorizes suits to be brought for the collection of penalties, incurred for the violation of ordinances passed by such associations, before any justice of the peace, police justice, or officer specially commissioned possessing the powers of police justices. *Held*, following *White v. Neptune City*, 28 Atl. 378, 56 N. J. Law, 222, that the proceedings prescribed by this section are civil suits, in the courts for the trial of small causes, and are not reviewable by certiorari, in those cases in which the parties are given an appeal to the court of common pleas by the provisions of the justices' courts' act.

(Syllabus by the Court.)

Certiorari, on the prosecution of George Layton, against the Ocean Grove Camp-Meeting Association, to review a judgment of a justice of the peace. Dismissed.

Argued June term, 1896, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Claude V. Guerin and Wm. H. Vredenburg, for prosecutor. John E. Lanning and Joseph Coult, for defendant.

GUMMERE, J. The writ in this case was sued out for the purpose of removing into this court, for the correction of alleged errors therein, a judgment rendered by one of the justices of the peace of the county of Monmouth, in a suit brought by the defendant association against the prosecutor, for the recovery of a penalty incurred by him by violating one of the ordinances of said association. The ordinance violated was passed under the authority of "an act conferring certain powers of government on boards of trustees, boards of directors, or managers of any camp-meeting association, etc." Pamph. Laws 1894, p. 140. By the terms of this act, any person who violates any provision of an ordinance passed under its authority may be sued by the association for the penalty prescribed in such ordinance, before any justice of the peace, police justice, or officer specially commissioned and possessing the powers of police justices. In the case of *White v. Neptune City*, 56 N. J. Law, 222, 28 Atl. 378, this court, in construing a statutory provision similar to that just referred to, held that the court designated by the act as the forum where such suits should be prosecuted was not a tribunal newly created by the statute itself, but was the pre-existing and well-known justice's court. Judgments of that court, except those obtained by confession, are only reviewable by appeal to the court of common pleas, and cannot be removed into this court by certiorari for the correction

of any supposed error therein, unless it appears that the justice was without jurisdiction. Gen. St. p. 1882, § 96. In the case before us it appears by the record and proceedings sent up with the writ that the justice had jurisdiction over the subject-matter of the suit, and also over the parties with reference to that subject-matter. That being so, we feel constrained to hold, under the authority of *White v. Neptune City*, supra, that the writ of certiorari in this case was improvidently issued, and should be dismissed. The prosecutor is entitled to costs.

(59 N. J. L. 311)

COLES v. FIRST BAPTIST CHURCH OF COLLINGSWOOD.

(Supreme Court of New Jersey. Nov. 13, 1896.)

COMMON PLEAS—JURISDICTION—MECHANICS' LIENS.

The pleas have no jurisdiction to pronounce judgment in a mechanic's lien case transferred to it from the circuit, and such judgment will, upon a writ of error, be for this cause reversed.

(Syllabus by the Court.)

Error to court of common pleas, Camden county; Vroom, Judge.

Action by Charles B. Coles against the First Baptist Church of Collingswood. Judgment for defendant. Plaintiff brings error. Reversed.

Argued June term, 1896, before BEASLEY, O. J., and MAGIE, LIPPINCOTT, and GARRISON, JJ.

George H. Peirce, for plaintiff in error. Lindley M. Garrison, for defendant in error.

GARRISON, J. We cannot do otherwise than reverse the judgment brought into this court by this writ of error, viz. a judgment of the court of common pleas pronounced in a mechanic's lien case.

The act of March 28, 1892 (P. L. 224), authorizing the transfer of suits from circuit courts to the courts of common pleas, cannot be interpreted to enlarge the jurisdiction of the pleas. The authority given to the pleas extends no further than "to hear causes so transferred in like manner as if the same had been originally brought in said court." The jurisdiction over mechanic's lien cases is vested exclusively in the circuit courts,—and, if brought originally in the pleas, could not be heard there at all. Hence, by the legislative test above cited, such cases cannot be heard by the pleas when transferred thereto from the circuit.

Upon application to the justice of the supreme court holding the circuit, the cause may be remanded for trial therein.

(59 N. J. L. 207).

**GOLDEN STAR FRATERNITY v.
MARTIN.**(Court of Errors and Appeals of New Jersey.
Nov. 16, 1896.)**STATUTES—TITLE AND OBJECT—MUTUAL BENEFIT
INSURANCE—CONSTRUCTION OF CERTIFICATE—BENEFICIARY.**

1. The authority conferred upon associations incorporated under the "Act to incorporate benevolent and charitable associations," by the supplement thereto approved March 2, 1883, and the further supplement thereto approved April 12, 1886, to make contracts with their members for the payment of death benefits, is authority to make contracts of the nature of life insurance. So far as those supplements purport to authorize contracts of ordinary life insurance, their enactments are ineffectual, for such an object is not within the title of the acts; but, so far as they authorize contracts whereby the fund to be paid at death of the member is to go as a gift among the class of persons named in the acts, their enactments are not objectionable, because that object is within the title of the acts.

2. The relation created by a "beneficiary certificate" issued to a member by an association so incorporated is contractual, and the contract is to be discovered in its language, read in connection with the rules and by-laws of the association and the above-mentioned act and its supplements, and is subject to the same rules of construction as other contracts.

3. The constitution of such an association provided for the establishment of a beneficiary fund, out of which, on death of a member who had complied with certain requirements, a sum should be paid "to whom" such member should direct. It issued a beneficiary certificate to Lizzie P. Martin, and thereby contracted to pay, on her death (she having complied with the requirements, etc.), a certain sum to her mother. By the rules of that association, Lizzie P. Martin could surrender that certificate, and obtain a new certificate, payable to another beneficiary dependent on her. The mother died before Lizzie, and the latter died without having designated a new beneficiary. *Held:* (1) That the contract thus made did not bind the association to pay the fund to the personal representative of Lizzie P. Martin, because such a contract was not within the power of the association, and was inconsistent with the plan of its beneficiary fund; and (2) that it did not bind the association to pay the fund to the personal representative of her deceased mother, because she acquired no vested interest or property in the fund, but only a possibility or expectancy, dependent on the will of her daughter. (3) Courts can only interpret and enforce contracts of such associations with their members according to their terms, and cannot correct them if their necessary construction does injustice.

(Syllabus by the Court.)

Error to circuit court, Essex county; Child, Judge.

Action by Lyman D. Martin against the Golden Star Fraternity on a benefit certificate. From a judgment for plaintiff, defendant brings error. Reversed.

The schedule annexed to the declaration contained in the record shows that plaintiff's action was founded upon the following instrument: "The Golden Star Fraternity. (Prudens Futuri.) Beneficiary Certificate. This certificate, issued by authority of the supreme council of the Golden Star Fraternity, witnesseth: That Lizzie P. Martin, a member of Excelsior Council No. 3, of Newark, N. J., is

entitled to all the rights and privileges guaranteed to beneficiary members of the Fraternity by our constitution and laws, and issued upon the express condition that she shall, while a member of said Fraternity, faithfully comply with all the laws, rules, regulations, and requirements of said Fraternity; otherwise, it shall be of no effect. And, in case she is in good standing at the time of her decease, then the person or persons hereinafter named shall be entitled to the amount of one assessment, not exceeding the sum of one thousand dollars; or should she become totally disabled for life while a member of the Fraternity, in good standing, so as to prevent her following her own or any other avocation, provided such disability did not arise from any immoral conduct on her part, then, upon satisfactory proof of such total disability, she shall be entitled to one-half of the above-mentioned amount, the remaining one-half to be paid at the time of her decease; and she now directs that, in case of her decease, it be paid to C. S. Martin (her mother). No. 582. In witness whereof we have caused this to be signed by our supreme moderator and supreme secretary, and the seal of this supreme council attached, this twelfth day of January, eighteen hundred and eighty-five. [L. S.] I. A. Looker, Supreme Moderator. J. B. Faltoute, Supreme Secretary." The declaration contains three counts. The first count grounds plaintiff's claim upon that instrument as entitling the administrator of Charlotte S. Martin, deceased, to recover from defendant \$1,000 on the death of Lizzie P. Martin, and avers an assignment from said administrator to plaintiff. The second count grounds plaintiff's claim upon the same instrument as entitling the administrator of Lizzie P. Martin, deceased, to recover from defendant \$1,000 upon her death, and avers an assignment from said administrator to plaintiff. The third count is for money had and received. The plea is the general issue. The cause was tried before the court, without a jury; and, the finding having been for the plaintiff, judgment was entered thereon, and this writ of error was brought.

Philip W. Cross, for plaintiff in error.
Thomas N. McCarter, Jr., for defendant in error.

MAGIE, J. (after stating the facts). None of the assignments of error need be considered except that which challenges the finding of the trial judge upon the ground that, upon the facts before him, a finding in favor of defendant in error was unwarranted in law. The facts established by uncontradicted testimony or admitted by the parties are, in substance, these: Lizzie P. Martin was admitted as a member of Excelsior Council No. 3, of Newark, N. J. (a council of the Golden Star Fraternity), early in January, 1885, and on January 12, 1885, there was issued to her the beneficiary certificate a copy of which

precedes this opinion. Charlotte S. Martin, the beneficiary named therein, was the mother of Lizzie P. Martin, and died March 15, 1888. Lizzie P. Martin survived her, and faithfully complied with all the laws, rules, regulations, and requirements of the Fraternity, and was in good standing therein at the time of her decease, which occurred March 2, 1894. The Golden Star Fraternity was incorporated by the filing of a certificate dated January 21, 1882, which recited, as authority for its assumption of corporate existence, the "Act to incorporate benevolent and charitable associations," approved March 9, 1853. An act of that title was approved on that date, but was repealed by the revision, and in its place was substituted the act of the same title which was approved April 9, 1875 (Revision, p. 79), to which latter act the certificate was doubtless intended to refer. Among the objects of the organization expressed in its constitution was the following: "Sec. 3. To establish a beneficiary fund from which, on satisfactory evidence of the death of a member of the Fraternity, who has complied with all its lawful requirements, a sum not exceeding two thousand (\$2,000) dollars shall be paid to whom he or she may direct." The constitution and rules of the Fraternity do not seem to provide for the terms of the certificate indicating the rights of a member in such fund, commonly called a "beneficiary certificate," but by section 12 of article 6 it is provided as follows: "Beneficiary members may at any time, when in good standing, surrender their certificate, and have a new one issued, payable to such beneficiary, dependent upon them, as they may direct, upon the payment of a certificate fee of fifty (50) cents." After the death of Charlotte S. Martin, the beneficiary, Lizzie P. Martin, the member, did not surrender her certificate, nor did she name a new beneficiary. After the death of Lizzie P. Martin, administration was taken out upon the estate of Charlotte S. Martin, and her administrator assigned her claim upon the beneficiary certificate to defendant in error. Administration was also taken out upon the estate of Lizzie P. Martin, and her administrator assigned her claim upon the beneficiary certificate to defendant in error. Defendant in error was a brother of Lizzie P. Martin, and he, with two other brothers, are her next of kin. They have also assigned any claim under the beneficiary certificate to defendant in error.

Upon these facts, the trial judge found that defendant in error was entitled to recover from the Fraternity the \$1,000 named in the beneficiary certificate. Under the assignment of errors now being considered, plaintiff in error claims that no legal liability on its part to pay that sum to defendant in error is established. Before considering the matter thus presented, I think there is a preliminary question which ought to be disposed of, although, for obvious reasons, it has not been raised by the parties. The beneficiary

certificate issued by plaintiff in error is plainly a contract of the nature of life insurance. The act to incorporate benevolent and charitable associations, under which I have assumed that plaintiff in error acquired its corporate powers, and the supplements to that act, which were in existence in 1882, declare the objects of such associations to be the relief or support of members rendered incapable of attending to their usual occupation or calling by sickness, casualty, or other cause, the decent interment of deceased members and their widows, benevolent and charitable relief to persons not members, and other charitable purposes. In 1883 a further supplement to the same act was passed, which, by its second section, enacted that it should be lawful for associations incorporated under the original act to contract with their members to pay death benefits according to their rules and by-laws, and to agree to pay the same to the "husband, wife, father, mother, brother, sister or legal representative of such member after his or her death, which contract the beneficiary therein named shall have full legal power to enforce in proceedings at law or equity." Laws 1883, p. 57. By a further supplement, approved April 12, 1886, the words "son and daughter" were added to those contained in the supplement of 1883. In a case in the supreme court, Mr. Justice Garrison suggested the question whether the legislature could endow such associations with the power to carry on the business of ordinary life insurance; but, as the question was not required to be solved for the decision of that case, no opinion was expressed thereon. State v. Taylor, 56 N. J. Law, 49, 27 Atl. 797. It is not open to doubt that, under a title declaring the object of the act to be the incorporation of benevolent and charitable associations, it would not be within legislative power to authorize such associations to engage in any business having neither a benevolent nor charitable purpose. The grant of such authority, not falling within the expressed object of the title, would be void under our constitutional provision on this subject, as construed by decisions of this court too well known to require citation.

Turning to the supplement of 1883, above set out, it appears that it was designed to empower such associations to contract to pay "death benefits" according to their rules and by-laws, but such contract is to be limited to the payment of such death benefits, after the death of the member, to certain specified relatives or connections of the member, or to his or her legal representative. It is obvious that such a contract is of the nature of a contract of life insurance. But, so far as it provides for the payment of death benefits to the near relatives and connections of the deceased member as a gratuity to them, it is life insurance having a benevolent purpose. Authority to make such contracts of life insurance, in my judgment, could be conferred upon such associations under the

title of this act. But the act also authorizes a contract to pay death benefits to the legal representative of a deceased member. When there is no context to indicate that the phrase "legal representative" is to be taken as meaning some other relative, it is to be considered as meaning the executor or administrator of a deceased person. *Lodge v. Weld*, 139 Mass. 499, 2 N. E. 95. A contract to pay death benefits to the member's executor or administrator is obviously a contract of ordinary life insurance. Upon the member's death, his estate would be increased by the sum thus contracted to be paid, and the transaction would have no benevolent or charitable feature whatever. Authority to make such a contract is not, in my judgment, within the title of this act. But the whole powers conferred by this act do not therefore fall. The power to contract to pay death benefits to the member's legal representative, not being within the title of the act, fails to be conferred. But the power to make contracts to pay death benefits as gratuities to the deceased members' relatives within the class named in the act is not thereby affected. The former power is distinctly separable from the other powers conferred, and may be eliminated from the act without any impairment of what remains. *Rader v. Union Tp.*, 39 N. J. Law, 509; *Evernham v. Hullt*, 45 N. J. Law, 53; *Hendrickson v. Fries*, Id. 535. The result is that, in my judgment, the legislature has conferred powers upon the plaintiff in error to make such a contract as seems to be contained in the beneficiary certificate relied on in this case. It is proper to note that the prohibitions contained in the supplement to the insurance companies' act, approved April 4, 1889 (Laws 1889, p. 174), which was before Mr. Justice Garrison in *State v. Taylor*, or in the supplement to the benevolent and charitable associations' act, approved March 11, 1893 (Laws 1893, p. 232), cannot in any respect impair the contract of the certificate made on January 12, 1885.

Taking up the question presented by the assignment of error now under consideration, it is obvious that its solution is to be reached by a determination of the true relation established by the facts to have existed between Lizzie P. Martin, the member, and Charlotte S. Martin, the beneficiary, respectively, and the Golder Star Fraternity, the plaintiff in error. It is well settled that the relation created by such beneficiary certificates as that before us is contractual in its character. The contract between the association and its beneficiary members is to be discovered in such a case from the beneficiary certificate issued to the member, read with the rules and by-laws of the association and the statute from which it obtained its corporate powers. *Holland v. Supreme Counsel*, 54 N. J. Law, 490, 25 Atl. 367; *Bac. Ben. Soc.* § 161. The contract, when discovered, is to be construed and given force and

effect as other contracts upon a similar subject. Reading the beneficiary certificate before us, it appears that plaintiff in error thereby contracted with Lizzie P. Martin, one of its members, that, in consideration of acts to be performed by her, it would perform one of two acts, viz.: (1) To pay to her, in case she became totally disabled for life, one-half of the sum named therein, and to Charlotte S. Martin the other half upon the death of Lizzie P. Martin; or (2) in case Lizzie P. Martin did not become so disabled, then, upon her death, to pay the whole of the sum named therein to Charlotte S. Martin. Reading it in connection with the by-laws and rules of the Fraternity, Lizzie P. Martin was empowered to surrender to plaintiff in error this certificate, and to require it to issue a new certificate of like character, but payable to another beneficiary, who must be a person dependent on her. But as the power of plaintiff in error to make this contract was derived from the provisions of the supplement of 1883, which have been above construed to permit such contracts only in favor of persons among the class of relatives and connections enumerated therein, it is obvious that the new beneficiary selected by her must be one of that class.

Such being the terms of this contract, let us next inquire what rights Lizzie P. Martin acquired thereunder. Had she become totally disabled, within the meaning of the clause contained in the certificate, she, undoubtedly, might have required the payment to her of one-half of the sum therein mentioned. But that contingency did not happen, and the inquiry is therefore to be limited to the rights acquired by her, she having survived her mother, the beneficiary, without having received any part of the sum named in the certificate. It appears by the opinion of the trial judge in the court below that his conclusion in favor of defendant in error was based on the theory that after the death of the beneficiary, no new beneficiary having been named, the fund became vested in the insured, and at her death was payable to her administrator, as in the case of ordinary life insurance. 13 Am. & Eng. Enc. Law, 654. I am unable to adopt this theory for several reasons. In the first place, if the contract is susceptible of this construction, it is not a contract within the power of the Fraternity to make, for, as we have seen, it is not authorized to make ordinary contracts of life insurance. Next, the theory ignores the expressed provisions of the constitution to the effect that, on the death of a member, the sum paid from the beneficiary fund is to be paid to a person designated by the member. Lastly, the contract cannot be construed as vesting in the member any interest in the fund. By such contracts the member acquires no property in the benefit, but only a power to designate a beneficiary. *Bac. Ben. Soc.* § 237; *Nibl. Mut. Ben. Soc.* § 201 et seq.; *Barton v. Association*, 63 N. H. 535, 3 Atl. 627; *Hellenberg v. District No. 1*, etc.; 94 N. Y. 590. Many other cases to

the same effect are to be found in the notes of the text-books above cited. Therefore the conclusion below cannot, in my judgment, be supported upon the ground there taken, that, upon the facts, the defendant in error had made out his claim under the assignment from the administrator of Lizzie P. Martin, upon which the second count of the declaration was based. But, if the finding below was warranted by the facts upon any ground within the issue made by the pleadings, it ought not to be disturbed.

It has been strenuously argued that, upon the facts established in this case, Charlotte S. Martin, the beneficiary, acquired a vested right in the sum named in the certificate, which right, if Lizzie P. Martin continued in good standing in the Fraternity until her death, and did not surrender the certificate and designate a new beneficiary, could be enforced by the administrator of Charlotte S. Martin. The contention is that the interest of a beneficiary named in such a certificate in the fund to be eventually paid is identical with the interest acquired under a life insurance policy by the person to whom, by its terms, a sum is to be paid upon the death of the insured. It seems to be the admitted doctrine that, when a contract is made to pay B. a sum of money at the death of A. by an ordinary life insurance policy, the title to such money becomes vested in B., and that his interest cannot be changed or divested without his consent. *Bliss, Ins. § 318; Whitehead v. Insurance Co., 102 N. Y. 143, 6 N. E. 267.* Doubtless, the interest of such a beneficiary is dependent upon the policy being kept alive by the payment of premiums and the performance of the required conditions. But, if the policy is kept alive until the death of the insured, the beneficiary may recover the amount of the insurance; and this court has held that, when such a policy is kept alive for a period by others for their own benefit, yet that the beneficiary named in the policy is entitled to a proportionate part of the insurance, in proportion to the amount of premiums previously paid. *Landrum v. Knowles, 22 N. J. Eq. 594.* But a beneficiary named in a certificate such as is now under consideration does not stand in a like position. By the terms of such contracts, the beneficiary may be changed by the mere will of the member, and without the beneficiary's consent. In such case the right of the beneficiary is not property, but a mere possibility or expectancy, dependent on the will of the member to whom the certificate issued. For this reason the beneficiary's interest in the certificate and contract evidenced thereby differs totally from the interest of a beneficiary named in an ordinary life insurance policy, containing no provision for the designation of a new beneficiary. The cases, so far as I can discover, are agreed upon this doctrine. They may be found collected in *Bac. Ben. Soc. §§ 292, 304, et seq.; Nibl. Mut. Ben. Soc. § 201.* But, if this contention could prevail, it would not tend to support the finding. The contract in this case did not provide in what manner the sum named

in the certificate should be disposed of in case of the death of the beneficiary before the member. By the beneficiary's prior death, her interest, if it could be deemed to be vested, was divested, and her administrator took nothing under the contract.

The result is that defendant in error acquired no right to the money under the administrator of Charlotte S. Martin. It is scarcely necessary to add that there is nothing in the facts which will support the claim that plaintiff in error is liable for this sum as for money had and received. Its liability arises out of an express contract, and there is nothing to raise an implied contract in favor of either the administrator or the next of kin of Lizzie P. Martin. It cannot be said that this result is entirely satisfactory. By the rules adopted by plaintiff in error, a member can only substitute as a beneficiary some person dependent upon him, and, by law, the selection must be from a limited class of persons. It may occur and there are reasons to believe that in this case it was the fact that the member had no person within the prescribed class dependent upon him. In such case no substitution can take place, and the result follows that the Fraternity escapes the payment of the sum for which the member has been paying his dues or premiums. But we cannot correct this grievance, if it be one. We can only interpret the law and the contract of the parties. As, upon our interpretation thereof, plaintiff in error is not bound to the payment of the sum named in the certificate, under the circumstances, of the death of the beneficiary named before the member, and the failure of the member to substitute another beneficiary, the finding below was erroneous, and the judgment thereon must be reversed.

(59 N. J. L. 259)

STATE (FOWLER, Prosecutor) v.
LARABEE et al.

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1896.)

ALTERATION OF HIGHWAY—ASSESSMENT OF DAMAGES—RETURN—AMENDMENT.

1. In the making of an alteration in a public road by surveyors of the highways appointed under the road act by vacating a part thereof, and laying out a new road in lieu of the part vacated, a return of surveyors that they had made an assessment of the damages to the respective owners of the land taken for the laying out of the aforesaid road, laid out by them to take the place of the part of said road thereby vacated, was held to be defective and insufficient, as not conforming to the statute, which requires, in such case, that the assessment be made for the damages the landowner shall sustain by the altering of said road.

2. In such a proceeding, affecting as it does the rights of individuals, there must be a strict observance of statutory requirements.

3. Since the passage of the supplement to the road act approved March 12, 1874, found in the General Statutes (page 2845), such defect is not necessarily fatal, but the common pleas may require the surveyors who signed the return to review their proceedings and make an amended return, correcting such defect in the assessment of the damages.

(Syllabus by the Court.)

Error to supreme court.

Proceedings by Albert S. Larabee and others for the alteration of a highway, which was opposed by Robert Fowler. From a judgment of the supreme court affirming the proceedings (33 Atl. 216), opponent brings error. Reversed.

Aaron E. Johnston, for plaintiff in error.
I. W. Carmichael, for defendant in error.

HENDRICKSON, J. The writ of error in this case brings up for review an adjudication of the supreme court affirming the proceedings of surveyors of the highways appointed by the court of common pleas of the county of Ocean, in making an alteration in a public road of said county. The alteration consists in vacating a part of the Toms River and Freehold road, beginning at a stake in the middle of said road, at the village of Lakewood, and running in an easterly direction, about 2,500 feet, to a stake in the middle of said road, and there to the end, and laying out a new road between said beginning and ending points, to take the place of the part so vacated. The alteration widens that part of the road from a width of 2 rods to a width of 50 feet, and changes the angle of the road somewhat; the new road running part of the way, only, over the bed of the part of the old road vacated. The principal grounds upon which the validity of the proceedings were challenged in this court (several grounds advanced in the supreme court having been abandoned) are (1) that the assessment of damages according to the return are made to the respective owners for the land taken in the laying out of the aforesaid road, and not for the damages they would sustain by the alteration of the part of the road in question; (2) that the road, as laid out, invades a portion of a dwelling house; (3) that the return altered and widened a public road in the village of Lakewood, without the consent of three-fourths of the owners of the lots fronting on the same.

The court below, in dealing with the reasons filed in that court, held that the depositions taken in the cause, by which it was sought to explain, modify, or contradict the return, would not be considered, because they were taken without the special authority necessary to validate them; referring to *Conover v. Bird*, 56 N. J. Law, 228, 28 Atl. 428. In this ruling I find no error. It was further held by the court below that the reasons based upon allegations of fact debors the record were not sustained by the proofs. Since this court can review, on writ of error, questions of law only, it is manifest that the assignments of error based upon such allegations of fact cannot be sustained.

This disposes of all the grounds of challenge to the proceedings below, above mentioned, except the first,—as to the validity of the assessment. The opinion below seems to be silent upon this point, unless it be embraced, as was insisted by the plaintiff in error, in

that paragraph which says, "The questions raised by the first class of reasons are reviewable only by the statutory appeal, by caveat and application for the appointment of freeholders." But, however that may be, this question was properly raised upon the return itself, as a part of the record, and was and is entitled to be heard and determined in the appellate tribunal. The language of the statute (Gen. St. N. J. p. 2809, § 13) is "that whenever any public road or highway shall be laid out or altered by the surveyors, or a majority of them, mentioned in this act, the said surveyors shall immediately thereafter make an assessment of the damages, if any, the owner of any land or real estate, other than the applicant or applicants for such road, shall sustain by laying out or altering the same, over and above the advantage that will, in their judgment, accrue to said owner." The return of the surveyors shows that the application in this case was for an alteration in the public road aforesaid, by vacating a part of said road, and laying out a public road to take and fill the place of the part so vacated; and after reciting that on such application the court appointed the surveyors of the highways (naming them), and that they met and proceeded according to law, the return says: "And, having viewed the premises, we, whose names are hereto subscribed, think and adjudge the said alteration in said public road to be necessary, by vacating a part of said road, and laying out a public road to take and fill the place of the part so vacated," etc.; "* * * and the said public road hereby laid out running part of the way over the part of said road that is hereby vacated." In another part of said return the assessment of damages is described as follows: "And we do further return that we have made an assessment of the damages to the respective owners of the land taken for the laying out of the aforesaid road laid out by us to take the place of the part of said road hereby vacated, and do hereby assess in favor of Albert S. Larabee twenty-five cents for the damages he will sustain by the laying out of the road." The same language is used in assessing the damages of all the owners, including the plaintiff in error, who was the prosecutor in the court below. It thus appears that the language of the assessment in question restricts the damages to such loss as may arise to the owner of the land by the laying out of the road, and the necessary inference from such language is that the surveyors did not consider, in making the assessment, damages that might have arisen to the owner from the alteration of the said road, which is something more than the laying out of a new road. In the present case it involved the widening of the old road in some places, and in others a departure of the road laid out from the bed of the road vacated. The counsel of the defendant in error insisted, upon the argument, that this seeming defect in the assessment is made good by a further paragraph of the return, where it

says, "And we do further return that we have taken into consideration the advantages that will accrue to said persons, owners of the land as aforesaid, and have assessed the damages which they will sustain over and above such advantages." This additional paragraph is made necessary by the thirteenth section of the road act, cited above, which requires that the assessment shall be for such damages as the applicant shall sustain by the laying out of, or the altering of, a public road, over and above the advantage that will accrue to said owner, and does not, as it seems to me, cover the difficulty. This last paragraph does not enlarge the scope of the damages, as expressed in the assessment. It limits its application, both as to the advantages and the damages, to the "owners of the land as aforesaid," and in the previous clause the assessment describes these owners as "the respective owners of the land taken for the laying out of the aforesaid road," etc. The principle which requires a strict observance of statutory requirements in proceedings like this is well stated by Chief Justice Hornblower in *State v. Van Geison*, 15 N. J. Law, 339, where he says "that a statutory proceeding affecting the rights of individuals, where what has been done is to be certified by the persons executing such special authority, or a record is to be made thereof, and such certificate or record is to conclude the rights of parties, it must appear upon the certificate or record that everything was done which the statute required." Since the return of the road and the assessment of damages are in fact but one proceeding, where the assessment is illegal and void the return of the road is also vitiated. *State v. Garretson*, 23 N. J. Law, 388. But this defect in the return is not now necessarily fatal to the proceedings; for under the statute found in Gen. St. p. 2845, § 195, it has been held that the record may be remitted to the court of common pleas, and an order made, on motion of the applicants, requiring the surveyors who signed the return to review their proceedings and make an amended return, correcting, among other things, the errors and defects in the assessment of damages in their former return. *Evers v. Vreeland*, 50 N. J. Law, 386, 13 Atl. 241; *State v. Field*, 38 N. J. Law, 290; *State v. Gibbs*, 44 N. J. Law, 169. The result is that the judgment below will be reversed, and the record remitted, so that an order may be made remitting the proceedings to the common pleas, to be there set aside unless application be made to properly amend the return.

(50 N. J. L. 391)

STOUT et al. v. BOROUGH OF GLEN RIDGE.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1896.)

STATUTES—CONSTRUCTION—INCORPORATION OF CITIES.

1. The word "town" has been used in our legislation in different senses, some restricted
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and some general. In determining its meaning in a particular statute, indications of legislative intent found in that statute may be considered; and, if they point to its use in a particular sense, that meaning must be given to it.

2. In the first section of the "Act providing for the incorporation of cities," approved March 22, 1895 (Laws 1895, p. 551), the word is used to designate all municipal corporations above the grade of townships, and below that of cities.

(Syllabus by the Court.)

Error to supreme court.

Bill by the borough of Glen Ridge against G. Lee Stout and others. From a judgment for plaintiff (33 Atl. 858), defendants bring error. Affirmed.

Thomas N. McCarter, for plaintiffs in error.
Chandler Riker, for defendant in error.

MAGIE, J. The writ of error in this case has brought before us a judgment of the supreme court setting aside certain proceedings taken by plaintiffs in error for the purpose of incorporating a city, to be called the "City of Bloomfield," which proceedings were taken under the provisions of the act entitled "An act providing for the incorporation of cities," approved March 22, 1895 (Laws 1895, p. 551). Those proceedings were brought before the supreme court by a writ of certiorari, sued out by the borough of Glen Ridge, the defendant in error. By the provisions of said act, it is enacted that the inhabitants of any district lying wholly in one county, and having a population exceeding 5,000, may become incorporated as a city; but the act expressly declares that such district is not to include any territory already within the limits of any "incorporated city or town." It was made to appear in the court below that the district the inhabitants of which sought to incorporate themselves as a city by these proceedings took in some territory lying within the township of Bloomfield, but also included territory which was within the limits of a borough called the "Borough of Glen Ridge." The petition which initiated the proceedings declared that the district, described therein by metes and bounds, lay wholly within the township of Bloomfield. Among the reasons for the vacation of the proceedings, assigned by prosecutors in the court below, was one based upon the description of the district proposed to be included in the incorporated city, as lying wholly within the township of Bloomfield, and not stating what part thereof was within the borough of Glen Ridge. Another of the reasons challenged the right to include, within a district proposed to be incorporated as a city under said act, any territory then included within the limits of an incorporated borough. The contention was that the exception in the act of territory within the limits of any incorporated city or town excluded territory within the limits of an incorporated borough. In the court below, the latter reason was held to be insufficient, and the act in question was construed as excluding from a district incorporated thereunder only such territory as was included

within the limits of such municipal corporations as were incorporated as cities and towns. Territory within the limits of municipal corporations otherwise named, it was held, might be included. But the former of the two reasons above mentioned was held in the court below to be sufficient to require the vacation of the proceedings, on the ground that, by its description, which was deemed to be defective, the petition became deceptive and misleading.

After careful examination of the act in question, I find myself compelled to a different construction of it than that adopted by the supreme court. In my judgment, the words "incorporated town," as used in the first section of that act, have a broader signification than that attributed to them by that court. It is undeniable that the word "town" has been used in our legislation in different senses. In the clause of our amended constitution which prohibits special legislation regulating the internal affairs of towns and counties, its meaning has been settled to be broad enough to include all kinds of municipal corporations formed for local government other than counties. *Van Riper v. Parsons*, 40 N. J. Law, 1; *Pell v. City of Newark*, 40 N. J. Law, 550. At the time of the adoption of that amendment to the constitution, there existed several municipal corporations incorporated specifically as towns. But, as was lucidly shown by the learned chief justice in the opinions delivered in the cases last cited, the word "town," in that amendment, was capable of a broader meaning, and was used in a generic sense, as including all municipal corporations, and not as expressing merely a species of such corporations which had been given that name. Since the adoption of that amendment, the legislature has passed many acts looking to the creation of a species of municipal corporation called "towns." Those acts are collected in the General Statutes, on page 3489 and the following pages. There can be no doubt that the signification of the word "town," as used in those acts, must be restricted to that species of municipal corporation which is created under them, and called "towns." As was justly said in the opinion below, these acts expressly provide for the inhabitants of boroughs becoming incorporated thereunder as towns, while the borough act of 1878 (Gen. St. p. 179), as originally enacted, provides for the formation of boroughs from townships only. By subsequent amendments, this power seems to be somewhat extended; but the act of April 22, 1886, expressly excluded the inhabitants of incorporated cities or towns from acquiring incorporation as a borough. That act was held to be unconstitutional by the supreme court. But the whole trend of this legislation does, I think, justify the deduction made in the opinion below, namely, that towns, in our system, are a higher class of municipal corporations than boroughs. In *Banta v. Richards*, 42 N. J. Law, 497, the supreme court had before it an act authorizing towns to levy taxes for certain purposes, and held that it did not apply

to townships. But Mr. Justice Dixon, who delivered the opinion of the court, pointed out the varying signification given to the word "town" in our legislation, and suggested that it was capable of a meaning covering the class of municipal corporations lying between cities and townships.

From this variant use of the word, I think it obvious that, before we determine whether it is used in a particular statute in a restricted or in a more general sense, we must examine the whole statute, and if, from indications in the rest of the statute, it clearly appears that the legislative intent was to use it in one sense, that meaning must be given to it. From the rest of the act now before us, I deem the legislative intent clearly appears, and that the words "any incorporated city or town" were meant to include every species of municipal corporation above the grade of townships. My conclusion is based upon the following provisions: The proceeding provided for is initiated by a petition setting forth the boundaries of the district proposed to be incorporated, which is to be presented to the chairman of the township committee of the township in which the district or the greater part thereof is located. There is no provision for presenting the petition to any officer of a borough or other municipal corporation. If the greater part of the proposed district lies in such a corporation, the act would not avail the inhabitants. When a petition is presented to the proper chairman of the township committee, the act requires him to call a meeting of his committee, or, if the district lies in two townships, a joint meeting of the committees of those townships, of which meeting a public notice is to be given. At such meeting, upon complaint of any landowner of the district that, in laying it out, territory has been unreasonably included or excluded, the committee or committees are to hear and determine thereon, and are authorized to make such changes in the boundaries as, in their opinion, will secure the best results from the incorporation to persons and property affected thereby. If the district includes parts of a borough or other such municipal corporation, it is obvious that it can have no representative in the tribunal empowered to make this important determination. It is further provided that the same committee or committees shall order the election to decide whether the proposed city shall be incorporated, and fix the time and place or places for holding the same. If the election results favorably to incorporation, the chairman of the township committee who first called the meeting in pursuance of the petition is to certify its result, which certificate is to be attested by the clerk of his township, and filed with the secretary of state, whereupon the district becomes incorporated. It is made the duty of the same chairman, within 10 days thereafter, to call another meeting of the same committee or committees, who are empowered to divide the city into wards, and fix the time of

the first election in the new city. The act nowhere provides for any representative of a borough or other municipal corporation taking part in these proceedings. But the provisions of the sixth section indicate the legislative intent that cities incorporated under this act shall be formed from townships alone still more convincingly. It is thereby enacted that a city thus incorporated shall be independent of the township or townships "from whose territory it was taken"; that lands belonging to such townships, and located within the city, shall be the property of the city; all other lands belonging to said townships shall remain the property of the township where located; that all property debts and obligations of such township or townships, at the time of incorporation, shall be equitably divided between the city and such townships. If the city council and township committee or committees cannot agree on the division, either may apply to the court of common pleas, who are to appoint three commissioners, not inhabitants or property owners in such city or township or townships, who are to make such division, their determination to be final unless appealed from.

Upon reading the whole act, and especially the careful provisions for protecting the property rights of the township or townships out of which the new city has been formed, and noting that no provisions whatever have been made for protecting such rights of boroughs or other municipal corporations, I think the sense in which the legislature used the word "town" in the excluding clause of this act is very plainly indicated. In my judgment, the legislative intent was that the district the inhabitants of which might become incorporated under this act should not include territory within the limits of any municipal corporation higher than that of a township. "Town," as used in the act, must be construed as including all such corporations ranging between cities and townships. The result is that the proceedings to incorporate the city of Bloomfield were fundamentally wrong, because the district described in the petition included territory within the limits of the borough of Glen Ridge. As this result compels an affirmance of the judgment of the supreme court, although on a different ground than that there taken, it is unnecessary to pass upon any of the other questions in the case.

(59 N. J. L. 189)

NEW JERSEY ZINC & IRON CO. v.
LEHIGH ZINC & IRON CO.

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1896.)

EVIDENCE—PRIVATE MEMORANDA—BOOKS OF SCIENCE—ACTS AND DECLARATIONS AGAINST INTEREST—SECONDARY EVIDENCE—EXPERT TESTIMONY—LETTERS PATENT—EVIDENCE OF PRACTICABILITY—DOCUMENTS—PROOF OF EXECUTION.

1. Private memoranda of the plaintiff's business, made by its bookkeeper, which were not the original statements of the transactions to

which they referred, which were made by one who was not cognizant of the transactions, which were not contrary to the interest of the person who made them, and which did not relate to dealing with the defendant, were not legal evidence in favor of the plaintiff, against the defendant, to prove the transactions.

2. Books of science are generally inadmissible as evidence to prove the opinions contained in them; but, if a witness refers to them as an authority for his own opinions, they may be received for the purpose of contradicting him.

3. Evidence showing that the plaintiff's predecessor in title had, by his conduct while he held the title, disavowed the claim now set up by the plaintiff under the title, is competent against the plaintiff.

4. The defendant offered in evidence the minute book of the plaintiff's proceedings, for the purpose of showing the action of the plaintiff, in view of a certain agreement made between third parties, and recited in the minutes. Held, that the evidence was competent, without producing the agreement itself, or accounting for its non-production.

5. Who is entitled to be considered as an expert in regard to any matter of science or skill is a question which must be left very much to the discretion of the trial court; and its decision is conclusive, unless clearly shown to be erroneous in matter of law.

6. The interest of an expert witness affects the weight, not the legality, of his testimony.

7. A copy of an English patent is not legal evidence to prove the practicability of the process described in it.

8. When the subscribing witnesses to the execution of a writing are shown to be out of the state, other proof of its execution is competent.

Depue and Gummere, JJ., dissenting.

(Syllabus by the Court.)

Error to supreme court.

Ejectment by the New Jersey Zinc & Iron Company against the Lehigh Zinc & Iron Company. From a judgment for defendant, plaintiff brings error. Affirmed.

T. N. McCarter and F. W. Stevens, for plaintiff in error. R. W. Parker, C. D. Thompson, and G. Collins, for defendant in error.

DIXON, J. The New Jersey Zinc & Iron Company instituted an action of ejectment in the supreme court against the Lehigh Zinc & Iron Company, to recover possession of a vein of ore on Mine Hill farm, in the county of Sussex. On the trial in that county, a verdict was rendered for the defendant, and the exceptions there taken by the plaintiff form the basis of the assignments of error presented for review by this court. Many of these exceptions were directed against the rulings of the trial justice, which followed the lines laid down by the opinion of this court delivered in an action of trover brought by the same plaintiff against the same defendant, for the conversion of ore taken from the same vein (55 N. J. Law, 350, 26 Atl. 920). On the discussion of this cause before us, that opinion was assailed at great length, and with much zeal, by counsel for the plaintiff. Nevertheless, the court adheres to the views there expressed, as the most reasonable and practicable of those suggested, with respect to the title of these litigants, and the evidence by which it may lawfully be supported or impugned. Numerous exceptions to the admission or rejection of testimony, and all of the exceptions to

the charge and to the refusals to charge (save as to a few requests to charge matters which could not affect the issues submitted to the jury), stand in the category just mentioned. It is not deemed necessary to bestow upon them further notice.

The printed case submitted to us seems to contain the stenographer's notes of the trial. These notes frequently indicate that exceptions were taken on behalf of the plaintiff which have not been sealed by the trial justice. This, perhaps, is an illustration of what Mr. Justice Brown said in *Grayson v. Lynch*, 163 U. S. 468, 485, 16 Sup. Ct. 1064, 1071: "There is always a possibility that, in the very abundance of alleged errors, a substantial one may be lost sight of." We can deal only with those which have been sealed.

The court has endeavored to give, and I have no doubt has given, due consideration to every legal assignment of error, but a special reference to each one of them would only involve a reiteration of rules which are thoroughly settled. Some of the exceptions touching the admission of evidence must be discarded as frivolous,—some because no ground of objection was stated at the trial (*Mooney v. Peck*, 49 N. J. Law, 232, 12 Atl. 177); others because they were practically abandoned on the argument; and still others for the reason that the rulings were harmless, or were within the discretion of the trial judge. The exceptions which do not plainly range themselves in these classes will now be considered.

In examining them, it should be borne in mind that the central question of fact to be decided by the jury was whether the vein in dispute consisted of franklinite or iron ore that could be removed without disturbing any vein, stratum, or mass of ore which in 1848, when the plaintiff's title originated, in a deed from Samuel Fowler to the Sussex Zinc & Copper Mining & Manufacturing Company, would have been thought reasonably fit to mine for zinc. The plaintiff contended for the negative of this question. An exception is sealed upon the exclusion, as evidence, of certain slips made out by the plaintiff's bookkeeper, in the regular course of his business, from reports sent to him daily by persons engaged in the plaintiff's manufacturing department, which slips purported to show what materials had been placed in the plaintiff's furnaces, and what products had been obtained therefrom between August 10, 1867, and November 10, 1868. The avowed object of offering the slips was to prove that, at the time stated, the plaintiff had manufactured zinc from such ore as was in controversy. These slips had none of the characteristics on the strength of which private memoranda of previous transactions have been received as juridical evidence. They were not original statements of the transactions to which they referred. They were not written by one who had taken part in or even been cognizant of those transactions. They were not contrary to the interest of the person who made them, nor did they relate to dealings with the party

against whom they were offered. We have been unable to discern any legal principle which would render them evidential against the defendant, and we think they were properly rejected.

Another exception arose in this way: A witness produced as an expert by the plaintiff testified with regard to the feasibility, in 1848, of extracting zinc from the ore in controversy; and during his cross-examination he mentioned several scientific books, on which he, in part, based his opinion. The plaintiff then offered these books as evidence, to corroborate the witness, and they were excluded. The general rule on this subject is thus stated in 7 Am. & Eng. Enc. Law, 513: "Books of science are inadmissible in evidence to prove the opinion contained in them; but, if a witness refers to them as an authority, they may be received for the purpose of contradicting him." In *Pinney v. Cahill* (Mich.) 22 Am. Law Reg. (N. S.) 104 (12 N. W. 862), may be found a reference to many cases in which this rule has been upheld; and Dr. Wharton has summarized the reasons for the rule in his work on Evidence (section 665). The admission of almanacs, mortuary tables, and perhaps some other scientific publications of undisputed accuracy, seems to form an exception to the rule. The practice in New Jersey has conformed to this doctrine, and the course adopted at the trial was right. The rule covers also the admission of "Whitney's Metallic Wealth of the United States," on the cross-examination of Mr. Williams.

Other exceptions relate to the admission, as evidence offered by the defendant, of certain instructions, given orally and in letters, by successive presidents of the New Jersey Zinc Company to their subordinates, with regard to the working of the company's mines in the neighborhood of the disputed vein. These instructions were given and acted upon while that company owned and was operating under the title on which the plaintiff now relies, and they were received in evidence with the view of showing that the plaintiff's predecessor in title had, by its conduct, disavowed the claim now asserted. Such evidence is legitimate. 1 Phil. Ev. 526; *Ten Eyck v. Runk*, 26 N. J. Law, 513. The fact that part of this conduct took place after the New Jersey Zinc Company had obtained a decree against the Boston Franklinite Company, adjudging it to be the owner of this vein, while, of course, it detracted much from the force of any alleged signs of renunciation, did not render the evidence illegal. Some of the letters also appear to assert, rather than disclaim, the plaintiff's title. If, for that reason, they might have been excluded from the jury, their admission could work no harm to the plaintiff. To the suggestion that the court ought to have directed the jury to put upon the letters a construction favorable to the plaintiff, it must be answered that we find no exception touching anything which the court said or refused to say as to their meaning.

On similar ground stands the reception in

evidence of admissions, made by the plaintiff and its predecessors in title, in contracts and suits to which they were parties. The objection now urged against the competency of some of these records—that, under the English rule, the statements of a bill in equity cannot be treated as admissions of the complainant—was not suggested at the trial, and hence cannot now prevail. *Railroad Co. v. Dailey*, 37 N. J. Law, 526.

With regard to the objection that the minutes of the plaintiff's proceedings, reciting the provisions of a contract between Moses Taylor and the New Jersey Zinc Company and its stockholders, were received in evidence without producing the contract itself or accounting for its absence, the answer is that the pertinency of the testimony lay, not in its proving the contract as a binding obligation of the parties named in it, but in its showing the action of the plaintiff in view of the matters recited. For this purpose it was not essential that the truth of the recitals should be otherwise indicated. The case is within the rule that, where the writing is only collateral to the question in issue, it need not be produced. 1 Phil. Ev. *579.

The defendant offered August Hecksher as an expert witness on the point in controversy, and the plaintiff objected to him, on the ground that his investigation had commenced only after he had become peculiarly interested in the defendant's claim, which was as early as 1881, and had been prosecuted with the view of ascertaining the extent and validity of that claim. His testimony was received, and exception thereto sealed. It appeared that the witness had been the defendant's business manager ever since 1881; that, as such, he had become familiar with the mineral deposits on Mine Hill farm, and with the various processes of reducing zinc ores; that he had visited many other zinc mines in this country and abroad, and several reduction works in Missouri, Kansas, and Virginia; that he had read all the standard books on the reduction of zinc ores from the year 1830 to the present time, and had studied the subject thoroughly and continuously since 1881; that, when he began his studies, he did not know of any other claim to the ore now in dispute than that of the defendant; and that his examination was not made with a special view to litigation existing or anticipated about franklinite or zinc ores. These circumstances presented a fair case for the decision of the court below. Who is entitled to be considered as an expert in regard to any question of science or skill cannot be determined by any precise rule, but, from the nature of the case, must be left very much to the discretion of the trial judge; and his decision is conclusive unless clearly shown to be erroneous in matter of law. *Castner v. Silker*, 33 N. J. Law, 95; *Manufacturing Co. v. Phelps*, 130 U. S. 520, 9 Sup. Ct. 601; *Rogers*, Exp. Test. § 22. The interest of the witness affected the weight, but not the legality, of

his testimony. *Dickenson v. Inhabitants of Fitchburg*, 13 Gray, 546. We think there was no error in admitting the evidence.

The plaintiff offered in evidence a copy of an English patent issued in May, 1836, as tending to maintain its contention that before 1848 there was a process known by which the vein in dispute was available for the production of zinc. The patent showed but two things: First, that the patentee claimed to have invented a process for using a blast furnace in the making of metallic zinc; second, that his claim had been allowed by the authorities of the patent office. We cannot see how either of these things could affect the defendant on the issue before the jury. Of course, evidence that the process had been successfully employed for the purpose indicated would have been competent, as would also the testimony of experts that it was practicable; but neither the claim nor the ex parte decision embodied in the patent was of any force in this controversy.

Other exceptions rest on the admission of writings, to the execution of which there were subscribing witnesses, without producing any of those witnesses. It having been previously shown that all of the witnesses were out of the state of New Jersey, other proof of execution was competent. 1 Phil. Ev. 493.

We have found no error in the record, and the judgment should be affirmed.

DEPUÉ and GUMMERE, JJ., dissent.

(50 N. J. L. 198)

SMITH v. OCEAN CASTLE, NO. 11,
KNIGHTS OF THE GOLD-
EN EAGLE.

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1896.)

BENEVOLENT ASSOCIATIONS—REMEDIES OF MEMBERS
—COSTS ON APPEAL—JUDGMENT.

1. The constitution of a benevolent society having provided that members and their assignees should not seek redress against the conduct of subordinate branches of the society, by appeal to the civil courts, until they had exhausted the laws of the order by appeal to the superior authorities of the society, a failure to comply with that provision will bar an action in the civil courts.

2. On reversing a judgment given under the justice's court act, the supreme court may award costs to either party.

3. If the supreme court reverses a judgment brought before it by certiorari, and also decides what final judgment should be rendered in the cause, that court ought itself to enter the judgment upon the record, and award execution thereon, without remitting the record to the inferior court whence it came.

(Syllabus by the Court.)

Error to court of common pleas, Atlantic county; Thompson, Judge.

Action by W. B. Smith against the Ocean Castle, No. 11, Knights of the Golden Eagle, of New Jersey. From a judgment of the supreme

court reversing a judgment for plaintiff (33 Atl. 849), he brings error. Affirmed.

Clarence L. Cole, for plaintiff in error. A. Stephany, for defendant in error.

DIXON, J. A judgment of the court of common pleas of Atlantic county, on appeal from a justice's court, rendered in favor of the original plaintiff, was removed by certiorari into the supreme court; and there it was adjudged that the judgment of the common pleas should be reversed, with costs, that the record should be remitted, and a judgment of nonsuit entered. The propriety of this adjudication is now before us for review on writ of error.

The plaintiff first contends that a judgment of affirmance should have been rendered. On this point we agree with the views expressed in the supreme court, holding that, before seeking redress in the courts of the state, the plaintiff was bound, by the constitution of the order to which he belonged, to carry his complaints against the "Castle" to the higher authorities of the society. A nonsuit was therefore properly directed.

The plaintiff further contends that it was unlawful to award costs on reversal of the judgment of the common pleas. This contention rests on the ninety-ninth section of the justice's court act (Gen. St. p. 1833), providing that, if a judgment given by virtue of that act be reversed on certiorari, the plaintiff in certiorari shall not be entitled to any costs. But by a subsequent act relative to the writ of certiorari, approved April 6, 1871 (Gen. St. p. 368, § 8), it was enacted that the court in any certiorari may, in its discretion, give judgment for costs for either party. It is urged that this law is not applicable to cases within the justice's court act; but we think the words are too clear and too comprehensive to admit of such a limitation, especially as no dictate of justice is contravened. The superior court, therefore, had the power to award costs; and, plainly, the case was a proper one for its exercise, since the determination of the court not only reversed the judgment of the common pleas, but finally decided the cause in favor of the defendant. *Railroad Co. v. McFarland*, 44 N. J. Law, 674.

So much of the rule entered in the supreme court as directed that the record be remitted to the common pleas should be annulled. In obedience to the writ of certiorari, the record of the cause was removed to the supreme court. *Hinchman v. Cook*, 20 N. J. Law, 271; *Welsh v. Brown*, 42 N. J. Law, 323. That court, having determined what final judgment should be rendered, ought itself to have ordered such judgment to be entered upon the record. 2 Saund. 101w, note z; *Hoxsey v. City of Paterson*, 39 N. J. Law, 489. Being competent to execute the judgment, the supreme court should also award execution thereon. *Tidd, Prac.* 1137; 2 Saund. 101z; *Anon.*, 3 N. J. Law, 753; note to *Gardner v. State*, 21 N. J. Law, 561; *Welsh v. Brown*, *ubi supra*. This slip being harmless, it should not prevent the allowance

of costs in this court to the defendant in error.

With the exception mentioned, the judgment of the supreme court is affirmed, with costs.

(178 Pa. St. 43)

In re KUHLMAN'S ESTATE.

Appeal of REHFUSS.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

LIMITATIONS OF ACTIONS — EXECUTORS — CLAIMS AGAINST ESTATE — PRESUMPTION AS TO PAYMENT.

1. The fact that notes of a decedent are held by his executor does not prevent the running of the statute of limitations against them.

2. Where an executor claimed credit in his accounts for the amount of a bond and certain notes executed to him by the testator, which had matured before the testator's death, but bore no marks of cancellation or payment, *held*, that there was no presumption that they came into his possession as executor, and that the question of payment was one of fact to be determined from the evidence.

Appeal from orphans' court, Lancaster county.

This was accounting by one Rehfuß, as executor of the estate of Philip Kuhlman, deceased. From a decree of the orphans' court refusing to allow the executor credit in his accounts for the amount of a bond and certain notes he held against the estate, the executor appeals. Reversed.

D. McMullen and C. Reese Eaby, for appellant. W. H. Roland, for appellee.

McCOLLUM, J. The question raised by this appeal is whether the learned court below erred in refusing to allow the appellant a credit in his account for the amounts represented by the bond and notes he held against the estate. The claims based on the notes were barred by the statute of limitations, and the claim founded upon the bond was not. The former were simple contracts for the payment of money, and the latter was a specialty. There was no evidence of a payment, acknowledgment, or promise which tolled the statute as to the notes, and the lapse of time was not sufficient to raise a presumption that the bond was paid. The mere fact that the notes were held by the executors of the estate did not prevent the running of the statute. If, therefore, the only question raised on the appeal related to the effect upon the claims of the statute of limitations the claim upon the bond should be allowed, and the claims upon the notes should be rejected. The learned court below thought that, as the claimant was the executor of the maker of the bond and notes, and they matured several years before the death of the latter, the unexplained possession of them by the former was not sufficient to enable him to recover upon either of them. *McGeary's Appeal* (Pa. Sup.) 6 Atl. 763; *McMahon's Estate*, 132 Pa. St. 179, 19 Atl. 68, and *Hoffer's Estate*, 156 Pa. St. 474, 27 Atl. 11, are cited to sustain this view. *McGeary's Appeal* was not decided on the ground

of a presumption that the papers on which the claims were based were received and held by the claimant as administrator of the estate, but upon the weight of the testimony in the case. In the opinion on which the decree of the court below was affirmed it was said: "Most of the other papers offered in evidence upon which credits are claimed are debts due by the decedent which antedate his death from three to four years, and a majority of the transactions were of such a nature that the probabilities are they were settled in his lifetime. All of these papers were found in a wallet containing other valuable papers of H. S. McGeary in his safe after his death. But he may have come into possession of all, except the note for \$500, dated November 9, 1890, which matured after decedent's death, as his administrator. This possibility weakens the prima facie case made out by their possession." After summarizing the material parts of the testimony, the court said: "The weight of the evidence seems to be against the accountant as to the credits claimed for indebtedness due by the decedent to H. S. McGeary, except as to the G. B. Brown note, and, with that exception, they are not allowed." In McMahon's Estate it was decided that on the distribution of the effects of the decedent "it was not error to exclude from allowance a note signed by the mark of the testatrix, who could not read or write, and the execution of which was not clearly and satisfactorily established." All that was said in the opinion in regard to the duty of the claimant to prove that he had the note by a "hostile title" was said in the light of circumstances which condemned his claim as fraudulent, and on which it was rejected. In Hoffer's Estate the claims were allowed upon the evidence of the executor's wife that the notes on which they were based were in her custody immediately after the decedent's death, and that she then handed them to her husband. Not one of the decrees entered in the cases cited rests distinctly upon the ground on which the court below entered the decree in this case. The decree in each of the cited cases was based on the facts found from the testimony.

If it be conceded that the executor in this case, by reason of the time intervening between the maturity of the bond and notes and the death of the maker of them, was bound to show a hostile title, there was ample and undisputed evidence to establish it. The proof was clear that the bond and notes were executed by the decedent, and represented loans made by him of Rehfuß from time to time, and equally clear that his financial condition from the time of their execution to the time of his death was not such as to render the repayment of them probable. His own declarations in regard to the loans were flatly opposed to the theory that he had paid them, and at least one of these declarations was made within a few months of his death. Besides, there was nothing upon the bond or notes to

indicate that he had paid them, or that they were in his possession at any time after he executed and delivered them to Rehfuß. It is not usual for a party who has paid his note to retain it without cancelling his signature to it, or making some entry thereon destructive of his liability created by it. In view of the evidence, we think the conclusion that Rehfuß obtained possession of the bond and notes as executor of the estate was unwarranted, and that his claim upon the bond, which was not barred by the statute of limitations, should have been allowed. We therefore sustain the second specification of error, and so much of the first as relates to the disallowance of the claim upon the bond. Decree reversed, at the costs of the appellee, and record remitted, with direction to enter a decree in accordance with this opinion.

(17 Pa. St. 387)

LEHIGH & WILKESBARRE COAL CO. v. WRIGHT et al.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

COAL LEASES—INTERPRETATION.

Certain coal lands were leased upon the following terms: The lessees were to pay 25 cents per ton for all coal mined, but the minimum payment for any year was to be \$4,000, whether or not sufficient coal was mined to make such amount due, and, if there was a failure to mine coal any one year up to the minimum, the deficiency could be made up any succeeding year without paying for same. After the lessees had been in possession for some years, they claimed the right to continue in possession and mine the remainder of the coal without any further payments, upon the ground that they had already paid the lessors more than the value of all the coal remaining unmined. *Held*, that under the contract the lessees must pay the \$4,000 yearly stipulated for as long as they remained in possession. Williams and Green, JJ., dissenting.

Appeal from court of common pleas, Luzerne county; Stanley Woodward, Judge.

This was a bill in equity by the Lehigh & Wilkesbarre Coal Company against Annie A. Wright, Carrie G. Wright, George R. Wright, Thomas Graeme and Ellen H. (his wife), C. E. Hawley, Mary Hawley, and James J. Hawley (by their next friend, C. E. Hawley), John B. Smith, L. M. Smith, and Louisa S. Davenport, to restrain defendants from enforcing the forfeiture of a lease. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Andrew H. McClinton, Henry W. Palmer, and Samuel Dickson, for appellant. Henry A. Fuller and George R. Bedford, for appellees.

DEAN, J. The plaintiffs operated coal mines upon a large body of land in Luzerne county, adjoining a tract of 75 acres owned by these defendants. Before the 29th of November, 1879, the plaintiffs held a lease of the coal on this tract from the ancestor of defendants. By agreement of the parties, on that day, however, the old contract was canceled, and a new one entered into, which leased to

plaintiffs "all the coal upon and under" the 75-acre tract, to have and to hold the premises from 1st of January, 1879, "for and until such time as all the merchantable anthracite coal shall have been mined and removed." By section 1 of the contract plaintiffs covenanted to pay to defendants 25 cents per ton for every ton of 2,240 pounds of coal mined; the "rent or royalty" to be paid quarterly. By section 2—the most important part of the contract—plaintiffs covenanted as follows: "And the said party of the second part, its successors and assigns, whether coal be mined or not, shall pay to the said party of the first part, their executors, administrators, and assigns, in the proportions aforesaid, an annual minimum rental of not less than four thousand dollars, payable in quarterly installments on the said first days of April, July, October, and January. And if the said party of the second part, its successors and assigns, shall fail in any year to mine coal to amount to the said minimum, which it or they shall have paid, the deficiency may be made up in any subsequent year during the time of this lease without any payment therefor. And should the breaker of the said party of the second part, its successors and assigns, be destroyed by fire or other unavoidable cause, the rent may be postponed for the time which may be necessary to erect a new breaker, not, however, to exceed three months." By section 11 it was agreed that on default of any quarterly payment all the right of plaintiffs under the lease should be forfeited at the option of the defendants; or they might issue a landlord's warrant, and distrain for arrears of rent; or, if forfeited, then by authority of a power of attorney thereby given, judgment in ejectment might be confessed, and possession taken of the premises. The quarterly payments of the minimum annual rental—that is, the one-fourth of \$4,000—were regularly made up until 1st of July, 1888, when plaintiffs notified the defendants that the minimum rental they had received up to that date had overpaid them for all the coal in the tract, not only for what had been mined, but for what remained in place, computing its value at 25 cents per ton, and therefore no further payments would be made. Thereupon, May 29, 1889, this bill was filed; to restrain defendants from enforcing at law the forfeiture of the lease, and, further, to restrain them from re-entry under the power of attorney to confess judgment. The object of both parties was to have their rights determined by a judicial construction of their contract. The sole issue raised by bill and answer is whether plaintiffs have paid all that they, by their contract, stipulated they would pay for the coal. By the illness and death of two masters appointed by the court the event of the issue in the court below was delayed. Then, on a former appeal to this court, after full consideration, there were developed such differences of opinion on the question at issue as to call for a reargument before the full bench, which

was accordingly had; so that now, after elaborate argument by the able counsel concerned, and with the report of the master and opinion of the learned court below, we proceed to enter final judgment.

The learned master finds as facts that: (1) Up to July, 1888, the plaintiffs had mined 79,744 tons of hundredweight of coal; (2) that up to that time, they had paid for 154,431 tons; (3) that, computing the coal actually mined at 25 cents per ton, there was then an overpayment of \$12,000; (4) that, estimating the quantity of coal yet in place by the methods which determine it with approximate accuracy, this \$12,000 more than paid for all that remained when this bill was filed. He concluded: That a forfeiture of the lease would be unconscionable. That the true construction of the contract made it a sale in fee simple of the coal in place at the price of 25 cents per ton, to be paid in annual installments of \$4,000. As by the annual installments of purchase money already paid plaintiffs had paid more than (at 25 cents a ton) for every ton of coal in and out of the mine, no more money was payable to defendants, and there was consequently no right to forfeiture when they proposed to exercise it. Further, that plaintiffs, under the contract, were entitled to a reasonable time to remove the remaining coal, which time was not yet up, and which he suggested should be fixed as 1st January, 1895, until which time defendants should be restrained from re-entering. The court below concurred in the master's findings of facts and in his opinion that the contract was a sale of the coal in place, but dissented from his conclusion of law that the amount of purchase money was determined solely by the royalty of 25 cents per ton. On the contrary, he held that the \$4,000 annual minimum to be paid while plaintiffs were in possession fixed the amount of purchase money. As they were in default under this covenant, defendants' right to forfeit was clear, and the bill was therefore dismissed.

As preliminary to a construction of this contract, we remark that the mere use of technical words or phrases which have a definite legal signification cannot be allowed to defeat the contrary intention of the parties, if that intention be manifest from the whole contract. *Caldwell v. Fulton*, 31 Pa. St. 478; *Funk v. Haldeman*, 53 Pa. St. 229. So that the words "demise," "lease," "mine," "let," "lessors," and "lessees," and like words, specially appropriate to a contract between the owner and tenant for years, have no bearing, if the contract is, in fact not a lease, as this is not. If the owner of a tract of land grant the right for a fixed term to mine coal, ore, or other mineral, or to cut wood or timber, to be paid for at so much per ton, per cord, or per thousand, as mined or removed during the term, the intention of the parties to such a contract might, with some approach to accuracy, have been expressed by the use of these technical words; but they give us no aid in the construction of this one. We must ascertain the in-

tention here in determining whether the exercise of the right to forfeit is sustainable from the whole contract,—the subject of it, the surroundings, and the purpose of it. When this contract was entered into the defendants were the owners of the coal under 75 acres of land. The coal was in place. They wanted to get and enjoy the value of it. If plaintiffs had wanted to buy and indefinitely leave it in place for future operation, each party would have dealt on the basis of a lump sum for the coal under the tract, or for so much per acre for it, and would have arranged for payment, just as they would have done if the subject of the contract had been land. Each might, as preliminary to the contract, have sought by surveys to ascertain the proximate quantity in place, and thus have fixed in their judgment the value; but the number of tons and value per ton would have been no express part of the written contract. A round sum for the whole or per acre would have represented the price the sellers were willing to accept and the buyers to give. But, although the contract was a sale of the coal in place, they did not bargain on the basis of a lump sum. Why? Because the plaintiffs were not purchasers of coal or coal lands to hold for appreciation in price, in view of a future sale for a round sum, or a lease to others at a profit. They were operators, who desired to mine and market the coal at a profit, intending to operate immediately. Therefore, as in all such operations, it is more convenient to pay while the operation is going on, for it involves an expenditure of far less capital, consequently a less fixed charge. Say, they had paid down for this coal, what approximately they did pay in the nine years between the date of the contract and filing the bill, at simple interest, they would have been at an annual expense on the \$36,000 of \$2,160. This could be avoided only by payments as the mining progressed, and this they endeavored to stipulate for in the bargain. It was the adoption of this method of payment alone that prompted the expression of value of 25 cents per ton to be paid when mined, as provided in section 1. But the owners' interest now clashed with theirs. The operators, once in possession, with right to all the coal in the tract, might indefinitely prolong such possession. Fluctuations in the market, wage disputes and strikes, accidents to machinery, and like causes, might render rapid mining unprofitable to the operators. The rate of profit would depend on circumstances not foreseeable, and the rate of output would depend on rate of profit. The owners' enjoyment of the value of their property would largely depend on receiving that value soon. If the payments, by reason of slow mining, were stretched into the future, they would receive far less than if made within a period of two, three, or even five years; and all this coal could easily be mined within that time. Both parties assumed the value of the coal in place to be 25 cents per ton, and this value defendants would have proximately got if it had been mined diligent-

ly. But if, on account of conditions of market, charges for transportation, or price of labor, it paid plaintiffs better to mine very slowly, defendants would not receive nearly that value. For example, take the \$4,000 paid for the 16,000 tons mined the ninth year. If the 16,000 tons were worth 25 cents per ton at date of contract, then defendants had lost nine years' interest, or \$2,160. Deducting this from the \$4,000, left only \$1,840, equal only to 11½ cents per ton, by reason of the long-deferred payment. The hardship of the bargain by the happening of this very contingency the owners sought to guard against by two distinct methods of fixing the purchasing price,—one, 25 cents per ton, to be paid as mined; and this is all plaintiffs would have paid if they had mined with diligence. But there was another method. If for any reason they chose to retain possession, and not mine diligently, then defendants had provided for this by exacting a fixed annual income of \$4,000. See section 2: "And said party of the second part, * * * whether coal be mined or not, shall pay to the said party of the first part, * * * in the proportions aforesaid, an annual minimum rental of not less than four thousand dollars." This was a plain bargain; in no sense unconscionable at the time it was made. The owners exact positive stipulations as to price of that which they owned, in view of future contingencies. In no case are the plaintiffs to pay less than 25 cents per ton. But, if they choose to not diligently carry on the work of mining, so that they take out less than 16,000 tons annually, then they shall pay \$4,000 annually as long as they retain possession of the premises to mine coal under the contract. The hardness of the bargain is, it seems to us, assumed by the able master on insufficient grounds. He adopts the price per ton as mined as the one value of the coal; not noting that, if it paid plaintiffs better to not mine, or to mine it very slowly, it was a serious loss in price to the owners, which they guarded against. Whether, on the whole, as a business venture, the operators gained or lost by the second method, would depend on the soundness of their judgment; but, if they lost by exercising their judgment, that does not prove the bargain a hard one.

The provision that, if there were a failure to mine coal any one year up to the minimum, the deficiency should be made up any subsequent year, in no respect conflicts with the construction here given. That only means, if in one year, say but 8,000 tons had been mined, and \$4,000 paid, then the next or a subsequent year, if plaintiffs mined, say 24,000, the \$2,000 might be credited on the excess beyond 16,000 tons. The plaintiffs are given the privilege of recouping the excess of payment above what they have mined in a preceding year by an excess of coal in a subsequent year. There is no intimation in the language employed that there is to be any reduction or change in the annual minimum payment of \$4,000 while plaintiffs are in pos-

session. There is just one provision for suspension of the annual payment, and it is embodied in this section. It is: "Should the breaker * * * be destroyed by fire or other unavoidable cause, the rent may be postponed for the time which may be necessary to erect a new breaker, not, however, to exceed three months." This is the only contingency which can work a suspension of any part of the \$4,000 rental; and, as there is the expression of one contingency alone, the silence of the contract as to any other is significant of an intention to exclude all others. "*Expressio unius exclusio alterius.*"

The possession of the premises, with the right to timber or other material on the surface, was granted to plaintiffs along with the coal under the surface. The position of appellants is that, having already paid for more coal than the tract originally contained, at the rate of 25 cents per ton, they have the right to cease payment, and retain possession of the premises, with these rights on the surface, until all the coal be mined. As already noticed, this is not our construction of the contract. The intention of the parties to every contract of this kind must determine their rights and remedies. In the authorities cited there is no real conflict. The difference in the surroundings of the parties at the date of the contract and a distinction in the subject compel different constructions to give effect to the intention. The language of no two of them is the same; the covenants are different. It is useless to go over them, because, to be in point, they should be in *verbis ipsissimis* concerning the same subject, and the parties in the same situation. On one proposition they all agree,—that in contracts like unto this they must be construed as a sale of the coal or other mineral in place. The determination of the price, as well as the remedies for the enforcement of the contracts, are as different as the minds of the parties. And while we do not go to the length the English cases do in enforcing payment of the purchase money where there is a total failure of consideration, yet, where the consideration has not failed, as here, the law of the contract which the parties have made for themselves is the law of the land. The appeal is dismissed, and decree affirmed.

WILLIAMS and GREEN, JJ. We dissent from this judgment because we regard the contract as a simple sale of coal in place to be paid for by the ton. The right to mine and remove it was an incident to the sale. When all the coal in the tract was paid for, the purchase money was extinguished. If the company remained in possession for an unreasonable time in closing up its mining operations after the coal had been fully paid for, it was liable to the owners of the land for such occupation, and subject to an action for the recovery of the possession. It is not liable to pay \$4,000 per year for coal that has no existence.

(178 Pa. St. 335)

In re FISHER.

Appeal of CITY OF ALLEGHENY.

(Supreme Court of Pennsylvania. Nov. 9, 1896.)

EMINENT DOMAIN—COMPENSATION FOR PROPERTY TAKEN—MUNICIPAL CORPORATIONS—LOCAL STATUTE.

1. Where property is taken or injured by a municipal corporation under the power of eminent domain, the compensation to which the owner is entitled is to be fixed by the established judicial tribunals of the state, and such corporation cannot legally be authorized to itself determine the amount of such compensation.

2. So much of the local act of 1870 relating to streets in the city of Allegheny as empowered the city, by its councils, and viewers appointed by them, to assess the damages to a property owner by reason of a change in the grade of a street, is in violation of Const. art. 3, § 7, prohibiting local laws changing the jurisdiction or procedure of courts.

3. Where property was injured by changing the grade of a street by proceedings under a local law containing no valid provision for fixing the compensation to which the owner was entitled, the owner may proceed to have the damages assessed by the court of common pleas under the statute of May 16, 1891 (Laws 1891, p. 71), which is general, and applies to all municipal corporations of the commonwealth.

Appeal from court of common pleas, Allegheny county.

Proceeding on the petition of Cora E. Fisher for the appointment of viewers to assess her damages caused by a change of grade of Woodland avenue by the city of Allegheny. From the decree confirming the report of the viewers appointed, the city appeals. Affirmed.

Elliott Rodgers and Geo. Elphinstone, for appellant. Charles W. Dahlinger, for appellees.

WILLIAMS, J. The constitution guards the citizen against an unjust or oppressive exercise of the right of eminent domain. In section 8, art. 16, it is provided that municipal, like all other corporations possessing the right of eminent domain, shall make "just compensation for all property taken, injured or destroyed by them," and that such compensation shall be paid or secured to the owner before the taking, injury, or destruction shall be allowed to take place. The same section secures to the property owner the right to appeal from any preliminary appraisal of the compensation due him, and the further right to a trial before a jury in such appeal, according to the course of the common law. The machinery by which this "just compensation" shall be ascertained is provided by the act of 1874. It is set in motion upon the petition of the corporation or of the owner. It consists of the appointment by the proper court of viewers to investigate and determine the value of the injury done to the owner, and then report to the court. From this report an appeal lies to the court that appointed the viewers, in which, upon request, the amount of the damages to be paid to the claimant may be deter-

mined by trial before a jury. The whole proceeding is judicial. Every successive step is made a matter of record in the office of the clerk of the court, and is open to the inspection of the parties and the general public at all times. The idea that the corporation exercising the right of eminent domain might exercise judicial jurisdiction over its own causes, appoint viewers to ascertain the damages it had inflicted upon a property owner, require him to come before it and contest the conclusions of the viewers, confirm or set aside the report at its will, and set up its own action in support of the plea of *res adjudicata*, when called upon in a court of law to answer for the taking, injury, or destruction of the property of the citizen, gets no support or countenance from the constitution or the general law of 1874. It is too monstrous to be tolerated. The city is the taker. The citizen whose property is affected is the complaining party,—the plaintiff. This controversy must be litigated in and determined by the established judicial tribunals to which the decision of all other controversies is committed. The defendant can have no better right to sit as judge in its own case than the plaintiff, and so much of the local act of 1870 as professed to confer this power upon the defendant is a palpable violation of the declaration of rights and of section 7, art. 3, of the constitution. The city can properly raise committees or appoint viewers or boards of appraisers for its own information, and require reports to be made to the mayor, councils, or heads of departments. Such bodies are instrumentalities made use of in the administration of municipal affairs to facilitate the transaction of business, and to secure exact information in regard to important subjects upon which municipal action may become necessary. But it can call upon no one having a claim against the city to submit to the arbitrament of such boards or committees, or of the city itself.

Now, in this case the city of Allegheny by ordinance established the grade of Woodland avenue, and in the same ordinance, acting under the local act of 1870, appointed viewers to assess the damages and benefits occasioned thereby, with directions to report to the city councils. The viewers made a report allowing no damages and assessing no benefits. This report was confirmed by the city councils. In 1874 the work of changing the grade upon the ground was entered upon, and the avenue was put upon the grade established by the ordinance. In 1895, Cora E. Fisher presented her petition to the court of common pleas of Allegheny county for the appointment of viewers to assess the damages she had sustained by reason of the change of grade. Viewers were appointed, who awarded damages, and imposed them upon the city. This report has now been confirmed, and the present appeal was taken from the decree of confirmation. The appellant alleges that the court of common pleas has no jurisdiction

over the assessment of damages done, or benefits conferred, by the change in the grade of Woodland avenue. The first reason given in support of this denial of jurisdiction rests on the alleged legal value of the proceedings taken by the city before itself under the act of 1870. The second rests upon a denial of the jurisdiction of the court. The first of these reasons requires no discussion. It was decided by this court in *Re Wyoming St.*, 137 Pa. St. 494, 21 Atl. 74, and in *Huckestein v. Allegheny City*, 165 Pa. St. 367, 30 Atl. 982. The second reason has not been heretofore considered, but it does not seem to be involved in much difficulty. The entry of the city upon the premises of Mrs. Fisher was made, as is alleged, under the act of 1870, but it was equally authorized by the act of May 16, 1891, and its supplement of June 12, 1898. The act of May 16, 1891, authorizes all municipal corporations to change the grade or lines of its streets, lanes, or alleys, and in so doing to take, use, occupy, or injure private property. If the compensation due to the owner is not ascertained by agreement, provision is made by this act for its ascertainment by proceedings in the court of common pleas of the proper county. Upon petition of the owner or of the corporation, viewers are to be appointed to ascertain the damages and the benefits, and make report to the court appointing them. When the report is made, both parties have an opportunity to be heard for or against the report, and, if required by either party, a trial may be had before a jury, and the amount to which the owner is entitled as his "just compensation" determined by a verdict. This act is general in its terms. It embraces "all municipal corporations of this commonwealth," and it provides a remedy for every person injured by the action of any municipal corporation relating to the change of the grade of any of its streets, lanes, and alleys. If, by reason of the unconstitutionality of the provisions of the act of 1870 relating to the assessments of damages and benefits for the change of grade upon Woodland avenue, there is no local act under the terms of which the plaintiff has a right to apply to the court of common pleas, then the act of 1891 provides a remedy. It relates to this subject. It empowers the court to act upon the petition of either party, and provides the necessary machinery for the ascertainment of damages and the assessment of benefits. If the entry authorized by this act has taken place under the authority of any act of assembly, and there is no other means of determining the amount of injury done thereby to the property owner, he may come into the court of common pleas, and ask to be accorded the benefits of an ascertainment of his damages under the provisions of the general law of 1891. A party entitled to relief will not be turned away from the courts because his property has been taken, injured, or destroyed under a local law that makes no provision for compensation, so long as a general law can be found which sup-

plies the deficiency in the local law, and gives him an ample remedy. The city has changed the grade of Woodland avenue. It had the right to do so under the act of 1870 and that of 1891. The act of 1870 made no provision for ascertaining the damages done by the change of grade. The act of 1891 makes ample provision, and the plaintiff is entitled to the benefit of its provisions. The judgment is affirmed.

(178 Pa. St. 408)

COMMONWEALTH v. SHAFFER.

(Supreme Court of Pennsylvania. Nov. 11, 1896.)

HOMICIDE—CONFESSION—PRIVATE COUNSEL ASSISTING DISTRICT ATTORNEY.

1. While proof of the collateral features of a confession increases the probability of its truth as a whole, and tends to establish its main feature, disproof of them, though lessening this probability, does not necessarily establish the falsity of the main feature.

2. It is not error to permit the district attorney to call two attorneys to his assistance in a murder case, the application being on the ground that the ends of justice required such assistance; they being familiar with the facts, having, one acting as deputy district attorney, conducted the prosecution of another person charged with the same offense, and the district attorney having recently come into the office, and it being important that he be called as a witness.

Appeal from court of oyer and terminer, Luzerne county.

Frank Shaffer was convicted of murder, and appeals. Affirmed.

John F. Shea and E. F. McGovern, for appellant. James L. Lenahan, Henry A. Fuller, and D. A. Fell, Jr., Dist. Atty., for the Commonwealth.

FELL, J. None of the assignments of error can be sustained, and they present no question which requires discussion. The defendant was convicted on his confession of guilt made before his arrest, repeated and reduced to writing during his confinement, and twice sworn to by him in court. Before his statement was made to the district attorney, and before he testified in court, he was fully informed that he was not required to speak, and was distinctly notified that what he should say might be used to secure his conviction. Because of his denial at the trial of the truth of his confession, and of his assertion that it had been made and repeated under the inducement of hope, the learned judge, after the most careful instruction upon the subject, submitted the question whether the confession had been made voluntarily, and, if so, whether it was true. The jury were told to reject it altogether if they found that it was not voluntary; and the vital question—its truth—was kept constantly before them.

The commission of a willful and deliberate murder was established beyond all doubt. The presence of the appellant in the immediate vicinity at the time was shown and admitted, and his statement, seven times repeated to different persons, three times reduced to writing, and

twice sworn to by him, was corroborated by the proof of independent facts tending to sustain it. Five of the assignments of error relate to this corroboration. The appellant had stated in his confession, and testified in court, that Nelson Miller, who was charged in another indictment with the same offense, had placed the dynamite in position under the building, secured the battery, and connected the wires; and that after the explosion he had taken a pocketbook containing money from a trunk which was in the building. It was shown by other testimony that a trunk which was in the building at the time of the explosion was missing, and that the trunk and pocketbook were afterwards found in Miller's possession. This testimony, together with the testimony that Miller had a knowledge of the use of dynamite, and experience in exploding it by means of a battery, was in direct corroboration of the appellant's statement that Miller had planned the crime, and procured the means by which it was perpetrated, and particularly of the important feature of the confession that Miller was present, aiding and directing the appellant in the operation of the battery. The vital feature of the appellant's confession was that he had caused the explosion. His conviction depended upon the truth or falsity of this. Every fact shown by other testimony which tended to confirm other parts of the confession, and to corroborate it as a whole, was against him; and any fact showing that other parts of the confession were untrue weakened it as a whole, and threw doubt upon its vital feature. But it did not follow that the raising of a doubt by other testimony as to a material part, collateral to the main question, required the rejection of the whole confession, and the acquittal of the prisoner. Proof of the truth of the collateral features of a confession increases the probability of its truth as a whole, and tends to establish its main feature. Disproof of them lessens this probability, but it does not necessarily establish the untruth of the main feature. The jury was so instructed, and told that, "the more of these collateral matters which from other evidence you find to be false, the less probable becomes the truth of the vital features."

It was not error to permit the district attorney to call two members of the bar to his assistance in the trial of the case. The application was on the ground that the ends of justice required such assistance. These gentlemen did not represent a private prosecutor, but the Commonwealth. Both of them, one acting as deputy district attorney, had conducted the prosecution of another person charged with the same offense, and they were familiar with the facts. The district attorney had recently come into office, and it was important that he should be a witness in the case against the appellant. The care and caution which should be observed in the trial of a prisoner when his confession of guilt is the only testimony directly connecting him with the commission of the crime with which he is charged were fully observed by all who were officially connected with the trial. Before and during the trial the prisoner was treat-

ed by the prosecuting attorneys with entire fairness, and all of his rights were scrupulously observed by them. The charge of the learned judge contains a very full, clear, and orderly presentation of the testimony, and of the law applicable to it. The case was well tried, and the record before us shows no error. The judgment is affirmed, and the record is remitted, in order that the sentence may be carried into execution according to law.

(178 Pa. St. 123)

JONES v. PENNSYLVANIA CANAL CO.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—DANGEROUS BRIDGE—INSTRUCTIONS.

1. The defendant, in rebuilding a bridge and footway across its canal, left a hole immediately in front of the approach to the footway, across which was laid a plank 10 or 12 inches wide, connecting with the bridge, which had been opened to travel. Plaintiff crossed over the plank after dark in safety, but returning (also in the dark), in attempting to recross, fell in, and was injured. At the trial she testified she did not see the hole, and did not know it was there. *Held*, that plaintiff was warranted in assuming that the bridge was reasonably safe, and the question as to whether she saw the hole was properly left to the jury.

2. In such case, a charge that a person traveling the highway is bound to exercise common prudence in avoiding dangerous places, and, if he does not, although the authorities have been negligent in their duty, still, if the traveler also has been negligent, the law has no motive to interfere, between the parties, and leaves them where it finds them, was as favorable as defendant was entitled to.

3. A charge that, if the plaintiff saw the hole, she was guilty of negligence in trying to walk over on the plank, was as favorable as defendant was entitled to.

Appeal from court of common pleas, Perry county.

This was an action of trespass by Annie Jones against the Pennsylvania Canal Company to recover damages alleged to have been sustained by reason of the negligence of the defendant in not keeping in reasonable repair and safe condition the bridge to a footway over its canal. From a judgment in favor of the plaintiff, defendant appealed.

B. F. Junkin, for appellant. W. H. Sponsler, for appellee.

STERRETT, C. J. While the alleged negligence of defendant company, on which this action is founded, is not expressly conceded, it was so clearly established by the testimony that no jury could hesitate in finding the fact in favor of the plaintiff. Among other things, it was conclusively shown that the county bridge spanning the Juniata river at Millers-town, and the wagon and foot bridge across defendant company's canal a few feet east of the river bridge, were swept away by the great flood of June, 1889. Within less than six months thereafter, both bridges were reconstructed, with the exception of the approach to the foot bridge across the canal near the east

end of the river bridge. At that point, a ditch from five to seven feet long and from two to three feet deep extended across the footwalk, between the two bridges. Diagonally across that ditch, and connecting the wagon road with the foot walk of the canal bridge, was laid a heavy plank, 10 to 12 feet long and 10 or 12 inches wide. The footwalk was a continuation of the sidewalk, and had been open and unguarded from November, 1889, when the canal company completed the reconstruction of its bridge, until the night of the accident. Between the west end of the footwalk of the canal bridge and the east end of the county bridge a quantity of lumber was piled up, so as to divert travel from that part of the roadway. From the time the bridges were swept away until the day of the accident, plaintiff had been confined to the house by protracted illness; and the first time she crossed the bridges after their reconstruction was on her way to church on the evening of February 28, 1890, at 7 o'clock. On her way home, in crossing to the footwalk of the canal bridge, she fell into the unguarded ditch above referred to, and was seriously injured. She testified, in substance, that in going to church she crossed on the footwalk of the canal bridge, and on the plank referred to; "did not know of any other way;" "did not know there was any danger;" "knew there was a plank there, but thought it was there because the bridge was that much higher than it was before;" "did not see that the plank was over a hole;" "thought it was there just so that you would not have to make that step." While the plaintiff had not previously crossed the recently reconstructed bridges, she knew they had been thrown open for travel, and used by the public for several weeks. She was, therefore, warranted in assuming that they were in a reasonably safe condition for public travel, and proceed to cross as she had been accustomed to do before they were destroyed by the flood. In reply to the question, "Did you look where you were going?" her answer was, "No, sir; because the bridges looked to me as they always did." Relying on this answer and other testimony relating to the degree of care exercised by plaintiff in crossing and attempting to recross the footway of the canal bridge, etc., defendant company sought to impale her on the only sharp point that is not conclusively settled by the undisputed evidence, and thus eliminated from the case; and accordingly the court was requested to give binding instructions against her, on the ground of contributory negligence. The learned trial judge refused to invade the province of the jury by arrogating to himself the determination of questions of fact upon which the alleged contributory negligence clearly depended, and he accordingly submitted to the jury the testimony relating thereto, with correct and fully adequate instructions. In affirming defendant's second and third requests for charge, he instructed the jury, in the words thereof, thus: "(2) Every person of years of discretion, in traveling the highway of the commonwealth, is bound to exercise common, ordi-

uary care and prudence to avoid dangerous places; and, if he does not, although the authorities having charge of such highways may have been negligent in their duty, still, if the traveler has also been negligent in not avoiding the danger, the law has no motive to interfere and assist them, and leaves them where it finds them. (3) If the jury believe that the plaintiff, Annie Jones, saw the hole under the plank, she was guilty of negligence in trying to walk the plank. She should have returned to the east end of the bridge, and passed over the safe wagon bridge." These instructions were quite as favorable to the defendant company as it was entitled to. The plaintiff testified that she did not see "the hole under the plank," and as to that fact she was impliedly, but nevertheless emphatically, accredited by the verdict of the jury. Whether she did or did not see "the hole under the plank" was one of the questions of fact that were specifically submitted to the jury, and, if they had not determined it in her favor, their verdict would necessarily have been for the defendant. It was also contended that in the exercise of ordinary, reasonable care the plaintiff should have seen the hole, and, in the circumstances, the legitimate inference was that she knew it was there, etc. If it be conceded that any such inference was possible, it certainly cannot be pretended that it was an inference of law to be drawn by the court. As an inference of fact it was clearly for the jury. In refusing to charge without qualification, as requested in plaintiff's fourth point, the learned court said: "This point is refused, unless you find from the evidence in the case that she did cross over on the plank on her way to the church, and she could and would see the danger at that time. If such be the fact, then the point is affirmed." There was surely no error in that. Nor was there any substantial error in the learned court's answers to defendant's first, fifth, sixth, and seventh points. The only question in the case that could be at all regarded as worthy of any consideration was the question of plaintiff's alleged contributory negligence, and that was definitively settled by the verdict. Aside from that, there was nothing else in the case to relieve the defendant from the just consequences of its manifest and inexcusable negligence. The assignments of error are all overruled, and the judgment is affirmed.

(178 Pa. St. 38)

RUTHERFORD v. PENNSYLVANIA MIDLAND R. CO. et al.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

RAILROAD COMPANIES—RECEIVER'S CERTIFICATES—JUDICIAL DISCRETION—MATERIALS AND LABOR.

1. On request of 96 per cent. of the bondholders, without prejudice to those nonconsenting, the court below granted an order allowing the issuance of receiver's certificates to complete an unfinished railroad, making such certificates a lien prior to existing bonds. Held that, while ordinarily it would be going too far to issue re-

ceiver's certificates to complete a road, yet in this case there was no manifest abuse of discretion, and, as the rights of nonconsenting parties were protected by the decree, the proceedings would not be reversed.

2. A decree authorizing the issue of receiver's certificates for the payment of materials and supplies furnished and labor performed within the six months preceding the appointment of such receiver (said certificates to be a first lien) is within the discretion of the court, and according to the usual rule. *Union Trust Co. v. Illinois Midland Ry. Co.*, 6 Sup. Ct. 809, 117 U. S. 434, cited.

Appeal from court of common pleas, Bedford county.

On petition of John W. Rutherford, a receiver was appointed on October 24, 1895, to take charge of the property of the Pennsylvania Midland Railroad Company. Six days afterwards the president of the company, at the instance of the holders of 491 out of a total of 510 bonds of said company, petitioned for a decree authorizing the issue of receiver's certificates to pay for materials and labor. On November 7, 1895, the receiver, at the instance of the same bondholders, petitioned the court for a decree authorizing the issue of receiver's certificates for the completion of the road. The petition was granted "without prejudice to the rights of nonconsenting bondholders." From this decree H. Frank Gump and others, alleged creditors of the company, appealed. Affirmed.

Kerr & McNamara, Moses A. Points, Reynolds & Colvin, and Alexander King, for appellants. John S. Weller, for appellee.

STERRETT, C. J. The bill in this case avers a contract by plaintiff with defendant company for the construction of its railroad, partial performance of the contract, insolvency of the company, and threatened destruction, disintegration, and sacrifice of its property, etc., and concludes with a prayer for the appointment of a receiver "to take charge of, keep, and preserve the property of said company, subject to the further order of the court." On October 24, 1895, plaintiff was appointed receiver. Six days thereafter the president of defendant company, at the instance of the holders of 491 out of a total issue of 510 bonds of said company, petitioned the court for a decree authorizing the issue of receiver's certificates to the amount of \$50,000 for the payment of claims against the company for materials and supplies furnished and labor performed within the preceding six months; said certificates to be first liens on defendant company's property. On November 7, 1895, the receiver, at the instance of the same bondholders, petitioned the court for a decree authorizing the issue of receiver's certificates, not exceeding \$150,000, for the completion of said railroad. On November 25, 1895, the appellants, one of whom was the holder of five of said company's bonds, and both claiming to be creditors of defendant company for materials, labor, and money furnished for the construction of its railroad

more than six months prior to the appointment of the receiver, asked leave to intervene and object to the issuance of said certificates. On December 20, 1895, the decree prayed for was made, but "without prejudice to the rights of the nonconsenting bondholders, and with leave hereafter to petition to have their bonds, like those of the consenting bondholders, held subject to the prior lien of the receiver's certificates."

Our first impression was that the learned judge had gone too far in authorizing the issuance of receiver's certificates for the completion of an unfinished railroad; that to do so would be establishing a dangerous precedent, etc. Ordinarily this would undoubtedly be so, and we would not hesitate to express our disapprobation of such proceedings; but, upon fuller consideration of the special and somewhat peculiar facts and circumstances of this case, we are not prepared to say that he was so clearly in error that the proceedings should be reversed. We are rather inclined to think that to sustain the contentions of the appellants would be prejudicial to all parties concerned. In matters that rest so largely in the sound discretion of the trial court as do cases of this kind, we should not interfere unless there appears to have been manifest abuse of that discretion. In view of the fact that the proceedings complained of were had at the request of a very large proportion of the bondholders, and without prejudice to those nonconsenting, it is unnecessary to notice specially some of the questions presented by the record. As to the equitable power of the court to appoint a receiver of an insolvent railroad company when a proper case is presented, there cannot be any doubt. Such appointments, as already intimated, rest in the sound discretion of the court, exercised with a view to the interests—both public and private—that may be involved. This is also true, in the main, as to the power of the court to authorize its receiver to raise money necessary for the preservation and completion of a railroad, and to make the same chargeable as a lien thereon. Whether, as a general rule, the power to order receiver's certificates for the completion of a railroad, and make them a lien prior to existing bonds, should not be limited to "going concerns," may be regarded as an open question; but in view of the fact that the decree in this case was made upon the request of a very large majority of the bondholders, and those who did not join in the request are sufficiently protected by the form of the decree, it is unnecessary in this case to further consider the subject. The ground upon which courts act in all such cases is the enhancement of the security of the bondholders. When it appears that the holders of over 98 per cent. of the bonds assented to the decree, it is fair to assume that the security of the bonds, as a class, is not likely to be impaired thereby.

The decree authorizing receiver's certificates for the payment of the prior claim in this

case stands on substantially the same footing. It was requested by the president of the company, representing the stockholders thereof. The usual rule is to allow prior claims for materials and labor for the six months preceding the appointment of the receiver. *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. 800; 20 Am. & Eng. Enc. Law, 425. This is evidently the rule adopted by the bondholders in petitioning for the decree in this case. An inspection of the petition and account shows that Thomas Stuff is allowed a preference for \$2,250 for materials furnished since May 1, 1895, but a similar claim by him, antedating the period of six months prior to appointment of the receiver, is not allowed. The appellants appear to be creditors whose claims accrued more than six months prior to said appointment, and hence they would not be entitled to preference in any event. They are not, therefore, in a position to complain of the action of the court.

It is unnecessary to notice other questions presented by the record. Neither of the specifications of error is sustained. Decrees affirmed and appeal dismissed, with costs to be paid by the appellants H. Frank Gump and others.

(178 Pa. St. 363)

CITY OF McKEESPORT v. SOLES.

(Supreme Court of Pennsylvania. Nov. 9, 1896.)

PUBLIC IMPROVEMENTS—ASSESSMENTS—RURAL OR URBAN PROPERTY.

Land may be assessed as urban property for improvements on a street on which it fronts, though it be not divided into lots, and has always been used for farm purposes, if the character of the surrounding property is urban.

Appeal from court of common pleas, Allegheny county; White, Judge.

Action by the city of McKeesport against Catharine Soles to recover on a special assessment. Judgment for plaintiff, and defendant appeals. Affirmed.

The charge of the court, the parts which defendant assigns as error being marked by brackets, is as follows:

"This is an action by the city of McKeesport against Mrs. Soles, to recover an assessment upon her property for the grading and paving of Fifth avenue, in McKeesport, from what is called the 'Iron Bridge' to the borough line, a distance of very nearly half a mile. Fifth avenue had been previously graded and paved, I presume, down to what is called the 'Iron Bridge.' Fifth avenue runs in a westerly direction, nearly parallel with the Monongahela river, and is at the foot, or nearly the foot, of what may be called the 'River Hill.' Considerable of a valley lies between this avenue and the Monongahela river, which, according to the plot in evidence, has been laid out in lots, and was laid out into lots at the time this improvement was made, and considerably built upon; and between the railroad and the river are very large manufacturing establishments, among

the largest in the county of Allegheny. At the time of this improvement, in 1890 or 1891, McKeesport was a borough, and the improvement was consummated, I believe, before it became a city. By the increased population, it is now ranked among cities of the third class in this state. The work was done under a local act for the borough of McKeesport, passed in 1867. It provided that, on the petition of a majority of the citizens owning property on a street, the council might order the grading, paving, and curbing of that street; but it provided that the expense should be assessed upon the properties according to their feet front. That act did not require that there should be a majority in interests of owners, as well as a majority in number; and according to the evidence here, there was a majority of the owners of property applying for the improvement at that time.

"One of the contentions of the defendant is that, because the petition was not signed by a majority in interest, it was unconstitutional; but that act has been before the supreme court several times, from cases tried in our courts here, and it has been sustained in the supreme court. The contention here is that this is rural property, and not liable to an assessment for street improvements; and that is really the only question there is in the case. If it is to be considered rural property in the sense of the law, then there can be no recovery at all on the part of the plaintiff. If it is not rural property in the sense of the law, as I shall explain to you presently, then your verdict would be for the plaintiff for the amount of the assessment. The jury have no right to consider whether the assessment was too high or not. Your verdict must be for the amount claimed or nothing. The defendant owns 1,063 feet on what would be called the southerly side of Fifth avenue, and her assessment, at the rate of \$9.78, was something over \$10,000; but since that assessment there has been a claim put in by Mrs. Soles for damages for the grading of this avenue. The assessment was for paving, grading, and curbing, and the proceeding to assess her damages for the grading resulted in the allowance to her of the sum of \$3,800. That is to be allowed as a credit in this case, and reduces the assessment that much. If you find for the plaintiff, then, it would be for the difference after subtracting the \$3,800 from the amount of the assessment. As I said, the whole distance of this portion of the avenue is very nearly a half mile,—about 2,563 feet,—and according to this plan, prepared by the city engineer, and on which the council passed the resolution fixing the assessment, there were seventy properties assessed. The largest lot on the southerly side of the avenue, that is the side on which is Mrs. Soles' property, had a depth, I suppose, of about a little over 200 feet. There were several small lots on that side, and, according to the plan here, there were small lots—town lots—on both sides of Mrs. Soles' property. The total length being 2,563 feet, and her ground being 1,063 feet, there were assessments upon other properties

upon that side of the avenue, amounting to about 1,500 feet. Those lots were assessed, and on the northerly or the river side of the avenue the lots were assessed. I do not know exactly the entire depth of them, but I believe the one having the largest frontage had a frontage of about 150 feet. The largest lot on the southern side, the side of Mrs. Soles' property, had a frontage of 138 feet. Then there were a good many lots of 60 feet, and from that on up to a hundred.

"In the early days of our state, the grading and paving of streets in cities, towns, and boroughs was paid by general taxation. This was the case in the city of Pittsburg. About forty years ago there was a great demand for laying out streets and improving them in what were then called the 'Suburban Parts' of Pittsburg, extending out towards East Liberty and Wilkinsburg. It was all farm land at that time, and, being rather hilly, the expense of laying out streets and grading and paving them would be very great. The old city objected to those improvements being made to be paid by general taxation, because the properties down in the city were very valuable, and, if there was simply a general taxation to improve all those streets, it would fall very heavily on the properties on our main streets, and would be greatly to the benefit of those properties out there that wanted the streets, enhancing the value of their properties immensely, and actually being no benefit to the property holders down on the streets of the old city. They contended that the property holders there should pay for the grading and paving of those streets, because it would be done for their own benefit, and enhancing the value of their own property. Out there they replied that the old city had been paved at public expense, and asked why their streets should not be laid out and paved in the same manner. To make a kind of amicable adjustment of the matter there was an act of the legislature passed providing for the assessment of all the old streets of the city and charging the property holders with that value. That was done, and I know that, while I was city solicitor, I collected a vast amount of assessments upon the property in the old city to make up for the streets that were paved in front of their property at the time, and then these newer properties were to pay for the grading and paving of their own streets. [The principle of all these local assessments is that the properties are benefited by these local improvements, and therefore ought to pay for them; and that is a sound principle. Where there is a public benefit, or any improvement for the general public, it is paid for by general taxation; but these local improvements, where the properties are benefited by it, the properties should pay for it. The only difficulty in the case I have mentioned was to get at a rule for estimating the benefits. The foot-front rule was adopted; that is, that the expense should be borne by the property holders according to the frontage of their property at so much a foot front. That was sustained in this state, and

nearly all the improvements made in the city—out in the rural regions of our city—were made and paid for on that basis. But there was a disposition to extend that beyond all reason, and hence it led to a reaction. The first case was what is called the 'Washington Avenue Improvement.' That was the case of an avenue that was laid out on the southern side of the city, to extend away out into the country, through farms miles out into the country, by a special act authorizing it to be done, and authorizing an assessment of the farms for a distance on each side. When that came before the supreme court, they said that was wrong; that while this foot-front rule was right enough in cities, it could not be extended to farm land; and an improvement of that kind, running out miles through the country, through farm land, was a perversion of that principle,—was unconstitutional and wrong. So, in the Penn Avenue Case (Seely v. City of Pittsburgh, 82 Pa. St. 360), persons living out in East Liberty, miles from the city, wanted to have a magnificent driveway in place of the old Greensburg pike, and they got a special act of the legislature authorizing that to be constructed. At that time there were a great many farms between what was known as East Liberty and the city, and they undertook to assess all those farm lands and everybody along the line of Penn avenue so much a foot front, and that was declared by the supreme court unconstitutional, and the principle in those cases was announced that rural property could not be taxed by the foot front for an improvement of that kind. But never heretofore have we had a clear and satisfactory definition of what is to be understood as rural property, in the sense that it is not liable to an assessment for street improvements. The principle has been announced, but no clear definition of it, perhaps because none of the cases required that. The cases that went up were manifestly through rural property, through farms on both sides, and there was no pretense of it being town land, but it was entirely and undoubtedly farm land.]

"This case, perhaps, requires us to scrutinize more closely what is meant now by the term 'rural,' so as to be exempt from assessments for street improvements. I may say that the general act of assembly passed in 1891 has very largely superseded these improvements at the foot-front rate, and has declared that, where there is grading and paving done, the assessment shall be according to benefits. There is no doubt at all that in many of the old cases the foot-front rule worked great hardship. There is no doubt about that, but it was adopted because it seemed to be a reasonable measure of getting at the benefits conferred upon the property by the improvement. Now properties may be greatly injured by the grading of a street. There may be a deep cut on some properties, and there may be a high fill on other properties, and then on the others it may be level ground, and there is scarcely any grading and no injury; and hence an iron-clad rule of making it so much a front foot would work great hardship and injustice in cases of

that kind. To remedy that there was an act passed allowing damages for the grading, and where the grading did damage, and the owner received compensation for the damage done by the grading, then, when it comes to paving, there can be no damages. There can be no damage in any case to the property by paving the street, and I am inclined to think that for simple paving and curbing the front-foot rule might still hold good, although it has been abolished in these cases by the act of 1891, for this reason, that, after the grading of a street, when it comes to the paving of it, as it can't do any harm, the property is presumed to be benefited by the paving of a street; and the law holds out that idea because, under the act of 1891, for a sidewalk and curbing, the property holder is required to do it, on proper notice, and if he does not do it, it may be done by the city or the borough and he may be charged with the full expense of it. That is still the law. [Now, in this case before you, allowing credit for the damages resulting from the grade, it comes down really to the expense of paving and curbing that street. As I said to you, the supreme court has not yet given a clear definition of what is meant by 'rural property,' in the sense that it is to be exempt from an assessment for the improvement of a street. This case, however, requires me to give you some instructions on that point, and I will endeavor to do so, and to define what is meant by 'rural property,' and to illustrate its meaning by referring to cases that may happen. The land in this case is farm land. Mrs. Soles has a farm of fifty or sixty acres, which fronts on this avenue 1,063 feet. It has always been used as farm land, either for cultivation or for pasture, and is not laid out into lots. That is proven here and is admitted; but those facts do not decide this contention. The assessment is for the front, 1,063 feet; but it only extends back 172 feet, because that appeared to be, I presume, the average depth of lots fronting on the street. The lien filed in this case is a lien on that strip of land, 172 feet in depth, and no more. It does not cover the whole farm, and, if there should be a sale on this lien, it would only sell that strip fronting on the avenue and extending back 172 feet; but of course that is valuable in connection with the farm, and it is in that aspect that it is to be considered by the jury. As I have said, the land has always been used for farm purposes, either for growing crops or for pasture, and has never been laid out into lots. In that sense, it is rural property; but this fact does not determine the present controversy. The question is, is it rural in the sense that it is not liable under the law to be assessed for the improvement of the street? It is very difficult to give a clear and satisfactory definition of what is to be considered 'rural property,' in contradistinction from 'city property,' so as to be exempt from liability for assessments for street improvements. The character of the locality, the streets, lots, buildings, and improvements, and the market value of the property, as also of the neighboring and surrounding properties, must be considered. Whether the par-

particular property in dispute is to be considered 'rural' or 'city,' depends largely upon its surroundings, and the character of the property in the neighborhood. If the buildings and improvements in the neighborhood are few and scattered; if they partake of the character of the country, rather than of the city or town, and are occupied by persons engaged in rural pursuits,—the locality should be considered rural. On the other hand, if the houses and improvements partake of the character of the city or town, and are mainly occupied by persons engaged in city pursuits, the locality should be considered as city and not rural. A locality which is laid out in small lots, of the usual size for city or town lots, and partly built upon with city improvements, such as paved streets and gas or water pipes, should be considered in the class of city property. There may be, in the city, a square, or several squares, or several acres of ground, used only for pasture or growing crops; yet, if in the midst of a business part of the city, it would be treated as city property, liable to street assessments. In a large city there may be thriving villages or suburbs some distance from the main body of the city, with large farms intervening on both sides of the street. In such case the villages or suburbs would be considered as city property, and the farms rural; but if the intervening territory be devoted to fine residences, ornamented with trees and shrubbery, and occupied by business men of the city, it would be properly classed as city property. If the property on one side of the street be built up, or considerably built up, with residences, factories, or other places of business, the vacant or farm land immediately across the street should, as a general rule, be considered city property. The owner on one side of a street may hold back until the land on the other side is divided into lots, sold, and built upon, thus having his property greatly enhanced in value; and, if not liable to assessment for the improvement of the street, he would derive an unjust advantage over the other property owners. I can hardly conceive of a case where the property on one side of the street is to be considered as city property, and that on the other side as rural. It might possibly be where there were no improvements whatever on that side of the street.]”

A. M. Brown and John D. Brown, for appellant. W. B. Rodgers and T. C. Jones, for appellee.

PER CURIAM. This case appears to have been tried substantially on the lines indicated by this court when it was here last year. City of McKeesport v. Soles, 165 Pa. St. 628, 30 Atl. 1019. We find nothing in the record that would justify us in sustaining either of the specifications of error, nor do we think they involve any question that requires discussion. As was well said by the learned trial judge, in his charge: “It is very difficult to give a clear and satisfactory definition of what is to be considered ‘rural property,’ in contradistinction from ‘city property,’ so as to exempt from liability to assess-

ment for street improvements.” This is followed by about a page of instructions which, in view of the evidence before the jury, are as correct and pertinent as could have been given in this case. Generally speaking, the inquiry as to what is rural and what is urban property, within the meaning of the law, is one to which no hard and fast rule can be safely applied. It necessarily depends largely on the special circumstances of each case. There appears to be nothing in the record that requires special notice. The assignments of error are all dismissed, and the judgment is affirmed.

(34 Md. 333)

HARVARD PUB. CO. OF NEW YORK v. BENJAMIN.

(Court of Appeals of Maryland. Nov. 20, 1896.)

ACTIONS AGAINST HUSBAND AND WIFE—EVIDENCE—PLEADING—ACTION ON NOTE—PARTIES—MISJOINDER.

1. Code, art. 45, § 2, declaring that a married woman may be sued jointly with her husband on any note, bill, contract, or agreement which she may have executed jointly with him, includes only contracts wholly reduced to writing, and signed by both husband and wife.

2. In an action against a husband and wife, on a note executed by the wife alone, and indorsed in blank by the husband, who is the payee, parol evidence that the instrument was made with the intent and understanding that it should be indorsed to plaintiff cannot be received for the purpose of showing that said note, after such indorsement, became in fact the joint obligation of both spouses, and was therefore binding on the wife.

3. The maker of a note and the indorser thereof, who is also the payee, cannot be joined in one action on the note, their contracts being separate and distinct.

4. In an action against husband and wife to recover on a note, it is error to quash the writ of summons, if the declaration contain a count averring that defendants, by their joint note, promised to pay a designated sum at a specified time, though the note filed with the declaration is inadmissible under said count, being executed by the wife alone, and indorsed in blank by the husband.

5. It is error to quash a writ of summons when the declaration contains the common counts.

Appeal from Baltimore city court.

Action by the Harvard Publishing Company of New York against Charles R. Benjamin and Margaret Benjamin, his wife. The wife was permitted to make defense separately, and from a judgment quashing the writ of summons on her motion, plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, and FOWLER, JJ.

William Reynolds, for appellant. Joseph C. France, for appellee.

McSHERRY, C. J. Suit was brought in the Baltimore city court by the Harvard Publishing Company of New York against Charles R. Benjamin and Margaret Benjamin, his wife. The declaration contains the money counts, a count on a promissory note executed jointly by the defendants, and a

special count wherein it is alleged that Margaret Benjamin, by her promissory note, promised to pay to the order of Charles R. Benjamin \$288.84, two months after date, "with the intent and understanding that said note should be indorsed by him to the plaintiff, to be by it received in part payment of certain property, agreed to be sold by it to him, by a contract dated November 18, 1895, and that said note was so indorsed by him to the plaintiff, and was duly presented for payment, and was dishonored," etc. With the declaration there was filed a promissory note, drawn by Margaret Benjamin, the wife, and payable to the order of Charles R. Benjamin, the husband, and by him indorsed in blank. By leave of the court the wife was allowed to make defense separately from her husband, and she accordingly filed a motion to quash the writ of summons against her for the following reasons: First, because she did not contract or promise to pay, as alleged in the declaration; and, secondly, because, being a married woman, she is not subject to suit, except as by statute allowed, and the cause of action set forth in the declaration is not a cause of action upon which, by the statutes of the state of Maryland, she may be sued. The motion was sustained, and the writ of summons was quashed as to the wife. From this order the pending appeal was taken.

There are two questions presented by the record. The first is whether the note described in the special count, and filed with the declaration, is a promissory note that is binding on the wife under the statutes of Maryland; and the second is whether the other counts of the declaration state a valid cause of action against the husband and wife jointly. It is enacted in section 2, art. 45, of the Code, that "any married woman may be sued jointly with her husband in any of the courts of this state on any note, bill of exchange, * * * contract or agreement which she may have executed jointly with her husband." And this has been construed to include only contracts or agreements reduced to writing and signed by both husband and wife. *Sturmfelsz v. Frickey*, 43 Md. 569. The wife is liable to be sued at law only upon some contract or agreement that she is empowered by the statute to make, her common-law disability still continuing as to all other undertakings. *Davis v. Carroll*, 71 Md. 571, 18 Atl. 965. Inasmuch, then, as, to be binding on her, under the section of the Code quoted above, the contract or agreement sued on must be in writing, and must be executed by the wife jointly with her husband, it is quite apparent that the provisions of the statute will not be gratified if but part of the contract be in writing and part in parol, or if the contract, promise, or agreement be not executed by the wife jointly with her husband. If the contract be not wholly in writing, or if it be not executed jointly by husband and wife, and if it be a

contract whose validity depends upon a compliance with this above-quoted provision of the Code, there can be no liability on the part of the wife, and consequently no suit or action can be maintained at law thereon against her. This is the settled law of Maryland, often declared and now merely reiterated. The averments of the special count of the narr. make it clear that the plaintiff seeks to hold the wife liable upon the note therein described, not because the note upon its face discloses a contract in writing executed jointly by the husband and wife, but because, dehors the note, it may be made by parol evidence to appear that the note was executed by the wife with the intent and understanding that it should be indorsed to the plaintiff, whereby the assent of the husband to the execution of the note by the wife is sufficiently evidenced to convert her note payable to him into the joint note of the two by his indorsement. But if it be conceded that such evidence would tend to show that the note which, on its face, is her note alone, was in reality the joint note of the two, it would clearly be inadmissible, for it would make her liability depend, not on the evidence which the statute prescribes,—a writing,—but upon parol. To allow this would broaden the statute by interpretation, and would directly reverse the ruling in *Sturmfelsz v. Frickey*, supra. But, besides this, no parol evidence could be received to vary or alter the character affixed by the law to the undertaking of the husband as the payee and indorser of the note. The contract, to be binding on the wife in cases like this, must be executed by her jointly with her husband. The note described in the special count, and filed with the declaration, is a promissory note made by the wife alone, and payable to the husband, and by him indorsed in blank. It is obvious that the liability of the maker of a promissory note is quite different and distinct from the liability of an indorser who is also named as payee. The liability of the maker is absolute and primary. That of such an indorser is contingent and conditional. The payee of a note incurs no liability on it until he becomes an indorser. Up to the moment that he indorses the note, no one is liable on it but the maker, though, when the payee does indorse it, he enters into a contract separate and distinct from that of the maker. The two contracts or undertakings are so distinct that both the maker and the indorser, who is also the payee, cannot be joined in one action on the note. *Halley v. Jackson*, 48 Md. 254. Assuming that the note drawn by Mrs. Benjamin was binding on her, her liability was that of a maker. When her husband, who was the payee, indorsed it, he incurred, not a joint liability with her as maker, but a separate, contingent liability as indorser. These two contracts, being wholly different, do not form one joint undertaking, and consequently the note described in the special count, and filed with the narr., does

not evidence a contract executed by the wife jointly with the husband, and therefore cannot be recovered on under the statute. Hence, had there been no other count in the declaration, the order quashing the writ would have been free from error. The case at bar is clearly distinguishable from *Schroeder v. Turner*, 68 Md. 506, 13 Atl. 331. In that case the notes were drawn by Herbert & Co. payable to Schroeder, and were indorsed by the wife of Herbert. Under the case of *Ives v. Bosley*, 35 Md. 262, the wife was held to be a joint maker.

The seventh count states a good cause of action. It contains an averment that the husband and wife, by their promissory note, executed by them jointly, promised to pay to the plaintiffs a designated sum of money at a specified time. While, under this count, the note filed with the declaration would not be admissible in evidence, for the reasons we have already given, yet any note answering the description in the count could have been offered. With this count in the declaration, it was error to quash the writ of summons. It was equally erroneous to quash the writ when the common counts were in the declaration. *Davis v. Carroll*, 71 Md. 568, 18 Atl. 966. In the case last cited we held that a demurrer to the common counts was bad. Suit there was in assumpsit against the executor of the last will of Ann Chatterton, deceased. The declaration contained the common money counts, and also a special count. A demurrer was filed to each count, and was overruled. This ruling was held to be correct as to the common counts, but erroneous as to the special count. In dealing with the special count we said: "A plaintiff's right to recover must be shown on the face of the declaration, and when, therefore, the suit is one upon a contract of a feme covert, who can only be sued under prescribed conditions, it must appear, by proper averments, that those conditions exist; otherwise, the declaration will be fatally defective on demurrer." There were no averments in that special count which disclosed a liability on the part of the feme covert; but the language used in disposing of the question presented by the demurrer to that count cannot be separated from the subject under consideration, and applied to a totally different subject. Under the common counts now before us a recovery could be had upon any written contract, not under seal, executed by the husband and wife jointly, that was admissible in evidence under the issue joined on the plea thereto. The question intended to be raised by the motion to quash would have arisen on an objection to the admissibility of the proffered evidence, and in that way only.

The first reason assigned for quashing the writ amounts merely to the plea of never promised as alleged, and, even if true in point of fact, furnished a defense to the suit, but not a ground for quashing the writ. Because of the error in quashing the writ

while there were good counts in the declaration, the judgment appealed from must be reversed. Judgment reversed, with costs above and below, and new trial awarded.

(84 Md. 304)

ZEILER v. CENTRAL RY. CO. et al.

(Court of Appeals of Maryland. Nov. 19, 1896.)

MUNICIPAL CORPORATIONS—CITY COUNCIL OF BALTIMORE—RULES—CONSTRUCTION—PASSAGE OF ORDINANCE—VALIDITY.

1. A rule of a city council provided that, when a question should have been indefinitely postponed, the same subject should not be acted on again, or considered, during the session. *Held*, that such rule prevented further action on a subject or scheme which was substantially the same as that contained in an ordinance indefinitely postponed.

2. A city council indefinitely postponed an ordinance which authorized a street-railroad company to lay tracks on certain streets named, but did not require such tracks to be connected with its system as then laid. At the same session it passed an ordinance which authorized such company to lay tracks on substantially the same streets, but which required it to lay its double tracks on an additional street to a specified point, and connect the new system with the old by a single track. It also contained other requirements not provided for by the postponed ordinance. *Held*, that the scheme of the postponed ordinance was not substantially the same as that of the one passed, and the passage of said ordinance was not a violation of the rule of the council that, when a question should have been indefinitely postponed, the same subject should not be acted on again, or reconsidered, during the session.

3. A rule of a city council provided that every ordinance, before being put on its passage, should have two readings on two separate days, unless two-thirds of the members of the branch should, by vote, otherwise direct, etc. *Held*, that the words "members of the branch" mean that number of the body which makes a lawful body, or quorum, which is a majority, in the absence of a statute prescribing a different number.

Appeal from circuit court of Baltimore city.

Bill by John S. Zeller against Alcaeus Hooper, mayor, and Janon Fisher, city commissioner, of Baltimore city, and the Central Railway Company, of such city, for an injunction restraining such city officers from issuing or approving a permit authorizing such company to dig up, and lay its tracks on, certain streets, as authorized by a certain ordinance of such city. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BOYD, and PAGE, JJ.

John N. Steele, John E. Semmes, and Francis K. Carey, for appellant. T. W. Blakistone, George Blakistone, Thomas G. Hayes, and Thomas I. Elliott, for appellees.

PAGE, J. The appellant contends that the ordinance mentioned in the bill of complaint is null and void, because (1) it did not pass the first branch in conformity with law, because it was put upon its passage

before it had been read twice upon two separate days, as required by the ninth joint standing rule, then in full force and unsuspended; and (2) it did not pass either branch legally, because the question as to authorizing the Central Railway Company to extend its railway "over almost all of the streets named in the ordinance" had been indefinitely postponed in the second branch at the same session of the council, and, under the twentieth joint standing rule, the same subject could not be again considered at such session, by amendment or otherwise. These propositions involve the consideration of two questions: First, were the rules of procedure violated as stated? And, second, if they were, did such violation, under all the circumstances of the case, operate to render the ordinance null and void?

It is contended that the indefinite postponement of the "question as to authorizing it [the Central Railway Company] to extend its railway over almost all of the streets named in the ordinance [mentioned in the bill], including Wolf street," precluded the possibility, under the rules, of passing the ordinance under consideration. The facts are these: On the 18th May, 1896, the joint standing committee reported favorably, to the second branch, two ordinances,—one entitled "An ordinance to authorize the Central Railway Company to lay its tracks on Wolf St., Aliceanna St., and certain other streets in the city of Baltimore" (this will be hereafter referred to as the "Wolf Street Ordinance"); the other, "An ordinance to authorize the Central Railway Company to lay its tracks on E. Lexington St., in the city of Baltimore" (this will be referred to as the "Lexington Street Ordinance"). On the same day both were read and laid over, under the rule. On the 25th May the Wolf street ordinance was put upon its second reading. After several amendments were offered and voted on, it was moved and adopted that "the further consideration of the report and ordinance be indefinitely postponed." On the 8th of June the Lexington street ordinance, having passed its second reading, came up again, the question then being upon its passage; and it was amended by striking out all of the ordinance, as reported by the committee, after the words at the end of the first section, and inserting those provisions which the appellant contends are in fact the same subject as the Wolf street ordinance. The rule alleged to have been thereby violated is as follows: "Rule 20. When a question shall have been indefinitely postponed, the same subject, whether originating in this or received from the other branch, shall not be acted on again, or reconsidered during the session." From the bare reading of this rule, it is clear that the indefinite postponement of a question precludes the further consideration of the subject to which the question

must be referred, during the entire session, whether it originated in the one branch or the other. What, then, was the subject under consideration, upon which the vote of postponement operated? It certainly needs no argument to show that no single feature of the Wolf street ordinance can be separated from its context, and be properly regarded as the "subject" under consideration. It is true that each item in the ordinance demanded of the members, as watchful guardians of the public welfare, a careful scrutiny. Whether the Central Company should be the donee of the franchise, whether the tracks ought to be permitted on each street named, the terms and conditions upon which the privileges were to be granted, and many other matters, demanded the careful attention of the council. But none of these, taken separately, can properly be regarded as the "subject" postponed. Such a construction would be too narrow, and would preclude the council from considering any other measure that contained any one or more of these features. Such new measure might be highly beneficial to the public, and, taken in its entirety, wholly free from the objections of the original ordinance; and yet, if it contained any feature common to both measures, the rule would have the effect of rendering the council wholly powerless. We think a more correct construction of this rule is that which prevents further action upon a subject or scheme which is substantially the same as that contained in the postponed ordinance. Now, is the scheme of the Wolf street ordinance substantially the same as that of the Lexington street ordinance? The donee of the franchise, it is true, in both is the same; also the mode of propulsion; and many of the streets in the one are mentioned in the other. But, in its entirety, the scheme of the Lexington street ordinance is wholly different from that contained in the Wolf street ordinance. The Wolf street ordinance authorized tracks from Aliceanna street to North avenue, along the streets named; but there is no provision requiring the company to connect the new tracks with its present system, or to furnish an outlet for its passengers, on a single fare, to the center of the city. Without such provisions, the new tracks would be but a local concern, and persons using the new road could go no further than over its limits, unless by transferring and paying an additional fare. On the other hand, by the Lexington street ordinance the company was required to lay its double tracks down Lexington street to Gay, and connect its present system, by a single track, with the new system of tracks; and, having thus provided for a continuous road, permission was granted to lay tracks on other streets, opened and to be opened and paved. Moreover, there was a more efficient protection of the public interests, in

the requirements for gutter plates and grooved rails. There are other features by which the two bills may be distinguished, but what we have said is quite sufficient, we think, to substantially differentiate the two measures. Neither in respect to the privileges conferred on the company, nor in the methods by which the safety, convenience, and general interests of the public are protected, nor in the essential features of the two schemes, are the two bills alike. They present two entirely different propositions, having, it is true, some features in common, but, in their substance and entirety, wholly dissimilar. We are of opinion, therefore, that there was no violation of the twentieth rule in the passage of the ordinance in question.

Having thus passed the second branch, the Lexington street ordinance, amended as we have stated, came up for consideration in the first branch on the 8th day of June. "Mr. Allison moved a suspension of the rules to obtain a second reading." The yeas and nays were called for, and 14 members voted in the affirmative, and 6 in the negative, whereupon it was announced that, "two-thirds of the members having voted in the affirmative, the motion was declared adopted." The appellants contend that this decision was in violation of the ninth standing rule, which is as follows: "Rule 9. Every ordinance or joint resolution, before being put on its passage, whether originating in this, or received from the other branch, shall have two readings on two separate days, unless two-thirds of the members of the branch shall by a vote otherwise direct; but simple resolutions of inquiry, &c., may at once be put on their passage." It is insisted that the "two-thirds" here mentioned means two-thirds of all the members of the branch (that is, in this case, two-thirds of 22 members); and, if this be correct, the motion to suspend failed to receive the requisite vote. Attention is also called to rule 15, to show—First, the rule cannot be "suspended"; and, second, there is a distinction to be made between "members of the branch" and "members present," which can only be satisfied by construing the former term to mean "all the members of the branch." Rule 15 is as follows: "No standing rule of the branch shall be rescinded or changed without the assent of three-fourths of the members of the branch, and after one day's notice shall have been given; but any standing rule may be suspended, upon the assent of three-fourths of the members present except rule IX." But we do not deem it important to determine here what was meant by the use of these different terms,—whether, by the words "members present," it was intended to include all who were actually present, as distinguished from those voting. The question now before us must be determined by the proper meaning to be placed upon the words "members of the branch," as

used in the ninth rule. It is now well settled that in all cases a majority of a legislative body is a quorum, entitled to act for the whole body, except where the power that creates it has otherwise directed. In *U. S. v. Ballin*, 144 U. S. 8, 12 Sup. Ct. 509, the court said: "Where a quorum is present the act of the majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations." There is no act of the state of Maryland that prescribes what number shall constitute a quorum of either of the two branches of the city council. That is determined by the common law, which fixes the "majority as the legal body"; and, under the authority granted by the legislature, to "settle their rules of procedure," there exists no power in either branch, or both, to fix a greater number. *Heiskell v. Mayor, etc.*, 65 Md. 125, 4 Atl. 116. In that case the court defined a quorum to be "that number of the body which, when assembled in their proper place, will enable them to transact their proper business; or, in other words, that number that makes a lawful body, and gives them power to pass a law or ordinance." It would therefore seem to follow from this that when "a branch," or "the members of a branch," are the words used, with nothing to qualify them, and in the absence of a clear intent to the contrary, they must be taken to mean that "number of the body that makes a lawful body." To construe the words "two-thirds of the members of the branch," as used in the ninth rule, to mean two-thirds of all the members, would be to fix a meaning upon them that would deprive the majority of their legal power to act. It would amount to declaring that a majority, constituting the lawful body, intended, by a rule of procedure, to take away from itself, under certain circumstances, the power it rightfully has, to do the work it was assembled to do. We think, therefore, it would be anomalous to hold that, while a majority is competent to do business, a rule, made under a power to settle the "mode and manner" of conducting the business, should be construed in such a manner as to take away from it the power to do business at all, under certain circumstances. "Two-thirds of the members of the branch," we are of opinion, means two-thirds of the members voting, not being less than a majority, and not two-thirds of all the members. This view is fully sustained by authority. In the case of *State v. McBride*, 4 Mo. 308, the question was upon the adoption of an amendment of the constitution. "Two-thirds of each house" was the vote necessary to ratify it. The question to be solved was, what was the meaning of the word "house," as used in the constitution? Did it mean all the members elected, or did it mean any number sufficient to constitute a quorum? The court held that,

the "most common meaning of the word being the number of members sufficient to constitute a quorum to do business," a vote of two-thirds of those voting, being a quorum, was sufficient. So, where the constitutional provision was that the legislature shall pass no act of incorporation unless with the assent of at least two-thirds of each house, it was held the word "house" meant members present and doing business, being a quorum. *Southworth v. Railroad Co.*, 2 Mich. 287. This case is cited, apparently with approval, in *Cooley*, Const. Lim. 141 (marg.); *Warnock v. City of Lafayette*, 4 La. Ann. 419. In the case of *Green v. Weller*, 32 Miss. 700, it was held that in matters connected with the organization of a body, the preservation of order, and the transaction of its ordinary business of legislation, the word "house" is synonymous with "quorum" or "majority." The constitution of South Carolina (article 9, § 7) provides that no law to create a public debt shall take effect until it has been passed "by a vote of two-thirds of the members of each branch of the general assembly," etc. In construing this provision the supreme court of that state, in the case of *Morton v. Comptroller General*, 4 S. C. 463, after stating that the constitution fixed the quorum to be a majority, proceeded as follows: "It [a quorum] is indeed, for all legal purposes, as much the body to which it appertains as if all the component parts were present. When, therefore, either branch of the general assembly is spoken of, in the absence of a clear intent to the contrary, the quorum of such body must be understood as intended. It would follow that provisions ascertaining the mode in which the body should divide, in order to complete action in any given case, whether by a mere majority, or by a still greater proportion, must be interpreted primarily as applicable to the body as legally organized at the time such action is taken. If the rule is the mere majority rule, then a majority of the quorum present and acting is intended. If the rule is that of two-thirds, then two-thirds of such quorum must concur, for effective action." The motion made was for "a suspension of the rules in order to obtain a second reading." This we think was passed by a two-thirds vote, and was sufficient to put the ordinance on its second reading. It is true, rule 15 makes no provision for the suspension of rule 9, but rule 9 itself provides, substantially, that the branch, by a two-thirds vote, may direct when the ordinance or joint resolution may be read. The motion, therefore, while it may possibly be ineffective to work a suspension of rule 9, is quite sufficient to indicate a direction to put the ordinance on its second reading at once.

It follows from what we have said that, in our opinion, there have been no violations of the rules of the council, and it, therefore, is not important to this case to consider what, if there had been such violations, the effect would have been upon the validity of the ordinance in question. Decree affirmed.

(34 Md. 292)

McCOSKER et al. v. BANKS et ux.

(Court of Appeals of Maryland. Nov. 19, 1896.)

TRIAL—REFUSAL OF INSTRUCTIONS—FORM OF EXCEPTIONS—ACTION ON NOTE—EVIDENCE—INSTRUCTIONS—BURDEN OF PROOF.

1. Where prayers for instructions are presented at the same time, and form a series of consecutive propositions, the ruling of the court thereon is a single act, and one exception thereto is sufficient to embrace the whole.

2. Where, in an action by a firm to recover on a note made by defendants to a third person or order, and by him indorsed to plaintiffs, defendants plead that the note was procured by fraud, of which plaintiffs had knowledge at the time of the indorsement, the testimony of one partner "that the firm was not aware of any fraud" is inadmissible, since he can only testify as to his own want of knowledge.

3. Where, in an action by a firm to recover on a note, the pleadings raise the issue as to whether plaintiffs are partners, and evidence is taken thereon, an instruction directing a verdict for plaintiffs without leaving to the jury the question of partnership is properly refused.

4. In an action by the indorsee of a note against the maker thereof, proof by defendant that the note was procured by fraud casts on plaintiff the burden of showing that he had no knowledge of the fraud when he acquired the instrument.

Appeal from circuit court, Prince George county.

Action by David McCosker and George J. Malloy, trading as McCosker & Malloy, against John T. C. Banks and wife, to recover on a note. From a judgment for defendants, plaintiffs appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BOYD, and ROBERTS, JJ.

R. Ford Combs and C. A. M. Wells, for appellants. F. Snowden Hill and James C. Rogers, for appellees.

McSHERRY, C. J. This case is before us for the second time. The former appeal is reported in 82 Md. 518, 34 Atl. 539. As presented now, the record contains six bills of exception. One of these relates to the admissibility of evidence, and the others to rulings of the circuit court for Prince George county in rejecting five prayers presented by the plaintiffs for instructions to the jury. The prayers having all been submitted at the same time, and forming a series of consecutive propositions, the ruling of the court upon them was a single act, and not five separate and distinct decisions; and, consequently, one exception, if properly taken, and executed, would have been sufficient to embrace the whole. *Ellicott v. Martin*, 6 Md. 517. The practice of embodying each prayer in a separate exception, though it prevailed half a century ago, has long since been abandoned as one that served no useful purpose. The action is in assumpsit. The plaintiffs, who are the appellants, sued in their firm name and style as partners. They declared on a promissory note made by the defendants, the appellees, and payable to one P. O'Brien or order, and by him indorsed

to them; and they added the common money counts. The defendants pleaded that they never promised as alleged; that the note sued on was procured by fraud, of which the plaintiffs had knowledge when it was indorsed to them; and the defendants specially denied that there was a partnership existing between the plaintiffs. Upon the issues joined on these pleas the case proceeded to trial before a jury. The verdict and judgment were for the defendants, and the plaintiffs have appealed.

The plaintiffs offered evidence tending to prove their co-partnership, the signatures to the note sued on, its nonpayment, and the indorsement of it by O'Brien, and there rested. The defendants then gave testimony designed to show that the note was procured by the fraud of O'Brien, the payee; and in rebuttal, Malloy, one of the plaintiffs, was placed upon the stand, and testified that he had no knowledge of any fraud practiced by O'Brien in the obtention of the note. He was then asked whether or not the firm of McCosker & Malloy were aware of any fraud practiced by O'Brien in the obtention of the note. To the admissibility of this question the defendants objected, but the court permitted the witness to answer, reserving the right to rule the answer out. The witness replied that the firm of McCosker & Malloy were not aware of any fraud in the obtention of the note. Thereupon the defendants asked the court to strike out the answer so given, and this the court did, and the plaintiffs excepted. This ruling is the one complained of in the first bill of exceptions. It will be observed that the question sought to elicit from the witness an answer as to whether the firm of McCosker & Malloy had knowledge of the alleged fraud on the part of O'Brien in the obtention of the note, and that the answer actually given and subsequently stricken out was that the firm had no such knowledge. The word "firm" is equivalent to "partnership," and signifies the name under which any house of trade is established or conducts business; but a firm is not a being or entity distinct from the individuals who compose it. Knowledge or ignorance of a firm must consequently be the knowledge or the ignorance of the persons who constitute the firm. *Stewart v. Katz*, 30 Md. 344. Now, while notice to one member of a firm is notice to all the members, precisely as notice to an agent is notice to his principal, it by no means follows that the ignorance of one member, or his want of notice, is the ignorance or want of notice of the others. Ignorance of a particular fact—that is, want of knowledge of that fact—consists in this: that the mind, though sound, and capable of receiving an impression, has never acted upon that subject, because that subject has never been brought to the notice of the perceptive faculties. Ignorance is a negative condition of the mind, and that condi-

tion is communicable to others only by some act, or by some declaration. Whether an individual is ignorant of a particular fact depends in no measure upon the want of knowledge of some one else as to the same fact, however closely allied the latter may be to the former; but the existence of such ignorance must, as to each individual, be sought by other methods consistent with the settled rules of evidence. Hence, when it becomes incumbent upon a plaintiff to show that he was ignorant of imputed fraud affecting the validity of a promissory note which he has acquired by indorsement, he obviously cannot discharge the burden resting upon him by showing through other persons his own declarations, for that would be but hearsay. As the state of his own mind—its want of knowledge of the alleged fraud—is an essential element of his case, he must prove that want of knowledge by legally competent evidence. The testimony of some one else that the plaintiff was ignorant of the imputed fraud would, of necessity, be but the conclusion of the witness derived from the plaintiff's own declarations, or adduced from other circumstances. As a party cannot offer in evidence in his own behalf his own declarations, and as the conclusions of the witness, deduced from other circumstances, are, in such instances, not facts to the existence of which the witness can testify, it is manifest that neither of these methods would be competent to establish ignorance or a want of knowledge in the plaintiff. But a witness would be at liberty to depose to facts within his own knowledge, from which facts a jury might infer the existence of ignorance as to a given subject in another. While one member of a firm may be ignorant of defects in the origin of a promissory note, another member of the same firm may have full knowledge of such defects; and this knowledge of the one would be sufficient to charge all; and therefore the ignorance of the one cannot be treated as the ignorance of the others. *Frank v. Blake*, 58 Iowa, 750, 13 N. W. 50. As a consequence, whenever it becomes necessary for the members of a co-partnership to show that they acquired a promissory note by indorsement in good faith without knowledge or notice of its imputed original infirmities, such want of knowledge must be shown as to all the partners; and, as one partner cannot give evidence that his co-partner was ignorant of a particular fact, except by repeating or testifying to the co-partner's declaration, which would be clearly inadmissible, it results that each partner must show his want of knowledge by his own testimony, or that other facts must be submitted to the jury from which they may legitimately infer the absence of such knowledge. Nothing of this kind was attempted in the case at bar, but the answer given by the witness that the firm had no knowledge of the imputed de-

fects was merely an effort to prove by one partner the negative mental state,—the absence of knowledge of the other partner. The circuit court was clearly right in excluding the answer.

The first, third, fourth, and fifth prayers were properly rejected. They all direct a verdict for the plaintiffs, without leaving to the jury to find whether the plaintiffs were partners. The issue was raised by the pleadings as to whether the plaintiffs were partners. This threw upon them the burden of proof, and while they adduced a witness to establish the affirmative, the credibility of that witness was solely for the jury. They had the right to disbelieve him, and no action of the court could lawfully restrict the exercise of that province of the jury. The prayers just indicated wholly omitted to submit to the jury the finding of the fact of a partnership, and, had they been granted, would have permitted a verdict for the plaintiffs, even though the jury had concluded that there was no partnership existing between the plaintiffs. There was no error in rejecting these prayers. *Trust Co. v. Corner*, 2 Gill, 410. What we have said in disposing of the first exception is also applicable to the fourth prayer, and furnishes another reason for the rejection of that prayer.

The second prayer, as offered, was rejected, but, as amended by the court, was granted. As offered, it asked the court to say to the jury that, if they found that the note sued on was obtained by fraud practiced by O'Brien, the plaintiffs would still be entitled to recover if the jury believed the note was acquired by the plaintiffs by indorsement for value before maturity, without notice of any fraud practiced by O'Brien; but the court amended it by adding these words: "And the burden of proof is upon the plaintiffs to show that they had no knowledge of the fraud." There can be no question as to the correctness of the instruction as granted. Through a series of cases beginning with *Totten v. Bucy*, 57 Md. 452, and followed by *Crampton v. Perkins*, 65 Md. 22, 3 Atl. 300; *Williams v. Huntington*, 68 Md. 590, 13 Atl. 336; *Griffith v. Shipley*, 74 Md. 591, 22 Atl. 1107; *Cover v. Myers*, 75 Md. 406, 23 Atl. 850; and *Banks v. McCosker*, 82 Md. 518, 34 Atl. 539,—the law of Maryland on this subject has been consistently declared. In an action against the maker of a negotiable note the indorsee "has nothing to do in the opening of his case but to prove the signature to the instrument, and introduce it in evidence, for the instrument goes to the jury with the legal presumption that the plaintiff became the holder of the same for value at its date, or before maturity, in the usual course of business, without notice of anything to impeach his title. He is at liberty to rest upon this presumption, and is not bound, in the first instance, to show the circumstances under which he obtained the note, or that he paid value for it. But, if the defendant

shows by such proof as may be properly left to the jury to consider that the instrument was procured by fraud, or was fraudulent in its inception, or that the consideration was illegal, or that it had been lost or stolen before it came to the possession of the holder, the burden of proof is changed, and it is then incumbent upon the plaintiff to show that he acquired the note bona fide for value, in the usual course of business, before maturity, and under circumstances that create no presumption that he knew of the existence of the facts that impeached the validity of the instrument. This is a well-established rule, as applicable to negotiable instruments; and it is said to be wise and salutary in the protection that it affords. It proceeds upon the presumption that the person who has been guilty of the fraud or illegality in obtaining the instrument would dispose of it, and would place it in the hands of another person to sue upon it; and it is because of such presumption that the proof of fraud, illegality, or loss casts upon the holder the burden of showing that he is a bona fide holder for value, or under what circumstances, and for what value, he became the holder of the note." *Totten v. Bucy*, supra. The instruction we are considering proceeds upon the hypothesis that fraud had been practiced in the obtaining of the note, and the only criticism upon it is that the court erred in declaring that the burden of proof was in consequence cast upon the appellants to show that they had no knowledge or notice of that fraud when they acquired the note from O'Brien. Upon the proof of fraud in the origin of the note the burden is shifted, and the indorsee must show that he or some preceding indorser took the note in good faith, for value, before maturity, without knowledge or notice of the fraud. There being no errors in the rulings excepted to, the judgment appealed from will be affirmed. Judgment affirmed, with costs above and below.

(34 Md. 261)

ANDERSON et al. v. BROWN et al.

(Court of Appeals of Maryland. Nov. 19, 1896.)

WILLS—CONSTRUCTION—NATURE OF THE ESTATE.

Testator, after excluding those of his children who had received or should receive advancements, and giving an estate for life or widowhood to his wife in all his property except a certain lot, devised his whole estate to his eight children named, in fee, with a limitation that, if any one died without issue living at his death, his share should go "to the survivor or survivors"; and directed "that the accumulations and accretions shall be affected by the same principle of survivorship." By the sixth clause he gave his personality to his wife for life or widowhood, "to keep together" for managing the real estate, "and at her death or marriage to be divided among the children mentioned" in a previous clause, "who have received no advancement"; and directed that, in case of the death of any such child or children before the death of their mother, without issue, the part he would take should go to the sur-

vivors, and, in case of the death of any one leaving issue, the issue should take the parent's place in the division. *Held*, that the children not excluded took the estate in fee, as tenants in common, defeasible as to each on his or her death without issue, in which event the share of the person so dying passed to the survivor, so that the last survivor took his estate, including that which survived to him, in fee absolutely.

Appeal from circuit court, Queen Anne's county, in equity.

Action of partition by Preston R. Anderson against William J. Anderson and others, in which there was an order of sale, and the land sold by John B. Brown and Edwin H. Brown, trustees appointed by the court to make the sale. All the parties to the action filed a petition for an order directing the trustees to turn over to petitioners the proceeds of the sale, and accept from them a release therefor, to which the trustees filed an answer. From an order overruling a demurrer to the answer of the trustees and dismissing the petition, the petitioners appeal. Reversed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, ROBERTS, BOYD, and PAGE, JJ.

Hope H. Barroll, for appellants. John B. Brown, Edwin H. Brown, and P. B. Hopper, for appellees.

PAGE, J. William J. Anderson died in 1881, leaving a widow and nine children. After his death his property was sold under a decree of the circuit court for Queen Anne's county, and the proceeds thereof are now in the hands of the appellees, trustees. The petitioners, who claim to be legally entitled to the fund, allege in their petition that they have jointly and severally agreed that each shall be paid the proportion to which they may now be entitled, and to surrender and release all their several or joint rights of survivorship to the said fund, and to deliver to the trustees such releases as may be requisite to discharge them from further liability. Whether they are so entitled depends upon the construction to be placed upon the provisions of the will of the deceased. By the first and second clauses of his will the testator declares his desire that William J. Anderson, his son, to whom he had made advancements equal to his full share of the estate, shall not further participate in his property; and that any other of his children to whom he should thereafter advance an equivalent (in his opinion) of his or her full share shall be considered as if he or she had never been mentioned in the devises thereafter contained. By the third section he gives his real estate (except the Millington property) to his wife for life or widowhood, and provides for the "moderate and proper support and maintenance on said property for such of his children as may not receive advancement, so long as they shall remain unmarried and obedient, etc.; and at the death

or marriage of the widow he devises the property to his eight children (not including William), "to them and their heirs and assigns forever, and, in case of the death of any one of them without issue living at the time of his or her death, I do give and devise his or her share to the survivor or survivors; and this principle of survivorship I do direct to apply not only to the original, but to all accretions by survivorship until the death of any and all of such children as may die without issue at the time of his or her death." By the fourth clause he desires his wife shall take her thirds only, if she marry again; and that, subject thereto, he devises "over or in remainder shall go into immediate effect." By the fifth he directs the Millington property to be sold, and of the proceeds one-third to his wife, and the residue to the children named in the third clause of his will to whom he shall not have made advancements. By the sixth he disposes of his personalty to his wife for life or widowhood, "to keep together" for managing, etc., the real estate, and at her death or marriage to be divided among the children mentioned in the third clause who have received no advancement. "In case of the death of any such child or children before the death of their mother without issue, the part he would take to go to the survivors. In case of the death of any one leaving issue, the issue to take the parent's place in the division." And by the seventh and last clause, in case his wife shall marry, she is to receive her thirds in his personal estate, and the bequests to the children to take immediate effect.

The appellees contend that under a proper construction of this will the petitioners cannot effectively release the trustees, and are not entitled to have distribution of the fund, because the testator intended that the defeasibility attaching to the several shares should continue till the last child died without issue; and therefore, to effectuate that intention, in case of the death of one or more with issue living, and then the death of one or more or all of the others without issue, the issue of the predeceased children would take a proportional part of the share or accretions thereof of the ones so dying without issue; and also, in case all the children mentioned in the third item of the will died without issue, the line of succession, as provided by the will, would be exhausted, the fee simple be defeated, and a contingency not contemplated by the testator would arise; and the property would, in that event, pass to such heirs at law of the testator as would answer the description when the contingency happened. Now, the determination of this question thus presented is purely a matter of what the testator himself intended. If a general intent can be gathered from a fair consideration of the whole will when taken in connection with the relations of the testator to the objects of his bounty, such intent must prevail, unless some positive rule of law intervene to prevent. Here the devise is to the eight children in fee as tenants

in common, and, in the event of the death of any one of them without issue living at the time of his death, then his share to the survivor or survivors. If the word "survivor" is to be taken in its ordinary meaning, it is obvious that no one can take but one who answers the description of the parties named as devisee, viz. the survivor or survivors of the eight children named in the third clause of the will. *Turner v. Withers*, 23 Md. 41; *Moate v. Moate*, 16 Jur. 1010. Now, to meet this difficulty, and to carry out the intention which it is insisted is to be found in the will, the appellees argue the word "survivor" should be regarded in this case as synonymous with "other." It is undoubtedly true that, in order to carry out the intention of the testator, this has sometimes been done. "But," says Redfield in his treatise on Wills (vol. 2 [3d Ed.] p. 272), "it seems to be now established by numerous decisions that the same rule of construction will be applied to the word 'survivors' as to any other. It will be received in its natural and literal import, unless there is something in the context or attending circumstances tending to a different conclusion." "To construe it as equivalent to 'other,'" said the Lord Chancellor Lyndhurst, in *Crowder v. Stone*, 3 Russ. 217, "is a construction which the court may sometimes be compelled to adopt in order to accomplish the intention which appears on the whole will." 2 Jarm. Wills (Ed. 1861) 648. All the cases to which we have been referred, or which we examined, in which "survivor" has been construed as the equivalent of "other," appear to have been so decided because there was something in the will to make it clear that the testator intended the issue of predeceased children to take; or because some other clearly expressed intention would otherwise be rendered inoperative. We refer to some of the cases: *Wilmot v. Wilmot*, 8 Ves. 10; *Ranelagh v. Ranelagh*, 2 Myne & K. 441; *Leeming v. Sherratt*, 2 Hare, 14; *Alton v. Brooks*, 7 Sim. 204; *Marriott v. Abell*, L. R. 7 Eq. 478; *Badger v. Gregory*, L. R. 8 Eq. 78; *Benn v. Benn*, 29 Ch. Div. 844; *Pomfret v. Graham*, 19 Ch. Div. 191; *In re Usticke*, 35 Beav. 338; *Nevill v. Boddam*, 28 Beav. 554. In *Twist v. Herbert*, 28 Law T. (N. S.) 490, we have from the lord chancellor the following remark (whether it can be taken as a rule of construction or not, it commends itself as sound, and pertinent to this case): "It is," said he, "not a safe mode of construction to take a single reason which contributed to a conclusion in a particular case, and elevate it into a canon of construction, which is to rule all other cases to which that reason alone would apply." The words "survivor" or "survivors" "are to be taken in their natural or primary sense, except when there is some reason which justly leads to another conclusion." In this case, the scheme of the will is fully apparent, and is maintained consistently to the end of the instrument. After excluding those of his children who had received or should receive advancements, and giving an estate for life or widowhood to his widow in all his property, real and personal (except the Millington lot),

he devises his whole estate, by several clauses, to his eight children, whom he names, in fee, with a conditional limitation, viz. that, if any one die without issue living at his death, his share is to go to the survivor or survivors; and the concluding part of the third clause then declares "that the accumulations and accretions shall be affected by the same principle of survivorship." Now, we can find in his devise no intention on the part of the testator to do more than divide his property among those of his children who had received no advancements. If one died leaving issue, such issue are to take the parent's share; if without issue, then the share is to go to the surviving children. In the sixth clause, in disposing of his personality, his language is unmistakable. In case of the death of any such child or children before the death of their mother, without issue, the part he would take is to go to the survivors. In case of the death of any one leaving issue, the issue is to take the parent's place in the division. It is obvious the parent would take only such share as he would be entitled to at the period of his death; and, if this be so, nothing could come to the issue of predeceased children, except that which the parent possessed or was entitled to at the time of his death. We do not think there is anything in the language relating to the accretions which affects this construction. The testator had already stated how he desired the corpus of his estate to go, and now he declares that he desires the same rule of transmission shall apply to the accretions. There is no gift over in any part of the will, in the event of the death of all the children without issue. He had given the whole estate to them in fee as tenants in common, with cross remainders between them; so that the survivor or survivors should take these shares of those who died without issue living at the time of their death. We do not think the argument is sound that the estate of the last survivor would be defeated upon his death without leaving issue. The master of the rolls dealt very effectively with a contention of this kind in *Maden v. Taylor*, 45 Law J. Ch. 572. There the devise was to trustees in trust for four nieces for their respective lives, as tenants in common; on the death of any of them, to the children of the person so dying; and on the death of any without issue, then to the "survivor or survivors." "Does any one," says he, "doubt that a gift to the survivor of ten people of a sum of money, or an estate with no previous gift at all, vests the sum of money or estate absolutely in the last liver? It is quite true that the last liver does not survive himself, but he survives all the rest, and in that sense is a survivor." Much stress was laid by the appellees upon the cases of *Doe v. Wainwright*, 5 Term R. 427, and *Smith v. Osborne*, 6 H. L. Cas. 375. These properly belong to a particular class of cases, in which *Waite v. Littlewood*, 8 Ch. App. 70, *Wake v. Varah*, 2 Ch. Div. 355, and many others cited in chapter 47, 2 Jarm. Wills, may be included. As a résumé of them all, that learned author says: "It may, therefore, apparently be taken as set-

tled with regard to the class of cases now under consideration that, in order to read the expression 'survivors' as meaning 'others,' there must be a gift over, or some other indication of manifest intention to oust the ordinary interpretation." In the case of *Wake v. Varah*, supra, the devise was to trustees to pay the income equally among his three children during their respective lives; at the death of each his share to go to his issue; and, if any child died without issue, then to the survivor or survivors during their respective lives; and, if all died without issue, then for the representatives of the survivor. It was held there was a fair inference that there should be equality "between the stirpes"; but this conclusion, it was expressly stated, did not follow from the use of the words "survivor or survivors," but the next provision supplied the necessary clue, viz. the gift over. But even the ultimate gift over is not always sufficient ground for altering the construction of the words, when no other reason can be found for so altering. *Twist v. Herbert*, supra. In this class of cases, much importance is laid on the peculiar devise, viz. that the first taker receives only a life estate, with remainder to survivors, and, on failure of issue, an ultimate gift over. In such cases cross remainders between the stirpes would be created in order to effectuate the intention of the testator to provide as much for the issue as for the children. In *Doe v. Wainwright*, the court said that the meaning of the word "surviving," standing in this context, is that on the death of one child without issue that portion shall go to the "surviving line of heirs." In *re Corbett's Trusts*, Johns. Eng. Ch. 597. But in the case at bar these features are wanting. The children here take estates in fee, in common defeasible on the death of any one without leaving issue; and there is no gift over on an entire failure of issue. In this state, however, a doctrine broader even than that recognized in these cases seems to have been laid down in the case of *Turner v. Withers*, 23 Md. 18. There the testator devised his real and personal estate to his wife and five children to each one sixth part for life; and, in case either died without children or descendants alive at his or her decease, the part of the one so dying to be divided among the remaining children for their lives; in case of death with children, then to the children per stirpes, and not per capita; and in case of the death of all the children without issue, over to another in fee. One of the children died in 1852, leaving children, and in 1860 another died, without children; and the question was whether, under the will, the issue of the child who died in 1852 were entitled to a share of the estate of the child who died in 1860. Here, then, were many of the conditions upon which the English courts have construed the devise to create cross remainders between the stirpes, as well as between the children. But this court held that the issue of the child dying in 1852 could not take as devisees under the will, nor by descent from their parent,—not by descent, because the parent had only a life estate; not under the will, be-

cause the remainder was granted by the terms of the will to his "remaining children." And no one could take by purchase as devisees under the will unless he answered to the "description of the parties as devisees." Under the will in this case we are of opinion the petitioners mentioned in the third item took an estate in fee as tenants in common, defeasible as to each on his or her death without issue, in which event the share of the person so dying passed to the survivor, so that the last survivor took his estate, including that which survived to him, in fee absolutely. For these reasons we must reverse the decree of the lower court, and remand the cause for further proceedings in conformity with the views herein expressed. Decree reversed, and cause remanded.

(87 N. H. 508)

EMERY et al. v. HAVEN et al.

(Supreme Court of New Hampshire. Rockingham. March 16, 1894.)

WILLS—INTENTION—INCOMPETENT EVIDENCE—REMAINDER—TESTAMENTARY POWER—EXECUTION.

1. A beneficiary was entitled to the usufruct of the trust property so long as she lived, and at her death it was to descend to her heirs, unless she devised it. Fearing that the property would pass under the provisions of a will which she had made, she procured from the legatees named therein a written acknowledgment that it was not her intention to exercise the power of disposing of the trust property, and that they disclaimed any interest therein under the provisions of the will making them residuary legatees. Held, that the acknowledgment was not competent evidence of the testatrix's intention, as expressed in a subsequent will.

2. Where there is nothing in the will to show a different intention, a testatrix's power to dispose of a remainder expectant on her life estate is executed by her devise of property described as "all the rest, residue, and remainder of my estate and property, of every description."

Bill by James W. Emery and William H. Rollins, trustees, against Alfred W. Haven and others.

Alfred W. Haven conveyed certain property to the plaintiffs, upon the following, among other, trusts: If his wife, Margaret, should survive him, "the trustees * * * shall pay to her, during her life, one-third part of the net rent, income, and profits of the said trust fund, and on her death shall convey and distribute one-third share of the capital of said trust fund, as the said Margaret shall by her last will, or by any instrument in the nature of a will, attested by two credible witnesses, direct or appoint, and, in default of such testamentary provision, shall convey and distribute the same to her heirs at law absolutely." Margaret survived Alfred, and died testate, March 4, 1891, leaving two sons and two daughters. Her last will, dated June 16, 1886, contained the following residuary clause: "All the rest, residue, and remainder of my estate and property, of every description, I give, devise, and bequeath to my two daughters, Katherine M. Haven and Ellen B. Haven, in equal shares, and to the survivor of them, and

to the heirs and assigns of said survivor, in fee simple." She had property aside from her interest in the trust fund. She made a prior will, dated January 13, 1886, containing substantially the same provisions. The sons, claiming that the power was not executed by the last will, offered to prove that a few days after making the first will the testatrix expressed a fear that her share of the trust fund would pass by the residuary clause to her daughters, and induced them to make an agreement under seal, dated January 27, 1886, as follows: "We, the undersigned, residuary legatees under the will of Margaret H. Haven, dated January 13, 1886, do hereby acknowledge that the intent of the said Margaret in disposing of the residue of her estate as therein mentioned was not to include her share in the capital of the trust fund created by Alfred W. Haven, our father, now deceased, by his deed dated January 9, 1862, but that said share should go to said Margaret's heirs at law, and that said will was not an execution of the power contained in said deed to dispose of said share; and we hereby severally release any and all claim we may severally have under said will to said share of said trust fund to the respective heirs at law, and we severally agree to make no claim upon said Margaret's estate for said share of said capital under said residuary clause in her will, and to claim only our respective rights therein as heirs at law. And we do further severally agree to make and execute any and all papers, receipts, releases, or other documents that may be necessary or proper, or which may hereafter become necessary, in order to effectuate the intention of said Margaret not to dispose of said share by her will." The agreement was delivered to the testatrix, who had control of it until her decease. The daughters claim that the power was executed by the residuary clause of Margaret's last will.

S. W. Emery, for the trustees. C. E. Batchelder, for the sons. J. S. H. Frink, for the daughters.

CHASE, J. It was held in *Kimball v. Society*, 65 N. H. 139, 23 Atl. 83-85, that a testator's power to dispose of a remainder expectant upon his life estate is executed by his devise of property described in his will as "my estate," when it appears from competent evidence that he used those words as a description of all the property he had power to dispose of. In the appointor's will there was no mention of the power, nor of the property to which it related, and he had other property upon which the will operated. The ancient common-law rule on the subject (*Colt v. Bishop of Coventry*, Hob. 140b; *Denn v. Roake*, 5 Barn. & C. 720) was not followed, although it had been recognized in *Bell v. Twillight*, 22 N. H. 500, 517, and adopted in *Burleigh v. Clough*, 52 N. H. 267. A rule of interpretation that defeats more often than

it effectuates the intention of the appointor (see citations of counsel in *Kimball v. Society*, 65 N. H. 144 [23 Atl. 83-85]) is not now enforced in this state. The law looks to the competent evidence bearing upon the question for the ascertainment of intention, rather than to arbitrary rules of construction. *Elderly v. Barker*, 66 N. H. 434, 447, 31 Atl. 900, 902, and authorities cited. The question for consideration, therefore, is, what intention in respect to the execution of the power does the competent evidence show that the testatrix expressed by the residuary clause of her will? Before considering the question, it is necessary to determine whether the testimony offered by the sons is to be taken into account. If the testatrix had declared in positive and unmistakable terms, orally or in writing, that she did not intend to execute the power by the residuary clause of her first will, the declaration could not be considered in the interpretation of either will. *Utley v. Tiltcomb*, 63 N. H. 129; *Holt v. Holt*, 63 N. H. 475, 3 Atl. 604. Her expression of fear that her will would be misconstrued on this point, and her act in inducing the daughters to make the agreement of January 27, 1886, are equally incompetent. The testatrix had all the fruits of the trust property so long as she lived, and at her decease it was to descend to her heirs, unless she disposed of it by will. She had as complete and absolute testamentary power over the property as she had over any property that she owned. Such use, power, and provision in respect to descent would impress one unfamiliar with the technical rules of law as amounting to practical ownership. The phrase, "all the rest, residue, and remainder of my estate and property, of every description," would be understood by such a person to include property so held. There is nothing in the language of the will tending to show that the testatrix did not intend to execute the power, except the absence of terms specifically referring to the power or the property to which it related. The probability that she regarded the phrase, "my estate and property of every description," as descriptive of all property which she could dispose of by will, accounts for the absence of more specific terms. The fact that she owned other property upon which the will operated does not conflict with this view. She intended to dispose of all property (not disposed of by previous provisions of the will) over which she had the power of disposition, whether by reason of ownership, or by reason of authority from the owner, and used language sufficiently broad to indicate such intention. Similar reasons have led the court of Massachusetts to adopt the rule that a general residuary devise will operate as an execution of a power to dispose of property by will, unless there is something to show that such was not the testator's intention. *Cumston v. Bartlett*, 149 Mass. 243, 21 N. E. 373, and authorities cited; *Hassam v. Hazen*, 156 Mass. 93, 30 N. E. 469. The same rule has been established by statute

in England and in New York. 1 Vict. c. 26, § 27; 4 Rev. St. N. Y. (8th Ed.) p. 2450, § 126; *Hutton v. Benkard*, 92 N. Y. 295; *Mott v. Ackerman*, Id. 539; *Trust Co. v. Livingston*, 133 N. Y. 125, 30 N. E. 724. The common-law rule has been reluctantly followed in Connecticut by a divided court. *Hollister v. Shaw*, 46 Conn. 248. The daughters are entitled to the third of the trust fund over which the testatrix possessed the power. Case discharged.

DOE, C. J., did not sit. The others concurred.

(67 N. H. 537)

SANBORN v. BLACK et al.

(Supreme Court of New Hampshire. Merrimack. March 16, 1894.)

MUTUAL BENEFIT SOCIETY—MEMBERSHIP CERTIFICATE—SUBSTITUTED BENEFICIARY—VESTED RIGHT.

Where a member of a mutual benefit association makes a proper change in the beneficiary of his membership certificate, and duly notifies the association, the failure of the directors to consent to the change, and to record it as required by the by-laws, because no meeting occurred between the notice and the member's death, cannot defeat the beneficiary's rights.

Bill of interpleader by Edward B. S. Sanborn against Louisa F. Black, Sarah M. Bruce, and others.

The Odd Fellows' Mutual Relief Association of the Connecticut River Valley has paid to the plaintiff, for the benefit of the party entitled to it, \$975, upon a certificate of membership issued to the plaintiff's intestate, Frederick A. Black, February 8, 1877, by which the association promised to pay \$1,000, upon Black's decease, to the person or persons designated by him in his application for membership, or in his last legal assignment; provided such person or persons should be heirs or relatives of him, or dependents upon him. The by-laws of the association contained the following provisions: "If either of the persons so designated have died prior to the death of the member, the sum which would have been paid to said decedent's beneficiary, had he or she been living at the time of the member's death, shall be payable to other beneficiaries, if there are any named, in equal proportions, but, if there are no other beneficiaries named, to the next of kin of the deceased member. A member shall not change his beneficiary * * * without the consent of the directors, and a record being made of the same on the books of the association." In his application, Black designated his wife, Julia, as beneficiary. She died in 1885, and he subsequently married the defendant Louisa. September 27, 1889, he indorsed upon the certificate and signed the following, "It is my will that the benefit named in this instrument be paid to my wife, Louisa F. Black," and sent it to the association, at Springfield, Mass., to get the consent of the directors to the change, and have it recorded. He died October 3, 1889.

The directors, not holding any meeting in the meantime, did not consent to the change before his death. Three of them consented in writing September 20, 1890. Louisa and the next of kin appear, each claiming the money in the plaintiff's possession.

E. B. S. Sanborn, for plaintiff. F. N. Parsons, for defendant Louisa F. Black. Albin & Martin, for other defendants.

CHASE, J. It is claimed that Black's designation of his second wife as beneficiary is not effectual, because it was not consented to and recorded, as required by a by-law of the association, before his death. The association's promise to pay the sum named in the certificate of membership to some one—either the designated beneficiary or the member's next of kin—is absolute. It also gives the member authority to choose, and from time to time to change, his beneficiary, provided the person appointed is a relative of, or a dependent upon, him. This feature distinguishes the contract from ordinary contracts of life insurance. *Marsh v. Legion of Honor*, 149 Mass. 512, 515, 21 N. E. 1070, 1071. It deprives any one from acquiring a vested interest in the insurance during the lifetime of the member. *Barton v. Association*, 63 N. H. 535, 3 Atl. 627; *Knights of Honor v. Watson*, 64 N. H. 517, 519, 15 Atl. 125, 126. Compare *Bank v. Whittle*, 63 N. H. 537, 3 Atl. 645. Authority in the association or its directors to defeat the member's choice by arbitrarily withholding consent would be inconsistent, not only with the right expressly granted to him, but also with the general nature and purpose of the contract. It would "go to the destruction of the thing granted, and, * * * according to the well-known rule, the thing granted would pass discharged of the condition." *Dallman v. King*, 4 Bing. N. C. 105, 109; *Moore v. Woolsey*, 4 Ell. & Bl. 243, 256; *Braunstein v. Insurance Co.*, 1 Best & S. 782, 795; *Boydton v. Insurance Co.*, 43 Vt. 256, 262; *Thomas v. Fleury*, 26 N. Y. 28, 34; *Bowery National Bank v. Mayor, etc., of City of New York*, 63 N. Y. 336, 339, 340; *Nolan v. Whitney*, 88 N. Y. 648. It is not claimed that any reason existed in this case for withholding consent. The person designated as beneficiary is one of a class entitled to become such, and, so far as appears, is unexceptionable in all respects. One purpose of the by-law was to secure to the association reliable evidence of every change in beneficiaries, so that it would know to whom it was liable upon the death of a member, and be protected, to some extent, at least, from litigation by adverse claimants. *Anthony v. Association*, 158 Mass. 322, 324, 83 N. E. 577, 578; *American Legion v. Smith*, 45 N. J. Eq. 466, 17 Atl. 770; *Supreme Conclave v. Cappella*, 41 Fed. 1, 4. Here this purpose was fully accomplished. Black's designation was sufficient in form and substance. It was forwarded to and received by the association several days before his

death. He did all that he was required to do—all that he could do—to complete the transfer of the association's obligation to Louisa. There being no sufficient reason to justify other action on the part of the directors, he had the right to have the transfer consented to by them, and recorded. The only reason suggested why consent was not given, and record was not made, is because the directors did not meet before his death, after receiving the assignment. If they had met, and declined or neglected to consent, and Black had lived, law or equity would have furnished him an adequate remedy to secure his right. *Walker v. Walker*, 63 N. H. 321. Upon his death, Louisa's expectancy became a vested right. She became entitled (as he was in his lifetime) to insist that the directors should perform their duty under the contract. *Scott v. Association*, 63 N. H. 556, 4 Atl. 792; *Connelly v. Association*, 58 Conn. 552, 20 Atl. 671; *Vivar v. Knights of Pythias*, 52 N. J. Law, 455, 20 Atl. 36. Under the circumstances, equity treats that as done which ought to have been done. *Supreme Conclave v. Cappella*, 41 Fed. 1; *Isgrigg v. Schooley*, 125 Ind. 94, 25 N. E. 151. Case discharged.

BLODGETT, J., did not sit. The others concurred.

(67 N. H. 575)

Appeal of HOWLAND.

(Supreme Court of New Hampshire. Grafton. March 16, 1894.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—FAILURE TO FILE SCHEDULES—VALIDITY.

A failure to comply with Pub. St. c. 201, § 8, which requires a debtor, within 10 days after making an assignment, to file schedules of his creditors and of all his estate, does not invalidate the proceedings.

Appeal from probate court, Grafton county.

Appeal by Edgar F. Howland from a decree dismissing proceedings under an assignment for the benefit of creditors. Exceptions sustained.

Howland made an assignment for the benefit of his creditors September 14, 1892. He filed a list of his creditors October 22, stating their residences, and the amount of each one's claim, but not the nature and consideration of the claim, nor whether it was secured. Because of this omission and the fact that the list was not filed within 10 days after the beginning of the proceedings or before the first meeting of creditors, the judge of probate dismissed the proceedings; and the court at the trial term affirmed the order of dismissal, subject to the appellant's exception.

S. B. Page and Smith & Sloane, for appellant. W. F. Westgate and Bingham, Mitchell & Batchellor, for Arthur Knapp, a creditor.

CHASE, J. By the common law, an insolvent debtor might assign his property to trustees for conversion into money and dis-

tribution with or without preference among those of his creditors who assented to the assignment, upon condition that he should be discharged from their claims. *Haven v. Richardson*, 5 N. H. 113. Such assignments furnished facilities for committing injustice and fraud, of which parties took advantage. To remedy the evil, the act of July 5, 1834 (Laws 1834, c. 161), was passed, by which it was enacted that no assignment for the benefit of creditors should be valid, unless it provided for an equal distribution of the debtor's property among his creditors according to their respective claims, nor unless the debtor made oath that he had "placed and assigned, and the true intention of his assignment was to place in the hands of his assignees, all his property of every description," not exempt from attachment, to be thus distributed. *Manufacturing Co. v. Smith*, 8 N. H. 347, 348; *Low v. Wyman*, *Id.* 536, 537; *Barker v. Hall*, 13 N. H. 298, 301. This statute was incorporated into the Revised Statutes (chapter 134) and continued in force without change until 1861. Neither the common law nor this statute required the filing of a schedule of the debtor's assets or a list of his creditors. *Haven v. Richardson*, *supra*. This requirement originated with the act of July 3, 1861 (Laws 1861, c. 2488), which provided, among other things, that the assignee should, within 10 days after the assignment, file in the office of the register of probate a schedule of all the property embraced in it, and a list of the names and residences of the creditors, verified by the oath of the debtor and himself. *Id.* § 1. The act carefully guarded against a failure by the assignee to perform the duty for want of information, by requiring the debtor to furnish him true information upon the subject, and subjecting him to liability to punishment if he refused or neglected. *Id.* § 7. There was no express provision in the act that a failure to perform the duty should defeat the assignment, nor anything tending to show that such was the intention of the legislature. By the act of July 9, 1862 (Laws 1862, c. 2594), it was provided that the assent of creditors to an assignment should be presumed, unless the contrary intent was manifested to the assignee within 30 days after they were notified of the assignment, and that the actions of assenting creditors should be discontinued. *Fellows v. Greenleaf*, 43 N. H. 421; *Frink v. Buss*, 45 N. H. 325. In *Chamberlain v. Perkins*, 51 N. H. 336, the defendant undertook to avail himself of these provisions to procure the discontinuance of the action by pleading in bar the pendency of insolvency proceedings. The plaintiffs demurred to the plea, because it did not allege that the residences, as well as the names of creditors, were stated in the list; and the demurrer was sustained. The court (Bellows, C. J.) said: "The plea in this case is in bar of the further prosecution of the suit, and is based upon the law of July, 1862 (section 1, c. 2594). * * * Independently of that section, the plea could avail nothing;

and, to enable the debtor to plead it with effect, he must show a substantial compliance with the provisions of the law which were designed to give the creditor the means of judging of the character and validity of the assignment, and consequently of determining whether to give or withhold his assent. These provisions, in respect to filing a schedule and list of creditors, with their residences, are of that character; and we cannot hold that anything short of a full compliance with those provisions will be sufficient to justify a presumption of assent so far as to maintain a bar to the further prosecution of the suit." The decision did not go to the extent of holding the assignment void. In effect, it allowed the plaintiffs to dissent from the assignment long after the expiration of 30 days from its execution, and to pursue their remedy against the debtor outside the insolvency proceedings. By this course they could not divert the property in the assignee's possession from assenting creditors, but could reach the surplus remaining after assenting creditors were paid. *Fellows v. Greenleaf*, supra. All the acts referred to were revised upon the enactment of the General Statutes in 1867, and incorporated into chapter 126. Section 4 of this chapter requires that the schedule of assets shall contain a statement of the estimated value of the property embraced in the assignment, and of the incumbrances upon it, and that the list of creditors shall contain a statement of the amount and nature of their respective claims, in addition to the particulars required by section 1 of the act of 1861. Section 8 provides that, if the assignee shall fail to file a schedule of property and list of creditors in ten days, or a bond in five days, or within such further time as the judge may allow, he shall cease to be assignee; and section 9 provides that, whenever a vacancy shall occur in the office of assignee from any cause, the judge shall appoint another upon application of the debtor or any creditor. Failure on the part of the assignee is remedied, not by avoiding the assignment, and depriving the debtor and creditors of their rights under it, but by substituting for the delinquent an assignee who will perform the duties of the office.

The law thus far was distinctively an insolvency law. *Bank v. Chick*, 64 N. H. 410, 13 Atl. 872. It contained no provision for a discharge of the debtor from his debts without payment in full, nor any provision for involuntary proceedings. The United States bankruptcy act of 1867 was repealed in 1878. After, and doubtless because of, its repeal, many of its provisions were incorporated into the state insolvency law, rendering it essentially a bankruptcy law. Laws 1885, c. 85; Laws 1889, c. 96; Pub. St. c. 201; *Barth v. Backus*, 140 N. Y. 230, 35 N. E. 425. Creditors as well as the debtor may now begin proceedings, and the debtor may be discharged from certain of his debts. Voluntary proceedings are begun by an assignment to the judge of probate, and an as-

signee to be appointed by him, instead of to an assignee selected by the debtor. However it is made or expressed, it must be construed to convey all the debtor's estate not exempt from attachment. *Dube v. Insurance Co.*, 64 N. H. 527, 15 Atl. 141. It avoids all payments and liens on the debtor's property, made within three months, to satisfy or secure previously existing debts. Pub. St. c. 201, § 28. The property passes immediately into the possession and custody of the court, and the court may proceed to dispose of certain kinds of property, and to collect debts due the estate, without waiting for the appointment of an assignee. All the property of the debtor not exempt from attachment comes under the jurisdiction of the probate court, to be converted into money, and distributed among his creditors. The right of creditors to such distribution vests in them immediately on the assignment. In *re Mann*, 32 Minn. 60, 63, 19 N. W. 347; *Metcalf v. Van Brunt*, 87 Barb. 621, 627. The provision (section 8) for filing a schedule of assets and a list of creditors is as follows: "The debtor shall, within ten days after the beginning of the proceedings, make, on oath, and file in the office of the register a schedule of his creditors, stating the place of residence of each, if known, the amount due each, the nature of each debt, the true consideration thereof, and any security given for its payment, and a schedule of all his estate, giving its location and description, and the nature of all incumbrances thereon, with the date, amount, and consideration of each. If, by mistake, accident, or misfortune, the schedules are not furnished within the time above limited, they shall be delivered as soon as may be thereafter, and before the first meeting of the creditors." The object of this section was not to obtain information for notifying creditors of the pendency of the proceedings; that is provided for in section 6. It was not to secure an inventory of the debtor's estate; that is provided for in section 25. The provisions of the section are not relied upon for discovering fraud. Special and ample provisions for that purpose are made in other parts of the law (sections 15, 19, 26, 27, 40). But their office, like that of the provisions of section 7 of the act of 1861, is to secure for the assignee and other parties in interest true information concerning the condition of the estate. They are supplemented, at least in involuntary proceedings, by section 50, which provides that the debtor shall be punished if he willfully omits to furnish the information, or fraudulently furnishes false information. They are incidental, rather than essential provisions. Noncompliance with them does not render it impossible to carry into effect the purpose of the law. The assignee and the creditors can get the information from other sources, or from the debtor himself, with the aid of section 27, which provides that the debtor, when required, shall submit to examination on oath by the assignee or any creditor, "touching any matter which may affect the settlement of his estate in insolvency." There is no provision that a failure to comply with the requirements of the

section shall make the assignment invalid, and discontinue the proceedings. The modifications of the law effected by the acts of 1885, 1889, and 1891 do not lessen the weight of this negative evidence. A result of such vital consequence to the debtor, and especially to the creditors, in a bankruptcy proceeding, would not be left to inference. The purpose of the law is "the distribution of the debtor's property proportionately among his creditors, and the discharge of the debtor from further payment, if he shall bring himself within the conditions prescribed for obtaining it." *Batchelder v. Batchelder*, 68 N. H. 31, 32, 20 Atl. 728. If the proceedings under an assignment are arrested, the purpose is defeated. The creditors lose their rights in the debtor's property, including that portion which has been relieved from liens by the operation of the law. All this may happen without their previous knowledge or assent. If they knew it was likely to happen, they would be powerless to prevent it, however much it might be for their interest to do so. The debtor might, by his willful or negligent omission to file the schedules, accomplish what he could not do directly by a formal deed revoking the assignment. This is inconsistent with the purpose and theory of such laws, and there is no reason to suppose the legislature attached such meaning to the terms of the statute. Exception sustained; decree of probate court reversed.

CARPENTER, J., did not sit. The others concurred.

(67 N. H. 514)

WINNEPISSEOGEE LAKE COTTON & WOOLEN MANUF'G CO. v. TOWN OF GILFORD (three cases).

(Supreme Court of New Hampshire. Belknap. March 16, 1894.)

TAXATION—VALUATION OF PROPERTY—EVIDENCE OF VALUE—SALE OF STOCK OF CORPORATION.

1. A judgment fixing the value of real estate for the purpose of taxation in 1884, while admissible as evidence of its value in subsequent years, is not conclusive of its value in 1890 or subsequently; and, in a proceeding to determine its value at that time, evidence of the price at which it was sold in 1889 is admissible.
2. A contract by a mill corporation, by which it agreed, for a certain length of time, to discharge a sufficient quantity of water from its reservoir through its dam to maintain a certain flow in a stream below, where it bound the corporation to do no more than it was required to do by law in equalizing the flow of the stream, cannot be considered such an incumbrance that a sale of the stock of the corporation during the existence of the contract would not measure the full value of its property for purposes of taxation.

Case reserved from Belknap county.

Appeals by the Winnepisseogee Lake Cotton & Woollen Manufacturing Company from the refusal of the selectmen of the town of Gilford to abate taxes. Defendants object to the entry of decrees on the findings of the trial court. Case discharged.

v.35A, no.22—60

The plaintiffs were incorporated June 28, 1831. The preamble of their charter is as follows: "Whereas, William Batchelder, John Chase, Nathan Batchelder, and their associates, being owners of the farm, mill, and mill privileges commonly called 'Folsom's Mills,' in Meredith, upon which the proprietors have erected, and are about to put in operation, two factories for the manufacture of cotton and woollen cloths, and for the manufacture of machinery at their said mills, for the greater convenience in carrying on said business, have petitioned the legislature, praying that said owners and proprietors may be incorporated and made a body politic and corporate, which prayer appearing reasonable, therefore," etc. The corporation was authorized to manufacture and sell machinery, purchase and hold real estate, erect dams, mills, and other buildings for manufacturing all kinds of cotton and woollen yarn, thread, and cloth: "provided that the whole amount of real and personal estate at any time vested in the business of said corporation shall not exceed the sum of \$100,000." By an amendment of the charter in 1846 (Laws 1846, c. 437), the corporation was authorized to increase its capital to \$1,000,000, and "to acquire and hold in this state such real and personal estate, not exceeding in the whole the said sum of one million of dollars, as may be necessary to improve the water power of the Winnepisseogee, Pemigewasset and Merrimack rivers, and for that purpose to make such contracts and grants, to and with the proprietors and owners of lands, mills and mill privileges on the said rivers, and their tributary streams and waters, as may be necessary to accomplish those objects." Individuals and corporations owning mills or mill privileges upon the rivers named, or their tributaries, were authorized to hold stock in the corporation. The plaintiffs, at the time of the assessments, were owners of the land in Gilford upon both sides of the river near the outlet of Long Bay, upon which Folsom's Mills formerly stood. It was not deemed necessary at the trial term to determine the exact location of the line between the bed of the river that belongs to the plaintiffs and the bed of the lake that belongs to the state. Prior to 1846 there was a dam in the river upon this land, which enabled the owners to use the bay, to some extent, as a mill pond. After 1846 the plaintiffs, at an expense of about \$500,000, deepened the outlet of the lake at the weirs, making Long Bay an arm of the lake, and built a new dam in the river on their land, a short distance below the old one, of sufficient height and strength to control the lake and hold the water in times of freshet. The purpose and effect of these changes were to make the lake, including the bay, a reservoir, and enable the plaintiffs to equalize the flow of water from it, and thereby improve water powers on the Merrimack river, in which they were interested. The quantity of water annually flowing from the lake was not increased. The area of the reservoir thus

made is 71½ square miles, and nearly the whole of its basin was and is the property of the state. It was held that the state, by the acts of 1831 and 1846, granted to the plaintiffs a perpetual right to a reasonable use of the lake as a reservoir and source of a reasonably uniform stream for the improvement of the mill privileges upon Winnepiseogee and Merimack rivers, subject to the limitation that the right of navigation upon the lake should not be unreasonably impaired thereby, and also subject to the right of the owners of mill privileges upon said rivers to have the water of the lake come down its natural course without unreasonable diminution, or an unreasonable degree of irregularity caused artificially. This construction was a material element in fixing the value of the plaintiffs' real estate. If, by the true construction, the right above described was not granted, if the grant is revocable without compensation, or if the state, by the exercise of any other power than eminent domain, can stop the plaintiffs' reasonable use of the lake as a reservoir, or prevent their making reasonable changes in its natural level, the value of the plaintiffs' real estate is less than that found. It was also held that the state owned the shore of the lake between the lines of high and low water, and that this ownership bore on the value of the right granted to the plaintiffs. July 17, 1889, the plaintiffs' stockholders sold their shares in the plaintiffs' capital stock to Warren F. Daniell for \$85,000, reserving certain personal property. The sale was in every respect, with a single qualification, what the authorities of this state require to show the market value of a thing sold, and was the best evidence of the market value on that day of the beneficial interest of the equitable owners in all the corporate estate and franchises, except the reserved personal property. The qualification was that, while the stockholders could not have got more by a fair sale, they might have got less, if the plaintiffs' water rights had been understood to be limited as above set forth. A lease of a mill privilege upon the Winnepiseogee river at East Tilton from the plaintiffs to the P. C. Cheney Company, dated July 1, 1886, for a term expiring in 1905, contains a stipulation that "the total flow of water at the said dam of said lessors shall not, by any act of said lessors, be reduced below 250 cubic feet of water for each second of time, except when the same may be shut off for necessary repairs." Before July, 1889, the plaintiffs had made contracts with other persons on the subject, but none that required them to allow a larger quantity of water to flow in the river. As a matter of fact, these contracts do not limit or impair the rights acquired by the plaintiffs under the acts of 1831 and 1846. The allowance of the flow stipulated in the contracts is no more than a performance of the plaintiffs' duty to equalize the stream by a reasonable use of the lake. The sale vested in the purchaser all the control of the lake the plaintiffs ever had. If the flow stipulated in

the contracts infringes upon the right of navigation in the lake (a subject not investigated at the trial), the valuation placed upon the plaintiffs' real estate is too high. The judgment upon the referees' report in the plaintiffs' appeal from a refusal of the selectmen of Gilford to abate a part of the plaintiffs' taxes in 1884 (64 N. H. 337, 10 Atl. 849) was received in evidence. It was held that the judgment conclusively established the fact that the plaintiffs' property then taxed could have been sold for \$275,000, the valuation which the referees placed upon it. Due weight being given to this adjudicated fact, and to all the other evidence in these cases, it was found that the value of the plaintiffs' real estate taxable in Gilford in 1890, 1891, and 1892 was \$57,000, and that the plaintiffs' taxes should be abated to conform to this valuation. The plaintiffs, being content with the conclusions of law and fact, moved that decrees be entered accordingly. The defendants objected.

E. A. & C. B. Hibbard and E. B. S. Sanborn, for plaintiffs. Jewell & Stone, Bingham & Bingham, and S. O. Clark, for defendants. Jewett & Plummer, for Laconia.

OHASE, J. The finding that the plaintiffs' charter conveyed to them rights in the lake, as stated in the case, is favorable to the defendants. Its tendency was to increase the market value of the plaintiffs' real estate. The defendants have no occasion to object to it, and the plaintiffs have waived their objection by moving for decrees in accordance with conclusions of law and fact, founded, in part at least, upon the finding. It does not appear that the plaintiffs' land in Gilford was bounded by the lake. If it was not, the ruling that the state owns the shore of the lake between high and low water marks was immaterial. If it was so bounded, and if, according to the true construction of the conveyance, the plaintiffs' title extends to low-water mark, the error in the ruling was substantially neutralized by the finding that the state conveyed to the plaintiffs, in their charter, the rights above mentioned. Such rights would give the plaintiffs much the same use of the shore that they would have if they owned it. *Manufacturing Co. v. Robertson*, 66 N. H. 1, 17, 18, 25 Atl. 718, 726. The difference between the value of the shore itself and the value of such rights in it must be slight. As it appears improbable that the defendants' rights were prejudiced by this ruling, and as they have not specifically objected to it, the question of law involved in it is not considered. "The selectmen shall appraise all taxable property at its full and true value in money, as they would appraise the same in payment of a just debt due from a solvent debtor" (Pub. St. c. 58, § 1); that is, "at its just value" (Id. c. 233, § 1). Such value is the market value, or the price which the property will bring in a fair market, aft-

er fair and reasonable efforts have been made to find the purchaser who will give the highest price for it. *State v. James*, 58 N. H. 67; *Atlantic & St. L. R. Co. v. State*, 60 N. H. 133, 140; *Low v. Railroad Co.*, 63 N. H. 557, 562, 3 Atl. 739, 743; *Winnepiseogee Lake Cotton & Woolen Manuf'g Co. v. Town of Gilford*, 64 N. H. 337, 348, 10 Atl. 849, 850. An attempt was made at the trial to find such value of the plaintiffs' real estate in Gilford. Unless testimony was excluded that ought to have been considered, or testimony was received that ought not to have been considered, the finding of value there made, being a finding of fact, must stand.

The record of a judgment as to the value of the plaintiffs' real estate April 1, 1884, in a prior action between these parties for an abatement of taxes, was received as evidence. The defendants do not object to the competency of this evidence, but they claim the judgment conclusively established the value of the property for taxation in 1890, 1891, and 1892, and that evidence of an intervening sale of the property was therefore inadmissible. If experience showed that the market value of real estate never changed, there would be ground for this contention; but it is well known that it does change, sometimes to a considerable extent in a brief space of time. *Atlantic & St. L. R. Co. v. State*, 60 N. H. 133, was an appeal from the assessment of taxes upon the company's railroad in this state for the year 1879. The company leased their railroad to the Grand Trunk Railway in 1853 for 990 years, reserving a certain rental. It was held that the rental was evidence of the market value of the road at the date of the lease, although not conclusive. In the opinion it is said (page 142): "If the value of the leased road increased from the date of the lease to the present time, the less value of 1853 cannot be taken as its present value, on which its share of the public expense is to be computed; and, if its value diminished during that period, its greater value in 1853 is not the test of its present share of the common burden. For the purpose of taxation in 1853, it should have been appraised at the highest price it could have been fairly sold for on the 1st day of April of that year. For the purpose of taxation this year, it should be appraised at the highest price it could have been fairly sold for on the 1st day of April of this year, and not at the greater or less price for which it could have been sold or leased at some former time. The price at which it was sold or leased at any former time is evidence only so far as its proof of a former value tends to show the price for which it could have been sold on the 1st day of April, 1879. If, on that day, it could not have been leased by an owner of the entire title at the price of 1853, it would be as wrong to make that price the test of the value of 1879 as to appraise it now at less

than its present value because it was once sold or leased for less than it is now worth." The judgment in the prior action between these parties as to the value of the property in 1884 differs from evidence of a sale or lease of the property at that time only in its weight and binding effect. In the judgment, all uncertainty resulting from considering and weighing conflicting evidence bearing on the question of value is eliminated. The judgment establishes the value of the property at the time to which it referred. If, instead of a judgment, the evidence had related to a sale or lease, it would have been necessary to find the value at that time from a consideration of the sale or lease, the circumstances surrounding the making of it, and all other evidence relevant to the question of value.

It was proper to consider, in connection with the judgment, other evidence as to the value of the property in 1890 and subsequent years. The evidence of the sale July 17, 1889, by the plaintiffs' stockholders to Daniell of their stock was properly received. The question of its competency, by reason of remoteness, was one of fact. The decision of it at the trial term is not reviewable here. It is found, as a fact, that the sale was, in every respect, what the law requires in a sale to give it weight as evidence of market value, with the single qualification that the stock might not have brought as much if the corporation's water rights had been understood to be limited according to the views taken of them at the trial term. This qualification did not injure the defendants. The sale transferred the equitable ownership of all the corporation's property and franchises, and was, in effect, a sale of them. The price received for the stock was, in effect, the price which the property and franchises of the corporation brought, if the corporation was not indebted, and it is not suggested that it was. There was no error in admitting this testimony. *Atlantic & St. L. R. Co. v. State*, 60 N. H. 133, 141.

The plaintiffs leased to the P. C. Cheney Company, July 1, 1886, for a term extending to 1905, a mill privilege at East Tilton, and stipulated that "the total flow of water at the said dam of said lessors shall not, by any act of said lessors, be reduced below 250 cubic feet of water for each second of time, except when the same may be shut off for necessary repairs." They made contracts with other parties on the same subject, but none that required them to allow a larger quantity of water to flow in the river. The defendants claim that these contracts rendered it impossible for the stockholders to sell the entire beneficial interest in the control of the lake, and that the price obtained for the stock was a price for an incumbered title of the property. It is found that the flow stipulated for in these contracts was no more than a performance of the plaintiffs' duty to equalize the stream by a reasonable

use of the lake, and that the stockholders' "sale vested in the purchasers all the control of the lake the plaintiffs ever had." The owners of mill privileges upon the Winnepeiseogee and Merrimack rivers have a right to the natural flow of the rivers, without unreasonable diminution or alteration. *Cowles v. Kidder*, 24 N. H. 364; *Tillotson v. Smith*, 32 N. H. 90, 94; *Holden v. Lake Co.*, 53 N. H. 552, 560; *Manufacturing Co. v. Robertson*, 68 N. H. 1, 29, 25 Atl. 718, 732. But the natural flow might be controlled to a reasonable extent by arresting the excess in times of high water, and releasing it in times of low water, and so equalizing the flow throughout the year. *Manufacturing Co. v. Strafford*, 51 N. H. 455, 477, 490; *Thompson v. Improvement Co.*, 54 N. H. 545, 558. This control of the lake as a reservoir is limited within the bounds of reasonableness, having reference to the rights of riparian owners upon the rivers forming its outlet. It is found that such limitation requires the plaintiffs to release at least 250 cubic feet of water each second, independently of any express contract on the subject, and, consequently, that the contracts do not increase the duties which the law otherwise puts upon the plaintiffs, nor create an incumbrance upon their title. Such being the fact, there is no ground of objection to the ruling that the price received for the stock was the price received for an unincumbered title to the plaintiffs' property. There should be judgment for abatements in accordance with the finding at the trial term. Case discharged.

DOE, C. J., and CLARK, J., did not sit. The others concurred.

(59 N. J. L. 232)

MAYOR, ETC., OF JERSEY CITY v. ERWIN.

(Supreme Court of New Jersey. Nov. 16, 1896.)

DE FACTO OFFICERS—CITY ATTORNEY.

1. A de facto board cannot create a de jure officer.

2. The charter of Jersey City provided for the appointment of a single person as city attorney. Two persons acted in that capacity as de facto officers. *Held* that, while the acts of each were valid with respect to strangers, neither could maintain a suit for the official salary.

Dixon, J., dissenting.

(Syllabus by the Court.)

Action by James S. Erwin against the mayor and aldermen of Jersey City. Rule to show cause why the judgment should not be set aside. Rule made absolute.

Argued February term, 1896, before BEASLEY, C. J., and DIXON and GARRISON, JJ.

John L. Keller and Chas. L. Corbin, for plaintiff. Spencer Weart and Wm. D. Edwards, for defendant.

BEASLEY, C. J. This suit was brought by Mr. Erwin, the plaintiff in the suit, to recover

the salary which he alleges to be due to him for his services as the attorney of Jersey City. By the institution of such an action, the title of the plaintiff is put in question, as was held in this court in *Meehan v. Freeholders of Hudson*, 46 N. J. Law, 279. Upon this subject these undisputed facts appear in the evidence, viz.: That the plaintiff below, Erwin, was elected to the office just mentioned by the board of finance of Jersey City, in which body the right to fill the office was vested by the statute; that, at such election, four votes were cast in his favor, that being the number requisite for the legality of the proceeding; and that, at the time of the transaction, a quo warranto was pending in the supreme court, challenging the title of one of the members so voting; and that, subsequently, in that course of law, a judgment resulted, declaring that the member referred to was a usurper, and ousting him from his position. By the legal force of this proof, it is conclusively shown that the plaintiff was appointed by a board; that, so far as the function in question is concerned, he had no legal authority to act in the premises. Notwithstanding this plain defect in his title, the defendant entered upon the office of attorney of the city, and performed sundry of the duties appertaining to that post. It is also shown that, during the period within which the services just mentioned were performed by the plaintiff, Mr. Weart, who had been the preceding municipal attorney, claimed the right, at the instance of the mayor of the city, to continue in office, and accordingly proceeded to perform a considerable part of its functions. I do not find any legal justification for this continuance in office, so that, according to the view now taken, each of these claimants stand precisely upon the same footing. They were each clothed with official insignia, and were respectively acknowledged as officers by certain of the heads of the city departments. Under these circumstances, it is plain that, in their dealings with individuals, each of these counsel was a de facto officer, and, beyond all doubt, such dealings were and are valid. The rule upon this subject is not open to the least question in this state.

But this is not the problem now to be solved, for our inquiry relates, not to the standing of the plaintiff with respect to individuals, but with respect to the community itself. Claiming the salary in dispute, what is the plaintiff's status against the city? On the argument it was contended that he is in this proceeding to be regarded as an officer de jure, but I have found no semblance of strength in that position. We have seen that the board from which he derives his title was illegally constituted, and in his election it acted as a de facto, and not as a de jure, body. Can the appointee of such a board prevail in a court of law when he sets up that he has a legal title to the office so illegitimately conferred. The question is an important one, and has been considered with corresponding care.

The doctrine that legal validity attaches to the acts of public officers who, having an official semblance, are in fact destitute of all authentic title, is true only so far as there is a public necessity for its prevalence, and no further. If, in the ordinary affairs of business, all persons were bound to verify the titles of public officials before they could rely upon their acts, the burden would be intolerable. It is not too much to say that a considerable part of such business could not be transacted under the pressure of such a rule. It is always to be deprecated that the act of a usurper of office should have a legal sanction conferred upon it; but this result obtains by reason of the great public inconvenience that its rejection would introduce. To this extent, and on this ground, the law legalizes the act of the intruder. It is obvious, therefore, that public utility is the sole reason that can be assigned in favor of the prevalence of the doctrine; and it is thus manifest that such doctrine is a judicial creation, and, consequently, it is not to be applied in the regulation of any case that does not plainly fall within the principle in which it has originated. Unlike matters proceeding from legislation, in a case thus conditioned there is no place for the maxim, "*Voluntas stat pro ratione*;" and on this account the reason for the rule and the scope of its operation must be coterminous.

In the light of this view, it becomes conspicuous that the general rule, acknowledged on all sides, that gives efficacy to the acts of the officer *de facto*, cannot have the effect of investing the appointees of *de facto* boards with *de jure* titles. I have failed to see a single reason for perpetuating the wrong done by such an appointment, while the evils of such a principle are serious and multiform; its immediate result being to offer a strong incentive to usurpation, and to prevent the public from having a voice in the selection of its own officials. And, on the other hand, the invalidation of illegitimate titles of this character, when properly put in issue, cannot be a detriment to any one but to the holders of them. The claim of the indefeasibility of these spurious titles was pointedly rejected in the case of *People v. Railroad Co.*, 55 Barb. 344, the court saying "that there can be no such officer *de facto* as against the people in an action at the suit of the people to try the title to the office. The doctrine in respect to officers *de facto* only applies to and in favor of third parties who have trusted to the apparent title of an officer." The rationale of this subject seems to me so plain that it is deemed useless to discuss it further. The question thus disposed of has not heretofore been directly before the courts of this state for consideration, and, although there may be a few judicial expressions to be found in the reports indicative of opinions somewhat inconsistent with the view here taken, such expressions are mere obiter dicta, and, as such, are not entitled to much weight. The case of *Dugan v. Farrier*, 47 N. J. Law, 383, 1 Atl. 751, which

was relied on by the counsel of the plaintiff, is not in point. In that instance the moot point was whether the organization of a board of chosen freeholders had been legalized by the admission *pro hac vice*, as presiding officer, of a person who had been, but who was not then, a chosen freeholder; and it was decided that this evident irregularity did not prevent the board so constituted from electing an officer *de jure*, the president of the meeting taking no part in the act.

Having thus concluded that the plaintiff cannot be accredited as an officer *de jure*, the next inquiry is as to his status as a suitor in the pending case? Whether an officer *de facto* can sue for his salary is a subject that has never been judicially examined in this state. In New York, in the case of *Dolan v. Mayor*, etc., 68 N. Y. 274, it was decided that such an action was not sustainable; and in *Stuhr v. Curran*, 44 N. J. Law, 189, that proposition is not controverted, nor was it considered, and properly so, as it was not there *sub judice*. Nor on the present occasion have I found it necessary to examine this question, which is not, in my opinion, without its difficulties. The reason of this dispensation is that the case now in hand has certain peculiarities which are decisive of its legal merits. As has already been shown, during the entire period in question there were two counsel, the plaintiff and Mr. Weart, each of whom claimed to be city attorney, and acted as such. It seems unquestionable, that, with respect to third persons, each of such counsel was an official *de facto*. Each knew that the other was occupying that status, and neither made any opposition to the situation. Either could have tested the right that the other claimed. So far, therefore, as the performance of official duties was concerned, each of the counsel named was the incumbent of one-half of the office, and each has precisely the same right that the other has. Under those conditions, it does not seem to me that either of these rival contestants can have any legal claim upon the public for compensation for his services. It is incontestable that, if one of them is to be paid, so must the other be, and thus the charge upon the city will be double the sum fixed by law as the salary of its law officer. Upon no legal principle that I am acquainted with can the plaintiff ask to be remunerated for having put the municipality in such an unfavorable position.

It will be observed that this office, having been fashioned for a single incumbent, cannot be held by two persons at the same time. Thus, in the case of *McCahon v. Commissioners*, 8 Kan. 437, it was said: "Two persons cannot be officers *de facto* for the same office at the same time." And this seems to be the true doctrine so far as concerns such intruders and the public authorities, whatever the effect of such dual holding may be with respect to strangers dealing with either of such officers. This appears to be the view taken in *Morgan v. Quackenbush*, 22 Barb. 72. It is plainly the

teaching of the common law that, where an office has been created to be held by one person, two or more persons cannot hold it as tenants in common. My conclusion is that this action is opposed to correct legal principles, and therefore cannot be sustained. Let the rule be made absolute.

GARRISON, J., concurs.

DIXON, J. (dissenting). This suit was brought to recover the salary due to the city attorney of Jersey City for the months of January, February, and March, A. D. 1894. The trial took place in the Hudson circuit before the judge, without a jury, and resulted in a finding for the plaintiff, which is now before this court on a rule to show cause why it should not be set aside. It appears that the plaintiff was appointed city attorney by a resolution of the board of finance passed December 27, 1893, and took the oath of office on the following day. The defendant disputes the legality of this appointment on two grounds: First, because the statute purporting to confer upon the board the power to appoint is unconstitutional; second, because the resolution was adopted by the vote of one who was only *de facto*, and not *de jure*, a member of the board, and was vetoed by the mayor. But under the decision of the court of errors in *Stuhr v. Curran*, 44 N. J. Law, 181, the right to the official salary does not depend upon the determination of such legal questions as are thus presented. According to that decision, the right to the fees or compensation of an office does not grow out of any contract between the government and the officer, but arises from the rendition of the official services, unless the person rendering the services has fraudulently intruded into the office. In the present case it is not suggested that the plaintiff was guilty of fraudulent intrusion; and the evidence before the trial judge fully justified his findings of fact that the possession of the office was surrendered by the former incumbent to the plaintiff upon his appointment, and that thereafter, during the months mentioned, he performed the duties of the position. His right to the salary was thus established. I think the rule to show cause should be discharged.

(58 N. J. L. 144)

STATE (MORAN et al., Prosecutors) v.
MAYOR, ETC., OF JERSEY CITY.

(Supreme Court of New Jersey. June, 1895.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS
—ASSESSMENT OF BENEFITS.

1. The final assessment of benefits made by commissioners against property for the improvement of a street is not invalid because it varies somewhat from the preliminary assessment or estimate made before the work was done.

2. An assessment of benefits for the improvement of a street, officially declared by the commissioners in their report not to be, in their judgment, in any case in excess of the actual benefits, will not be set aside as erroneous unless clearly shown to be excessive and unjust.

Certiorari by the state, on the prosecution of Charles Moran and others, against the mayor and aldermen of Jersey City, to review an assessment of benefits for a street improvement. Assessment affirmed.

Argued February term, 1895, before DIXON and LIPPINCOTT, JJ.

Gilbert Collins, for prosecutors. Spencer Weart, for defendants.

LIPPINCOTT, J. This writ brings up for review the final assessment of benefits against the lands of the prosecutors for filling, grading, flagging, and draining Germania avenue, in the city of Jersey City, from the northerly line of Thorne street to the southerly line of Carlton avenue. The commissioners, in their report, have ascertained and determined the total cost of the improvement to be the sum of \$24,423.94, and that this total exceeds the aggregate of the amount of the assessable benefits by the sum of \$7,593.94, which latter sum is to be borne by the city at large, and paid by general taxation, and that the lots and parcels of land specially benefited are only benefited in the aggregate to the amount of \$16,830, which they have assessed upon the lots and parcels of land so benefited, in proportion to the benefit received by each. Mr. Moran, one of the prosecutors for plot 1, block 925, which lies on the easterly side of Germania avenue, just south of Thorne street, adjoining Thorne street, being a plot having a frontage on Germania avenue of 225 feet by 100 feet deep, is assessed at the rate of \$100 a lot; also, plot 1, block 926, belonging to him, on the westerly side of Germania avenue, running from Thorne street southerly, 225 feet frontage by 100 feet deep, is assessed at the rate of \$90 per lot. Lots owned by others to the south on the easterly side of Germania avenue, in block 925, to within 100 feet of Lincoln street, are assessed at a somewhat higher rate, from \$100 to \$105 per lot. Lots on the westerly side, in block 926, are assessed from \$90 to \$105 per lot, to within 100 feet of Thorne street. The lot on the northwest corner of Germania avenue and Lincoln street is assessed at \$325. The lot on the northeast corner of Germania avenue and Lincoln street is assessed at \$200, and the same on the opposite corner. From thence to Zabriskie street, the lots on the east side are assessed from \$60 to \$75 per lot; on the west side, at \$90 and \$100 per lot. Of the corner lots at Zabriskie street, one is assessed at \$275, the other at \$200. The lot on the southerly corner is assessed at \$300, having a depth or frontage on Germania avenue of 123 feet, continuing southerly on Germania avenue. On the west side, lots are assessed all the way from \$55 to \$100,—mostly about \$100 per lot. On the easterly side, to Hutton street, of varying depths, they are assessed from \$75 to \$90 per lot. South of Hutton street, lots on the easterly side are assessed at from \$50

to \$75 per lot,—these lots varying somewhat in width and depth. Then, again, other property of Moran is reached, and the plot on the easterly side of Germania avenue, having a frontage of 415 feet, is assessed at \$1,680, it being nearly 17 lots, and at a rate a little less than \$100 per lot. The rear of this plot is somewhat longer than the frontage. On the westerly side, a plot of Moran, with a frontage of 365 feet, is assessed at \$1,480.22, being 15 lots, at a rate a little less than \$100 per lot. These two last-named plots have a frontage on Manhattan avenue. South of Manhattan avenue, on the east side, a plot of Moran, with a frontage of 300 feet, is assessed at \$1,000, or at the rate of \$83.33 per lot. On the west side, a plot of Moran, with a frontage of 353 feet, is assessed at \$1,360.22, being 14 lots, at a little less than \$100 per lot. These plots have a frontage on Manhattan avenue also. In these tracts of Moran there are four corners owned by him on Germania avenue and Manhattan avenue, and two corners on Beach street, where Moran's lots end. Each of the corners owned by others on Carlton avenue, 25 feet by 100 feet, are assessed at \$200 each. Mr. Prigge, for lot 19, in block 931, is assessed \$200. This is a lot on the northwest corner of Germania avenue and Zabriskie street, and is 78 feet along Germania avenue by 25 feet on Zabriskie street. On the opposite corner,—that is, the southeast corner,—Prigge's lot is assessed at \$300, having a frontage on Germania avenue of 123 feet and 3 inches by 25 feet on Zabriskie street. Lot 17, block 931, on the east side of Germania avenue, belonging to Mr. Prigge, is assessed \$100, and lots favorably situated on the street, 25 feet by 100 feet, belonging to other parties, on both sides of him, are assessed at about the same sum. This presents the general situation and the comparative assessments.

It will be noticed that the assessment is confined to the lots, plots, and parcels fronting upon the improved street. But no question is made in this case that the general idea of the assessment is not a proper one, nor is the area of assessment complained of. There can be no objection to frontage assessment when it properly distributes the benefits among the owners benefited. *Raymond's Estate v. Borough of Rutherford*, 55 N. J. Law, 441, 27 Atl. 172, and cases there cited. The first reason considered for setting aside the assessment of the prosecutors is that the final assessment, as made by the commissioners, does not follow the proportions announced to the property owners by the preliminary assessments as that of the probable assessment for the benefits from the proposed improvement. It is true that a preliminary assessment was made by the commissioners after the improvement was applied for by the requisite number of property owners, among whom were the prosecutors, in which it was proposed to assess the whole cost upon the property owners

within the area of the assessments as fixed by the commissioners, and by which the proportion to be paid by the property owners upon their respective lots or parcels was preliminarily established; and it is true, to a certain extent, that the proportions thus established were not maintained and adopted when the final assessment was made. It will be noticed that the personnel of the commission was changed before the final assessment was made. The cost of the improvement exceeded the preliminary assessment,—the preliminary assessment being \$20,336, all to be assessed on the property owners benefited. The actual cost of the improvement was \$24,423.94, of which the commissioners concluded the sum of \$7,503.94 should be borne by the city at large, and the sum of \$16,830 assessed upon the property owners; and the contention is that this sum should be assessed upon the several lots and parcels in the same proportions that the \$20,336 was assessed by the preliminary assessment. The preliminary assessment was made before any of the work of the improvement was commenced, and was only an estimate made upon what was perceived on the surface of things, to give the property owners a general knowledge of the approximate expenses of the improvement; but the cost of the work was increased by unforeseen and unavoidable difficulties in its progress. The work proved to be of a somewhat different character from that anticipated. The preliminary estimate of the expense cannot be allowed to absolutely control the commissioners in their final assessment. Neither the city charter of Jersey City, nor any other statute authorizing an assessment of this character, provides that the preliminary estimate or assessment shall govern the commissioners in making their final assessment. This may be the case as to the final assessment of the cost of a formal opening of a street, but it is not applicable to an assessment for an improvement of the character now under review. Pamph. Laws 1871, p. 1094. This objection to this assessment cannot prevail.

The other reasons urged by these prosecutors for setting aside these assessments may be grouped together for the purposes of consideration. They are that the assessments are for a greater amount than the benefits received; that they are unequal, and disproportionately made; and that the commissioners did not adopt a just, uniform, and proportional rule of assessment. The result contended for is that the prosecutors are compelled to bear more than their just share of the improvement, or, in other words, they are assessed to a greater amount than the benefits received by them. The report of the commissioners sets out distinctly "that they have considered that each of the said lots or parcels, and the proportion of assessable benefits that each of said lots or parcels were actually benefited by the improvement,

and that each were benefited by said improvement to the amount assessed upon it, and that they have assessed each in proportion to the benefit received, and no more than it was benefited by the improvement." As against this official declaration, formally made in accordance with the statutes regulating the making of this assessment, only clear proof of great force will justify the court in concluding that the assessment is erroneous. The assessment cannot be interfered with unless the evidence against it be such as clearly carries conviction that it is wrong, and that an injustice has been done. *Raymond's Estate v. Borough of Rutherford*, 55 N. J. Law, 441, 27 Atl. 172; *Simmons v. City of Passaic*, 55 N. J. Law, 485, 27 Atl. 909. A review of the evidence shows very clearly the great difficulties which beset the commissioners in making this assessment, but it does not, in any part, successfully assail and overthrow the judgment of the commissioners. The evidence on the part of the prosecutors, giving full force and effect to it, does not reach this result. It consists, mainly, in the expression of opinion that the property values have not been enhanced to the amount of the assessment; but these opinions are not at all sustained by the facts stated in any of the evidence. It is needless to state that this evidence is not of the character to induce the court to declare the assessment invalid. Besides, the judgment of the commissioners, as stated in their report, is fully sustained by the evidence on the part of the defendants. This evidence is not reviewed in detail. The conclusion reached is that this assessment must be affirmed.

(177 Pa. St. 519)

CUMBERLAND VAL. R. CO. et al. v.
GETTYSBURG & H. RY. CO. et al.

(Supreme Court of Pennsylvania. Oct. 5,
1896.)

RAILROAD COMPANIES — COMPETING LINES — EXCHANGE OF TRAFFIC — CONTRACTS — SPECIFIC PERFORMANCE — CONSOLIDATION OF RAILROADS.

1. A contract between railroad companies whose roads approach their point of connection almost at right angles, so that they cannot become competitors, to interchange traffic and cars, sell coupon passenger tickets, make through bills of lading, and apportion their earnings, is not unlawful.

2. A contract between several railroad companies, that the parties of the third and fourth parts will, "so far as they lawfully can," send all traffic controlled by them to its destination via the lines of the parties of the first and second parts, and that the latter parties will, so far as they can consistently with their obligations to other parties, promote the development and interchange of traffic, and carry it at as favorable rates as they accord to any others, is not unlawful.

3. The provision in a contract between several railroads that it shall not be construed to give the use of the roads and facilities of the parties of the first and second parts to any parties whose interests are at variance with or unfriendly to them, nor to divert from such parties of the first and second parts traffic properly tributary to lines controlled by them, as it can-

not prevent any party, after a connection has been lawfully established with a line competing with any other party from interchange of traffic, nor prevent shippers from routing freight over any lines they may select, is capable of a lawful construction, which will be given, when no violation of law has been shown.

4. When several railroads have entered into a contract for the interchange of traffic, etc., and two of them have agreed to set aside a certain portion of their gross receipts for the purchase of the bonds of another, and have complied with such agreement, the contract should be specifically enforced, when the roads which have received the benefit of the consideration refuse to comply with its terms.

5. Where several roads enter into an agreement for interchange of traffic, etc., and subsequently two of them are consolidated under a new name and a new management, such change cannot affect the consolidated railroad's liability to the other parties to the contract, and presents no obstacle to a decree for specific performance.

6. Where, in a contract between several railroad companies, two of them agree to set aside a certain portion of their gross earnings for the purchase of the bonds of another, the time for which the bonds are to run fixes, by the plainest implication, the duration of the contract.

7. A contract between railroad companies for interchange of traffic and apportionment of earnings, etc., is not so indefinite in its terms that it cannot be enforced because the exact details by which each road shall receive and transport promptly the others' traffic, and how the earnings shall be apportioned on a mileage basis, cannot be particularized by the court.

Appeal from court of common pleas, Cumberland county.

This was a bill in equity by the Cumberland Valley Railroad Company and the Pennsylvania Railroad Company against the Gettysburg & Harrisburg Railway Company, the Philadelphia & Reading Railroad Company, the Hunters Run & Slate Belt Railroad Company, and Edward M. Paxson, Elisha P. Wilbur, and Joseph S. Harris, receivers of the Philadelphia & Reading Railroad Company, to enforce specific performance of a contract between plaintiffs and the first-named defendant. From a decree in favor of plaintiffs, defendants appeal. Affirmed.

J. W. Wetzel and Thos. Hart, Jr., for appellants. E. B. Watts, John Hays, and D. Watson Rowe, for appellees.

DEAN, J. The Pennsylvania and the Cumberland Valley Railroads—the first extending east and west, and the second south—had for years prior to 1882 maintained a connection at Harrisburg for the interchange of freight and passenger traffic. From Carlisle, a point on the Cumberland Valley Railroad 18 miles southwest of Harrisburg, the South Mountain Railway & Mining Company operated a railroad for 18 miles, to Pine Grove, in a southeasterly direction. This road had a connection and interchanged a traffic with the Cumberland Valley. In 1882 the Gettysburg & Harrisburg Railroad was incorporated, to be built from Hunters Run, a point on the South Mountain Railway about 10 miles from Carlisle, to the town of Gettysburg, in Adams county, a distance of about 21 miles. This last company needed funds to build, and

thereupon all four roads named, on 30th of September, 1882, entered into an agreement by which it was covenanted that they would, to promote their mutual interests, interchange traffic and cars on their respective roads; would sell through coupon tickets for passengers; make through bills of lading for freight; and the joint earnings of the business coming from and going over the Harrisburg & Gettysburg road should be apportioned among the respective parties on a mileage basis thereafter to be agreed upon, and the whole connecting system of the four roads should be operated in harmony in the development of traffic; the South Mountain and Harrisburg and Gettysburg at the same time covenanting that they would, so far as they lawfully could, send traffic to destination over the lines of the Cumberland Valley and Pennsylvania Railroads. In consideration thereof, these two last-named roads covenanted to set apart 15 per cent. of the gross receipts of freight and passenger traffic to and from any points upon the South Mountain and Gettysburg & Harrisburg roads to and from any points on the Cumberland Valley and Pennsylvania roads, and pay the same to the trustee in a mortgage of \$250,000, to secure bonds to be issued on such mortgage on the Gettysburg & Harrisburg Railroad; the bonds to be payable in 30 years, with interest at 6 per cent.; the trustee to appropriate the fund thus raised annually in the purchase of the bonds. It was further agreed that the trustee should attach to each bond a memorandum of this provision of the agreement. The bonds were, soon after, all sold at par, and the road completed to Gettysburg in April, 1884. A prosperous business was built up. The Cumberland Valley paid of the 15 per cent. set apart by it in the purchase of bonds, in the first five years after the road was opened, \$18,000; and the Pennsylvania, \$19,000. In May, 1891, the Philadelphia & Reading Railroad purchased a controlling interest in the stock of the Gettysburg & Harrisburg road, and all of the stock of the South Mountain. Immediately after, the boards of directors in each company were changed, and officers and employes of the Reading were put in their places, and the two roads consolidated under the name of the Gettysburg & Harrisburg Railway Company. About the same time the Hunters Run & Slate Belt Railroad was incorporated to build a road from Pine Grove, the southern terminus of the South Mountain, to the slate quarries, a distance of about five miles. Then, a traffic contract for the term of 999 years was made between the different companies, and such leases made as were deemed desirable, with the stipulation that all traffic was to be sent to destination by the Reading and lines controlled or operated by its connections. At the date of these contracts the contract with the Cumberland Valley and Pennsylvania, of 30th of September, 1882, was known to all parties. Soon after, by orders of the general manager of the Reading, the

connection between trains running on the Cumberland Valley and Pennsylvania was broken. Through billing of freight and the sale of coupon tickets were stopped. The theretofore agreement for apportionment of receipts on a mileage basis was also disregarded. In fact, the business accruing to the Cumberland Valley and Pennsylvania under their traffic contract was practically extinguished, as concerned them. Thereupon these two companies filed this bill, setting out these facts, and praying (1) for a decree of specific performance of the contract, as against the Gettysburg & Harrisburg Railway Company, into which the two contracting roads had been consolidated; and (2) for an injunction against the Philadelphia & Reading Company and its receivers, in aid of such decree. The answers filed by defendants really leave nothing in dispute as to the material facts which must control the decree. The right to relief as prayed for is denied.

The court below, after full hearing, decreed as follows: "And now, June 26, 1895, the court does order and decree that the Gettysburg & Harrisburg Railway Company shall observe and perform those covenants in the agreement between the Pennsylvania Railroad Company, the Cumberland Valley Railroad Company, the South Mountain Railway & Mining Company, and the Gettysburg & Harrisburg Railroad Company, dated September 30, 1882, and recited in paragraph 2 of the bill, which are to be performed by the third and fourth parties thereto, especially in the following matters, as to the performance of which we adjudge that breaches have been shown. Wherefore it is ordered and decreed that the Gettysburg & Harrisburg Railway Company shall do and perform as follows: First. It shall issue coupon tickets to passengers who shall travel from its line via the Cumberland Valley Railroad and the Pennsylvania Railroad, or either of them. Second. It shall issue through bills of lading for freight which is shipped from its line via the Cumberland Valley Railroad and the Pennsylvania Railroad, or either of them. Third. It shall send to destination all traffic controlled by it, via the Cumberland Valley Railroad and the Pennsylvania Railroad, except traffic destined to points not reasonably accessible by those lines. Fourth. It shall receive and transport over its line, upon as favorable terms as it gives to any other railroad, all traffic interchanged by it with the Pennsylvania Railroad Company and the Cumberland Valley Railroad Company, or either of them. Fifth. It shall furnish its agents with rates on freight via the Cumberland Valley Railroad and the Pennsylvania Railroad, and shall not charge local rates to Carlisle on shipments routed via the Cumberland Valley Railroad, so long as such rates are not charged to all other lines. Sixth. The court does further adjudge and decree that the Hunters Run & Slate Belt Railroad Company henceforth treat clause 5 (which is

recited in the bill) of the lease and traffic contract of July 13, 1891, as inoperative, null, and void, in so far as it conflicts with the rights of the plaintiffs under the agreement of September 30, 1882, and that it specifically perform the covenants of said agreement which are to be performed by the party of the third part thereto, as to business interchanged between the roads of plaintiffs and the leased road extended from Hunters Run to Pine Grove. Seventh. The Philadelphia & Reading Railroad Company and Edward M. Paxson, Elisha P. Wilbur, and Joseph S. Harris, receivers of said railroad company, their directors, officers, and agents, are hereby perpetually restrained and enjoined from holding possession of and operating the road of the Gettysburg & Harrisburg Railway Company in any wise to the detriment of the rights of the plaintiffs under the said agreement of September 30, 1882. Eighth. It is ordered that the costs in this action be paid equally by the Gettysburg & Harrisburg Railway Company and the Philadelphia & Reading Railroad Company, or the receivers thereof." From this decree both plaintiffs and defendants have appealed. The plaintiff assigns 29 errors to the decree; defendants, 39. As to those on either side which question the correctness of any finding of facts by the court below, they are dismissed. We discover no manifest error in any of these findings.

We are clear in our conclusion that the South Mountain and Gettysburg & Harrisburg form in no reasonable view a parallel and competing line to the Cumberland Valley, with which they connect. Their line approaches Carlisle, the connecting point, almost at right angles. A glance at any railroad map shows this. From Gettysburg to Carlisle, the traffic along this line, when the contract of 30th September, 1882, was made, was not one for which the Cumberland Valley could compete. The only competitors that these two short roads could have had at that date were country wagons on the ordinary highways. The contract was not, therefore, forbidden by the constitution. It was in fact an advantage to the public, as well as to the contracting parties; for it relieved the public of the inconvenience of transfer of goods and rebilling, provided for travelers close connections, and necessarily lessened the actual cost of transportation, and there is no evidence that the contract was made with a view to increase charges to the shipper. The profits of the contracting parties were expected to result from a lessening of operating expenses to all of them. Any such contract inevitably tends to the advantage of the public; for, the cheaper any product can be delivered at destination, the better able is the producer to meet in the market the same products brought to the same destination by other roads, which last always aim to reach, and do reach, the points where products are marketable. The contract really tends to ac-

complish the purpose of the general railroad law of 1868, which provides that railroads of a similar character shall have the right to connect, upon such terms as may be agreed upon by those who have the management of such roads, and also of the constitution, which declares that they shall have the right to connect, and then avows the purpose,—that they may "receive and transport each the other's passengers, tonnage and cars, loaded or empty, without delay or discrimination." We conclude, therefore, that the contract was not between parallel and competing roads, nor was it unlawful in its ostensible purpose. Whether any of its provisions are unlawful, or whether, because of the indefiniteness of others, it is incapable of specific execution, are altogether different questions, and these we now proceed to notice.

It is alleged by defendants that the contract attempts to exclude other railroads from any use of the roads controlled by the contracting parties. This is only inferential. There is nothing in the contract expressive of such intention. The fifth section of the agreement provides that "the parties of the third and fourth parts [the South Mountain and the Gettysburg & Harrisburg roads] hereby respectively covenant and agree that they will, so far as they lawfully can, send to destination all traffic controlled by them, via the lines of the parties of the first and second parts hereto." Then, further, the sixth section: "It being the intention of the parties hereto that their lines shall be worked, as far as possible, in harmony with each other,"—the two stronger roads covenanting that they will, so far as they can consistently with obligations to other parties, promote the development and interchange of traffic, and carry it at as favorable rates as they accord to any others. Up to this point there is nothing even hinting at a course of conduct violative of either the common or statute law. Nor is the eighth section obnoxious to the law. It is as follows: "Nothing in this contract shall be so construed as to give the use of the roads and facilities of the parties of the first and second parts hereto [the Cumberland Valley and Pennsylvania] to any parties whose interests may be at variance with or unfriendly to said parties; nor shall the same be used hereunder to divert from the parties of the first and second parts traffic properly tributary to the lines controlled by them." The object of this provision, it is clear, had no application to circumstances as they existed when the contract was made, 30th of September, 1882. The Philadelphia, Harrisburg & Pittsburg Railroad, running from Shippensburg to Harrisburg, and crossing the Gettysburg & Harrisburg road six miles south of Carlisle, was not opened for nearly ten years after the date of this contract. It is leased and controlled by the Philadelphia & Reading, and not only is a parallel and competing road with the Cumberland Valley, but was probably intended to be such by its promoters. This section of the contract

had in contemplation, doubtless, the construction of this or any other road to be thereafter built; but its provisions could not legally prevent either the one party or the other, after a connection was established as provided by law, from interchange of traffic, nor could it prevent shippers from routing freight to destination over any lines they selected, no matter what the point of shipment or destination. All that can be said of this section is that it may have contemplated a violation of law. If it did, no such violation is shown, although the contract was in operation for years. As it is capable of a wholly different and lawful interpretation, we cannot assume that it was intended to unlawfully exclude traffic.

It seems to us that the argument and the authorities cited to show the illegality of the contract bear on a state of facts other than those found in this case. If this agreement was intended to give a preference to a certain class of shippers or transporters, and to exclude others shipping and transporting under like circumstances, it would be void; and *Sandford v. Railroad Co.*, 24 Pa. St. 378, and like cases, would be in point. But it is wholly between connecting roads, not competing or parallel, for interchange of traffic upon terms agreed upon; and they expressly disclaim any intention to violate the law, by stipulating to promote their mutual interests so far as they lawfully can.

Before the construction of the Gettysburg & Harrisburg road, plaintiffs agreed to set aside 15 per cent. of certain gross receipts for the purchase of the bonds of that road, which had 30 years to run. That at once gave them a value to the investing public, who, it is to be presumed, now hold them. They have 30 years to run. To every one of them, by full authority of plaintiffs, was appended a memorandum of this agreement. The road was constructed from the money thus received. By virtue of this stipulation, already nearly \$40,000 has been set aside and appropriated to the purchase of these bonds; and the action of these plaintiffs having made this part of the contract, in effect, a contract between them and the bondholder, their liability by the contract will continue until the last has been paid; that is, nothing the obligor in the bond, the Gettysburg & Harrisburg road, may do in violation of the contract, can relieve plaintiffs from, in substance, their contract with the bondholders,—to continue to set aside 15 per cent. of the gross receipts for purchase of bonds. The South Mountain and Gettysburg roads having received, in large part, the consideration for entering into the contract, and the contract not being in violation of law, it ought to be enforced specifically, if it be of such terms as that it is capable of enforcement in equity, and if the parties, as they now stand in relation to each other, can be brought within the jurisdiction of equity, so that the hand of a chancellor will reach them.

First as to the Gettysburg & Harrisburg Railway, which by the consolidation now stands

as the representative of the South Mountain and Gettysburg & Harrisburg Railroad Company: A controlling interest in the stock of the two merged and consolidated roads was obtained by the Philadelphia & Reading, which controlled the Philadelphia, Harrisburg & Pittsburg Railroad, a parallel and competing line with the Cumberland Valley, constructed long after the contract. It was manifestly, therefore, to the Reading's interest, as the practical owner of a competing line, to break the contract with the plaintiffs. It proceeded to do so without hesitation, acting nominally through the new boards of management in the roads over which it had secured control. But a change of persons in a corporation board of directors does not change the identity of the corporation, nor its contract liability, nor is the obligation of the other party to the contract affected. Such change can no more relieve the corporation from its contract liability than from the \$250,000 mortgage on its corporate property. What effect the dissolution of the corporation under judicial decree, or the sale of its franchise and property under proceedings in bankruptcy, would have on unsecured contracts, are altogether different questions. Here the two corporations, at the instance of stockholders having full knowledge of the prior contract, were consolidated under a new name and different management; but, for juridical purposes, the new managers and new name present no obstacle to a judicial decree for performance of a contract. Equity deals with the substance, not the form, when it seeks to enforce its decrees. This was, in substance, held in *Bald Eagle Val. R. Co. v. Nittany Val. R. Co.*, 171 Pa. St. 284, 33 Atl. 239. Counsel are mistaken in assuming that the decision in that case was based solely on *Tulk v. Moxhay*, 2 Phil. Ch. 774. The court below, in the case first cited, had based its decree on *Spencer's Case*, 5 Coke, 16, and *Keppell v. Bailey*, 2 Myne & K. 517. *Tulk v. Moxhay* was cited by us as overruling *Keppell v. Bailey*, and deciding that where the covenant was that the purchaser and his assigns would use, or abstain from using, the land in a particular manner, equity would enforce the covenant against all purchasers with notice of it. The doctrine of that case has been applied in later cases in England only to restrictive covenants. But this court has not so limited the principle, by confining the administration of equity in like cases to a restraining order. To accomplish equity, where there is no adequate remedy at law, often demands mandatory orders; "Thou shalt do," as well as "Thou shalt not." True, the restrictive order is generally more easily enforced than one purely mandatory. In practice, often, the latter is incapable of enforcement. But, where such order can be enforced in aid of an equitable decree, it will be issued, and ought to be. In the mere change of name and personnel of the boards, we see no serious obstacle to a mandatory writ in aid of a restraining order.

It is further argued that, as the term for

which the contract was made is not fixed, therefore it continued only during the will of the parties, and might be revoked by either on notice. This, as a general proposition, if the fact were as stated, is correct; and it is so held in *Philadelphia & R. R. Co. v. River Front R. Co.* 168 Pa. St. 357, 31 Atl. 1098, and the authorities there cited. But the term in this contract is fixed by the plainest implication. The bonds to be purchased ran for 30 years. The obligation of plaintiffs was to set aside annually 15 per cent. of the gross receipts, to be used in annual purchase of the bonds. The term of defendants' obligation under the joint contract must be co-extensive as to time with plaintiffs' obligation to set aside and pay; that is, 30 years. Nor is the contract so indefinite in its terms that performance cannot be decreed. For nine years they operated their roads under the agreement without, so far as appears, finding it necessary to resort to the arbitration clause in case of dispute. Its indefiniteness is first alleged when a motive exists for breaking the contract. While the exact details by which each shall receive and transport promptly the other's traffic, and how the joint earnings shall be apportioned on a mileage basis, cannot now be particularized by the court, the primary stipulations of the contract are definite, and as to them has been entered a decree that they shall be performed specifically. The purpose of defendants to stop the interchange of traffic under the contract has been arrested by this decree. The contract is now obligatory upon all the parties, and is to be performed according to its manifest intent. When this is done in good faith, the daily operations of the respective roads alone can determine the exact details necessary to effective obedience of the decree. In case of dispute as to the particular methods, either can call into operation the arbitration clause, or, if this be unavailing, either can, on proper proof, secure from the court below a supplementary decree, which, in the light of the evidence that may then be adduced, will carry out fully the decree already made. While parties to such contract can agree definitely that they will promote and facilitate the interchange of cars and business between their respective roads, and that the earnings from the joint business shall be apportioned on a mileage basis, it would be practically impossible to enumerate in the agreement all the details by which it should be carried into effect. These would necessarily have to be postponed until the daily operations of the road suggested what would best promote their convenience and that of the public.

As to the appeal of the Gettysburg & Harrisburg Railway Company, it is dismissed, and the decree affirmed. For the reasons given by the court below, the decree, as against the Philadelphia & Reading Railroad Company, the Hunters Run & Slate Belt Railroad Company, and the receivers of the Philadelphia & Reading Railroad Company, is affirmed, and their appeals dismissed.

(177 Pa. St. 544)

CUMBERLAND VAL. R. CO. et al. v. GETTYSBURG & H. RY. CO. et al.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

APPEALS — DECREE — SUFFICIENCY OF — RAILROAD COMPANIES — CONTRACTS.

An appeal from a decree enforcing the performance of a contract between several railroads for interchange of traffic, etc., because it does not determine what connections shall be arranged, and how joint earnings shall be apportioned on a mileage basis,—such matters not being specified in the contract,—is premature, as these matters can only be properly determined when the decree goes into effect.

Appeal from court of common pleas, Cumberland county.

This was an appeal of the plaintiffs from the decree of the court for specific performance in the above case. Affirmed.

The main questions involved in this appeal were whether the Cumberland Valley Railroad Company was entitled to close connections with the Gettysburg & Harrisburg Railway Company at Gettysburg Junction, and whether the Cumberland Valley Railroad Company and the Pennsylvania Railroad Company were entitled to an apportionment of earnings on a mileage basis of 20-mile blocks in their traffic with the Gettysburg & Harrisburg Railway Company. The plaintiffs contended that the court should have decided both these questions in the affirmative, and so decreed, although the contract was not specific in regard to these matters, but contained an arbitration clause in case of dispute. A fuller statement of the facts will be found in the opinion of the court in the defendants' appeal in this case, *supra*.

E. B. Watts, John Hays, and D. Watson Rowe, for appellants. S. S. Neely, J. W. Wetzel, and Thos. Hart, Jr., for appellees.

DEAN, J. There is nothing of merit in these assignments of error which has not been passed upon in the opinion this day filed in the appeal of defendants from same decree. 35 Atl. 952. In so far as the insufficiency of the decree is complained of, the appeal is premature. What connections shall be arranged between the railroads, and how they shall apportion joint earnings on a mileage basis, can only be properly determined when the decree of the court below goes into effect. The daily operations of the roads will point out to both what shall be to their mutual advantage, and circumstances, as they then exist, will suggest what is an equitable apportionment, under the contract, of the joint traffic receipts. If then irreconcilable disputes arise, either party can call into operation the arbitration clause of the contract, or, if this be ineffective, either can ask, on proper proof, for a supplemental decree from the court below. We will not now assume that the parties will refuse to carry out the contract according to its true intent and meaning, when the court below and this court have adjudged it binding upon them.

The appeal is dismissed at costs of appellants, accruing on their appeal since the same was taken.

(177 Pa. St. 26)

ALLEN v. HAMILTON et al.

(Supreme Court of Pennsylvania. July 15, 1896.)

On rehearing. Modified.

For former report, see 34 Atl. 667.

DEAN, J. We have this day handed down, in the case of *Landell v. Same Defendants*, 35 Atl. 242, a modification of our first decree, filed 4th May, 1896, in that case. The same original decree was made in this case. See *Allen v. Hamilton*, 175 Pa. St. 330, 34 Atl. 667. The application of the same principles as in the decision this day filed would induce a modification of the decree here. We do not think the structures of plaintiff along the lines of lots 1,208 and 1,210 are, in any sense of the word, a party wall. They were not intended as such by the owner of 1,210, who erected them, nor had the owner of 1,208 any reason to consider them as such. In the most favorable construction to defendants, they had but the right to use the walls for building purposes to the height of 10 feet, to which the restriction limited them. But it appears that plaintiff or his grantors built a line or division solid wall along 1,210, from the rear of the old main building on 1,208, 13 feet 9 inches high, for a distance of 56 feet, and from that point back to Sansom street was built a still higher wall; that is, the owner of 1,210 has, by his acts, declared that, on the whole, to a greater height than 1,206 has conceded, light and air from 1,208 are valueless to him. He has himself completely shut out more of both. But we can make no modification of the decree in favor of defendants which can affect 1,206. The owner of 1,210 can no more affect the right of the owner of 1,206 by his act in building a wall, than he could destroy that right by a deed relinquishing the restriction altogether. We therefore only so far modify the original decree in this case as will make it accord with the modified decree in *Landell v. Same Defendants*, this day filed. While defendants, perhaps, do not get all they would have the right to demand as against Allen, they get all we can give consistent with the rights of *Landell et al.* Let the original decree be modified so that appellees, *Hamilton et al.*, be restrained from building higher than 13 feet 9 inches for a distance of 19 feet from the old main building on 1,208, and higher than 12 feet for a distance of 37 feet further. Costs to follow original decree. Should the owner of 1,210 agree to waive the restriction to the height of 17 feet for a distance of 19 feet, then there is nothing to hinder defendants from building to the height of 17 feet on the whole lot for a distance of 19 feet from the old main building;

for, as we have seen in the decree in *Landell v. Hamilton*, the owner of lot 1,206, as to that lot and to that extent, has already waived the restriction.

(178 Pa. St. 291)

AYE et al. v. BROWN et al.

(Supreme Court of Pennsylvania. Nov. 9, 1896.)

APPEAL—QUESTIONS OF FACT—VERDICT.

Where a case depends on a question of fact which has been definitely settled by verdict, and there are no errors in the admission or rejection of evidence, nor in the charge of the court, the judgment will not be disturbed on appeal.

Appeal from court of common pleas, Armstrong county; Calvin Rayburn, Judge.

Assumpsit by Frederick Aye, Albert Aye, and R. T. Martin against R. L. Brown, J. R. Smith, William H. H. Piper, and G. W. Reese. From a judgment in favor of the plaintiffs, defendants appeal. Affirmed.

J. B. Neale, J. H. Painter, and W. D. Patton, for appellants. M. F. Leason, for appellees.

PER CURIAM. This case depended on a question of fact, which was properly submitted to the jury, and has been definitely settled by their verdict. There was no error in the admission or rejection of evidence, nor in the court's instructions to the jury. We find nothing in the record that requires discussion. Judgment affirmed.

(178 Pa. St. 303)

KUHN v. OGILVIE.

(Supreme Court of Pennsylvania. Nov. 9, 1896.)

MARRIED WOMEN—MORTGAGE FOR DEBT OF ANOTHER.

The power of a married woman to mortgage her estate for the debt of another was not restricted by Act June 8, 1893 (P. L. 344), providing that a married woman "may not become accommodation indorser, maker, guarantor or surety for another."

Appeal from court of common pleas, Cambria county.

Scire facias by Henry H. Kuhn, trustee, against Ada J. Ogilvie, on a mortgage. From a judgment in favor of plaintiff, defendant appealed. Affirmed.

R. E. Cresswell, for appellant. Donald E. Duffon, Henry H. Kuhn, M. D. Kittell, and Alvin Evans, for appellee.

MITCHELL, J. A mortgage being in many respects treated as a mere security, though in form a conveyance, it might well have been held that a mortgage by a married woman to secure her husband's debt is in substance a contract of suretyship, which she was not, at common law, capable of making. But, on the other hand, she has, under the law of Pennsylvania, the right of every owner to convey

her estate, subject to certain conditions as to mode, etc.; and, as she could sell or mortgage, and give the money immediately to her husband, there was no substantial reason why she should not subject her estate to a merely contingent liability for the same purpose. When the case of *Hoover v. Samaritan Soc.*, 4 Whart. 445, came before this court, the latter argument prevailed, and it was held that a married woman could use a power of appointment to execute a mortgage as collateral to her husband's bond for money loaned to him. This view has been steadfastly adhered to, and it is now the established rule that a married woman may mortgage her estate as security for her husband's debt, including future advances to him, or for the debt of any other person. *Haffey v. Carey*, 73 Pa. St. 431; *Hagenbuch v. Phillips*, 112 Pa. St. 284, 3 Atl. 788; *Bank v. Kuntz*, 175 Pa. St. 432, 34 Atl. 797.

This being settled, the only question left open in the present case is whether the rule has been changed by the act of June 8, 1893 (P. L. 344). It will be observed that the cases last cited were decided after the married woman's act of 1848, and it was held that the capacity of a married woman to mortgage her estate was not affected by that act, the purpose of which was to restrict the husband's power and that of his creditors, not that of the wife herself. The act of 1893 is a further step in the same direction, and, instead of contenting itself with restricting the power of the husband, it affirmatively enlarges the power of the wife. The first section provides for her control over her estate, including conveyance and mortgage of realty when her husband joins. The second section authorizes her to "make any contract in writing or otherwise, which is necessary, appropriate, convenient or advantageous to the exercise or enjoyment of the rights and powers granted by the foregoing section, but she may not become accommodation indorser, maker, guarantor or surety for another." It is upon this last clause that the argument for the appellant rests. It is clear, however, that this was a cautionary proviso against too liberal a construction of the very large powers conferred by the first part of the section,—a saving of the previously existing disability so far as it covered the particular class of contracts specified. The general intent of the act is so plainly in enlargement of her contractual capacity that nothing less than explicit negative words should be construed as narrowing powers admittedly possessed before the passage of the act. The case of *Patrick v. Smith*, 165 Pa. St. 526, 30 Atl. 1044, arose under the act of 1887, and there is nothing in it in conflict with this view of the act of 1893. A wife indorsed her husband's note, which plaintiffs discounted and passed to her credit, and she immediately drew a check to her husband's order for the whole amount. At maturity the husband paid part of the note, and the wife gave her note for the balance, which plaintiffs discount-

ed, and she again drew her check to her husband's order for the proceeds. On this note she was sued. It was held that her action throughout was for the accommodation of her husband, and that the statute could not be evaded by such a "transparent device," to which the plaintiffs were party. *Investment Co. v. Roop*, 132 Pa. St. 496, 19 Atl. 278, also arose under the act of 1887, and the strict construction given there probably had much influence in the passage of the act of 1893, which enlarged the grant of contractual capacity in express terms. Judgment affirmed.

(173 Pa. St. 397)

NUSS v. RAFSNYDER.

(Supreme Court of Pennsylvania. Nov. 11, 1896.)

INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

A workman who voluntarily goes to work on a scaffold which he knows to be unsafe cannot recover for injuries caused by its fall.

Appeal from court of common pleas, Philadelphia county; Wilson, Judge.

Trespass by Lewis C. Nuss against Edwin Rafsnyder to recover damages for personal injuries. From a judgment for plaintiff, defendant appeals. Reversed.

The defendant, Edwin Rafsnyder, was the owner of certain property on Montgomery avenue in March, 1894, and was erecting thereon a number of three-story houses. The American Cornice Company had a contract with the defendant to construct the metallic cornice on the buildings, the defendant agreeing to furnish the scaffolding necessary for the construction of said cornice. The plaintiff, L. C. Nuss, was employed by the American Cornice Company, and on the day of the accident was working upon a scaffold, putting up the cornice. The scaffold fell or broke, and the plaintiff's injuries were caused thereby.

Leoni Melick and Sheldon Potter, for appellant. Lincoln L. Eyre, for appellee.

McCOLLUM, J. It was the duty of the defendant to erect a suitable scaffold on which the plaintiff could properly and safely perform the work he was sent to do, and the first question to be considered in the case is whether this duty was discharged. The plaintiff submitted evidence tending to show that it was not, and that the neglect to discharge it was the cause of his fall. A part of this evidence was descriptive of the manner in which scaffolds were usually constructed for the performance of such work as the plaintiff was required to do, and was to the effect that scaffolds so constructed were safe. It was also to the effect that a scaffold constructed as the plaintiff and his witnesses testified the one in question was, was unsafe. This branch of the plaintiff's contention was answered by the defendant with evidence showing that the scaffold was constructed precisely as the plaintiff's experts testified it should

have been in order to make it secure and a proper place for the performance of the work. It will thus be seen that the parties agreed as to what should have been done by the defendant, and disagreed as to what was done by him. If, therefore, the plaintiff's evidence on this point was believed, it established the charge of negligence; and, if the defendant's evidence was credited, there should have been a verdict in his favor. It was not possible to reconcile the conflicting testimony. Assuming that the plaintiff's evidence was believed by the jury, and that the defendant's evidence was not, the next question for us to consider is whether the plaintiff was chargeable with contributory negligence. It seems to be conceded that his fall was attributable to the defective condition of the scaffold. He says that this condition was the result of the defendant's negligence in the construction of the scaffold, and the defendant says that it was caused by a change or alteration of the scaffold by Krimmel. Did the plaintiff go upon the scaffold on Monday with knowledge of its condition? It is contended by the defendant that, if he did so, he was chargeable with negligence fatal to his suit. In connection with this contention, we must consider the evidence affecting it. The plaintiff had been employed four summers in such work as he was engaged in at the time of his fall. He noticed on Saturday, and again on Monday, that there was no upright inside the window, and he knew that in this respect, at least, the construction of the scaffold differed from the construction of the scaffolds on which he had formerly worked. He also knew that the object of such an upright was to strengthen the scaffold, and hold down the heel of it to prevent it from tilting. His fellow workman and witness, Krimmel, testified that there was nothing inside the window to support the ledger boards, and no upright underneath them to the ground; that on Saturday, while he and the plaintiff were upon the scaffold, "it appeared loose," and "rocked up and down," and that on leaving it, at noon, he complained to the defendant of the condition of it. Broadbent, the plaintiff's witness, testified that the scaffold wobbled on Saturday when the plaintiff and Krimmel were upon it. The plaintiff also testified that he heard Krimmel complain to the defendant on Saturday that the scaffold was not "in the way it should be; that there was something loose; it might cause an accident," and the defendant replied that he was very sorry. This was all he heard the defendant say in regard to the complaint made by Krimmel, and the latter never claimed to him, until after his fall, that the defendant promised to repair the scaffold, or said that it should be attended to. It is plain, therefore, that the plaintiff was not induced to go upon the scaffold Monday morning by anything said to him or in his presence by the defendant or by Krimmel, his fellow workman. He testified distinctly that he noticed before going upon it on Monday

that there had been no change in its condition since he left it Saturday noon. He must therefore, upon his own showing, be regarded as having voluntarily resumed work upon it on Monday with knowledge that it was improperly constructed and unsafe. There was an obvious risk in working upon the scaffold, as the plaintiff described it. "When an employé, after having the opportunity of becoming acquainted with the risks of his situation, accepts them, he cannot complain if subsequently injured by such exposure. By contracting for the performance of hazardous duties, he assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of which causes he has had opportunity to ascertain." *Brossman v. Railroad Co.*, 113 Pa. St. 490, 6 Atl. 226; *Bemisch v. Roberts*, 143 Pa. St. 1, 21 Atl. 998. If it be conceded that the scaffold, by reason of the negligence of the defendant in constructing it, was insecure and dangerous, the negligence of the plaintiff in going upon it with the knowledge and under the circumstances disclosed by the case, as presented by him, must, on well-settled principles, defeat this action. We therefore sustain the third specification of error. Judgment reversed.

(178 Pa. St. 276)

MANROSS v. OIL CITY.

(Supreme Court of Pennsylvania. Nov. 9, 1896.)

ICY SIDEWALKS—CONTRIBUTORY NEGLIGENCE.

In a suit for injuries resulting from a fall caused by slipping on an icy sidewalk, the fact that plaintiff saw the ice, and attempted to cross, does not prove such contributory negligence as warrants the withdrawal of the case from the jury.

Appeal from court of common pleas, Venango county.

Trespass by Lizzie Manross against the city of Oil City for damages for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

Lizzie Manross, while walking along a street in Oil City, slipped on an accumulation of ice upon the sidewalk, and fell, thereby receiving the injuries for which this action was brought. It was a disputed question whether or not the presence of the ice on the sidewalk was due to the city's negligence. The defendant also contended that the fact that the plaintiff went upon the ice was such conclusive proof of contributory negligence that the case should be withdrawn from the jury. The case was submitted to the jury, and they brought in a verdict for plaintiff, on which judgment was entered.

Ash & Speer, for appellant. J. H. Osmer, A. R. Osmer, and N. F. Osmer, for appellee.

PER CURIAM. There appears to be nothing in this record that would have warranted the withdrawal of the case from the jury.

The testimony was quite sufficient to justify its submission to them on the questions of defendant's negligence and the alleged contributory negligence of the plaintiff; and that was accordingly done, with instructions which appear to be adequate and substantially correct. The result was a verdict impliedly finding that defendant's negligence was the proximate cause of plaintiff's injuries, and that she was not chargeable with any negligence which contributed thereto. Plaintiff's right to recover was thus established by competent evidence, and her damages were assessed. We find nothing in the specifications of error that would warrant a reversal of the judgment, nor do we think there is anything in either of them that requires special notice. Judgment affirmed.

(178 Pa. St. 373)

LETT v. KUNKLE et al.

(Supreme Court of Pennsylvania. Nov. 9, 1896.)

ACTION ON A NOTE—EVIDENCE—VERDICT.

In an action on a promissory note, where there is no competent evidence to impeach its validity, there is no question to submit to the jury, but a verdict should be directed for plaintiff.

Appeal from court of common pleas, Westmoreland county.

Assumpsit by John Lett against J. L. Kunkle and M. P. Wilson, partners under the firm name of Kunkle & Wilson, to recover the amount of a promissory note and interest. Plea, non assumpsit, with leave to give special matter in evidence. From a judgment in favor of plaintiff, defendants appealed. Affirmed.

The defendants were importers and dealers in horses at Irwin, Pa., and had made several trips to England for the purpose of buying breeding stock. In 1890 they both went to England, and were introduced to the plaintiff, from whom they obtained five horses of the Cleveland Bay strain. After the horses were safely on board ship, J. W. Lett, an agent of the plaintiff, produced the note in suit, written on English stamped paper, on which the words "Bill or Note" were printed in white, upon the red background of the stamp, and of which the following is a copy: "£405. I promise to pay John Lett on demand the sum of four hundred and five pounds sterling, for value received, at five per cent. Kunkle & Wilson, Irwin, Pennsylvania, U. S. A. Sept. 5, 1890." Defendants testified that they had bought the horses for sale on commission, and had signed the note under the impression that it was a receipt; that it had been brought into the hold of the ship on the eve of departure, while the horses were being stowed away; and that there was confusion and darkness at the time. There was also much evidence to prove the worthlessness of the horses. On the plaintiff's part it was testified that there was no agreement for sale on commission, and

J. W. Lett testified that he read the note aloud to the defendants, while they were seated together comfortably in the dining saloon of the vessel at mid-day, and that it was signed by Mr. Kunkle in Mr. Wilson's presence, with full understanding of its nature. There had been no warranty accompanying the transaction, and there was evidence that two of the horses had been awarded prizes in England, while other horses plaintiff had sold had taken prizes in America, including the World's Fair in Chicago.

The charge of the court was as follows: "This case has been quite extended in getting the facts before you, but when we come to apply those facts to the law governing them the law will not permit us to submit the case to you men as jurors, for the reason that there is, on the part of the plaintiff, a note offered, signed by the defendants; and the evidence given on the part of the defendants is not sufficient in law to transform or change that note into the instrument of writing which the defendants claim it was, there being but the evidence of the two defendants as against the evidence of the plaintiff's witnesses; and as against the note in suit, which is in writing, it is not sufficient in the law to overthrow the note. It is our duty, viewing the law that way, to direct you to find a verdict for the plaintiff for the amount of the note in suit, together with interest from the date of the note up until this date. It is not necessary for me to go over the facts before you, because the plaintiff, having offered in evidence this note, and it having been executed by the defendants, that is a prima facie case; and the evidence of the defendants is not sufficient in law to overthrow this note, and it will be your duty under the law to return a verdict for the amount of the note, four hundred and five pounds, with interest at five per cent. from the date of the note, which is September 5, 1890. Gentlemen of the jury, your verdict will be in favor of the plaintiff for \$2,429.25."

Laird & Keenan, Gregg & Potts, and Marchand, Gaither & Woods, for appellants. Charles G. Brown and Atkinson & Peoples, for appellee.

PER CURIAM. We find nothing in the testimony that would have warranted the learned trial judge in submitting this case to the jury. He was, therefore, right in directing them to find in favor of the plaintiff, and in charging them, in the language of plaintiff's fourth point, that "the note is the final contract of the parties in writing; and, there being no competent evidence to go to the jury to impeach the note, the verdict should be for the plaintiff for the amount of the note and interest." It follows that there was no error in refusing to affirm defendants' points recited in the third to ninth specifications, inclusive. There is nothing in the record that requires further notice. The assignments of error are all dismissed. Judgment affirmed.

(19 R. I. 651)

STATE v. WOODMANSEE.

(Supreme Court of Rhode Island. Dec. 1, 1896.)

HUSBAND AND WIFE—NEGLECT TO SUPPORT—RIGHT TO MAKE COMPLAINT.

1. Under Gen. Laws, c. 281, § 25, declaring that the agent of state charities and corrections, the chief of police, or overseer of the poor of any town, or such officer as the town council or city council may appoint, may make complaint for offenses described in section 24, providing for the punishment of persons failing to support their wives and for the punishment of beggars, drunkards, etc., the right to make complaint is not restricted to the officers named therein.

2. A complaint under Gen. Laws, c. 281, § 24, providing for the punishment of any husband who neglects to provide for the support of his wife, may be made by the wife.

Complaint against William A. Woodmansee for the neglect of the defendant to provide for the support of his wife. From a refusal to quash, defendant appeals. Affirmed.

James A. Williams, for complainant.
Clarke H. Johnson, for defendant.

MATTESON, O. J. This is a complaint under Gen. Laws R. I. c. 281, § 24, charging the respondent with neglect to provide according to his means for the support of his wife, Grace L. Woodmansee, by whom the complaint was made. Besides the offense charged in the warrant, section 24 enumerates, among others, the offenses of being idlers, sturdy beggars, vagrants, prostitutes, common drunkards, common cheats, common ralers and brawlers. Section 25 of the same chapter provides that the agent of state charities and corrections, the chief of police, or overseer of the poor of any town, or such officer as the town council of any town of the city council of any city may appoint for the purpose, may make complaint against any persons for any of the offenses mentioned in section 24. The respondent moves to quash the complaint, because, as he contends, the authority to make complaint for the offenses specified in section 24 is exclusive, and hence that no person other than the agent of state charities and corrections, chief of police, or overseer of the poor of a town, or such officer as the town council of a town or the city council of a city may appoint for the purpose, can make complaint. In support of these contentions he urges that we find in section 24 a collection of offenses made such by statute, the prosecution of which requires the exercise of great care and discretion to prevent injustice; and he therefore argues that the prosecution of these offenses cannot be safely left to neighbor against neighbor or wife against husband, and that the officers of the law are named as public prosecutors to exclude as far as possible a misuse of the prosecuting power as to these offenses by individuals for their own purposes. We are

not convinced by the argument that the authority to make complaint for the offenses in question was intended to be exclusive. We are of the opinion, rather, that the authority conferred on the officers of the law specified in section 25 was intended to be additional or supplementary to that of private complainants, to make sure that complaint should be made if the public interests should require it, even though no private person should be sufficiently interested to undertake the prosecution. We do not think that the offenses enumerated in section 24 are of such a serious and important character as to require the exercise of any greater care and discretion to prevent injustice than should be exercised in the prosecution of violations of criminal law generally, and we think that it may safely be left to the courts to see that the prosecuting power is not misused for private ends. The motion to quash is overruled, and the case is remitted to the common pleas division for further proceedings.

(19 R. I. 653)

WEBSTER et al. v. WIGGIN et al.

(Supreme Court of Rhode Island. Dec. 1, 1896.)

WILL—INTEREST ON LEGACIES.

A will devising legacies to various legatees upon certain conditions provided that the legatees should notify the executors of the acceptance of the legacies within six months after notification. Notice of a certain legacy was not sent to the legatee until more than a year after the death of the testator, but within the six months limited the legatees notified the executors of the acceptance of the conditions. *Held*, that the legatee was entitled to interest after the lapse of the year from testator's death, and not merely from the acceptance of the legacy.

Bill by Webster and others, executors of the will of Chase Wiggin, against Charles Wiggin and others to construe the will.

O. M. Van Slyck, for complainant. E. K. Parker, for Dartmouth College.

MATTESON, O. J. The question before us is from what time interest is to be allowed on the legacy given to Dartmouth College. The executors, though conceding the general rule to be that interest is to be allowed on legacies after the lapse of a year from the testator's death, contend that in the present case the time from which interest begins to run is fixed by the acceptance of the legacy in accordance with the provision, on page 9 of the printed copy of the will, which makes it the duty of the executors to notify the legatees of the nature, amount, and conditions of their legacies, and provides that, if either of the legatees shall decline to accept the legacy, or to notify the executors of his acceptance of the legacy, with its accompanying conditions, for the space of six months after having received notice from the executors, then the amount of such legacy shall be used for and applied to the payment of other lega-

cies, or shall revert to the estate. The executors contend that interest should be allowed only from the time of the acceptance of the legacy. Dartmouth College was not notified by the executors of the legacy to it till after the lapse of more than one year from the testator's death. It accepted the legacy, with its accompanying conditions, within the six months limited in the will after it was notified of the legacy. In *Tilton v. Society*, 60 N. H. 377, it was held that, when a legatee does not demand his legacy because he has no knowledge of it, it is the duty of the executor, being aware of the reason, to give him information of the bequest. In that case it was doubtful to which of two societies the legacy belonged, and it was held to be the duty of the executors in such a case to institute a legal proceeding without delay to obtain a judicial decision of the question; and it was further held that, though the legacy was not demanded in consequence of the executors' nonperformance of the duties mentioned, the legatee was, nevertheless, entitled to interest after the end of one year from the testator's death. Inasmuch as the will makes it the duty of the executors to notify the legatees of the nature, amount, and conditions of their legacies, and the failure of Dartmouth College to signify its acceptance of the legacy prior to the expiration of one year after the testator's death was due to the neglect of the executors to notify them, and not to any neglect of the legatee, we think that the case is within the decision in *Tilton v. Society*, *supra*, and that the legatee is entitled to interest from the expiration of one year after the testator's death. And see *Esmond v. Brown*, 18 R. I. 48, 25 Atl. 652.

(19 R. I. 650)

HORTON v. LICENSE COM'RS OF CENTRAL FALLS.

(Supreme Court of Rhode Island. Nov. 30, 1896.)

INTOXICATING LIQUORS—ELIGIBILITY FOR LICENSE.

Pub. Laws 1889, c. 816, § 24, declares that, in case of a violation of the Sunday law by a person holding a license, he shall forfeit his license, and be disqualified to receive another for five years. Petitioner, having been convicted of violating this act, appealed to the common pleas division of the supreme court, where, during the same session, the complaint was discontinued without a trial. *Held*, that petitioner was not disqualified to receive a license; his conviction having been vacated by the appeal, and no judgment being thereafter entered against him.

Appeal from decision of license commissioners.

Application by Lyman G. Horton to the license commissioners of Central Falls for a license to sell intoxicating liquors. From a refusal to grant it, petitioner appeals. Application approved.

James A. Williams, for petitioner. Benj. M. Bosworth, for respondent.

PER CURIAM. The applicant for a license to sell intoxicating liquors in this case was on November 13, 1895, a holder of a license for the sale of intoxicating liquors, and was convicted on that date, in the district court of the Eleventh judicial district, of the offense of selling liquor on Sunday, in violation of Pub. Laws R. I. 1889, c. 816, § 24, and was sentenced to pay a fine of \$20, the costs of prosecution, and to be imprisoned in the Providence county jail for 10 days. From this judgment and sentence he appealed to the common pleas division of this court. This appeal was duly filed in the common pleas division, at the September session, 1895, and subsequently, during the same session, discontinued.

Pub. Laws R. I. 1889, c. 816, § 24, after prohibiting the sale of liquors enumerated in the previous sections of the chapter on Sunday, except by pharmacists on physicians' prescriptions, and after providing for the punishment for violations of the section, further provides that, in case such violation be by a person holding a license for the sale of intoxicating liquors, the license shall be forfeited, and such person shall be disqualified to receive a license for the sale of intoxicating liquors for the period of five years after his conviction. The question is whether, on the facts stated above, the applicant is disqualified by section 24 to receive a license for the sale of intoxicating liquors. We think the question must receive a negative answer, because there is no judgment of conviction remaining against the applicant. His conviction in the district court was vacated by the appeal to the common pleas division, and, the complaint having been subsequently discontinued in the common pleas division without a trial, no judgment of conviction was ever entered upon it. An order may be entered approving and remitting the record to the license commissioners.

(19 R. I. 648)

MATTESON et al. v. WHALEY et al.

(Supreme Court of Rhode Island. Nov. 24, 1896.)

BILL IN EQUITY—MULTIFARIOUSNESS—PROCESS—PARTIES—PLEADINGS—AMENDMENTS.

1. A bill to prevent continuing trespasses on land claimed by complainants is not multifarious because it includes a prayer that the court will ascertain and fix the exact boundaries of the highway.

2. Amendments to a bill to prevent continuing trespasses on complainants' land, and to have the court ascertain and fix the boundaries of the highway, provided for making the town a party; but the subpoena was directed, among others, to the town treasurer, on whom it was served, the town not being named in the process. *Held*, that the town did not become a party.

3. A town council is a continuing body, and hence it is not necessary to bring into a suit against it members newly elected during the pendency of the action.

4. Under a rule of court providing that agreements of parties or attorneys touching the busi-

ness of the court shall be in writing unless orally made or assented to in the presence of the court, it will be presumed that, where amendments of a bill purport to have been allowed by consent, the court acted upon consent given in its presence.

Bill by Oliver R. Matteson and others against Thomas G. Whaley and others. Defendants demurred to the bill. Demurrers overruled.

Dexter B. Potter, for complainants. E. K. Parker, for respondents.

PER OURIAM. The purpose of the bill is to prevent continuing trespasses upon land which the complainants claim as theirs. The prayer that the court will ascertain, fix, and establish the exact lines and boundaries of the highway is not a separate and distinct matter since the repeal of the statute (Pub. Laws R. I. c. 453, of April 1, 1875), but is incidental to the equitable relief sought by the bill. We do not think that the bill is multifarious.

On looking into the papers, we find that, though the amendments to the bill provided for making the town of Coventry a party, the subpoena issued after the amendments was directed, among others, to the town treasurer of Coventry, on whom it was served. It was doubtless intended thereby to make the town a party to the suit; but, as the town was not named in the process, the service failed in its purpose, and the town has consequently never been made a party to the suit. No relief being sought against the town, and the town having no power to act except through the town council, we think it should not be made a party.

The town council is a continuing body, and for this reason we do not think that it is necessary to bring into the suit, from time to time, members newly elected.

The rule of the court provides that agreements of parties or attorneys touching the business of the court shall be in writing, unless orally made or assented to in the presence of the court, or that they will be considered of no validity. The amendments of the bill were allowed by the court, and, as they purport to have been allowed by consent, we are bound to assume that the court acted upon consent given in its presence. The motion to strike out the amendments was heard in this county, without the record of the court that the amendments had been allowed by the court sitting in Kent county. The entry upon the minute book of "Motion granted" was simply an intimation by the court that the order might be entered striking out the amendments. No such order was made, for the reason that the matter was held open to ascertain the state of the record in Kent county. On learning that the amendments had there been allowed by the court, counsel were notified of the fact, and for that reason no order was entered. The amendments therefore stand as a part of the bill. Demurrers overruled.

MYERS et al. v. COMMISSIONERS OF BALTIMORE COUNTY et al.

(Court of Appeals of Maryland. Nov. 20, 1896.)

Motion for reargument. Overruled.
For original opinion, see 35 Atl. 144.

PAGE, J. We have carefully considered the motion for reargument in this case, but do not think there was such notice as is required by the statute. In *County Com'rs Allegany Co. v. New York Min. Co.*, 76 Md. 556, 25 Atl. 865, this court said: "Until the property owner was duly notified, and given an opportunity to come in and answer as to the valuation of the property proposed to be affected, who failed to come in after receiving notice, the commissioners have no authority or power to increase the valuation of property already valued and assessed, or to add thereto other property, not valued and returned to them by the proper assessors or collectors, as provided in the statute." Without discussing the matter further, we are of opinion this is conclusive of the case upon this point. The motion for reargument is therefore overruled.

(84 Md. 341)

SMITH v. PATTISON.

(Court of Appeals of Maryland. Dec. 8, 1896.)

FRAUDULENT CONVEYANCE—INSOLVENT SELLER—
BONA FIDE PURCHASER.

S. was a country merchant at the villages of A. and B., having a stock at each place. His father was carrying on a similar business at C., the villages being within a few miles of each other. On December 27, 1895, S., his father, and a brother, L., met at night in the father's store, and S. sold to his father the goods at A. for \$5,713.85. The father borrowed from L. \$2,300, which, with a check for \$300 and his notes for the balance, he delivered to S., who thereupon paid L. \$2,000 which he owed him. January 7, 1896, L. purchased from S. the notes made by the father, aggregating \$3,113.85, paying him therefor \$2,000. On January 15th, S. applied for the benefit of the insolvent laws, and returned in his schedule the stock of goods at B., worth about \$700, and a few book accounts, but no money or other property. The list of his debts aggregated \$6,000, and on February 1st the permanent trustee filed a bill to set aside the sale to the father, alleging that it was in fraud of creditors. Held that, within the rule that, when a purchaser has information sufficient to put him on inquiry, he is considered as having notice, the father was not a bona fide purchaser.

Appeal from circuit court, Dorchester county, in equity.

Bill by John R. Pattison, permanent trustee for James L. Smith, insolvent, against James H. Smith, to set aside a sale of merchandise, which had been made to him by the insolvent, as in fraud of creditors. From a decree in favor of complainant, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, ROBERTS, and BOYD, JJ.

Alonzo L. Miles, for appellant. Sewell T. Milbourne, for appellee.

BRYAN, J. James L. Smith on the 15th day of January, 1896, made application for the benefit of the insolvent laws. On the 1st day of February following John R. Pattison, his permanent trustee, filed a bill in equity against James H. Smith for the purpose of setting aside a sale of goods and merchandise which had been made to him by the insolvent on the 27th day of December, 1895. It was alleged in the bill of complaint that the sale was made with intent to hinder, delay, and defraud the creditors of the vendor, and that the vendee had knowledge of the vendor's fraudulent intent, and that he aided and assisted him in carrying it into effect. The defendant in his answer denied these allegations. The answer, although under oath, is not to be taken as evidence in favor of the defendant. Code, art. 16, § 147. James L. Smith was engaged in business as a country merchant at East New Market and at Secretary, two villages in Dorchester county, having a stock of goods at each place. James H. Smith was carrying on a similar business at Vienna, another village in the same county. These villages are within a few miles of each other. On the 27th of December, 1895, James L. Smith, James H. Smith, his father, and Lewis L. Smith, his brother, met at night in the father's storehouse in Vienna, and then and there James, the son, sold to his father his stock of goods at East New Market. The price named in the sale was \$5,713.85. James, the father, borrowed at the same time from his son Lewis \$2,800, and paid the money thus borrowed to his son James, and gave him his check for \$300, and at the same time delivered to him his five promissory notes for the remainder of the purchase money. James, the son, then and there paid to his brother Lewis \$2,000, which he owed him. Afterwards James, the father, executed a mortgage to Lewis to secure the payment of the money borrowed from him. On the 1st of January Lewis purchased from his father the Vienna stock of goods at the price of \$2,000, and afterwards credited this amount on the mortgage. On the 7th of January Lewis purchased from James, the son, the five notes given by the father as part of the price of the New Market goods, and paid him \$2,000 for them; said notes aggregating \$3,113.85. On the 15th of January, James, the son, applied for the benefit of the insolvent laws, and returned in his schedule the stock of goods at Secretary, afterwards appraised at about \$700, a few book accounts, but no money or other property. The list of debts showed that he owed about \$8,000.

We do not find it necessary to discuss in detail the evidence in this case. We have, however, given it a very careful examination, and are fully satisfied that James L. Smith made the sale of the stock of goods to his father for the purpose of defrauding

his creditors. It was part of a scheme, deliberately planned, which was to receive its final consummation by his release from his debts through proceedings in insolvency. Code, art. 47, § 8, makes sales of this kind void, and vests the property sold in the trustee in insolvency. By a long course of decisions it has been settled that the fraud of a vendor does not vitiate a sale unless the vendee has participated in the fraudulent intent. *Cooke v. Cooke*, 43 Md. 533; *Fuller v. Brewster*, 53 Md. 359; *Totten v. Brady*, 54 Md. 170; and many other cases. Where, however, the vendor has been declared an insolvent debtor on his own application within four months after the sale, or under proceedings instituted against him within the same time by his creditors, a rule of practice is established by section 24 of article 47 of the Code, as amended by Act 1896, c. 446. It enacts that, if any deed, assignment, transfer, or delivery, etc., of goods, chattels, etc., be made by any person when insolvent, or in contemplation of insolvency, "the same shall be prima facie intended to hinder, delay and defraud the creditors of the person by whom the same is made, and the burthen of proof shall rest upon him and the grantee to explain the same and show the bona fides thereof." It was always required that deeds, assignments, and transfers should be made bona fide. It was not sufficient that they should be made on good or valuable consideration. But the party attacking the deed was required to establish by proof that the transaction was not bona fide. This twenty-fourth section reverses the rule of evidence in the cases embraced by it, and changes the burden of proof by throwing it on the parties to the deed or transfer. It becomes necessary, then, to inquire whether this burden has been sustained. Without recapitulating the items of evidence, we will state our conclusions. It is very clear to us that Smith, the father, had ample reason, from the facts within his knowledge, to believe that his son was perpetrating a fraud on his creditors, and that, if his plans were successful, he would place the stock of goods and their proceeds beyond their reach. This court has frequently given its opinion on such a state of facts. In *Baynard v. Norris*, 5 Gill, 483, it was said: "In any purchase, if there be circumstances which, in the exercise of common reason and prudence, ought to put a man upon particular inquiry, he will be presumed to have made that inquiry, and will be charged with notice of every fact which that inquiry would give him." And again: "A purchaser, whenever he has sufficient information to put him on inquiry, in equity is considered as having notice; and in such case he will not be deemed a bona fide purchaser." We may also refer to *Green v. Early*, 39 Md. 229; *Abrams v. Sheehan*, 40 Md. 446; and *Higgins v. Lodge*, 68 Md. 235, 11 Atl. 846. Upon this principle, we must hold that Smith, the father, was not a bona fide purchaser.

The court below set aside the sale of the stock of goods, and we affirm its decision. Decree affirmed, with costs.

(84 Md. 282.)

STORR v. JAMES.

(Court of Appeals of Maryland. Nov. 19, 1896.)

TRIAL — TENTATIVE ADMISSION OF EVIDENCE — TRESPASS — PLEADING AND PROOF — ADVERSE POSSESSION — ERECTION OF FENCE BY ADVERSE PARTY WITHIN HIS BOUNDARIES — REFUSAL OF INSTRUCTIONS.

1. In trespass it appeared that the adjoining lands of plaintiff and defendant originally formed one tract, which belonged to S.; that, on his decease, partition was had, in which a lot embracing the land in dispute was set apart to one H., in right of J., his wife, who was one of the heirs; and that, as the land so allotted exceeded J.'s share, H. gave his notes for the amount of the excess. Under a plea of *liberum tenementum*, defendant offered in evidence the records of an equity action brought by the heirs of S. (except J.) against J., as administratrix of H., and the heirs of H., to enforce a lien for owelty of partition, in which proceeding a sale was decreed; and, in connection with such evidence, defendant offered a deed from the trustee who made the sale to defendant, as substituted purchaser. To all this evidence, plaintiff objected on the ground that among the papers in said cause was the will of H., by which the land claimed by defendant was devised to J. for life, and that as the latter was not a party to the equity suit, except in her representative capacity, her life estate did not pass to defendant. *Held*, that such objection, if available, could be invoked at the close of the case, by way of instruction or motion to strike, if it then appeared that there was an outstanding estate in J., but the fact that such evidence, taken alone, was not sufficient to support defendant's plea, was no ground for its exclusion at the time it was offered.

2. In trespass *quare clausum fregit*, evidence of title and right of possession in defendant may be given under a plea of not guilty, without pleading *liberum tenementum*; the removal of or injury to personal property not being involved.

3. Where the land in dispute is within the boundaries of defendant's deed, a fence erected by him within his lines, and for his own purposes, is not an inclosure of plaintiff, an adjoining owner, and hence affords no evidence of adverse possession in the latter.

4. It is not error to refuse instructions which reiterate in different language principles of law already submitted.

Appeal from circuit court, Dorchester county.

Trespass *quare clausum fregit* by William W. Storr against Richard James. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, PAGE, BOYD, FOWLER, and ROBERTS, JJ.

Clement Sullivan, for appellant. Alonzo L. Miles and Sewell T. Milbourne, for appellee.

McSHERRY, C. J. This is an action of trespass *quare clausum fregit*. To the declaration, which contains six counts, the defendant pleaded that he did not commit the

wrong alleged; second, *liberum tenementum*; and, third, that the land mentioned in the narr. was not, at the time the alleged trespasses were committed, the land of the plaintiff. He then took defense on warrant. Issue was joined on the first and third pleas, and, by way of replication to the second plea, the plaintiff new-assigned. To the replications new-assigning, the defendant rejoined that he did not commit the wrong alleged. The record contains five bills of exception, three of which embody rulings of the circuit court for Dorchester county on questions respecting the admissibility of evidence, and two bring up for review the action of the lower court upon the several prayers for instructions to the jury. The plaintiff offered in evidence sundry conveyances to establish his title to the locus in quo, and adduced testimony relative to the alleged trespasses, and as to his continuous and adverse holding, and then closed his case, whereupon the defendant, to show that the plaintiff had no title to the locus in quo, offered in evidence several deeds of conveyance, and the record of proceedings in an equity case between the heirs at law of Silas Fleming and the administratrix and heirs at law of one Alexander H. Hurley. To the admissibility of these deeds and equity proceedings the plaintiff objected, on grounds which will be stated in a moment; but the court overruled the objection, and permitted the evidence to go to the jury. This ruling forms the ground of the first exception.

The lands owned by both the plaintiff and defendant are adjoining parcels, and at one time formed one tract, which belonged to Silas Fleming. Upon the death of Fleming, proceedings were had, under the act to direct descents, to lay off and partition his real estate. In this partition a lot designated "No. 2," and embracing all the land now in controversy, was allotted to Alexander H. Hurley, in right of his wife, Sarah Jane Hurley, who was one of the heirs of Silas Fleming. The value of the land thus allotted exceeded the share to which Sarah Jane Hurley was entitled, and for the amount of this excess Alexander H. Hurley gave his notes. Subsequently Hurley and his wife sold a portion of this property to Thomas Storr, who died before receiving a deed therefor. After the death of Thomas Storr, Hurley and wife conveyed the portion so sold to Thomas Storr to Storr's two sons, John H. and William W. Storr. Later on, John H. Storr and wife conveyed John H. Storr's undivided half interest to the plaintiff, William W. Storr. In 1876 the heirs of Fleming, other than Mrs. Hurley, filed a bill in equity against Storr and others to enforce the lien of the notes given by Hurley for the above-mentioned owelty of partition, and the land so conveyed to William W. Storr was sold under the decree passed in the said equity proceedings, and at the sale was purchased by the plaintiff. The sale was ratified, and the trustee

conveyed the land to the purchaser; and, under an order of the court, one of the commissioners who had made the partition of Fleming's real estate also executed a deed to the purchaser. After producing evidence tending to prove that the plaintiff had held the land in controversy, under a claim of ownership, for more than 20 years, the plaintiff closed his case. Thereupon the defendant offered in evidence the record of proceedings in an equity case instituted in 1869 by the heirs of Silas Fleming (other than Sarah Jane Hurley) against Sarah Jane Hurley, administratrix of Alexander H. Hurley, and the heirs at law of Alexander H. Hurley, to enforce the lien of the owelty of partition notes against a part of lot No. 2 not embraced in the conveyance from Hurley and wife to Storr. This record showed that a decree for a sale had been passed; that a sale had been made to one Robert W. Hurley, in whose place and stead Richard James, the defendant in this suit, had been substituted as purchaser. At the same time a deed to James from the trustee who made the sale was also offered. To the admissibility of this record and deed the plaintiff objected on three grounds, namely: First, because among said equity papers a last will and testament of Alexander H. Hurley appeared, under and by which the land claimed by the defendant was devised to Sarah Jane Hurley (now living) during her natural life, which life estate did not pass by the decree and sale to the defendant, the substituted purchaser, for the reason that Sarah J. Hurley was not a party to the equity cause, other than formally, in her representative capacity as administratrix of her husband; second, because no commissioner's deed was ever obtained by the defendant, or those under whom he claims, to vest in him a legal title derived from Silas Fleming; third, because, under the pleadings, a new assignment having been made, and the defendant having only interposed the plea of not guilty thereto, he was not entitled to introduce any evidence under his defense upon warrant and his plea of *liberum tenementum*. The court overruled these objections and admitted the evidence. This ruling is the one questioned in the first exception.

With respect to the first and second reasons assigned against the admissibility of the proposed evidence, it is only necessary to say that, if available at all, they ought to have been invoked at the close of the case, by way of an instruction to the jury, or upon a motion to strike out. As each party has the right to offer his evidence in the order he may see fit, and as he cannot present the whole of it at one and the same time, it frequently happens that some portion of it, taken by itself, and altogether detached from the rest, is insufficient to support the issue which it may be adduced to establish. But this circumstance, if the evidence be relevant, and if there be no other reason for its exclusion, is no

ground for its rejection. It may amount to only a link in a chain of evidence, and be of no value standing alone; its probative force depending on other circumstances, to be subsequently adduced. Thus, in the first of the objections cited, the equity record, together with the deed to the defendant, was some evidence tending to show title in the defendant, and the fact that a complete and perfect title in him was not made out thereby was no reason for excluding them. If, when the whole evidence was in, it appeared that there was an outstanding life estate in Sarah Jane Hurley, it would have been competent to the plaintiff to ask an instruction to the effect that the defendant had failed to show a good legal title in himself, by reason of a subsisting life estate in Sarah Jane Hurley. The agreement found in the record, to the effect that the allegations of fact set forth in the objections heretofore quoted were to be treated as proved, we understand to be a substitute for the equity record. Its only office is to dispense with the necessity of inserting the equity proceedings in the record of this case. It may be further remarked, as to the second objection, that no deed from the commissioners appointed to make partition of Silas Fleming's land was necessary to perfect the title of the defendant. The defendant became the substituted purchaser at a sale made in a proceeding wherein the heirs of Silas Fleming, other than Sarah J. Hurley, were plaintiffs, and Sarah J. Hurley, as administratrix of Alexander H. Hurley, was, with others, defendant; and under that decree all the interest and estate of all the parties to the suit were sold, and the deed made by the trustee conveyed that interest and estate to the defendant.

With respect to the third ground of objection to the admissibility of the record evidence offered by the defendant, we see no difficulty. That objection is founded on the assumption that the defendant was not at liberty to show title and the right of possession in himself, unless he had pleaded *liberum tenementum*, and that inasmuch as, by the new assignment, all the former pleadings, including the defendant's plea of *liberum tenementum*, were eliminated from the case, there was no issue under which the evidence was admissible. It is undoubtedly true that the new assignment was, in legal effect, a new declaration, in which damages were claimed for trespasses other than those which the plea of *liberum tenementum* admitted and justified; and it is also true that it became necessary for the defendant to make rejoinder, because his former pleadings were no answers to the replications making new assignments, or setting up other and different trespasses than those justified by the plea. He was at liberty to rely, by appropriate rejoinders, upon precisely the same defenses that he could have interposed to the original declaration; and if, under the original plea of not guilty, it would have been competent to offer *liberum tenementum* in evi-

dence, then, equally, under the rejoinder of not guilty to the replications new-assigning, he was at liberty to offer the same evidence. Now, it is well settled that in this action, when there is no necessity to justify the removal of personal property from the premises in dispute, the defendant may, under the plea of not guilty, show title and the right of immediate possession in himself to the locus in quo, as a complete answer to the plaintiff's claim; for, if the plaintiff have neither title nor a right of possession, he cannot maintain the action. In other words, when the removal of or injury to personal property is not involved, *liberum tenementum* may be given in evidence under the plea of not guilty, or did not commit the wrong alleged. 1 Chit. Pl. 505; *Manning v. Brown*, 47 Md. 508; *Poe*, Pl. & Prac. 544. It is obvious, then, that the evidence was admissible. Its admissibility, and not its weight, is the sole question which the exception brings up; and, as there was no error committed in admitting it, the ruling set forth in the first exception is free from objection.

The second and third exceptions were taken to rulings which admitted certain evidence that the plaintiff insists was not admissible because *liberum tenementum* was not rejoined to the replications making new assignments. What has been said on this subject in considering the first exception disposes of these two also.

The fourth and fifth relate to the prayers. The plaintiff presented eight, and the defendant two, prayers. All of the plaintiff's, with the exception of the second, third, and seventh, were granted. The defendant's first was conceded, and his second was granted. The plaintiff, in the fourth bill of exception, complains of the rejection of his second, third, and seventh prayers; and, in the fifth bill of exceptions, he insists that there was error in granting the defendant's second prayer. The plaintiff's second and third prayers were properly refused, because they were both fully covered by his first, which was granted; and his seventh, being, in substance and effect, the same as his fifth, was for that reason rightly refused. Where the whole law of a case has been passed upon, and has been fairly submitted to the jury in the instructions actually given, a refusal to grant other prayers which reiterate the same principles, though couched in different words, is not erroneous. Instructions are intended to give to the jury a clear and concise statement of the law governing the case. The duplication of instructions has a tendency to mislead or confuse, rather than to guide, the jury, and thus to frustrate the very object intended to be accomplished by their being given at all.

There is no error in the fifth exception. The instruction complained of told the jury that if they found the land in dispute was within the lines of the defendant's deeds, and that if the defendant, for his own purposes, erected a fence within his lines, then such

fence "is not an inclosure of the plaintiff, and does not afford evidence of adverse possession in the plaintiff by inclosure." This is self-evident. An actual inclosure, though not necessary to prove possession (Code, art. 75, § 76), is, when erected by a party relying on a title by prescription, some evidence tending to show the character of his claim. It is his own affirmative act. It is given effect as evidence merely because it is his, and no one else's act. It defines the extent of his claim, and marks the outlines of his actual holdings. But where some one else, under whom the plaintiff does not claim, and with whom the plaintiff is not in privity of estate, erects a fence, "for his own purposes," within his own lines, obviously such a fence is, of itself, not an inclosure of the plaintiff, and its construction is referable to no act or claim of the plaintiff at all, and consequently cannot be relied on by him to show an adverse possession in himself by inclosure. This is necessarily so when the hypothesis of the prayer sets forth, as in this case, that the fence was erected by the defendant within his own lines "for his own purposes." If the jury found that the fence was erected by the defendant for his own purposes, then they could not conclude that it was an inclosure of the plaintiff, or that it afforded evidence of possession by the plaintiff by inclosure. *Doolittle v. Tice*, 41 Barb. 181. Finding no errors in the rulings excepted to, the judgment appealed from will be affirmed. Judgment affirmed, with costs in this court and in the court below.

(84 Md. 195)

HOOPER, Mayor, v. CREAGER.¹

(Court of Appeals of Maryland. Nov. 19, 1896.)

MUNICIPAL OFFICERS — MODE OF APPOINTMENT — STATUTES — CONSTRUCTION.

1. Act 1817, c. 148, § 2, provided that the mayor of Baltimore city should nominate, and, by and with the consent of the council, should appoint, all officers, etc. Act 1823, c. 114, passed as a supplement to the former act, authorized the mayor and council to pass ordinances "regulating" the manner of appointing persons to office, "which they are now or may hereafter be authorized by law to appoint." These two acts were thereafter combined and incorporated into Pub. Loc. Laws, art. 4, as section 30, though the first-named act was placed second in order in said section. *Held*, that Act 1823 did not take away the power of the mayor and council under Act 1817 to jointly make appointments, but merely authorized the adoption of ordinances regulating the mode of exercising such joint power; and hence an ordinance providing for the election of certain officers by joint convention of the two branches of the council, without any participation therein by the mayor, is *ultra vires* and void.

2. Where two acts passed at different times are combined and incorporated into one section of the Code, the fact that the act first in point of time is placed second in order cannot alter the construction which said acts as originally passed obviously bear.

Russum, J., dissenting.

Appeal from superior court of Baltimore city.

¹ For dissenting opinion, see 35 Atl. 1103.

Mandamus by Noble H. Creager to compel Alcaeus Hooper, mayor of Baltimore city, to administer to plaintiff the oath of office as city tax collector. From an order granting the writ, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, RUSSUM, PAGE, and FOWLER, JJ.

Thomas G. Hayes and Thomas I. Elliott, for appellant. Wm. S. Bryan, Jr., H. Stockbridge, Jr., and D. L. Brintin, for appellee.

McSHERRY, C. J. It is not necessary to go into any extended statement of the facts presented by this record, nor to discuss the many interesting and ably-argued questions which its pages set forth. With all, except one, of the positions taken by the eminent and distinguished judge who heard this case in the court below, we, in the main, agree, though we are not to be understood as adopting them; but upon one vital inquiry we reach a different conclusion. With the policy of the municipal legislation whose validity is assailed in these proceedings this court has no concern. If valid, its wisdom is not for us to question. If invalid, it becomes our plain and imperative duty to declare it so. The ordinance of the mayor and city council which is attacked on the pending appeal was passed over the veto of the mayor, and, by its provisions, the city tax collector was made elective by the joint convention of the two branches of the city council. Before the adoption of the ordinance, that officer and others had been nominated by the mayor, and, with the advice and consent of a joint convention of the two branches, appointed. Whether this radical change in the method of appointment of the city tax collector and of numerous other officers, whereby the mayor was deprived of all participation in their selection, is ultra vires or not, is the predominant and controlling question in the case.

The power to pass ordinances regulating the manner of making appointments to office is a power to regulate the method by which appointments shall be made by the depository of the power charged with the duty to make them, but is not a power to delegate to some one else, or to a fraction of that depository, the authority to do the thing which the depository itself alone was commissioned to do. The limits and the scope of the power to make appointments of municipal officers were originally defined in the legislation that has been compressed in section 30, art. 4, Code Pub. Loc. Laws. This section is not new legislation, creating and demarking, for the first time, the power; but it comprises portions of two distinct acts of assembly passed with an interval of more than 11 years between them—the one being supplementary to the other. But, when they were codified, the last in point of enactment, which, when enacted, was

simply a supplement to the former, was placed first in section 30; and the first in date of passage, and which, when passed, created the power, was placed second in order in the body of the section. This circumstance, however, cannot alter the construction which ought to be placed on section 30, as found in the Code, or make it mean precisely the reverse of the meaning which its component parts as originally enacted obviously bear.

As the fundamental question is whether the ordinance that strips the mayor of Baltimore city of all participation in making appointments of municipal officers is a valid exercise of the powers, or of any of the powers, given by the charter of the city, it will not be amiss, first, to quote the section of the Local Laws under which it is claimed the power to pass the ordinance does exist, and then to transcribe the two acts of assembly which are embodied in and make up that section. Section 30, art. 4, Pub. Loc. Laws, reads as follows: "They may pass ordinances regulating the manner of appointing persons to office under the corporation, which they are or may be authorized by law to appoint; but, unless such ordinances be passed, the mayor shall nominate, and, by and with the advice and consent of a convention of the two branches of the city council, shall appoint, all officers under the corporation, except," etc. Section 2, c. 148, Acts 1817, provides: "And the mayor of the city shall nominate, and, by and with the advice and consent of a convention of the two branches of the city council, shall appoint, all officers under the corporation, except," etc. And Act 1828, c. 114, declares: "That the mayor and city council may pass ordinances regulating the manner of appointing persons to office under said corporation, which they are now or may hereafter be authorized by law to appoint; anything, in the second section of the act to which this is a supplement, to the contrary notwithstanding." Now, it must be conceded, because it is too plain for denial, that if the act of 1817 had been incorporated in the Code without qualification of any kind, and just as the act stood on the day of its adoption, more than three-quarters of a century ago, appointments to city offices could only be made by the mayor with the advice and consent of a convention of the two branches of the city council. Under that act, the mayor and the city council were the depository of the power to make appointments. To those two constituent, but separate and independent, departments of the city government, was the power of making appointments confined. But more than this, not only was a power thus conferred, but the method of its exercise was prescribed. The mayor nominated, and, by and with the advice and consent of the convention, appointed. This was not a power given to the municipality as a mere corporate entity, to be

exercised like other corporate powers in the usual and ordinary way; but, having been given to the mayor and to the city council distributively, the manner of its exercise by them was specially and distinctively declared. The execution of the power was placed in the mayor and a convention of the two branches, but not in the branches separately. The method or manner of its exercise was therefore specifically pointed out. Obviously, so long as that provision remained unchanged by the legislature, no other or different method of exercising the power to make appointments could have been resorted to by the municipality, and neither the mayor nor the city council could have invaded the distinctive province of each other. What, then, was the effect of the act of 1828? Did it change the depository of power, or merely authorize the same depository to exert the power of appointment in some other manner which the municipality might by ordinance prescribe?

This act of 1828 was passed at the instance and upon the request of the mayor and city council. A resolution requesting the delegates from the city in the legislature to procure an amendment to the charter empowering the corporation to pass ordinances regulating the manner of appointing officers was presented to the general assembly; and, conformably to that request, the act, a draft of which accompanied the resolution, was adopted. The act of 1828 purported to be a supplement to the act of 1817, and provided, as stated before, that the mayor and city council might pass ordinances regulating the manner of making appointments to offices which "they" (that is, the mayor and city council) are or may hereafter be by law authorized to make, "anything, in the second section of the act to which this is a supplement, to the contrary notwithstanding." This act gives a power, not to make appointments, but to regulate the manner of making such appointments, as "they" (the mayor and the city council) are, or may hereafter be, by law, authorized to make; and it does this notwithstanding there is "anything" to the contrary as to their power to regulate the manner of appointments contained in the act of 1817; but it neither in terms nor by implication interferes with the depository of power to make appointments. On the contrary, the legislature, recognizing that both the mayor and the city council, as separate, co-ordinate branches of the municipal government, had been clothed with the power to make appointments of municipal officers, was, in the act of 1828, careful to provide only a subsidiary power, by which the manner of making appointments might be regulated as to such officers as they (the mayor and city council, not the municipality, but the mayor and the city council as separate branches of the municipality) then had, or might thereafter have, the power to appoint. In effect, the act reaffirms the existence of the power of the

mayor and of the city council, and then gives to the municipality, in its corporate capacity, the further power to pass ordinances,—whether with the approval of the mayor or over his veto is wholly immaterial,—whereby the manner of making appointments by the mayor and the city council, each having a voice, might be regulated. It was manifestly not the design of the act of 1828 to put it in the power of the city council to strip the mayor of all participation in making appointments, any more than it was contemplated that, under the power to regulate the manner of appointments, both the mayor and city council could, by ordinance, divest themselves of that power altogether, and delegate it to a total stranger. The language of the act of 1828 is explicit. Bearing in mind that, when that act was passed, the mayor nominated, and a convention of the two branches assented to all appointments, and that, therefore, both the mayor and the city council, as distinct entities, were vested with the power of appointment, it seems obvious that, when the act of 1828 gave authority for the adoption of ordinances intended to regulate the manner of making appointments which they (the mayor and the city council) were confessedly then empowered by law to make, it did not take away the joint power antecedently possessed to appoint, but simply provided that some different method of exercising that same joint power might be resorted to. But, if this were not abundantly clear, it is certainly made so when the thing authorized by the act to be done is considered. Now, the thing authorized by the act to be done was to pass ordinances regulating the manner of appointing persons to office; and it comes to this inquiry: Does the authority to regulate the manner of doing a thing, of itself, take away the antecedent power to do the thing? The power to do a thing must precede its exercise. It may be given coupled with a defined method of execution, or it may be given simply and nakedly without an accompanying modal regulation. But if afterwards, in the one instance, the defined method of execution be altered, or, in the other, a modal regulation be added, yet in neither event would the power be thereby necessarily destroyed; the power to do the thing would remain, though the manner of doing it might be changed. To briefly restate the proposition: The act of 1817 did two things: It first gave to the mayor and to the city council jointly the power to make appointments; secondly, it prescribed the mode or manner in which that power should be exercised. The act of 1828 did but one thing. It did not disturb the power to make appointments, but it did confer authority to prescribe, by ordinance, a new or different manner for the exercise of the power, the power still residing where the act of 1817 had reposed it.

Now, then, the power of the mayor and the city council to jointly make the appointments under the act of 1817 was not destroyed by

the act of 1828, unless the authority to regulate the manner of exercising the power took away the power itself. It could only do this upon the assumption that the power to regulate means the power to destroy. That such is not the meaning of the term in Maryland has been determined more than once. In *State v. Mott*, 61 Md. 297, an ordinance of the city of Baltimore, whereby the burning of lime within the city limits was prohibited, was sought to be upheld under that provision of the charter which gave the city authority to "regulate the places for manufacturing soap and candles, etc., and where every other offensive trade is carried on." This court said: "The power delegated is simply to regulate the places where they are carried on, and not to forbid their being carried on, or to destroy them altogether." And in *Whitman v. State*, 80 Md. 410, 31 Atl. 325, it was held that a power to regulate the liquor traffic was not a power to destroy 'he trade. See, also, *Brown v. O'Connell*, 36 Conn. 432.

As illustrating the correctness of the construction placed on the acts of 1817 and 1828 in this opinion, the case of *Com. v. Crogan* (Pa.) 26 Atl. 697, may be cited. Information of John M. Garman, district attorney of Luzerne county, was filed, giving the court to understand that Michael Crogan had exercised the office of street commissioner of the city of Wilkesbarre without warrant of law. The defendant had been appointed street commissioner of the city of Wilkesbarre by the action of the city councils. The position of the relator was that a valid appointment to the office required the concurrent action of the city councils and the mayor. The title of the defendant depended on this question. The charter of the city gave the mayor and councils the power "to appoint and remove such officers * * * as they may deem necessary to * * * enforce the ordinances and regulations of the city." The supreme court of Pennsylvania said: "Neither the mayor nor the councils can make the appointment any more than they could make the ordinances the officers are appointed to enforce." And, in speaking of the charter, the opinion proceeds: "It empowered the mayor and councils to create additional offices, and to fill them. In the exercise of this power, they have created a single office for the entire city, called 'street commissioner,' and the mere fact that the office was created by them is conclusive upon the necessity for their concurrent action in order to fill it. It is needless to add that the city ordinance relied on as authority for the appointment by the councils alone cannot change the law, or deprive the mayor of the powers which the law gives him, without his consent." And judgment of ouster was entered.

When the codifiers of 1860 consolidated the acts of 1817 and 1828, in section 25 of article 4 of the Code of Public Local Laws, they placed the provisions of the act of 1828 first;

and Mr. Poe, in the Code of 1888, in section 30 of the same article of the new Code, followed his predecessors. But this circumstance can make no possible difference in the meaning of the acts as codified. Both acts are in the section, and, when they were brought together, then their meaning was precisely the same as when they stood separately and apart. The power of the mayor and of the city council, as two independent co-ordinate branches of the city government, to make appointments of officers, is still retained in the section, as conferred by the act of 1817. The mode of making such appointments designated in the act of 1817 is still there, and may be exercised, unless the authority given by the act of 1828 (which is also there) to regulate the manner of appointments which "they" (the two departments, the mayor and the city council) are authorized by law to make is validly exerted. To give to these two statutes, when codified, a meaning precisely the opposite of the one they had before they were codified, merely because the one passed last in order of time happens to be transcribed first in the same section of the Code which contains them both, would invoke, or rather invent, a new and a very dangerous rule of interpretation. Statutes should be construed with a view to the original intent and meaning of the makers, and such construction should be put upon them as best to answer that intention, which may be collected from the cause or necessity of making the act, or from foreign circumstances, and, when discovered, ought to be followed, although such construction may seem to be contrary to the letter of the statute. *Johnson v. Heald*, 33 Md. 352.

Now, it cannot be assumed, in the face of the explicit language used in the act of 1828, and literally reproduced in section 30 of article 4 of the Code of Local Laws, that the legislature ever intended to give to the municipality of Baltimore the power to pass ordinances delegating to any one the right to name the many important officers that the efficient discharge of the public trusts committed to the corporation may require. And yet if it be conceded that the mayor may, under section 30, be deprived of all power as an integral part of the appointing power, because the power to regulate the manner of appointments means, if the city council so enacts over his veto, an abrogation of his antecedent power to participate therein, there is no escape from the conclusion that there can be by ordinance, passed with or without his approval, a valid delegation of the appointing power to one branch of the city council, and, if to it, then likewise to a single individual, not even a member of the city government. Such a construction means that there may be a lawful surrender of the power to appoint, and, under the guise of regulating the manner of appointment, a transfer of the whole power itself to an alien. And why not? If the statutes do not place this power in the mayor and the

city council to be executed by them, but gives them unlimited and unrestricted authority to pass any regulation they may see fit as to the manner of making appointments, there is no line at which logically you must halt, and say the ultimate limit has been reached beyond which the delegation of the power of appointment shall not go. That such a surrender or transfer to another of the power to appoint is not likely to occur may be probable; but this probability is no answer to the argument that the construction contended for irresistibly establishes its possibility. The bare possibility that such a result may flow from a judicial construction of a statute is sufficient to demonstrate the utter fallacy of the interpretation; especially when there is another and a different construction, which is far more reasonable, and which leads to no such serious consequences. A construction fraught with consequences so pernicious, as well as so dangerous to the order and good government of a great city, must be rejected, unless the plain, imperative words of the act of assembly are open to no other meaning at all.

Perhaps it may not be out of place, before concluding this opinion, to cite a few cases in which this court has held that, for the purpose of ascertaining the meaning of a section or provision of the Code, the original act of assembly embodied in the section or provision under consideration may be consulted. Thus, in the recent case of *Miles v. Stevenson*, 80 Md. 366, 30 Atl. 646, where it was insisted that mandamus was not the proper remedy to compel county commissioners to restore a road supervisor to the office from which they had removed him, because section 81, art. 5, of the Code, giving to every party aggrieved by an order passed by the county commissioners a right of appeal therefrom to the circuit court, furnished an appropriate remedy by appeal. We went into an examination of the original act from which the section was codified, and finding that the act, when adopted, had relation only to cases relating to public roads, and that the section providing for an appeal to the circuit court was, when passed, confined to appeals in such proceedings, we held that an order removing a road supervisor from office was not such an order as, under that section of the Code, could be reviewed on appeal by the circuit court, though the terms of the section taken by themselves, in the place where found in the Code, and without reference to the original act by which they were first adopted, were probably broad enough to embrace just such an order. See, also, *Maurice v. Worden*, 52 Md. 294; *State v. Popp*, 45 Md. 432; *Dorsey's Lessee v. Garey*, 30 Md. 499.

For the reasons given, the ordinance in question is, in our opinion, ultra vires and void. As a consequence, the appellee was not lawfully elected city tax collector, and hence the writ of mandamus which issued, directing the mayor to administer to the appellee the oath of office, should not have been ordered.

The order appealed from must therefore be reversed, and the petition for a writ of mandamus must be dismissed. Order reversed, and petition for writ of mandamus dismissed, with costs above and below.

RUSSUM, J., dissents.

(84 Md. 451)

GRAFFLIN v. ROBB, Register, et al.
(Court of Appeals of Maryland. Dec. 3, 1896.)
SALE OF TRUST PROPERTY—NOTICE TO PURCHASER.

A purchaser of stocks wherein the holder is designated merely as "trustee," without a specification of the trust or a designation of the beneficiaries, whether he seeks information from the trustee, and is deceived, or does not, is not, in absence of fraud on his own part, chargeable by the word "trustee" with notice that the sale is unauthorized and in fraud of the beneficiaries, if, by a reasonably careful investigation of the records or other proper sources, he could not discover the true state of the case.

Appeal from circuit court No. 2 of Baltimore city.

Bill by Stephen D. Grafflin, trustee, against John A. Robb, register, and the mayor and city council of Baltimore and others, to require the city to account for and return certain trust funds which a former trustee fraudulently disposed of to the city, and thereby converted to his own use. From a decree in favor of defendants, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BOYD, ROBERTS, and FOWLER, JJ.

J. J. Wade, for appellant. Thomas I. Elliott and W. A. Wade, for appellees.

FOWLER, J. This is a clear case, although it has been somewhat complicated by a most ingenious and elaborate attempt to fasten a liability upon the appellees, when, as we think (agreeing fully in that respect with the learned judge below), none whatever exists. Nearly 30 years ago, Henry C. Wysham was appointed trustee to sell the real and personal property of Jacob Grafflin upon the terms and conditions and for the purposes set forth in a deed of trust from said Grafflin to Hugh Davey Evans and others. In pursuance of the decree of the circuit court of Baltimore city, so appointing him, Wysham sold the trust property, and reported his sales, which were subsequently ratified by that court. He also filed several auditor's accounts, by which the net proceeds of said sales were distributed, according to the provisions of said deed of trust, among the numerous children and grandchildren of the grantor. It appears, however, that some of the distributees desired to have their shares of the proceeds of sale invested, and for that purpose various applications by petition were made by them to the court. But, in every instance in which

such investments were authorized to be made, the property to be purchased was particularly described, and the power to make the investment was conferred upon Wysham. Otherwise he would have been without authority in that respect, having been appointed as trustee for the sole purpose of sale, and distribution of the proceeds thereof. It also appears that certain investments in ground rents were made by Wysham in trust for Charles G. and Christopher L. Grafflin and their children, respectively, but we have found no orders of court authorizing such investments. The deeds, however, recite such orders, and it may be assumed, perhaps, that they were passed. But whether this be so, or not, is not material here; for the beneficiaries accepted the rents, and no complaint appears to have been made by them in respect to this action of Wysham. After making the investment in ground rents just mentioned, it is claimed that there was a balance of \$700 due each to Charles G. and Christopher L., or their children. And it is those two sums which are sought to be recovered from the mayor and city council of Baltimore by these proceedings by the appellant, who, 15 years ago, was appointed trustee in the place of Wysham, who about that time left this state, and has never since then returned. The ground upon which this claim against the city is based is that these two sums of \$700 each were on or about the month of November, 1870, invested in the purchase of two certificates of Baltimore city water stock, each for \$700, both of which were issued to said Wysham, trustee, and that they were subsequently sold by him to the appellee Robb, register of said city and by him transferred to the mayor and city council for the purposes of the sinking fund. It is conceded that full value was paid to the trustee, but, the proceeds having been appropriated by him to his own use, the claim is that the city must again pay the value of said water stock to the appellant, trustee for the beneficiaries claiming in these proceedings, because of the fact that the stock stood in the name of the trustee, Wysham, which, together with the proceedings of record in the circuit court of Baltimore city in the matter of the trust estate of Jacob Grafflin, was sufficient to put the city, as purchaser, upon inquiry, and to impute to it knowledge of the object and purpose of the trust, and to give it notice that Wysham was about to commit a breach of trust.

While the law very properly requires all persons dealing with trustees in reference to the sale or purchase of trust property to exercise reasonable care to ascertain if such trustee is acting within the limits of his power, yet it does not establish an arbitrary rule, which it is or may be impossible to obey. Each case involving a transaction like the one before us must be considered and de-

termined in the light of the facts therein presented. In some cases it would be gross negligence for a purchaser to deal with a trustee without making the most careful investigation possible, especially when ample and easily accessible information is spread out upon the records of the courts having jurisdiction of trustees. But, when such information cannot be so had, the mere failure to make the attempt to obtain it, which, if made, would be of no avail, ought not, we think, to subject the purchaser to punishment. This court has not yet said that the word "trustee" alone, in any and every case in which a trustee proves recreant to his duty by selling the trust property and appropriating the proceeds, shall be sufficient to give notice to the purchaser that a breach of trust is about to be committed. On the contrary, our predecessors said in *Albert's Case*, 2 Md. 159, that the proper inquiry in these cases is what circumstances there are in the case which furnish reasonable ground to the purchaser that a breach of trust was about to be committed. And while the fact that the person offering to sell holds the property in a fiduciary capacity, as trustee or executor, should certainly put the purchaser upon inquiry, it would, we think, be unreasonable to hold him liable for the misconduct by the trustee, unless, by a seasonable and reasonable examination of the records of the proper courts, he could discover the nature, extent, and purpose of the trust. But, before he could obtain this information, he must necessarily first ascertain to what trust estate the property belonged. We do not think it possible to assume, as contended by the appellant, that the stock in question must have belonged to the Grafflin trust estate, and that the purchaser must have discovered that fact if the record had been examined. We do not think it possible for any one, with reasonable skill and industry, by the examination of the records, as before us, of the proceedings in the cause pending in the circuit court of Baltimore city instituted for the purpose of selling the trust estate of Jacob Grafflin, to have discovered any connection whatever between that estate and the water stock sold by Wysham, trustee, to the city. No mention is made of such an investment there, nor is there any order of court authorizing any of the trust funds in such stock. If the purchaser had made the examination which it is contended and may be conceded the law would require him to make to free himself from liability, if by such investigation or examination the desired information could have been obtained, it would have been discovered that, so far from any of the money of the trust estate having been used in the purchase of the stock which Wysham held as trustee, it was in fact bought by the proceeds of a check drawn by him on an account in the Chesapeake Bank, standing in his name as attor-

ney, which account, upon its face, related entirely to his business as such, and which is not shown by any direct evidence to have been made of any part of the moneys of the trust estate. It was argued upon inferences drawn from this account, and certain pencil marks on one of the accounts of the auditor on file, and the dates of payments and investments made by Wysham as trustee, supplemented by certain calculations which are more ingenious than convincing, that it was perfectly apparent that the stock sold by Wysham to the city was held by him in trust for the beneficiaries now claiming it. But while such an investigation and calculation may be ingenious, and convincing to some minds, we do not think it would be just, under all the circumstances of this case, to determine by it the rights of the parties now before us. In the Case of Albert, supra, it was said that the mere designation of the parties as trustees, without a specification of the trust or designation of the cestui que trustent, could not possibly give the city officer any information; and, had he made inquiry in regard to the object and purposes of the trust, there was no one to whom he could with propriety apply, but to the trustees themselves, for the entry upon his own books gave him no clue whatever. It is not to be assumed that the very person who is about to perpetrate a fraud upon the purchaser, and to commit a breach of trust, would, if interrogated, supply the information which would prove his perfidy. But whether the purchaser seeks information from the trustee, and is deceived, or fails to do so, he should not be punished, in the absence of fraud on his part, if he could not, by a reasonably careful investigation of the records or other proper sources, discover the true state of the case. We do not understand this court to have reversed the ruling in Albert's Case, supra, as applicable to the state of facts there disclosed, by any of the later decisions in respect to the fraudulent or illegal transfers by trustees. It is true that in Marbury v. Ehlen, 72 Md. 216, 19 Atl. 648, it was said that the rule adopted in 2 Md. to the effect that the mere designation of parties as trustees, without some other facts which could and should be ascertained, could not be held to inform the purchaser of the intended fraud, should be limited to cases "precisely" or "exactly" analogous in facts. We think the case before us is clearly within the rule as limited in 72 Md., 19 Atl.; for here, as in Albert's Case, the mere designation of Wysham as trustee, without the reasonable possibility of getting information from any other reliable source, should not be held to impute knowledge, because it was knowledge which could not in any way required by law have been obtained by the city. Agreeing with the learned judge below, the decree appealed from will be affirmed. Decree affirmed.

(178 Pa. St. 298)

SMITH v. CITY OF NEW CASTLE.
(Supreme Court of Pennsylvania. Nov. 9,
1896.)

CONTRIBUTORY NEGLIGENCE--KNOWLEDGE AN
ELEMENT.

A person accustomed to passing along one side of a highway, which she knows to be safe, who, in the nighttime, crossed to the opposite side, and was there injured by falling into a hole, of which she testified she had no knowledge, was not, as a matter of law, guilty of contributory negligence. Railroad Co. v. Cadow, 14 Atl. 450, 120 Pa. St. 559, distinguished.

Appeal from court of common pleas, Lawrence county; W. D. Wallace, Judge.

Trespass by Elizabeth J. Smith against the city of New Castle to recover damages alleged to have been sustained by plaintiff on account of defendant's negligence in failing to repair Jefferson street. Plaintiff testified that she had been living in New Castle only about four days before the injury occurred. She had passed along Jefferson street on the west side several times, and knew there was a good pavement there. On the evening of the accident she crossed to the east side, where there was a hole, of the existence of which she had no knowledge, and into which she fell, sustaining serious injury. The court below granted a compulsory nonsuit, on the ground that plaintiff was conclusively guilty of contributory negligence, and subsequently overruled a motion to take off the nonsuit. Plaintiff appeals. Reversed.

J. Norman Martin, M. S. Anderson, and D. F. Anderson, for appellant. A. W. Gardner and D. B. & L. T. Kurtz, for appellee.

GREEN, J. There is no doubt as to the rule that where a person passing on the highway, or on any other place of passage, public or private, has a choice of two ways, one of which is safe and the other unsafe for passage, and the person about to pass voluntarily and knowingly chooses the unsafe way without any necessity for so doing, he takes upon himself the risks of the passage, and is guilty of contributory negligence. Haven v. Bridge Co., 151 Pa. St. 620, 25 Atl. 311, and many other cases. In Hill v. Tionesta Tp., 146 Pa. St. 11, 23 Atl. 204, we held that one who undertakes to use a public road, knowing that it is unsafe, and knowing the defects which make it so, but not choosing to avoid them, although he could do so by taking another road, cannot recover against the township for an injury resulting from such defects. But this doctrine involves necessarily the idea of knowledge of the danger on the part of the passing person. With a person having such knowledge the choice of the unsafe way is an act of negligence, and, as the negligence contributes to the injury, the person injured is incapacitated from recovering any damages for the resulting injury. And this, too, without any regard to the question whether the defendant has been guilty of negligence in maintaining the situation of danger. In the present case the plaintiff testi-

fied that she had only been living in New Castle about four days before the accident; that she had passed along Jefferson street on the west side several times, but had not passed along on the east side, where there was a hole in the street; and that she had never seen the hole, or had any knowledge or information concerning it. The night was dark, and there were no barriers or guards to prevent persons from falling in. Shortly before reaching this place she had crossed from the west to the east side of the street, and was proceeding along the east side, towards the post office, when she fell into the hole, and was injured. There was an abundance of testimony to prove the existence of the defect in the street, and, if the jury believed the witness, she had no knowledge of the defect when she fell in. The learned court below granted a compulsory nonsuit, thus taking the case away from the jury, on the ground that the plaintiff was conclusively guilty of contributory negligence. That this would have been so if she had voluntarily and knowingly left the west side of the street, which she knew to be safe, and gone to the east side, which she knew to be unsafe, cannot be doubted. But, if she knew nothing about the unsafe condition of the east side, the element which would convict her of contributory negligence is entirely lacking, and the ruling would be incorrect. She had a right to presume that the east side of the street would be in a safe condition for travel; and, if she had no actual knowledge or notice of its unsafe condition, she was certainly not chargeable with negligence, as a matter of law, in going to that side. The learned court below, in granting the nonsuit, acted upon the authority of the case of *Railroad Co. v. Cadow*, 120 Pa. St. 559, 14 Atl. 450, assuming that it controlled the question in this case. But the facts in that case were of an entirely different character from the facts in this, and presented a radically different aspect of the question. There the highway along which the plaintiff was passing was crossed by two tracks of the defendant's railroad, which was a visible and lawful obstruction. The plaintiff was in the daily habit of crossing the railway tracks on the highway, and had a perfect knowledge of the whole situation. The sidewalks on both sides of the street where the tracks crossed them were in good and safe condition, and in constant use. The plaintiff, on a dark morning, left the sidewalk, and undertook to cross the rails in a diagonal direction, and in doing so he caught his foot in one of the rails, stumbled and fell, breaking one of his legs. We held him guilty of contributory negligence, because he voluntarily left the safe sidewalk, and crossed at a place where he knew there was an obstruction. While he might not have known that the rails were not ballasted up even with the street at the ends of the plank crossing in the street, yet he knew of the presence of the rails across the street, and necessarily assumed the risks of crossing that kind of an obstruction. But in the present case the defect in the

street was, by its very nature, not a lawful condition of the street, and was not only not known to the plaintiff, but she had no reason to apprehend the presence of any obstruction, or any defect of any kind. She cannot be said, therefore, to have been conclusively guilty of contributory negligence in crossing the street and using the other side for passage. But that question, together with the question of negligence on the part of the defendant, would have to be determined by the jury. In its facts the case is somewhat analogous to the case of *Douglass v. Water Co.*, 172 Pa. St. 435, 34 Atl. 50. We therefore sustain the assignments of error, and send the case to another trial. Judgment reversed, and new venire awarded.

(178 Pa. St. 57)

SHREINER et al. v. SHREINER.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

TESTAMENTARY CAPACITY — DELUSIONS — INSTRUCTIONS.

1. Error in an instruction in regard to testamentary capacity that a sound mind is "a mind wholly free from delusion" is not cured by a subsequent statement that "a person whose mind is perverted by insane delusion with reference to one or many subjects, however unreasonable and absurd, may nevertheless make a valid will, provided the provisions of such will are not influenced by such delusions."

2. Lack of testamentary capacity is not shown by failure of memory as to persons, places, and recent small occurrences, which never extended to any serious matter, where testatrix recognized her estate and the natural objects of her bounty, and transacted important business for five years after making the will, with no suggestion of incapacity.

Appeal from court of common pleas, Lancaster county; J. B. Livingston, Judge.

Issue to try the validity of the last will of Maria Shreiner, deceased, in which H. M. Shreiner and B. Z. Shreiner (executors of the will) were plaintiffs and Mary E. Shreiner was defendant. The jury found in favor of defendant, thus setting aside the will, and plaintiffs appealed. Reversed.

A. H. Fritchey, H. M. North, and B. F. Davis, for appellants. W. U. Hensel, J. Hay Brown, and A. J. Eberly, for appellee.

MITCHELL, J. The third assignment of error must be sustained. The learned judge charged the jury that it was "necessary that a testator, at the time he makes and executes his will, should be possessed of a sound mind. * * * A sound mind has been defined to be a mind wholly free from delusion." This was a serious overstatement of the requirements as to testamentary capacity in a case where, as in the present, the will was contested mainly on the ground of delusions or hallucinations on the part of testatrix. It is settled that the existence of delusions will not destroy testamentary capacity unless they are such as dictate or substantially affect the provisions of the will itself. *Taylor v. Trich*, 165 Pa. St.

586, 601, 602, 30 Atl. 1053, 1056; *Thomas v. Carter*, 170 Pa. St. 272, 33 Atl. 81. In the latter case the following statement of the law was approved by the present chief justice: "A man may be of sound mind in regard to his dealings in general, but he may be under an insane delusion; and whenever it appears that the will was the direct offspring of the partial insanity or monomania under which the testator was laboring at the very time the will was made, that it was the moving cause of the disposition, and, if it had not existed, the will would have been different, it ought to be considered no will, although the general capacity of the testator may be unimpeached." It is true that later in the charge the jury were told that "a person whose mind is perverted by insane delusion with reference to one or many subjects, however unreasonable and absurd, may nevertheless make a valid will, provided the provisions of such will are not influenced by such delusion"; but the subject was committed to them in this general way, without any special reference or caution as to the nature of the delusions testified to. Under the circumstances, this was not an adequate presentation of the case, and was not sufficient to counteract the unfortunate overstatement as to testamentary capacity which had gone before. Much testimony was undoubtedly given to show that the testatrix labored under delusions in regard to the presence of strange people in her house, and climbing over the fence and up the walls. But none of these appear ever to have led to any action on her part, except occasionally getting her family up at night to look for fancied intruders; an occurrence not entirely unknown among nervous women, who are nevertheless entirely sane. None of these delusions had any tendency as matter of law, or were shown as matter of fact, to have had any bearing at all on the question of testamentary capacity, or on the circumstances of the making of this will; and the jury should have been explicitly so told in answer to the plaintiffs' ninth point. Failing this, we cannot consider that the error complained of in the third assignment was cured by the subsequent parts of the charge.

The delusions, even if they existed as testified to, being thus irrelevant, was there, outside of them, any sufficient evidence of want of testamentary capacity? We do not think so. The facts established beyond question were that the testatrix was a woman of intelligence, business capacity, and experience, having acquired a considerable estate by her own exertions in storekeeping. She was advanced in years, but retained her position as the head of her house, though she depended to some extent on the assistance of her daughter, the contestant, who lived with her. She gave directions for her will to her son, through whom it was drawn by counsel, submitted to her, and altered somewhat by her in contestant's favor, rewritten by counsel, read by him to her in private in his own office, de-

clared to be what she wanted, and executed by her in the presence of two reputable and entirely disinterested business acquaintances, who were specially called in as witnesses. She lived five years after that, keeping her own bank account, drawing checks, collecting dividends on her stock, receiving rent from her tenant and his wife, paying the milkman and the watchman who came to her house, and from time to time making purchases at market and in stores, though usually accompanied in these outdoor transactions by her daughter; and in 1889, two years after the making of the will, joined in a conveyance of a valuable piece of real estate; and during all this time no one raised any question of her capacity, although the contestant, with others of the family, was a party to the deed by which the property was conveyed to the trust company, and the president of the latter had known her for years, and had no hesitation in taking title from her. Against this array of actual business transacted there was the testimony of a number of witnesses as to the testatrix's loss of memory; her failure to recognize persons, including in one or two instances her own daughter; her inability to make correct change, and her offers to some of them to pay a second time after having paid previously. The witnesses were mostly neighbors and acquaintances, who did not have business transactions with her; and the things they testified to, apart from the delusions, showed little else than the ordinary forgetfulness of age, chiefly of names and faces, and not shown to extend to serious matters or business. These witnesses were allowed to give their opinions that testatrix was not fit to make a will, without having shown the slightest knowledge of what testamentary capacity requires. As to them the remarks of Paxson, J., in *Eddy's Appeal*, 109 Pa. St. 406, 420, 1 Atl. 425, 427., are entirely appropriate: "The opinions of many of them may be brushed aside as wholly worthless by reason of their lack of knowledge and judgment in such matters. A witness must know what testamentary capacity means before we can attach any weight to his testimony." The most important witness against the will was the family physician, who testified that testatrix had had an attack of acute congestion of the brain with slight paralysis, and that in 1887—the date of the will—"her case had developed into what we call senile dementia," the evidences of which he said were "impaired memory, depression of spirits, melancholy at times, feeble mind"; and "her condition was bad; she had hallucinations." This testimony was undoubtedly entitled to weight, but, as already said, the hallucinations which medically were a large part of the dementia were entirely irrelevant on the question of testamentary capacity, and the doctor neutralized much of the force of his testimony by the frank admission that he knew nothing at all about her business affairs, nor what she did in that way, for several years after the date of the will. As to her failure of memory, the

weightiest matter testified to was her not recognizing on one or two occasions her youngest daughter, but the will itself conclusively proves that this was not the lasting state of her mind, as that daughter is named, and given a share of the estate, with the clear explanation that it is less than the other shares, "because she is well provided for in life, and has received moneys through other sources in my lifetime." It was not shown that the testatrix's memory was in fault as to this or any other material fact relevant to her estate and her will in regard to its distribution.

Upon the whole case we have: First. Delusions showing impairment of mind in some directions, but not in any way relevant to the making of a will; failure of memory as to persons, places, and recent small occurrences, but not shown to extend to a single serious matter; and the opinions of a number of witnesses, most of them unlearned on the subject, that the testatrix was unfit to make a will. And, secondly, on the other side, a will drawn by counsel, and executed in the presence of business friends, called in for that purpose, with no evidence at all of want of testamentary capacity at the time of execution, and the will itself containing clear internal evidence of recognition of her estate, and of all the persons who may be said to be the natural objects of her bounty. And, finally, the continued transaction of important business for five years after the making of the will, with no suggestion from any one that she was not capable of attending to it. In the face of these actual transactions, the opinions of witnesses are of very little weight. Under such circumstances, and on such testimony, a jury cannot be allowed to overturn a will. The verdict should have been directed for the plaintiffs. Judgment reversed, and issue directed to be set aside; costs to be paid by appellee.

(178 Pa. St. 113)

FIDLER et ux. v. JOHN.

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

JUDGMENT—LIEN OF—FRAUD—EVIDENCE.

1. A judgment creditor, who advises the debtor to make a fraudulent conveyance in order to cheat another creditor, does not thereby lose the lien of his judgment.

2. The title of a purchaser at a sheriff's sale under his own judgment is not affected by the fact that he had before advised the judgment debtor to make a fraudulent conveyance, with the purpose of himself obtaining the property for less than its value.

3. Where a creditor, in fraud of whom property has been conveyed, subsequently obtains judgment, issues execution, and sells the property so conveyed, only the title of the fraudulent grantee is sold, and, liens prior to such conveyance not being affected by it, the holders thereof can follow the land into whosever hands it may come.

4. The uncorroborated testimony of a party who has perpetrated a fraud is insufficient to support a decree that such fraud was advised by another party, who absolutely denies it.

Appeal from court of common pleas, Northumberland county.

Ejectment by William Fidler and Justina Fidler against U. F. John to recover possession of a certain piece of property. Judgment was rendered for plaintiffs, and defendant appeals. Reversed.

Defendant had loaned money to William Fidler, one of the plaintiffs, and taken judgment therefor. Fidler owned a piece of property which had been purchased and paid for in part with money loaned him by his wife. Fidler had also borrowed money from Mrs. Eva A. Smink, who brought suit against him on the 28th of October, 1876. John appeared as attorney for Fidler in this suit. The case was arbitrated, and an award rendered against him for \$145.45. Four days after this award, William Fidler and his wife, Justina, executed and delivered a deed for his property to Michael Lucas, with a consideration named in the deed of \$2,500, although in fact not one cent was paid as consideration. Eva A. Smink issued an execution on her judgment, and finally purchased the lot at sheriff's sale. At the time of the sheriff's sale, a notice was read by George W. Zeigler, who was attorney for William Fidler and Justina Fidler, to the effect that the property was not the property of William Fidler, but of Michael Lucas, by virtue of the above-mentioned deed from Fidler and wife to Lucas. Afterwards D. C. Smink and Eva A., his wife, made a deed to Michael Lucas, for the consideration of \$334.50. After this Lucas and wife conveyed back to Justina Fidler, on the 24th of February, 1888, or by a deed bearing that date, for the consideration named of \$2,200. In point of fact nothing was paid as consideration for this transfer. Subsequently U. F. John issued execution on his judgment for \$550, and sold the property January 4, 1879, he becoming the purchaser. After the delivery of the sheriff's deed he instituted proceedings to obtain possession, in which he was successful. Afterwards this suit was brought by Fidler and wife, for the use of his wife, to recover possession from John. It was claimed that John had advised William Fidler to make the conveyance to Lucas for the purpose of defrauding Mrs. Smink, and for the further purpose of enabling John to buy the property for less than its value. The court charged that, if the jury found these statements to be true, his subsequent purchase at a sheriff's sale upon his own judgment could vest no title in him.

S. P. Wolverton and C. M. Clement, for appellant. W. H. M. Oram and G. B. Reimensnyder, for appellees.

GREEN, J. This is certainly a remarkable case. A man held a judgment, for valuable consideration, against another, who held title to certain real estate. The plaintiff in the judgment, being a lawyer, and conferring with the defendant and his wife about a suit pending against the defendant,

advised (so say the plaintiffs in the present suit) his clients to sell the real estate to a friend, in order to cheat the creditor, who had sued the client, and was about to obtain an award of arbitrators against him. The advice was followed, it is said; the land was conveyed to the friend without a penny of consideration; and, as a matter of course, the deed was void, for fraud against the creditor. Subsequently, after the creditor had proceeded to judgment and execution, and bought in the title notwithstanding the fraudulent conveyance, he conveyed the title to a trustee for the wife of the defendant in the judgment, and the trustee conveyed it to the wife; and now it is claimed that the owner of the original judgment, which was confessed to secure a real and honest debt, has lost his lien, and cannot enforce his judgment. Why? Because, it is said, he advised the original fraudulent conveyance. Suppose he did. How did he lose his lien? What is the connection between the premises and the conclusion of this astounding proposition? Of course, there is none. If the owner of the honest judgment had a valid lien, which is not and cannot be disputed, by what conceivable process of reasoning did he lose it? If he had it before he advised the fraudulent conveyance, how did he lose it because of that advice? If it was a good judgment before the advice was given, because it was given for a valuable consideration, it was a good judgment thereafter, because it was still a judgment which was given for a valuable consideration. Therefore it was still a good judgment. The fact of good consideration was precisely the same after as before the advice was given. As a matter of course, there is no answer to this. A queer contrivance of reasoning is set up by which to avoid the judgment. It would not be entitled to consideration if it had not misled the learned court below, and thereby got into the jury box. The framework of the structure was this: If, when the defendant, John, advised the plaintiff, Fidler, to make a voluntary conveyance to Lucas before Mrs. Smink obtained her award of arbitrators against him, in order to cheat Smink by taking away from her the means of obtaining satisfaction for her anticipated award, he (John) had an intent to get the land of Fidler for less than its value, this was a fraudulent intent on the part of John, and he could get no title to Fidler's land, even although he bought it at a public sheriff's sale, held by virtue of an execution upon a perfectly valid judgment. It seems incredible that any court could have been induced to lend its sanction to such a proposition; but it is so, and this case was submitted to the jury upon the question of fact whether John had such an intent when he gave the advice to the Fidlers to cheat their creditor Smink by conveying his land to Lucas without consideration. It is difficult to deal

with patience with such a proposition. Besides the utter want of any logical connection between the premise and conclusion of the proposition, there are inherent and radical defects in it, which exterminate it the moment they are exposed. In the first place there is not even a shred of testimony anywhere in the cause that the defendant, John, ever had or conceived such an intent. The whole thing is a sheer fabrication,—a mere figment of the imagination. Of course, there is no direct proof of such a purpose. Not a witness testified to a declaration or a fact which indicates in the least degree the presence of such an intent. An attempt is made to impute such an intent by an assertion that John schemed to get the land for himself at less than its value, by not entering satisfaction of certain judgments which had been paid but not satisfied of record, thereby allowing the record to show a larger amount of judgments than was really due. The argument totally ignores the consideration that it was Fidler's business, when he paid a judgment, to see that it was satisfied, and, if such judgments were permitted to remain open, it was his neglect of his own duty in that regard. If the record was thus made to show a large amount of liens which were not owing, it was the work of the defendant himself, for which he was personally responsible. But the circumstance was not of the slightest consequence in any event, because any sheriff's sale under John's judgment would divest the lien of all judgments, whether they were many or few, large or small. Hence the fact that the record was in that condition when John's execution was issued could not help John to get the property under its value, because the only means by which he could get it at all was a public sale by the sheriff, open to all bidders alike, with no responsibility for the application of the proceeds. Such a condition of the record, therefore, would not afford an iota of proof of an intent of John to get by this means the land of Fidler for less than its value.

But there is an additional reason why no such inference could be permitted from such a fact. Every judgment creditor has a perfectly lawful right to enforce payment of his judgment by execution process, and to get the property of his debtor for just as small a price as he can, if the sheriff's sale thereof is public and fair, and there is not a particle of proof, or even of complaint, to the contrary, as to the sale in this case. Hence the smallness of the price realized by the sale does not afford the least pretense of a wrongful intent on the part of the purchaser at such a sale. But there are still other reasons, more fatal even than these, to the very singular and farfetched theory of the plaintiffs. The voluntary deed from the Fidlers to Lucas on its face divested the title of Fidler, and gave it to Lucas. Now, it is not only proved and admitted by the plaintiffs, but

they assert and argue now in their paper book, that it was a fraudulent deed because it was made with intent thereby to defraud Smink. This is an allegation of their own fraud in the creation of title in Lucas; yet they now set up title in this action under this very fraudulent deed, because they claim title by the subsequent deed which Lucas made to Mrs. Fidler. As a matter of course, they cannot do this, and especially they cannot do it against one who was a bona fide judgment creditor of theirs by a judgment which was not divested by the sale under the Smink judgment, and who acquired his title by a sheriff's sale under this unimpeached and unimpeachable judgment. All the authorities hold that judgment creditors prior to a fraudulent sale by the debtor are not affected by a fraudulent deed made after their judgments are entered, because the fraudulent grantee takes title subject to their judgments. Thus, in Byrod's Appeal, 31 Pa. St. 241, we held that, where the owner of land charged with liens makes a conveyance which is fraudulent as against creditors, a sheriff's sale under a judgment subsequently obtained against the grantor passes only the title of the fraudulent grantee, and the prior liens are not affected. A conveyance intended to defraud creditors is not void, but only voidable by the creditors whom it intended to defraud; and this does not include prior lien creditors. Such a conveyance changes the title, and after-acquired judgments against the grantor are not liens against the same title as the prior ones. Such prior liens are not, therefore, affected by a sale under subsequent judgments. Said Lowrie, J., delivering the opinion: "As against prior liens the title is good, but charged with the liens. As against subsequent judgments against the grantor it is absolutely good, if it is not fraudulent as to them. A sale on the prior liens would pass the grantee's title, honest or not; for it takes the title against which the lien was created, and not the changed or vitiated one. A sale on subsequent judgments passes only the right to contest the grantee's title for fraud. It passes the quantity of interest that was fraudulently conveyed, and subject to the same liens. In other words, it passes the title of the fraudulent grantee, because it is fraudulent, leaving in full force the prior liens against the grantee's title, which cannot be presumed to have been intended to be defrauded. * * * Its purpose and effect is to take away the title of the fraudulent grantee; whereas, the purpose and effect of a sale on a prior lien is to take the title of both grantor and grantee."

This doctrine has been many times since reaffirmed and applied, and it is not at all disputed. Applying it to the entirely undisputed facts of the present case, the following results are immediately apparent: The deed of William Fidler and wife to Michael Lucas, dated August 10, 1877, was, and is ad-

mitted to have been, a fraud upon Eva A. Smink, who was about to, and four days afterwards did, obtain an award of arbitrators against William Fidler, who was the owner of the title. That award was a lien against the title of the grantee, Lucas. When Mrs. Smink issued execution and sold the title, it was not the title of William Fidler, but of the fraudulent grantee, Michael Lucas, that was sold. The prior lien creditors, among whom was the defendant, John, had no claim upon the proceeds of the sale, because they had no lien against Lucas, but only against Fidler, and their liens were entirely unaffected by the sale. They could still follow the land in whosoever hands it came. John's lien, therefore, still remained. Neither the fraudulent deed to Lucas nor the sheriff's sale to Smink had any effect whatever upon it. Whether the deed to Lucas was honest or fraudulent, it did not, and could not, have any effect upon John's judgment. Now, when Mrs. Smink conveyed to Lucas, she could only convey what she had, to wit, the fraudulent title of Lucas, because that was the only title she had. But that title was of no avail against John, who was not affected by the Smink judgment, or the sheriff's sale under it. As Smink could not set up her title against John, so neither could Lucas as her grantee. Where, then, is there any title, in either Fidler or his wife, to set up against John's? They had parted with their own title when they sold to Lucas, because that sale was perfectly good as to them. But the title which Lucas had under that deed was fraudulent as to Smink, and therefore she could have sustained it as against Lucas, but not as against John, or any other judgment creditor prior to the fraudulent deed. Of what avail, then, is any claim of title founded upon the deed from Smink? None whatever. Having no title, she can recover nothing in this action. Even if it were legally true, as it certainly is not, that advice given by John to Fidler to make the fraudulent deed would avoid John's judgment, how will that help the case? If he had no judgment, the sale under it was void, and passed no title to anybody; but that circumstance gives no title to the present plaintiffs, or either of them. In *Zuver v. Clark*, 104 Pa. St. 227, we said: "None but a person intended, by the parties to the conveyance, to be hindered, delayed, or defrauded, or holding under such person,—for instance, a purchaser at judicial sale in the collection of a debt due such person,—can avoid the conveyance; for only as against such person or persons is the deed void under the statute of fraudulent conveyances." Other cases holding the same doctrine are *Fisher's Appeal*, 33 Pa. St. 294; *Hoffman's Appeal*, 44 Pa. St. 95; *Dungan's Appeal*, 88 Pa. St. 416; *Haak's Appeal*, 100 Pa. St. 62, and *Long v. McConnell*, 158 Pa. St. 578, 28 Atl. 233.

But it is useless to waste time in discuss-

ing this branch of the case. The fundamental proposition of the plaintiffs is that John was guilty of fraud upon Mrs. Fidler by advising her husband to make a voluntary deed to Lucas in order to defraud Smink, and thereby lost his judgment and title, against William Fidler. This proposition is without reason, or common sense, or any authority whatever, to support it, and it cannot for a moment receive our sanction. It was William Fidler, not his wife, who held the title against which several creditors, including John, held judgments. How could there be a fraud against her which could divest his judgment against her husband because of such advice? Her lien was not affected, because it was prior to the deed, and she could enforce it just as well after as before the deed. But, even if she had been a part owner of the title, the case would have been no better. A man cannot lose his honest judgment against his debtor because he advises his debtor to cheat another creditor. If the debtor accepts the advice, and attempts to cheat his creditor, he becomes a party to the fraud, and cannot set up that fraud, even against the man who advised it, so as to take away from him a perfectly valid judgment. Some merit is claimed for Mrs. Fidler because it is said she knew nothing about the fraud. It is a matter of no consequence, one way or the other; but her own testimony is an answer to the claim. She testified that she was present when the deed was acknowledged, and said that she got nothing from Lucas for the deed, nor did her husband, so far as she saw. Lucas was her brother-in-law, and he testified that he did not pay a cent to her or her husband. It is not by any means the least consideration in the case that this claim of advice to commit a fraud on the part of John was set up and sustained only on the unsupported and uncorroborated testimony of William Fidler, who, by his confession, was the perpetrator of the fraud which was afterwards actually committed. Mr. John had nothing to do with the preparation or execution of the deed, according to the testimony of Fidler himself. It was Fidler and Lucas who went to 'Squire Hoke and got him to draw the deed. Fidler and his wife went to 'Squire Huntzinger to acknowledge it. None of them says that John had anything to do with it. But Mr. John, being examined as a witness, utterly and most positively denies the whole story. He says he never gave such advice, and knew nothing about the transaction. He says, also, he never knew there was such a man as Lucas in existence until the sale of the property under the Smink judgment, which occurred in the following year. So that the effect of the claim of the plaintiffs in this action, if it is successful, would be that the defendant would be deprived of his perfectly honest judgment, and also of his title by sheriff's deed, by the mere unsupported testimony of an interested witness, resting in parol only,

when that testimony is denied absolutely and emphatically by the other party. Would a chancellor decree a fraud, and a conveyance to be made by the defendant to the plaintiffs, or either of them, upon such testimony as this? Most certainly not; and for that reason, also, no verdict having such effect should be permitted to stand. We are of opinion that the first and fifth points of the defendant, requesting a binding instruction to find for the defendant, should have been affirmed, and the case withdrawn from the jury. The assignments of error are all sustained. Judgment reversed.

(178 Pa. St. 377)

FERGUSON et al. v. ANGLO-AMERICAN TEL. CO., Limited.

(Supreme Court of Pennsylvania. Nov. 11, 1896.)

TELEGRAPH COMPANIES—CIPHER MESSAGES—DELAY IN DELIVERY.

A telegraph company's liability for delay in delivering a cipher message whose importance is not disclosed is limited to the amount paid for its transmission. *Telegraph Co. v. Wenger*, 55 Pa. St. 263, and *Telegraph Co. v. Landis* (Pa. Sup.) 12 Atl. 467, distinguished.

Appeal from court of common pleas, Philadelphia county; Pennypacker, Judge.

Action by Ferguson Bros. against the Anglo-American Telegraph Company, Limited, for damages for delay in transmitting a telegram. From a judgment limiting the damages to the amount paid for transmission of the message, plaintiffs appeal. Affirmed.

M. Hampton Todd, for appellants. Read & Pettit, for appellee.

MCCOLLUM, J. This was an action for damages caused by the failure of the defendant to deliver promptly a telegraph message written in cipher. The evidence was to the following effect: Plaintiffs, on March 15, 1890, sent two cable messages in cipher, addressed to "Octorara," "Liverpool," the first of which ordered the purchase of 50 tons of soda ash, and the second ordered 100 tons of the same, subject to shipment on the steamer Kingsdale. The first message was duly delivered to plaintiffs' agents. The second was not delivered until six days afterwards. The steamer Kingsdale had sailed in the meantime. The delayed message reads as follows: "Bewail boarish, bewail bluster, provided steamer Kingsdale," and was interpreted to mean, "Purchase for our account 50 tons jarrow 50-56 per cent. soda ash, 50 tons jarrow 48 per cent. soda ash, provided shipment can be made per steamship Kingsdale." The plaintiffs had contracted for a resale of the entire 150 tons, and when the 100 tons failed to arrive they were compelled to pay a higher price to fill their contract, and thereby lost \$892.72. The plaintiffs claimed that this was the measure of damages, but the court confined it to the sum paid for transmission of

the message. Was this ruling erroneous? It seems that the question now presented has not been decided by this court. It has been frequently considered in many of the courts of our sister states and in England, and the great preponderance of authority is in accord with the ruling of the court below. The rule on this subject is stated in 25 Am. & Eng. Enc. Law, 842, 843, as follows: "The rule already set out as to the measure of damages confines the plaintiff's recovery in actions against the company for negligence to such as may fairly be supposed to have been in contemplation of the parties at the time of making the contract. This being true, it follows as a logical and necessary sequence that, where the message as delivered for transmission is unintelligible, except to the sender or the addressee, and the company had no information otherwise as to its character and purport, nor of its importance and urgency, the party injured can recover of the company nothing more than nominal damages, or at most the price paid for transmission. And this is the rule which has been adopted by the English and American courts almost without exception." Many decisions of the courts of this country and England are cited as sustaining the rule above stated. The numerous decisions of the courts of many states will be found to be opposed to the decisions of the courts of only three states,—those of Virginia, Georgia, and Alabama. Florida has recently reversed an earlier case, and thus joined the majority of the states on this question. The reasons advanced in support of the decisions which support the ruling of the court below have been various, the one most commonly applied being the rule of *Hadley v. Baxendale*, 9 Exch. 341. It is earnestly contended by the appellants that the rule of *Hadley v. Baxendale* has no application to the case in hand; that the word "contemplate" is there used as contradicting what is proximate and direct from what is remote and speculative, as in *Pennypacker v. Jones*, 106 Pa. St. 237, and *Express Co. v. Egbert*, 36 Pa. St. 360. They also call our attention to the fact that the view of *Hadley v. Baxendale*, contended for by the defendants, has been unsuccessfully urged upon this court at least twice before, namely, in *Telegraph Co. v. Wenger*, 55 Pa. St. 262, and *Telegraph Co. v. Landis* (Pa. Sup.) 12 Atl. 467, and that, therefore, this question is not an open one. We do not concede that the rule of *Hadley v. Baxendale* has no application to this case, nor that the decision of this court in *Telegraph Co. v. Wenger* or in *Telegraph Co. v. Landis* is opposed to the ruling of the court below. The message in *Telegraph Co. v. Wenger* disclosed to the agent of the company the nature of the business to which it related, and there was uncontradicted evidence that the sender "notified the operator that he would look to the company for damages if they failed in transmitting the message." In *Telegraph Co. v. Landis* there was enough on the face of the

message "to indicate to the operator that it referred to sheep, to be shipped to Philadelphia, and their price." It was a case not of delay, but of error in transmission, and Paxson, J., speaking for this court, said: "It seems reasonable that, where damages are claimed for mere delay in delivery, the face of the telegram ought to contain something to put the company on its guard. A delay of a day or even a few hours might cause a heavy loss." This suggestion is applicable to the case now before us, and in harmony with the view taken in *Abeles v. Telegraph Co.*, 37 Mo. App. 554, in which the court said: "Aside from the reasons which support the rule of damages in *Hadley v. Baxendale*, there is here a question of public policy, to which we could not shut our eyes if we were in doubt upon the question. Upon any other rule, where a cipher dispatch is delivered to a telegraph company for transmission, and not translated to them, and there is a delay in delivering it, or a total failure to deliver it, the door is open to unlimited fraud upon the company. The evidence of its meaning is entirely in the breast of the sender and person to whom it is sent. They may construct any meaning they choose, and upon the meaning thus constructed they may, by evidence which the company will be powerless to rebut, construct any fabric of facts on which to build an action for damages which they may see fit." That the measure of damages contended for by the appellants might produce such results is obvious. Under it a telegraph company may receive for transmission a cipher message, which on its face is absolutely unintelligible to them, and was intended by the sender to be so, and for the slightest delay in transmitting it they may be charged with damages which cannot reasonably be supposed to have been in the contemplation of both parties, when they received it. Surely such a message furnishes no tangible ground for an inference that it relates to an important business transaction, or that the slightest delay in the delivery of it might subject the company to liability for such damages as are claimed in this case. In *Candee v. Telegraph Co.*, 34 Wis. 471, Dixon, C. J., said: "It cannot be said or assumed that any amount of damages or pecuniary loss or injury will naturally ensue or be suffered, according to the usual course of things, from the failure to transmit a message, the meaning and import of which are wholly unknown to the operator. The operator who receives, and who represents the company, and may for this purpose be said to be the other party to the contract, cannot be supposed to look upon such a message as one pertaining to transactions of pecuniary value and importance, and in respect of which pecuniary loss or damages will naturally arise in case of his failure or omission to send it. It may be a mere item of news, or some other communication of trifling or unimportant character. Ignorant of its real nature and importance, it cannot be said to have been in his

contemplation, at the time of making the contract, that any particular damage or injury would be the probable result of a breach of the contract on his part." To subject the company to the same liability for mistake or delay in the transmission of such a message that it might be subject to for a like mistake or delay in the transmission of an intelligible message would open the door to the perpetration of fraud, and disregard the well-settled rule of *Hadley v. Baxendale*. We find nothing in *Express Co. v. Egbert* or in *Pennypacker v. Jones* which can be considered as a repudiation or qualification of that rule, or in the way of its application to the case at bar. For the reasons above stated, we concur in the ruling of the court below. Judgment affirmed.

(178 Pa. St. 346)

KATZ v. JOHNSTON.

(Supreme Court of Pennsylvania. Nov. 9, 1896.)

FRAUD—DAMAGES.

Defendant agreed with plaintiff to buy a certain piece of property, alleging the cost thereof to be \$5,500, and contracted to pay one-half thereof. The actual price of the land was \$5,000. Plaintiff and defendant gave a note for \$500 to the vendor, which plaintiff paid, and the vendor turned over the proceeds to defendant without the knowledge of plaintiff. Held, that defendant was liable to plaintiff for the amount not paid.

Appeal from court of common pleas, Allegheny county.

Action by Fanny Katz against James W. Johnston for money had and received, for an account, and for an injunction. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

The following are the findings of the court and conclusions of law:

"Statement: On the 28th day of March, 1893, the plaintiff and defendant bought from W. J. Dible and J. E. Hunter a piece of ground in Turtle Creek, this county, containing about one acre of ground, and the deed was executed to them of that date. The deed is to them as joint tenants. The consideration specified in the deed is \$5,500; to be paid \$2,500 cash, and the purchasers to assume the payment of a mortgage of \$2,500, and also to give a promissory note for \$500, payable at one year, with interest from date. In the deed it is recited that the purchasers assume a personal liability for the payment of a certain mortgage to Robert Caughey on the premises for \$2,500. Mrs. Katz, the plaintiff, paid the \$2,500 cash. Both the plaintiff and defendant signed the note for \$500. Johnston paid nothing at the time, and has paid nothing since the deed was delivered. Mrs. Katz subsequently paid the note for \$500, with the accrued interest on it, at the time it was paid amounting to \$530. That amount was received by Mr. Dible, but immediately paid over to Mr. Johnston. On the 1st day of May, 1893, an agreement was

entered into carrying out the verbal understanding between the parties prior to that and about the time the deed was delivered. That agreement recited the conveyance to them from Dible and Hunter, and says: 'Whereas, the consideration of \$5,500 above mentioned for said piece of ground was paid to the grantors in said deed as follows, viz. \$2,500 in cash by the said Mrs. Fanny Katz, and \$2,500 by the joint covenant of both of the parties hereto (which is contained in the above-recited deed) to assume the payment of a certain mortgage recorded in Mortgage Book, vol. 633, page 672, and \$500 by the promissory note of both of the parties hereto for the payment of said sum in one year from its date; and whereas, it is the purpose of the parties hereto to divide said piece of ground into lots and to sell the same as soon as conveniently can be done to good advantage: Now this agreement witnesseth: (1) That the said J. W. Johnston agrees and undertakes to manage said property, and to make sales thereof in lots, to the best advantage, and at such prices and upon such terms as shall be mutually satisfactory to the parties hereto, and agreed upon by them from time to time, and to act as the agent for procuring purchasers thereof, and to write all deeds and mortgages necessary in selling and conveying said property. (2) That the sums received as purchase money for lots in said piece of ground shall be applied, in the first place, to the discharge of the expenses of surveying, recording plans, releases, etc., and other expenses incidental to placing said property on the market, which the parties hereto may mutually determine to incur, and to the discharge of the promissory note and mortgage above referred to as a part of the consideration for said piece of ground, and afterward to the repayment to said Mrs. Fanny Katz of the sum paid by her in cash as above recited, viz. twenty-five hundred dollars, with interest thereon from the date of payment. (3) That after the discharge of the above-recited expenses, incumbrances, and obligations, with the interest thereon, and the repayment of the purchase money advanced by Mrs. Katz, as aforesaid, the profits arising from the joint undertaking of the parties hereto shall be semiannually divided and paid over to the parties hereto as follows, to wit, two-thirds of all such net profits to the said Mrs. Fanny Katz, and one-third of the said net profits to the said J. W. Johnston. (4) All the covenants, stipulations, and agreements herein shall be equally binding upon the parties hereto, their heirs, executors, administrators, or assigns. Witness our hands and seals the day and year first above written.' Signed by the two parties, under seal. A survey had been made, and the property divided into twenty-four lots. On the 12th day of June, 1893, one lot was sold, on which two payments were made, amounting to \$15. The second lot was sold on the 17th day of July, 1893, and \$5 paid on

that date, and also \$5 paid on July 29, 1893, and another \$5 paid February 6, 1894, since which time no payments have been made. A third lot was sold on or before March 16, 1894, and \$15 paid on that date, and \$10 more last November, since this bill was filed. Five dollars was deposited on account of the sale of a fourth lot, but was forfeited, making the total amount of purchase money received \$63.72. The expenses incurred in the management of the property, including taxes paid by Mrs. Katz, amount to the aggregate sum of \$133.77. Deducting therefrom small items of credit for rent of the ground, etc., amounting to \$36.50, leaves a balance due Mrs. Katz of \$96.27. Mrs. Katz also paid the first two installments of the Caughey mortgage of \$1,000, and paid also interest on the same, \$297.50. The next installment of the mortgage will be due next February. On the 11th day of December, 1893, two judgments were entered against Johnston by William McCuen, one for \$80 and the other for \$300, which, according to the record, are still unsatisfied, although Johnston says they are paid. On the 15th day of January, 1893, A. I. Scott & Co. entered a judgment against Johnston of \$534.50, and at once issued an execution thereon. This arrested the attention of Mrs. Katz. She immediately went to see Johnston, and that judgment on the record is satisfied. About the same time Johnston executed a deed for his interest in the property to D. S. Elliott. That deed was never delivered, and, Mrs. Katz learning about it, he gave it to her or her attorney. A short time before this bill was filed, the plaintiff says in the bill that she discovered that a fraud had been perpetrated upon her; that Johnston was to receive \$500, which he claimed as commission for effecting the sale to her; and the bill is filed calling upon him to refund that \$500, with interest, and also to restrain him from making sales or incumbering his interest in the property, and to make contribution for what Mrs. Katz has since had to pay on account of the purchase. The defendant's position is that he was not to pay any money at all on the purchase, but that Mrs. Katz was to pay the whole purchase money, and he was to get one-third of the profits for his time and services in managing the property and effecting sales."

"Finding of Facts: (1) That the actual price of the ground was \$5,000, instead of \$5,500; that Dible and Hunter had authorized Johnston to act as agent in selling the property, or to sell it if he could realize to them \$5,000; that if he could not sell it for more than that price he was to get no compensation, but if he could sell it for one hundred dollars (\$100) or five hundred dollars (\$500) more than \$5,000 he could retain the excess for his services in making the sale. (2) That Johnston is not a regular real-estate broker. He had a store in Braddock, and very near to his place of business is the store of Mr. Katz, the husband of the plain-

tiff in this action. He was engaged in some real-estate speculation, but was not known as a regular real-estate broker. (3) That the plaintiff's husband was her agent in this whole transaction. The money paid was Mrs. Katz's money, but he acted as her agent in engaging with Johnston, and in effecting the purchase. His knowledge, therefore, is her knowledge of the transaction. (4) The defendant never made known to the plaintiff or to her husband his agreement with Dible and Hunter, and neither the plaintiff nor her husband had any knowledge of such an arrangement, or that Johnston was to get any compensation whatever in the matter. They regarded him as an equal purchaser with the plaintiff, and supposed that the actual price to be paid to Dible and Hunter was \$5,500. (5) That when the agreement was made for laying the property out into lots and selling them, both the plaintiff and defendant expected a speedy sale, and expected that the proceeds of sale would be amply sufficient to pay the accruing installments and interest on the mortgage, all expenses, and refund to Mrs. Katz the \$2,500 she had paid, with the interest; and it was not expected at the time that Mrs. Katz would have to pay any more money, but that the proceeds of the sales would be sufficient for all purposes; but, in consequence of the depression in the times, and the difficulty in effecting sales, the arrangement failed in this: that very few lots were sold, and none except those already indicated. (6) Mr. Johnston, since the bill was filed, says he procured certain purchasers for certain lots, at certain prices, but Mrs. Katz was unwilling to accept the terms proposed, or the sale of those lots; and under the agreement and circumstances of the case she was not bound to accept those terms, or to make sales on the conditions that Johnston had proposed. (7) From the condition of the market and surrounding circumstances, it is not all probable that lots can be sold at prices which would refund to Mrs. Katz the money she has already expended, and to meet the payments yet to be met on the mortgage within any reasonable time,—perhaps not within two, three, or four years to come,—and the payments on the mortgage will have to be provided for other than by the sale of lots. (8) The provision in the agreement that Johnston was to receive one-third of the profits was based upon the idea that he would have to pay no money; that the sale of the lots would be sufficient to refund to Mrs. Katz what she had paid, and also meet all payments of expenses and on the mortgage. (9) Johnston, under the deed and arrangement between the parties, was jointly liable with Mrs. Katz to pay one-half of the purchase money of the property. The provision in regard to one-third of the profits was based on the idea that the sales of lots would be sufficient to refund the money to pay her, and also meet all contingencies, so that Johnston would not, in that way, have to advance

any money. Mrs. Katz, having advanced the twenty-five hundred dollars, and in that way secured the purchase under the arrangement, would receive two-thirds of the profits. (10) The concealment by Johnston of the arrangement between him and Dible and Hunter as to compensation, and holding out to Mrs. Katz, or to Katz, her husband, that the consideration of the purchase was \$5,500, and not revealing to them the fact that he had any personal interest in it, or was to receive any commission, was a fraud on Mrs. Katz. In good faith and honesty, he was bound to communicate the fact that he was to receive a commission on the sale, and the amount of it. (11) His executing a deed to Elliott was intended to hinder and delay his creditors, or to protect Elliott on some indorsement, but executing it without the knowledge or the consent of Mrs. Katz was a fraud upon her. According to his testimony that he was to pay nothing at all, he should not, in any manner, have incurred his interest in the property, which, according to the deed of record, was a one-half interest."

"Conclusions of Law: The defendant, Johnston, having perpetrated a fraud upon Mrs. Katz in reference to the \$500, should refund the same to her, with interest, and, according to the terms of the note, it bore interest from date, i. e. the 28th day of March, 1893. Mrs. Katz had no knowledge or information as to the claim of Johnston for commission until after that note had been paid. According to the deed and the testimony, the defendant was a tenant in common with Mrs. Katz in the purchase of the property, each having a one-half interest. He was liable to pay one-half the entire purchase money, although by the agreement between them Mrs. Katz paid the hand money, \$2,500, and he was also equally liable with her for the payment of the Caughey mortgage. The personal covenant in the deed is of both parties. He signed the \$500 note as if he were equally liable with her for the payment of that note. The change in circumstances and in the times renders it now impossible to carry out the agreement of May 1, 1893. There is no probability of the lots being sold to meet the future payments of that mortgage, and in that aspect of the case Johnston is equally liable with Mrs. Katz as the purchaser of the property, and he must pay over to her the one-half of all that she has paid up to this time, and be responsible for the one-half that may fall due hereafter. Good faith to her also requires that he shall remove any liens that are on his half interest in this property. Under the agreement of May 1, 1893, both parties must agree to any sale of lots. The difficulty of carrying out that agreement when Johnston had no money whatever in the property now and the change of times makes it almost certain that the parties cannot agree, and that Johnston, in his agency or management of the proper-

ty, will accomplish nothing; and it would be unjust for Mrs. Katz to advance all future payments on that property, and lie out of the money that she has advanced for an indefinite and uncertain period of time in the future. Even then there is no certainty that there will be any profits realized after sales. Johnston said that the property was worth \$13,000, but that was a mere guess, and there was no evidence that would justify any such opinion; and the fact that for two and one-half years only four lots have been sold out of twenty-four, and only \$62 realized on all of them, is satisfactory evidence that it will require years, perhaps, to effect sales, and it is very uncertain whether there will be any profits at all realized in the end. Johnston must do one of two things: He must refund to Mrs. Katz the \$500, with interest on it from the 28th day of March, 1893, and one-half of what she has had to pay on the mortgage, principal and interest, and also remove the liens that are now on this portion. He says that these two judgments remaining, amounting to \$380, are paid, but they remain unsatisfied on the record. If they have been paid, they can easily be marked satisfied upon the record; or, at his election, he may execute a quitclaim deed to Mrs. Katz for the property, retaining the \$500, which would be a most liberal compensation in the way of commissions for effecting the sale, and also an ample compensation to him for all his time and labor in trying to effect sales. That should be done within thirty days from this date. Let a decree be drawn in favor of the plaintiff as indicated in this opinion, and also an injunction against Johnston restraining him from making any conveyance of his interest in the property, or in any way incumbering it; the costs to be paid by him."

E. F. Duffy and James R. Macfarlane, for appellant. William Yost, for appellee.

PER CURIAM. We find no error in the proceedings leading up to the decree from which this appeal was taken, nor in the decree itself. The findings of fact were amply warranted by the pleadings and proofs; and the conclusions drawn from the facts thus established appear to be substantially correct. On these findings and legal conclusions of the court below the decree is affirmed, and appeal dismissed, with costs, to be paid by appellant.

(173 Pa. St. 200)

FELTS v. DELAWARE, L. & W. R. CO.

(Supreme Court of Pennsylvania. Nov. 9, 1896.)

On rehearing. Denied.

For former report, see 33 Atl. 97.

PER CURIAM. The effect of the constitutional provision in relation to the change of venue in civil cases, and of the act of 1875,

which was passed to carry that provision into effective operation, was fully considered when this case was decided. The motion for reargument now before us draws our attention to the same subject. We have carefully considered the suggestions in the appellant's brief, and the cases cited therein, but we can see no reason to doubt that the conclusions originally reached in this case were correct. *Evans v. Willistown Tp.*, 168 Pa. St. 578, 32 Atl. 87, which seems to be relied on for a contrary doctrine, is not in point. It merely decided that the act of 1893 did not repeal the act of 1891 relating to the same subject, because its title was defective. But for that circumstance, an opposite conclusion would no doubt have been reached. But the act of 1834, providing for the removal of cases in which a railroad or canal company was a party to another county for trial was a general law, though relating only to a particular class of cases. The act of 1875 is a later general law, embracing all civil cases. It was intended to introduce a system applicable to all cases that might arise, and to supersede and replace the incomplete system provided by the act of 1834. We think it was effectual for that purpose. The motion for reargument is refused.

(178 Pa. St. 384)

KEELY et al. v. HARTRANFT.

(Supreme Court of Pennsylvania. Nov. 11, 1896.)

CONTRACTS—PAROL MODIFICATIONS—ACCOUNTING—COPYRIGHT.

1. Where a written contract for the publication of a book does not prescribe the style, etc., or fix the selling price thereof, but leaves these matters to the discretion of the publisher, a parol agreement that copies shall not be sold for less than a given price materially modifies it, and will not be extended beyond the first edition, where there is a conflict of testimony as to whether it was intended to extend further.

2. In an accounting under a contract for the publication of a book, by which the authors are to receive a certain percentage of the net profits, the cost of publishing the books which remain unsold should be deducted from their market value, and the authors should receive their share of the balance.

Appeal from court of common pleas, Philadelphia county.

Action by Robert N. Keely, Jr., and G. G. Davis against Rufus O. Hartranft. From a judgment for plaintiffs, defendant appeals. Reversed.

Robert N. Keely, Jr., one of the plaintiffs, accompanied Lieut. Peary on his Arctic exploration, and upon his return wrote a small book, which he entitled "In Arctic Seas," in collaboration with Dr. G. G. Davis, the other of the plaintiffs. This book, in its form, was a failure. In September of 1892, information having been received of the success of the Peary relief expedition, the plaintiffs determined to have their book published in a larger form, by combining therewith certain subsequent matters relating to Lieut. Peary's ex-

pedition, an account of former Arctic explorations, and certain other matters, so as to increase the book 200 additional pages. They opened negotiations with the defendant, Rufus O. Hartranft, who was then a book publisher, to publish said book for them, which negotiations ended in a written contract made on the 29th day of September, 1892, whereby the plaintiffs conveyed all rights and use of the book theretofore published by them, also to 500 copies of that book in sheets, and appointed the defendant publisher, and agreed that no right to use or print any portion of the work should be transferred to any one else without defendant's consent. They also agreed to deliver before the 10th day of October, 1892, 200 additional pages, to be added to the book, and renounced all right to publication in favor of the defendant. And, further, it was agreed that the value of these 500 copies should be contributed to the advertising fund, and defendant agreed that their value was 40 cents a copy, which sum he would pay to the plaintiffs out of the net profits derived from the sale of the first 2,000 copies; that plaintiffs should accept, as payment for this transfer of right and 500 copies in sheets, 25 per cent. of the net profits received from the handling of the work by defendant. Under this agreement, 600 copies were furnished by the plaintiffs. The defendant had the book copyrighted in his own name, and published two editions, in form similar to that published before the work was enlarged, and also a cheaper third edition. In April, 1893, the plaintiffs demanded a statement of the defendant, which was furnished them; and, not being satisfied with that statement, they filed their bill in this case for an account, etc., and thereupon moved the court for an injunction to restrain the defendant from further publication of the book. The court, upon argument, refused to issue the injunction, and thereupon defendant answered said bill, denying the specific averments thereof, and praying to be dismissed, etc.; and thereafter the plaintiffs amended their bill by an averment that, at the time the contract was entered into as aforesaid, it was distinctly and expressly agreed between the parties that the said book should not be sold at retail at less than \$3 a copy, and that copies should not be sold to the trade below \$2 a copy, and that such fixing of a minimum price was an essential feature and part of the said contract, and, further, that the said book was at that time on sale at retail in Philadelphia at \$1.24 a volume, and had been offered to the trade at 90 cents, and amended their prayers,—that the defendant be enjoined from selling any copies of the said book to the trade at less price than \$2 a volume. Both the plaintiffs testified as to such agreement, but defendant testified that it extended only to the first edition.

William F. Johnson, for appellant. Reginald K. Shober and Marcel A. Viti, for appellees.

McCOLLUM, J. The learned master found there was an oral agreement prescribing the form and quality of the book, and fixing the price at which it should be sold. He said in his report that this agreement did not modify the written contract, but that it simply regulated matters as to which the latter was silent. He interpreted it, however, as fixing the selling price of every book published by the defendant under the written contract, and as guarantying the sale of it at that price. He accordingly charged the defendant at least two dollars for every book sold directly to the trade, and for every book sold by agents, and at least three dollars for every book "sold for cash and through the mail." We think the learned master erred in his conclusion that the oral agreement was applicable to all the books the defendant might publish and dispose of under the written contract, and that the latter was not modified by the former. It seems to us that the oral agreement materially modified the written contract, and was applicable only to the first edition. The evidence fairly warranted the finding of an oral agreement applicable and limited to the first edition, but it did not authorize the finding of an agreement applicable to all books the defendant might publish and sell under the written contract. We may therefore construe the agreement found by the master as limited to the first edition, and, with this modification of the written contract, determine the rights of the parties thereunder. By the terms of the contract, so modified, the plaintiffs were entitled to an account of the publication and sale of the first edition, on the basis adopted by the master. But the oral agreement furnished no basis for an account of the publication and sale of the second and third editions. As to these the contract, as written, furnished the basis for an adjustment. On the basis thus furnished, the plaintiffs are entitled to receive, first, \$240 from the net profits arising from the publication and sale of the work, and after that to have one-fourth of the net profits realized from the handling of the work by the defendant. All the expenditures connected with the publication and sale of the book must be borne by the defendant, and after the payment of \$240, as above stated, three-fourths of the net profits of the enterprise belong to him. In the absence of net profits, the plaintiffs are not entitled to anything more than a cancellation and surrender of the contract, together with a conveyance to them of the defendant's rights in the copyright. The written contract did not prescribe the form, style, or quality of the work, or fix the selling price of it. These matters were left to the discretion of the publisher, whose interest in it would naturally impel him to use his best judgment and skill to make the venture a success. He was not required to continue the publication and sale of the book at a loss, but it was his duty to do all that he reasonably could to promote the success of the enterprise. The amount expended in the pub-

lication of the unsold books should be deducted from their market value, and one-fourth of the balance, if any, should be paid to the plaintiffs. As it is evident that the defendant does not regard the copyright or contract as of any value to him, there can be no reasonable objection to the fourth and fifth paragraphs of the decree. In fact, the learned counsel for the appellant makes no objection to them. Decree reversed at the cost of the appellees, and record remitted, with directions to state an account and enter a decree in accordance with this opinion.

(178 Pa. St. 280)

In re WHITE et ux.

Appeal of BROWN.

(Supreme Court of Pennsylvania. Nov. 2, 1896.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—SALE OF REAL ESTATE—DISCRETION OF TRIAL COURT.

1. An assignee petitioned for an order allowing him to sell real estate, as sales by the sheriff, under judgments to which it was subject, would be injurious to the assignor and his creditors. A commissioner appointed by the court reported that the property was in 14 parcels, consisting of farms, coal lands, and village lots, valued at about \$69,000, with liens amounting to about \$102,000; that some of them were owned entirely by the assignor; that in some he had an undivided interest; and that some were held by equitable title. A contest was pending as to the validity of the judgments affecting the land, and a previous contest had greatly reduced their amount. *Held*, that these facts rendered it difficult to determine whether the lands could be sold for enough to pay all liens (Act Feb. 17, 1876), so as to warrant the court in granting the petition.

2. An order allowing an assignee for creditors to sell real estate which was subject to judgment liens will not be disturbed on appeal in the absence of proof of an abuse of discretion.

Appeal from court of common pleas, Westmoreland county; Lucien W. Doty and A. D. McConnell, Judges.

Petition by Edward E. Rollins, assignee of the estate of James White and wife, for an order allowing him to sell real estate. From a decree granting the order, John D. Brown, assignee of Peter S. Pool & Son, appeals. Affirmed.

John F. Wentling, David A. Miller, and Edward B. McCormick, for appellant. P. H. Gaither, H. P. Laird, C. E. Woods, J. B. Keenan, E. E. Robbins, and J. E. Kunkle, for appellee.

GREEN, J. It appears by the report of the commissioner in this case that the appraised value of the property for which the order of sale was asked was \$69,307.67, while the total amount of the liens affecting the same was \$102,623.34. The real estate in question consisted of fourteen different tracts of land and interests therein, thirteen of which were situated in Westmoreland county, and one in Washington. The properties

were of various kinds, consisting of farms, houses, and lots in villages, and tracts of coal land, in some of which the assignor owned undivided interests with other persons, and some of which he owned entirely. Some of the properties were held by fee-simple title, and others by equitable title only. Among the reasons set forth in the petition for granting the order of sale are the following: "The petitioner further represents that because of the number of properties, the varied character, quality, and value thereof, and the undivided interests held as aforesaid, and equitable titles dependent upon final decree, in his judgment a sale thereof by execution on the part of the sheriff would be not only to the disadvantage of the said James White, but would be working a manifest injury to many of his lien creditors." The petitioner also averred that, if an order of sale was granted, he would be able to sell the several tracts on the premises on more favorable terms, and with the opportunity of making subdivisions of such portions of the lands as were contiguous to villages and towns, and by these means he would be able to make more favorable sales, to the advantage of both the assignor and his lien creditors. It is alleged in the appellee's counter statement, and not denied, that all of the numerous creditors of the assignors, except this appellant, acquiesced in the petition. It also appears that a contest was pending as to the validity of the appellant's judgments, and it is alleged that, if that contest terminates favorably to the assignor, the amount apparently due on these judgments would be largely diminished. It is also set forth that, in one contest already had respecting these judgments, a diminution of their amount was effected, to the extent of \$35,000; and, since that, other facts have been discovered tending to establish a further defense to the judgments in Washington county, and that a rule to show cause why they should not be opened had already been obtained.

It is only necessary to refer to these allegations as tending to show a state of uncertainty as to the amount of the liens, and, consequently, as to the question whether, in the language of the act of 1876, it is "difficult to determine whether the same [the lands] can be sold for enough to pay all the liens." Before granting the order of sale prayed for, the court appointed a commissioner to ascertain the liens affecting the real estate in question, and the extent to which they affect the properties respectively. The commissioner thus appointed subsequently made an extended report, describing the various properties and the very numerous liens affecting them. The result of this report developed a very complicated situation in regard to the character, extent, and distribution of the liens among the various properties. There was a considerable number of mortgages, some of which would be discharged by a sheriff's sale, and others not, and

some of which were paid, either in part or in whole. Some of the judgments were liens upon parts of the properties only, and others upon other parts, all of which were carefully specified and described.

Upon an examination of the whole record, it seems to us that this was a very proper case in which an order of sale to the assignee should be granted, not only in the interest of the assignor, but also of all his creditors. A sheriff's sale or sales of such a mass of properties, with such a confused condition of the liens upon them, would almost certainly be attended by disastrous results in the prices obtained, all of which could be probably averted by assignee's sales made with care and deliberation, and at carefully selected times, and in limited parcels. In view of the fact that the discrepancy between the estimated value of the aggregated properties and the amount of the liens is not very great, and is an uncertain quantity, which may result in an amount of sales larger than the estimate, and an amount of liens less than is apparent on the records, we do not think there is anything in the act of 1876 which would deprive the court of its jurisdiction to entertain the petition, and to grant the order. The jurisdiction is not measured by any exact terms or precise limitations. The event upon which the power to grant an order of sale arises is itself an uncertainty. It is the difficulty of determining whether the real estate of a voluntary assignor for the benefit of creditors can be sold for money enough to pay all the liens against it. No one can absolutely decide such a question in advance, and considerable latitude must always be allowed in determining whether to exercise the power. Moreover, there are other reasons for its exercise than the one thus stated, and they appear in the act. They are found in these recitals, "Whereby the titles made by the assignees are regarded as doubtful, and the assignees are thereby unable to make advantageous sales of said real estate;" and, "Where the said court shall deem it for the manifest interest of all parties authorizing and empowering the said assignees to make public sale of said real estate." These considerations, briefly expressed, are: (1) The doubtful character of the title made by assignees; (2) the consequent difficulty of making advantageous sales; (3) the manifest interest of all parties concerned. In construing the statute, it is essential that all the matters should be regarded. Having, then, in view the difficulty of determining whether the lands can be sold for enough to pay off the liens, the doubtful character of the title made by assignees before the act of 1876 was passed, the resulting difficulty of making advantageous sales, and the manifest interest of all the parties concerned in the particular case, it must be also considered that the court to which the application for the order of sale is made has a discretionary power to grant or refuse the order. When that discretion is exercised, and an order is granted, it

will require very clear and satisfactory proof of either an abuse of discretion, or a manifest disregard of the plain rights of execution creditors, under all the evidence, to induce an appellate court to reverse the action of the court below. In the present case we not only do not see any reason for such action on our part, but, on the contrary, we are well convinced that the granting of the order of sale in question was a wise and judicious exercise of the power of the court below. Instead of proving a loss to any of the lien creditors of the assignor, we think a sale made in this way will result far more to the advantage of all than any possible sheriff's sale.

In the case of *In re Pauley's Estate*, 149 Pa. St. 196, 24 Atl. 114, we said: "Upon the facts of the application for the order of sale, we think it clearly apparent that the case is one eminently proper for the exercise of the power of the court to grant the order. The act was intended, and it expressly so declares, to apply to cases where the real estate is 'incumbered with liens to such an extent as to render it difficult to determine whether the same can be sold for enough to pay all the liens. That was precisely the case here. The liens were somewhat in excess of the appraised value, but the appraised value may not be the real value, and may not be so much as the proceeds of the sale. It is alleged here that the liens are stated excessively in respect that one of them is duplicated in the amount of another. We do not think the difference even in the amount of the appraised value and the aggregate of the liens as most largely stated is sufficient to relieve the case of the uncertainty which gives the court jurisdiction to grant the order." In that case the property was appraised at \$24,144.97, and the amount of the liens as stated was \$31,330.75, the excess of liens being nearly 30 per cent. greater than the appraised value. In the present case the difference is not much greater than that, taking the lowest estimate of the property, and the highest estimate of the liens; while, if the highest estimate of the property be assumed, and the lowest estimate of liens, there is scarcely any difference in the amount. In *Appeal of Thompson*, 126 Pa. St. 467, 19 Atl. 43, an order of sale granted by the court below was affirmed at bar by this court, the lien creditors having averred in their answer to the assignee's petition that the lands were appraised at \$194,053.33½, and the liens did not exceed the sum of \$90,000, and therefore there was no difficulty in determining whether the lands would yield enough to pay all the liens. Notwithstanding this wide divergence, we held that the order of sale was properly granted, and refused to interfere.

The reasons we have already stated are sufficient to sustain the order granted by the learned court below, and we therefore dismiss the assignment of error. The decree of the court below is affirmed, at the cost of the appellant, and the record is remitted for further proceedings.

(118 Pa. St. 310)

HAYES et al. v. TREAT et al.

(Supreme Court of Pennsylvania. Nov. 9, 1896.)

PARTNERSHIP PROPERTY—REAL ESTATE—VENDOR AND PURCHASER.

1. The presumption arising from a deed of real estate to the individuals composing a firm, that they hold as tenants in common, and not as partners, is rebutted by the fact that the property was bought with partnership funds, and treated as partnership property.

2. Trustees of a church were negotiating for the purchase of a certain lot of land. Plaintiff told the wife of one of the church members, who was not a trustee, that she had an interest in the land, and would not sell. *Held*, that proof of this declaration was incompetent for the purpose of showing notice of plaintiff's claim.

Appeal from court of common pleas, Washington county; J. F. Taylor, Judge.

Ejectment by Margaret Hayes, Katherine, Lola B., Margaret F., Bessie, and Charles H. Hayes, and Sarah Forrest, widow and heirs at law of Charles Hayes, deceased, against Milo C. Treat, William L. McCleary, and Isaac J. Dickson, trustees of the Baptist Church of Washington, Pa., to recover an undivided moiety of a lot of ground situated on the south side of East Wheeling street, in the borough of Washington, on which the defendants had erected a church edifice, and of which property they were shown to be in possession. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

David Sterrett, J. M. Braden, and Boyd & E. E. Crumrine, for appellants. T. F. Birch, for appellees.

WILLIAMS, J. Sheldon B. Hayes and Charles Hayes were brothers and partners in business. The time when the partnership was entered into does not appear, but it seems to have been in existence, and to have been successfully conducted, for many years prior to 1873. In that year they entered into an agreement as partners for the purchase from Mrs. Martha B. Montgomery of the lot of land, in the borough of Washington, now in controversy, for the price of \$3,100. The purchase money was paid out of partnership funds. They entered into possession as partners, and conducted a partnership business upon it. The deed was made to them in 1874, and names the individual partners, S. B. Hayes and Charles Hayes, as the grantees. S. B. Hayes died in 1879, but his son Marshall took his place in the firm, and the business was continued for the benefit of the surviving partner, Charles Hayes, and the family of his deceased brother, no settlement having been made. Charles died in 1886, but the firm business was continued under the same firm name, and without settlement, until the death of Marshall Hayes, in 1891. After his death, his executors and the executors of Charles Hayes joined in a sale of the lot in controversy to the defendants, for the sum of \$6,300, treating it as a part of

the property of the partnership. The purchasers paid \$4,300 in hand upon the contract, of which \$4,000 was at once applied to the payment of a partnership debt contracted in 1884, some two years before the death of Charles Hayes. For this debt the estate of Charles was liable, and the payment made upon it, at least to the extent of half of the amount, was in relief of the estate of Charles Hayes. The plaintiffs are the widow and heirs at law of Charles, and their claim in this case rests on the position that S. B. and Charles Hayes were tenants in common in this lot, and that the undivided one-half of the title descended to them at the death of Charles Hayes, as a part of his individual estate. The controlling question upon the trial in the court below was, therefore, whether this lot of land was held by S. B. Hayes and Charles Hayes as partnership property, or as their individual property. This, in the absence of any written declaration upon the subject by the grantees named in the deed, was to be determined by their conduct and the ownership of the fund out of which the purchase money was paid. The question is not raised by creditors of either the firm or the individual members of it, but by the heirs at law of one of the partners against the executors of their ancestor. There is therefore no question of priority or of notice to be considered, but simply one of ownership.

What was the fact as to the ownership as between these brothers, S. B. and Charles Hayes? The general rule is that, if the real estate is bought with partnership funds and for partnership purposes, it is partnership property, notwithstanding the deed may be made to the individuals of whom the firm is composed. *Bates, Partn. § 230*. Our own cases holding this general doctrine are numerous and consistent. In *Erwin's Appeal*, 39 Pa. St. 535, the title was in the name of one of the partners, but the lot had been bought for partnership purposes, and paid for out of partnership moneys. For some reason, it had not been used by the firm, but it was held to be partnership property; and its proceeds were distributed among partnership creditors, in preference to the creditors of the grantee named in the deed. So, in *Abbott's Appeal*, 50 Pa. St. 234, this was the only question raised, and we said that the presumption arising from the fact that the deed was to the individual partners was rebutted by the facts that the land was bought for partnership purposes, and paid for with partnership funds. Under such a state of facts, the grantees named in the deed take the legal title in trust for their firm, which pays the purchase money, and for whose use the purchase is made. To the same effect are *Meason v. Kaine*, 63 Pa. St. 335, and *Association v. Reed*, 80 Pa. St. 38. *Shafer's Appeal*, 106 Pa. St. 49, states the rule very fully, and that payment of the purchase money out of the partnership funds for property bought for firm uses rebuts the pre-

sumption arising from a deed to the individual members of the firm. *Warriner v. Mitchell*, 128 Pa. St. 153, 18 Atl. 837, takes the distinction between a contest made by creditors and one made by the partners with each other. In the latter case it was held that land bought with partnership funds, used for partnership purposes, and treated as partnership property, is partnership assets, notwithstanding the deed may be held by individual partners. The same rule was stated in *Collner v. Greig*, 137 Pa. St. 606, 20 Atl. 938. The importance to be given to the fact that the property had been bought for some partnership purpose is illustrated by *Coder v. Huling*, 27 Pa. St. 84, where it was held that, if the property had not been purchased for the use of the firm, the payment of the purchase money, standing alone, would not rebut the presumption arising from a deed made to the individual partners. In this case, therefore, we are of opinion that, as the plaintiff relied upon the presumption arising from the deed, the learned judge would have been warranted in telling the jury that, if satisfied that the land in controversy had been bought for the use of the firm of S. B. & Charles Hayes, had been paid for with partnership moneys, and treated by them during their lives as partnership property, the presumption arising from the deed was fully rebutted, and the plaintiffs could not recover against the vendee of the representatives of the partnership.

This view of the main question presented on this record makes the treatment of the several assignments of error separately a matter of little importance, but, as the case goes back, it may be best briefly to consider them.

The first assignment is sustained. It relates to an effort to show notice to the trustees of the Baptist Church. Proof of a conversation between one of the plaintiffs and a woman who was not even a member of the church, but whose husband was, although he was not one of the trustees, is wholly incompetent for the purpose of showing notice.

The assignments Nos. 2 to 11, inclusive, are to the admission of deeds for other property, having no relation to the property in controversy, but purchased at various times by the firm or one of its members, for purposes not disclosed by the testimony. These assignments are sustained.

Numbers 12, 13, and 14 are to the admission of the testimony of the several plaintiffs to show that they had not assented, directly or indirectly, to the sale of the property to the trustees of the Baptist Church. This could only be competent in case their assent had been alleged by the defendant. It is wholly immaterial whether they give or withhold their assent if this was partnership property.

The twenty-first and twenty-third assignments relate to the character of the proof required in cases where a written instrument is alleged to be different from the agreement actually made by the parties, and its reforma-

tion is sought. The general rule in such cases is as stated, but the simple affirmance of the points embodied in these assignments was, upon the evidence in this case, calculated to mislead the jury. The evidence of the plaintiff was the deed from Montgomery and wife, and the presumption arising upon it. The proofs of the defendants showed the facts necessary to rebut that presumption, and establish the title of the partnership. This evidence was clear, precise, and, as we understand, no effort was made to reply to it or throw doubt upon it. If so, it may be said that, subject to the credibility of the witnesses, it was indubitable. If the jury were satisfied by it that the partners bought the lot for partnership uses, with partnership money, and treated it as partnership property, then the *prima facie* of the deed was successfully overcome, and the title of the partnership established. It was not error to affirm these points, as we have already said, but it would have been better to have explained the extent of the application of the rule invoked to this case upon the evidence that was before the jury.

The remaining assignments of error relate to some phase of the general question which we have already considered, and do not require to be separately treated. The judgment is reversed, and a *venire facias de novo* awarded.

(178 Pa. St. 416)

In re MARTIN'S ESTATE.

Appeal of SAYERS.

(Supreme Court of Pennsylvania. Nov. 11, 1896.)

CONDITIONAL LEGACY—ASSIGNABILITY.

The right to a legacy payable to the legatee "personally when he shall come for it" becomes absolute on a personal demand made by the legatee, and the legacy is then assignable. *Stover's Appeal*, 77 Pa. St. 282, distinguished.

Appeal from orphans' court, Green county; Allen P. Dickey, Judge.

Report of auditor for distribution of the funds arising from sale of the real estate of Ruth Martin, deceased. From a decree of the orphans' court affirming the report, E. M. Sayers appeals. Reversed.

James E. Sayers, for appellant. A. A. Purman, for appellees.

FELL, J. The controversy in this case grows out of the following clause of the will of Ruth Martin: "Thrid. I give and bequeath to my grandson, A. M. Vale, \$1,000.00, to be and remain in the farm whereon I reside, to be paid to him personally when he shall come for it; but, should he never come for it, then I direct it to be divided among my other legatees equally, hereafter mentioned." In the same clause the testatrix directed that her daughter, Mary Riggle, should take the farm on which the legacy was charged, at a valuation to be fixed by

an appraisement, but provided that, if it was not taken by her, it should be sold, and the proceeds divided among a number of legatees. Her daughter declined to take the farm, and it was sold under proceedings in the orphans' court. Several years before the date of the will, A. M. Vale removed to the West, and there was a report in the neighborhood in which he had lived in this state that he was dead. The testatrix, his grandmother, had heard this report; and, at the time of the execution of the will, she was in doubt whether he was living. She died in October, 1881, two years after the date of her will. In February, 1882, A. M. Vale, having heard of the provisions of the will, came from California to Pennsylvania for the purpose of collecting the legacy. He demanded payment of Mary Riggle, on whose land, if she took the farm, the legacy was made a charge, and of the administrator *c. t. a.* of the estate. Neither of these parties at the time was in possession of funds with which to pay him. After remaining here a few weeks, he sold and assigned the legacy to E. M. Sayers, the appellant, and returned to his home in California, and has not since been in this state. It does not appear when Mary Riggle finally refused to take the farm at the valuation fixed. An appraisement was made, and negotiations between the parties were pending for some time; and, upon their failure to agree, proceedings to effect a sale were commenced, in June, 1885. Notice of these proceedings were served upon the appellant as assignee of Vale. Upon these facts the learned auditor found, as matter of law, that the legacy was not assignable, as it was contingent and the condition upon which it would vest had not been performed; that the demand made by Vale was insufficient, and that he must now come personally for the legacy to the party authorized to pay from the proceeds of the sale of the farm; and he directed that the amount of the legacy should be set apart to be paid to Vale, and that, in the event of his not coming and receiving it personally within six months from the confirmation of the auditor's report, the sum set apart should be distributed to the other legatees. His report, except the requirement as to the time within which Vale should appear and make demand, was confirmed by the court.

This finding cannot be sustained. The case is not governed by *Stover's Appeal*, 77 Pa. St. 282. The difference in the wills is sufficient to indicate different intentions on the part of the testators, and in *Stover's Appeal* no demand had been made for the annuity. It is unnecessary to consider whether the legatee had a vested interest in the legacy at the death of Mrs. Martin, as we think that the conditions upon which the legacy became payable were complied with by him. The evident intention of the testatrix was that her grandson, if living, should receive \$1,000 of her estate. She had

reason to suppose that he was dead, or that, if living, he might never return to receive her gift. She gave effect to her intention by providing that the legacy should be a charge upon the land which she desired her daughter to take, and to be paid to her grandson if he came for it, and by a bequest over if it should be unclaimed by him. He came within five months of her death, and claimed the legacy. This claim was made to the administrator, and to the daughter, to whom the land was to go. These were the proper persons of whom to make demand. They were unprepared to pay. No duty rested upon the legatee to wait indefinitely, or to cross the continent again to make demand at the particular time when, in the course of the administration, the fund was ready for distribution. He did all that he was required to do, and all that it was intended that he should do. He came and demanded the legacy. His right to it then, if not before, was fixed, and he could deal with it as he pleased. It follows that the assignment by Vale was valid, and that the appellant is entitled to the amount of the legacy, with interest from October 12, 1882. We see no reason why any part of the expenses of the audit should be deducted from the legacy. The appellant has not been in fault in asserting what we regard as a just demand, and the whole expense of the audit should be paid from the general fund. The order of the court of December 31, 1895, is reversed and set aside, and the record is remitted, in order that distribution may be made in accordance with this opinion.

(173 Pa. St. 239)

HESS v. BERWIND-WHITE COAL-MIN. CO.

(Supreme Court of Pennsylvania. Nov. 9, 1896.)

NEGLIGENCE — QUESTION FOR JURY — PROXIMATE CAUSE—AGENCY.

1. The fact that the result of negligence could not have been foreseen does not prevent such negligence being the proximate cause of an accident.

2. An employé of a mining company engaged in running its loaded cars down a grade siding owned by a railroad, but used solely by such company, is not, as to third persons, an agent of the railroad.

Appeal from court of common pleas, Jefferson county; H. M. McClure, Judge.

Appeal by defendant from the judgment of the court of common pleas of Jefferson county. Affirmed.

The facts sufficiently appear in the charge of the court below:

"This is an action brought by Annie F. Hess against the Berwind-White Coal-Mining Company, to recover damages, in behalf of herself and children, for the death of her husband, caused, as she claims, by the negligence of the defendant company. It is contended on the part of the plaintiff that on the 21st of April,

1893, Mr. Hess was in the employ of the Pennsylvania & Northwestern Railway Company, and on that day was on a freight train composed of eight cars, four of them ordinary box cars, and four coke racks. This train was backing down towards the No. 5 Mines of the defendant company, with the trainmen on it, and ran into a car protruding from the siding of the defendant company over the main line of the railroad; and plaintiff claims that, as a result of this collision, Mr. Hess was killed; that the car of the company protruding over the main track of the railroad company was placed or driven there by the negligent act of the defendant company; and that sufficient notice was not given the railway company of the obstruction on the track. * * * It is contended (and there is no dispute as to this branch of the case) that the sidings about the coal company's works at No. 5 Tipple were owned by the railway company; that it was accustomed to back the light cars up a light car siding beyond the tipple; they were then placed on a siding with a grade, known as a 'loading siding,' and brought to the tipple by the employés of the defendant company, loaded, and then run by gravity on down towards the main track of the railway; and that on this road was a throw-off or safety switch. This switch seems to have been the one that is in ordinary use, and has been for twenty years, by railway companies at like places, and that it was upon the day of the accident; so that, ordinarily, the cars, if they got beyond the control of the man in charge in dropping them down from the colliery, would run out on the ties, and over towards the hill, and away from the main track, so that they would not get on the main track. That is the object of the switch. It seems that on this day Mr. McGregor was dropping these cars for the company. He had dropped the first two cars (which was their custom, two at a time) to within some fifteen feet of the throw-off switch. He then dropped two more, and two more, until, at some one time, either one or three, so that he had the number of seven on this siding. He then dropped two more down, and they went with such speed that he seemed to be unable to control them, and they struck those seven cars, driving one, the last car, entirely off the siding, through this throw-off switch, to the front truck of the second car. This first car was so driven that it protruded over on the line of the railroad. It is contended on the part of the plaintiff that Mr. McGregor was negligent in the handling of this car. * * * In the second place, it is contended that, after the car had been thrown out on the main line, notice was not given the railway company; that the defendants were negligent in not notifying the railway company of the obstruction on its track. It seems there was an arrangement or understanding between those companies, or probably orders from the railway company, as we understand the testimony, that, when there was an obstruction on the track,

the orders were to go to the weigh office, and telephone to the dispatcher's office of the obstruction, so that the railway company could promptly for itself remove, and notify the men running the trains of, the obstruction. The testimony of Mr. McGregor on this point is that it was some ten minutes after the obstruction that he notified the railway company of the obstruction on the track. Was this notice given in time? Was it promptly given? Given in time? And was that all the notice that the railway company should have had of this obstruction? If it was, then the defendant company is not guilty of negligence on that branch of the case.

"In order for the plaintiff to recover here, she must not only show that the defendant company has been guilty of negligence, but it must also appear to you that the men in charge of this train were not guilty of negligence; for if they were guilty of negligence, and the two concurred or contributed,—the negligence of the defendant company, assuming that there was negligence, and that of the hands running the train,—if those two concurred or contributed to the injury, the plaintiff is not entitled to recover. It seems that this train was being backed along there at the rate of eight miles an hour. The engineer was at the rear of his train, and it seems he was the first one, although at the rear of the train, to notice the obstruction on the track. The conductor and Mr. Hess, a flagman, and other brakemen, were along this train; and the conductor, we believe, was on the first car, and the flagman also; and it seems, although they were there, that no notice was given by them to the engineer of the obstruction until after he had noticed it himself, and thrown on his brakes, and reversed his engine. * * * Was there due care on the part of those trainmen? Could they by this due care have discovered the obstruction on the track in sufficient time to have stopped the train? The evidence is, on the part of the engineer, that if they had, if the brakes had been applied in conjunction with his efforts, by the brakes on the tender and engine, and the reversing of the engine, the train could have been stopped in its length, or two hundred feet, and that he discovered the obstruction some eight hundred feet before they came to it, but was unable to stop the train, because he received no assistance from the trainmen to do so. Now, if they could have stopped this train by due care, could have seen the obstruction, and stopped the train, and, by not doing so, they ran into it, they would be guilty of contributory negligence, and the plaintiff could not recover.

"It further is necessary for you to find, and, of course, a most important part of this case, or one of the important parts, at least, that the defendant met his death by reason of the obstruction on the track. He was seen shortly before the collision on top of the car. He then went back, and we believe the rear brakeman testified that he saw him down be-

tween the cars, as he passed over them, just before the collision, or, rather, he stated he did not see him then, but that the last time he saw Mr. Hess he was down between the cars. He did not have time to look the last time he passed over them. The engineer, some time before that, saw him go down between the two cars,—that is, the first and the second car; and one of the other men saw him go down between them; we believe that was Mr. Aul. But all the testimony is for you to determine, and, if we have made a mistake, we have no doubt you will readily correct it. So that this man, Mr. Hess, was seen at that time, and then not again until he was on the track, maimed and injured to such an extent that in a few minutes he died. Then, was this collision the cause of his death? Was the company guilty of negligence in running the car out, and in not notifying the railroad company of the obstruction on its track? And, third, were the trainmen guilty of contributory negligence in the causing of this death? Those are the material points for you to determine; and unless you find, as we have said, that there was freedom from negligence on the part of the trainmen, even if there was negligence on the part of the defendant company, your verdict should be for the defendant; otherwise, for the plaintiff. * * *

Defendant's four points referred to in the opinion, and the answers thereto, are as follows: "Fifth. The plaintiff cannot link together, as cause and effect, events having no probable connection in the mind, and which could not, by prudent circumspection and ordinary thoughtfulness, be foreseen as likely to happen in consequence of the act in which the defendant was engaged. The defendant could not be required to foresee that the loaded coal cars would escape, and that, if they did escape, the safety switch would not perform its ordinary functions; that one of the cars would obstruct the main track; and that a nonscheduled train, with the engine behind pushing it, would be coming upon that track at that time; and that the trainmen would not see the obstruction in time to stop; and that when it had been seen by the engineer in time, who immediately put on his brake, and reversed his engine, that none of the brakemen would set their brakes to assist him in stopping the train before it reached the obstruction. Therefore the alleged negligence of the defendant was not the proximate cause of the accident. Answer: We do not so instruct you. Sixth. Under the evidence in this case, although McGregor was hired and paid by the defendant company, as to third persons he was the agent of the railway company, and defendant is not liable for his acts or omissions. Answer: We refuse to instruct you as requested. Seventh. There is no sufficient evidence that defendant company was guilty of any negligence which conduced to the accident. Answer: Refused." "Tenth. That, under the evidence in this case, the verdict of the jury should be for the defendant. Answer:

This point is refused." These answers were assigned as error.

G. A. Jenks, Means & Clark, and W. M. Fairman, for appellant. Charles Corbet, R. C. Winslow, and John E. Calderwood, for appellee.

PER CURIAM. Plaintiff's right to recover depended on questions of fact, which were clearly for the jury. They were accordingly submitted by the learned trial judge, with fully adequate and substantially correct instructions. In view of these instructions, the verdict is necessarily predicated of the following findings of fact, *inter alia*, viz.: That McGregor, as employé of the mining company, defendant, was guilty of negligence, that resulted in the death of plaintiff's husband, and that no negligent act of the latter contributed thereto. Special reference to the testimony tending to prove these and other facts necessary to sustain plaintiff's claim is unnecessary. It is sufficient to say that the verdict was fully warranted by the evidence properly before the jury. The defendant's four points, recited in the specifications respectively, were correctly answered. We find nothing in any of them that requires discussion. The learned court was clearly right in refusing to affirm either of them. Judgment affirmed.

(178 Pa. St. 337)

VAN STEUBEN v. CENTRAL R. CO. OF NEW JERSEY.

(Supreme Court of Pennsylvania. Nov. 11, 1896.)

RAILROAD COMPANIES—LEASES—FOREIGN CORPORATIONS—COUNTY—NEGLECT—EVIDENCE—QUESTIONS FOR JURY.

1. A lease by a railroad company of the property of another company, with which it does not connect, is contrary to the policy of the Pennsylvania laws, and will not be recognized as valid by the courts, even though both the parties are foreign corporations, and such lease is authorized by the laws of their native state.

2. In an action against a railroad company for the burning of buildings alleged to have been set on fire by a certain locomotive, witnesses for plaintiff testified as to the large size of the sparks thrown from the locomotive, and the unusual distance to which they were carried, both at that and at other times, and that the fire started immediately after the locomotive had passed. Defendant introduced evidence that the locomotive was furnished with an improved spark arrester, which had been examined shortly before and after the fire, and found in good condition. *Held* that, on this evidence, the question of defendant's negligence should be submitted to the jury.

3. Where a witness has testified positively to a fact, her testimony should be submitted to the jury, though she afterwards states that she was mistaken, for the reason that she was told so by a third person.

Appeal from court of common pleas, Northampton county; Henry W. Scott, Judge.

Trespass by Simon D. Van Steuben against the Central Railroad Company of New Jersey to recover damages for the burning of certain buildings alleged to have been set on fire by

passing locomotives. Judgment was rendered for defendant, and plaintiff appeals. Reversed.

O. H. Meyers and W. S. Kirkpatrick, for appellant. Edward J. Fox and James W. Fox, for appellee.

McCOLLUM, J. Three questions are raised by the specifications of error: (1) Was the action, in view of the leases given in evidence, maintainable against the defendant? (2) Was there sufficient evidence of negligence to submit to the jury? (3) Was the evidence as to the condition of the unidentified engines properly excluded? These questions will be considered in the order in which they are stated.

The action was brought to recover damages for the destruction of plaintiff's buildings by fire caused by the alleged negligence of the defendant, as the lessee of the Lehigh & Susquehanna Railroad. To fix the liability upon the defendant company, the plaintiff gave in evidence the charter of the Lehigh Coal & Navigation Company, under which the Lehigh & Susquehanna Railroad was constructed, and the charter of the defendant company, a corporation of the state of New Jersey, and a lease of the former road by the latter company for a period of 999 years, dated March 31, 1871. The defendant gave in evidence a lease dated February 12, 1892, by the defendant company to the Port Reading Railroad Company, a corporation of the state of New Jersey, of their railroads and leased roads, including the Lehigh & Susquehanna Railroad, with the rolling stock, for the balance of the term of 999 years. The Port Reading Railroad was projected to extend "from a point on the Bound Brook Railroad to a point on the Arthur Kill, on the Staten Island Sound," and was not shown to form a continuous route with the Lehigh & Susquehanna Railroad, and was unfinished at the time of the execution of the lease. The plaintiff, in rebuttal, gave in evidence a lease, dated February 11, 1892, of the Lehigh Valley Railroad Company of their roads in Pennsylvania, with the rolling stock, to the Philadelphia & Reading Railroad Company, for a term of 999 years, together with a tripartite agreement, dated February 12, 1892, between the defendant company, the Philadelphia & Reading Railroad Company, and the Port Reading Railroad Company, and further evidence to show that the Philadelphia & Reading Railroad Company, and not the Port Reading Railroad Company, was the real lessee from the defendant company, in contravention of the laws of Pennsylvania inhibiting the merger of parallel and competing lines, and the laws of New Jersey restricting the execution of leases made by foreign corporations. The court took the case from the jury, one of the grounds specified being that, under the evidence, the action was not brought against the proper party. The plaintiff's evidence given in chief was sufficient to establish a liability on the part of the defendant for negligence, until over-

come by countervailing evidence on the part of the defendant. If the defendant's evidence is insufficient for that purpose, it will not be necessary to consider the testimony in rebuttal. The first question which presents itself for consideration, therefore, is whether the lease of the defendant company to the Port Reading Railroad Company was valid.

The general rule of law governing the execution of railroad leases is thus stated by Mr. Justice Sharswood in *Pittsburgh & C. R. Co. v. Bedford & B. R. Co.*, 81 Pa. St. 104: "One railroad company cannot lease to another its franchise of operating a road built or authorized to be built, unless it can show a grant of power from the sovereign in express terms or by necessary implication. In England, courts of equity have frequently enjoined railroad companies from carrying leasing contracts into effect which wanted the express authority of parliament. 1 Redf. R. R. 592. The general canon of construction applicable to legislative grants of this class, derogating, as they do, from common right and public policy, requires that the intention should be very manifest; if not to be unequivocally expressed, at all events not to depend upon ambiguous phrases, rendering the implication doubtful." *Pittsburgh & C. R. Co. v. Allegheny Co.*, 63 Pa. St. 128, and *Stewart's Appeal*, 56 Pa. St. 418, are authorities for the same principle.

The defendant points to the statute of New Jersey for its authority for the execution of the lease, by which it seeks to escape liability. But the defendant company and the Port Reading Company are foreign corporations, and this leads us to inquire, what is their standing in our courts? "A corporation, being the mere creature of local law, can have no legal existence beyond the limits of the sovereignty where created. The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of these states,—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interest, or repugnant to their policy." *Paul v. Virginia*, 8 Wall. 181. The public policy of a state is to be deduced from the general course of legislation and the settled adjudications of its highest courts. *Christian Union v. Yount*, 101 U. S. 358. It has been ruled that an act, although held to be unconstitutional, may express legislative policy as to foreign corporations. *Empire Mills v. Alston Grocery* (Tex. App.) 15 S. W. 505.

The next question which we are called upon to consider is the public policy of our state as to the leasing of railroads. All of the statutes to which our attention has been directed, conferring leasing powers upon railroads, are limited to railroad companies created by or existing under the laws of this commonwealth giving them leasing rights with foreign or domestic railroads, provided

they shall be connected with each other directly, or by intervening railroads. It has been decided that the terms of a statute providing for the leasing of continuous lines must be held to refer to corporations of the state, unless there is an expressed intent that they are to apply to foreign corporations. *Freeman v. Railroad Co.* (Minn.) 10 N. W. 594. In *Empire Mills v. Alston Grocery*, supra, it was held that the repeal of the statute granting the privilege or organizing mercantile corporations was a direct prohibition against the operation of such corporations within the state, and therefore the law of comity did not require that a mercantile corporation organized under the laws of another state should be allowed to do business therein. In *Methodist Church v. Remington*, 1 Watts, 219, it was held that the equitable powers of the courts will not be exercised to enforce a trust which is against the policy of the state, as expressed by the legislature in parallel cases.

The warrant for the Port Reading lease must be found, if at all, in the legislation of this state. The defendant company relies upon the lease as a defense to the suit. It ought therefore to show that it is such a lease as is authorized by our laws. The act of April 23, 1861 (P. L. 410), and the act of February 17, 1870 (P. L. 31), expressly confer upon railroad companies leasing powers, but in each the grant of these powers is upon a condition named therein: To these acts the defendant must look for its authority to make the lease. It cannot be found in the act of March 24, 1865 (P. L. 49), or in the act of April 14, 1868 (P. L. 100). Neither of them expressly or by necessary implication confers leasing rights. The act of 1861 confers the right to lease, "provided that the roads of the companies so contracting or leasing shall be directly or by means of intersecting railroads connected with each other"; and the act of 1870 confers it, "provided, however, that such road or roads so embraced in any lease * * * shall be connected, either directly or by intervening line, with the railroad or railroads of said company or companies of this commonwealth so entering into such lease, * * * and thus forming a continuous route or routes for the transportation of persons and property." There is nothing in the Port Reading lease or in the evidence in the case which shows that the Port Reading Railroad was connected directly or by intervening line with the Lehigh & Susquehanna Railroad, and it is not claimed in the printed argument of the appellee that they were so connected. As the defendant company relied on its lease to the Port Reading Company for exemption from liability for loss or injury caused by the negligent operation of the Lehigh & Susquehanna Railroad, it was bound to show a warrant for the lease in the statutes of this commonwealth. This, as we have seen, it failed to do. It is well settled that, "where the lease is made without clear and specific authority, it is utterly void,

because public policy very strongly opposes any attempt on the part of the company to relieve itself of its high obligations by transferring them to another company; and, where this is the case, the liability of the lessor is entirely unaffected by the void lease. It remains the same, the lessee being regarded merely as the agent." Wood, Ry. Law, 1055, 1056, and cases cited.

We have not considered the appellant's contention that the lease to the Port Reading Company was in fact, though not in form, a lease to the Philadelphia & Reading Railroad Company, nor whether the evidence was sufficient to warrant a finding that the Lehigh Valley Railroad and the Lehigh & Susquehanna Railroad are parallel and competing lines. While these are questions of fact, to be determined upon evidence applicable to them in a proceeding to cancel the lease, the question whether they can be raised in an action for a loss or injury caused by negligence in the operation of the road does not appear to have been presented to or considered by the court below, nor was it brought to our notice in the argument on appeal. We express no opinion on this question now, but we suggest that it ought to be raised, argued, and considered in the court below and here before there is a final decision of it.

The next question to be considered relates to the sufficiency of the evidence offered to prove the negligence of the defendant. The buildings destroyed were a barn, wagon shed, grain shed, and pig sty, located in close proximity to the railroad tracks. The distance from the west-bound track to the place where the fire originated, in a pile of straw at the rear of the barn, was about 122 feet. The fire occurred on the 19th of July, 1892, about 6 o'clock in the evening, at the close of the day's work of threshing. It was first seen by the hired girl, Edna Redener. She testified that, immediately before she saw the fire, she had been sent from the house to the wood pile for some wood, and that, while she was standing on the porch of the house, she saw the west-bound coal train, with engine No. 315, pass the premises, going west. On reaching the wood pile, she saw the fire, and she at once notified Eugene Kindt, the tenant of the farm, who was in the barn, sweeping the floor. She further testified that she had seen this engine on different occasions throw coals as large as hickory nuts. Eugene Kindt testified that, from the front part of the barn, he saw the tail end of a train going west when he started towards the fire, and, when he first saw the fire, he could have covered it with a big hat. John Ruple testified that he lived about 150 rods west of the plaintiff's buildings, and some 120 yards from the railroad; that he was on his porch, watching for his brother on an east-bound train, at the time the fire started; that the east-bound and west-bound trains passed each other about 75 yards west of the barn; that the west-bound train was moving at the rate of 25 or 30 miles an hour, and threw fire

some 40 or 50 feet up in the air; that it set fire to the grass alongside of the track; and that "the tail end of the east-bound train had not passed yet when the fire broke out." John Warg testified that he had seen No. 315 throw coals the size of a hazel nut, from 150 to 200 feet. A number of other witnesses testified that unidentified locomotives on this railroad threw large coals shortly before and after the fire. Witnesses were produced by the defendant who testified that engine No. 315 was furnished with a spark arrester of an improved pattern, and that it had been examined shortly before and after the fire, and found in good condition. Defendant then recalled Edna Redener for further cross-examination. She testified that she was mistaken when she stated in her former examination that she had seen engine No. 315 throw sparks as large as hickory nuts, but the reason she gave for her mistake is not satisfactory. The reason she gave was that Mrs. Kindt told her she was mistaken, although she admitted that Mrs. Kindt was not present at the time she before thought she had seen the sparks. Mrs. Kindt was also called by the defendant for further cross-examination, and testified that the fire had started before the east-bound train had passed. The court thereupon struck out all the evidence as to the condition of the unidentified engines, and refused to receive similar offers, and, holding that the plaintiff had failed to make out a case, gave binding instructions for the defendant.

The evidence has been briefly reviewed in order to determine whether it was of such a character as to warrant a submission to the jury. If the action of the court in excluding the evidence in regard to sparks thrown and fire set by unidentified engines was correct, still there was sufficient evidence of negligence to warrant a jury in finding it. Besides the witness Edna Redener, there were two other witnesses who testified, among other things, as to the unusual distance to which the sparks from engine No. 315 were borne. Such evidence required the submission of the case to the jury, notwithstanding the testimony that the engine was provided with a sufficient spark arrester. *Huyett v. Railroad Co.*, 23 Pa. St. 374; *Railroad Co. v. Hendrickson*, 80 Pa. St. 182; *Railroad Co. v. Watson*, *81 Pa. St. 293; *Railroad Co. v. McKeen*, 90 Pa. St. 122; *Railroad Co. v. Schultz*, 98 Pa. St. 341; and *Henderson v. Railroad Co.*, 144 Pa. St. 461, 22 Atl. 851.

We also think the court erred in holding that the testimony of Edna Redener should not be submitted to the consideration of the jury. When the unsatisfactory reason for correcting her testimony is considered, we think the jury should have been permitted to pass upon it. The same may be said of the evidence as to the unidentified engines. Mrs. Kindt's testimony that the fire had started before the east-bound train had passed was not undisputed. The positive evidence of John Ruple left the question in doubt, and that doubt should have

been solved by the jury, and not by the court. *Kohler v. Railroad Co.*, 135 Pa. St. 346, 19 Atl. 1049; *Ely v. Railroad Co.*, 158 Pa. St. 233, 27 Atl. 970; and *Glase v. City of Philadelphia*, 169 Pa. St. 492, 32 Atl. 600. Judgment reversed, and venire facias de novo awarded.

(178 Pa. St. 232)

In re KENNEDY.

(Supreme Court of Pennsylvania. Nov. 9, 1896.)

ATTORNEYS—DISBARMENT.

Where an attorney was guilty of forgery, but was acquitted on the plea of insanity, the court is warranted in disbarring him, and in refusing his re-enrollment after discharge from an insane asylum; the evidence not being sufficient to prove that he did not know right from wrong.

Appeal from court of common pleas, Lancaster county.

Petition of members of the Lancaster bar for the disbarment of George O. Kennedy. From a decree of the common pleas striking his name from the roll of attorneys, respondent appeals. Affirmed.

The following statement is from the opinion and finding of facts by the court (Brubaker, J.):

"The petition in this case represents: That the persons who signed the same are members of the Lancaster bar, and the board of censors of the Lancaster Bar Association, which association has for its objects, inter alia, 'the general supervision and conduct of members of the bar, and of all persons connected officially with the administration of the law, or in charge of the public records, and, in cases of any breach of duty on their part, the institution of such proceedings as may be lawful or proper in respect thereto; the improvement of the law, and of its administration; the protection of the bar, and of judicial tribunals, their officers and members, from invasion of their rights, and the maintenance of their proper influence. That the said committee of censors, according to the constitution of said Lancaster Bar Association, has charge of said business of the association, and it is their right and duty, whenever any matter relating thereto is brought to their notice, to take such action on behalf of the association as they may deem proper. That Sue A. Himes has presented to said committee of censors an affidavit, which is appended hereto and made part of this petition. That, at a recent meeting of said Lancaster Bar Association, your petitioners were directed to institute proceedings to have a rule entered by the court upon G. O. Kennedy to show cause why his name should not be stricken from the list of attorneys practicing at the Lancaster bar, which action was taken by reason of the representations of fact set forth in said petition. That an examination of the records of and proceedings in the courts of Lancaster

county, specifically referred to and set forth in said affidavit, shows that said facts, or the most of them, are matters of record, or have been made matters of legal proof.' On this petition a rule was entered, in accordance with the prayer of the petitioners, on said Kennedy to show cause why his name should not be stricken from the list of attorneys practicing in the several courts of Lancaster county. C. E. Montgomery, Esq., was appointed examiner to take testimony on said rule, and report the same to the court on the Saturday preceding the third Monday in March, 1896, with notice to A. F. Hostetter, Esq., for the board of censors, and J. Hay Brown and T. B. Holahan, Esqs., for G. C. Kennedy, at bar. No answer was filed to the petition. Counsel for the respondent, however, appeared before the examiner. The following are the facts adduced from the testimony taken, which was submitted to us at the March term of the argument court: In the spring of 1892, G. C. Kennedy, then a member of the bar practicing in these courts, procured from Reese L. Himes two thousand dollars, to be loaned to B. F. Henry on a mortgage. An existing lien of one thousand dollars on the property was to be paid out of this money. That Kennedy kept one thousand dollars of the money, and failed to pay off the lien. In the fall of 1893 Kennedy procured from Himes \$350, for which he gave to Himes an obligation that purported to be an obligation of W. M. Tinsley, of Marietta, to him (Kennedy), and by him indorsed to Himes. Tinsley testified that the note was a forgery; that he never had any business relations of any kind with Kennedy; that he had not signed the Himes note, or any other; and that the whole transaction was a fraud. On April 1, 1892, the said Kennedy received from John B. Milley-sack \$840, principal and interest on a mortgage due to Susan A. Himes, from whom he had procured a power of attorney to satisfy said mortgage, which money he has never paid over to his client. On April 1, 1892, Kennedy, as the attorney of Sarah Himes, received from John S. Dombach \$2,000 for the transfer of a mortgage, which money was to be paid to his said client, and which he embezzled and retained, and never paid over to her. The only testimony submitted to us on behalf of the respondent is that of his physician, whose honesty and learning we do not question. His testimony, however, has been weakened by the positive evidence of other reputable witnesses that he had employed the respondent to attend to legal business about the time that the acts in question were done, and that he had said subsequently, when interrogated particularly with reference to his peculiarities and mental condition, that he was of sound mind.

"It will be noticed that the respondent does not deny the material allegations and charges thus specified and proven. The defense made by his counsel is that of insanity. As

we understood them to say when the case was submitted to us, it was made for the sole purpose of moving the conscience of the court towards a suspension, instead of an expulsion, from the bar. It must therefore be conceded that the conduct and the acts of the respondent as an attorney and a member of the bar, if he was sane, justify severe censure and punishment. * * * Was the respondent responsible for his acts? The defense of insanity is a novel one, in a proceeding of this kind. If we were satisfied by the evidence that the respondent was of such unsoundness of mind as to be actually insane, and to render him unable to have known the difference between right and wrong, we might feel inclined to follow the suggestions of his counsel in this matter, as a suspension in such a case would serve the same purpose as an expulsion. The proof before us, however, on this question, is at best of a weak and unsatisfactory nature. It would be insufficient, in our opinion, as an available defense for a defendant in any proceeding either in law or in equity. In the absence of corroborative evidence in behalf of the respondent, we would not be justified in holding that he was irresponsible for his acts, and especially, since there has been no testimony adduced in his behalf by his learned counsel, from members of his own profession, with whom he had been actively engaged in practice up to the time of the disclosure of the wrongs committed. Mere eccentricity of manner or peculiarity of conduct would not be a sufficient explanation of, or excuse for, his conduct. Under the evidence, we are compelled to conclude that the respondent is guilty of all the charges preferred against him in this proceeding, and that the defense made in his behalf is insufficient. Therefore exact justice in this case demands that the court, the bar, and the public shall be protected from such gross misbehavior as this case clearly shows was practiced by the respondent."

J. Hay Brown, T. B. Holahan, and C. E. Montgomery, for appellant. A. J. Kauffman, M. Brosius, A. F. Hostetter, and W. U. Hensel, as amici curiæ, for appellee.

PER CURIAM. One of the specifications challenges the correctness of the decree of June 22, 1895, striking appellant's name from the roll of attorneys admitted to practice in the several courts of Lancaster county. The other complaints of the decree of June 27, 1896, dismissing his petition to revoke the former decree. The first decree was clearly warranted by the facts then before the court, and upon which it appears to have acted. The facts subsequently presented were insufficient to entitle appellant to the revocation prayed for. We find nothing in the record that would justify a reversal or modification of either decree; nor do we

think there is anything in the specifications of error that requires discussion. They are both dismissed. Decree affirmed, and appeal dismissed at appellant's costs.

(73 Pa. St. 430)

CALDWELL et al. v. SNYDER et al.

(Supreme Court of Pennsylvania. Nov. 9, 1896.)

PARTITION—POWER OF SALE.

A power given to executors to sell land devised in fee, to be exercised only by agreement of the devisees, does not destroy the right of partition. *Baum's Appeal*, 4 Penny. 25, distinguished.

Appeal from court of common pleas, Armstrong county.

Bill by Florinda Caldwell and Henry Caldwell, her husband, against Mary Snyder, Simon Snyder, and others, for partition. The court sustained the demurrer generally, and dismissed the bill. Plaintiffs appealed. Reversed.

Joseph Snyder, of Armstrong county, died on the 27th day of March, 1892, leaving to survive him the plaintiff Florinda Caldwell and defendants, and by his last will, after certain provisions, gave and devised to the plaintiff Florinda Caldwell and the defendants all the rest and residue of the estate, and directed that his executors should sell any or all of his real estate "at any time that it may be advisable, and by the agreement of my wife and a majority of my heirs; and I further will and direct that, if any of my heirs are dissatisfied * * * and resort to law, they are hereby disinherited." Before the filing of the bill in this case, the personal estate of Joseph Snyder had been settled, and distribution made, after the payment of debts, among the widow and legatees mentioned in the will, by proceedings and decree in the orphans' court. Plaintiff filed her bill in partition under the act of July 7, 1885 (P. L. 257; 1 *Purd. Dig.* p. 779). Defendants demurred to the bill, setting up that the will forbade partition, and that plaintiff had, by filing the bill, under the penalty contained in the will, forfeited her interest.

M. F. Leason, for appellants. W. D. Patton, for appellees.

STERRETT, C. J. The rule of the civil as of the common law, that no one should be compelled to hold property in common with another, grew out of a purpose to prevent strife and disagreement. 1 *Story, Eq. Jur.* § 648. And additional reasons are found in the more modern policy of facilitating the transmission of titles, and in the inconvenience of joint holding. The early remedy was limited in its scope, but has been developed until, as has been said, practically the right of partition exists without regard to its difficulties. 1 *Story, Eq. Jur.* § 656; *Wiseley v. Findlay*, 15 *Am. Dec.* 712. Thus, in the *Cold Bath Field's Case* (*Warner v. Baynes*, *Amb.* 589),

Chancellor Hardwick did not hesitate to act, notwithstanding the admitted difficulties. *Turner v. Morgan*, 8 Ves. 143. So partition is of right between tenants in common, where some have limited, and some absolute, interests (*Duke v. Hague*, 107 Pa. St. 57), though it involve another partition on the death of the party having a limited interest (*Poundstone v. Everly*, 31 Pa. St. 11). So that part of the land, on which are improvements, may be set apart to the tenant who made them. *Appeal of Kelsey*, 113 Pa. St. 119, 5 Atl. 447. So, where land is incapable of equal division, it may be set apart to some, upon compensation made to others. Practically, the only limit to the right lies in the inherent qualities of the estate (as in *Hutchinson's Appeal*, 82 Pa. St. 509, and *Brown v. Church*, 23 Pa. St. 495), or of the subject (*Coleman v. Coleman*, 19 Pa. St. 100). And this is the question involved in the present appeal. Is there anything in the quality of this land or estate which forbids partition? Certainly, so far as the land is concerned, there is not; and, leaving out of consideration the power of sale given the executors, this is an ordinary devise of land, subject to certain charges for advancements. The testator, in the first instance, provided for his wife, and the payment of a legacy to his son Simon, which appears to have been paid in his lifetime, and is therefore out of question here; "after which all the rest and residue of his estate, real and personal and mixed," was "to be equally divided between" his children, subject to deduction, from "their share," of specified advancements. *Prima facie*, this made them tenants in common, in fee, with all the incidental rights of such estate. There was no active trust created, and no restriction on the individual right of disposition. Neither the interest of his widow nor the advancements are any obstacles to partition, for the law makes provision for the adjustment of such matters. There is therefore no occasion for the services of the executors, and no conversion. True, there is power of sale vested in the executors, but that can only be called into life by the agreement of the widow and heirs. But suppose those whose advancements are largest should refuse to agree to a sale by the executors; are the others thereby excluded from all other remedy, notwithstanding the manifest intent to put them all on terms of equality? Are they put to the election of selling their individual interests at a sacrifice, or maintaining indefinitely the tenancy in common? Surely not. As there was no exclusion of the ordinary remedies, this must have been intended as cumulative. The authorities are in entire harmony with this view. Thus, it was held in *Appeal of Rawle*, 119 Pa. St. 100, 12 Atl. 809, that a direction to executors to "divide" did not exclude partition by the devisees themselves; and in *Sheridan v. Sheridan*, 136 Pa. St. 14, 19 Atl. 1068, a power is given executors to sell, "if they found it necessary to do so in order to make a fair and equitable division of

the estate." The case of *Baum's Appeal*, 4 Penny. 25, upon which appellees rely, is exactly the converse of the present case. There the testator directed the executor to convert, giving the beneficiaries, however, the privilege—of which they never availed themselves—of taking the land instead of the proceeds, and partition was refused because the legatees had no title in the land, while here the legal and beneficial title was given to the children, accompanied by a mere power in the executors, which can only be exercised by virtue of their agreement, and the present proceeding implies failure to agree. It is therefore clear that a right of partition exists, and the decree below must be reversed. Decree reversed, with costs to be paid by the appellees, and record remitted to the court below, with instructions to proceed in accordance with the views expressed in this opinion.

(178 Pa. St. 223)

HILL v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Nov. 9, 1896.)

DEATH BY WRONGFUL ACT—COMPROMISE BEFORE DEATH.

Act April 15, 1851 (P. L. 674), provides that no action for personal injuries by negligence or default shall abate by reason of plaintiff's death, but shall survive to his personal representatives; and that, when the injured person did not sue during his life, his widow or personal representative may sue. Act April 26, 1855 (P. L. 309), extends the right of action to children and parents of a decedent, and provides for the distribution of damages recovered. *Held*, that a widow was not given an independent cause of action for injuries causing her husband's death which he could not in his lifetime release or compound.

Appeal from court of common pleas, Northumberland county.

Trespass by Florence I. Hill against the Pennsylvania Railroad Company to recover damages for the loss alleged to have been sustained by her and her minor children through the death of her husband and their father, John Nevin Hill. From a judgment in favor of defendant, plaintiff appealed. Affirmed.

S. P. Wolverton and C. M. Clement, for appellant. J. C. Bucher and J. S. Kline, for appellee.

GREEN, J. The plaintiff's husband was injured in a collision on the defendant's road, in November, 1890. He died of Bright's disease, in September, 1891. He was more or less infirm in physical health during the intervening period, being part of the time able to attend to his business, and part of the time unable. Shortly after his injury, he settled with the defendant for all claims and demands on account of the accident, and executed an absolute release of all demands, under seal, for the sum of \$350, which was duly paid to and accepted by

him. The evidence indicates very strongly that the cause of the death was Bright's disease, and not the injury; but that question does not arise, because the learned court below ruled that the plaintiff could not maintain the action on account of the release executed by her husband, and gave a binding instruction to the jury to find for the defendant. Substantially the question arising is whether the wife, under our existing legislation, and upon the facts of this case, has an independent right of action for the death of the husband, which the husband could not release. It is contended for the appellant that she has such a right of action, and that, therefore, the husband's release could not affect it. The solution of the question depends upon the construction to be given to our two acts of assembly of April 15, 1851 (P. L. 674), and April 26, 1855 (P. L. 309).

The act of 1851 provides as follows:

"Sec. 18. That no action hereafter brought to recover damages for injuries to the person by negligence or default, shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction."

"Sec. 19. That whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or, if there be no widow, the personal representatives, may maintain an action for, and recover damages for, the death thus occasioned."

It will be observed that in both these sections the right of action conferred is for the death of the party injured. The eighteenth section provides for the case of a party injured who has brought an action for his injury, but subsequently dies, and directs that in such case the action shall not abate by reason of the death, but shall survive to his personal representatives. Section 19 provides that, if no action has been brought for the injury during the life of the party injured, the widow, or, if there is no widow, the personal representatives, may maintain an action, and recover damages for the death thus occasioned. Thus, both classes of cases are provided for,—the one where an action was brought by the injured party during his life, but the plaintiff died pending the action; and the other where no action had been brought at the time of the death of the party injured. While it is very true that the injured party could in no circumstances recover damages for his own death, yet it is equally true that the cause of action provided for by both sections is death resulting from injuries. The act did not undertake to give a cause of action to the party injured for the injuries he had sustained, because such a right of action already existed independently of the act. Hence it cannot be argued that the intention of the

eighteenth section was to give one right of action to the party injured, and another and independent right of action for the same injury to his widow. The cause of action is the same in both sections, to wit, the death of the party, the only difference being that the eighteenth section provided for an action already pending, that it should not abate, but should survive to the personal representative, and the nineteenth section provided that, in case no action had been brought before the death of the party, an action might be brought by the widow, or, if there was no widow, then by the personal representative. The remedy given to the widow by the nineteenth section was, of course, a new remedy, which had no previous existence. This we held in the case of *Fink v. Garman*, 40 Pa. St. 95, and again in *Birch v. Railway*, 165 Pa. St. 339, 30 Atl. 826, in the latter of which we said: "While grounded on the same 'unlawful violence or negligence' for which the injured party had a common-law right of action in his lifetime, the statutory right given by the nineteenth section, is conditioned upon the concurring facts that the injured party's death was occasioned by violence or negligence, and that no suit for damages was brought by him." In the foregoing case the party injured (Mrs. Taylor) had brought an action in her lifetime to recover damages for the injury, but died pending the action, and before trial. Thereupon an amended statement was filed, alleging her death, and praying to substitute her executors. To this the defendant pleaded that the cause of action survived to the persons named in the act of 1855, and therefore could not be maintained by the executors. But we held that it did survive to the executors, under the eighteenth section of the act of 1851. As to this we said: "It follows from what has been said that the substitution of Mrs. Taylor's executors as plaintiff in the action commenced by her was fully authorized, and they should be permitted to prosecute the same to final judgment and satisfaction, notwithstanding the fact averred in their amended statement, that her death was occasioned by the defendant company's negligence. In the circumstances, their substitution was clearly warranted by the eighteenth section of the act of 1851." In substance, this was a decision that, although death resulted from the injury, the right of action survived to the executors of the decedent, and was not transmitted to the other parties named. It is true, an action had been brought by the injured party in that case, and here no action had been brought by the person injured before his death, but he had exercised his control over the right of action at a time when he alone had the whole right, with the same effect as if he had brought an action, and had prosecuted it to judgment and satisfaction. The basis of the action is the negligence of the defendant. When the in-

jured person survives, the sole right of action is vested in himself alone. If he brings an action, and it is tried, and results in a verdict and judgment for the plaintiff, which is paid, it must be conceded that this is the end of the case. The defendant's negligence has been tried and adjudged, and, when the judgment has been discharged by payment, it has been satisfied for all purposes. The consequences of the transgression have been suffered, and the penalty paid. We cannot consider, and it has not been so decided, that in this contingency there may be another suit brought for another result of the same act of negligence. The acts we are considering do not confer any such right, nor any right to recover as upon an additional cause of action. In other words, without these acts a cause of action for a specific act of negligence would have died with the person, and there could then be no recovery by anybody. But that consequence of the existing state of the law it was desired to avert, and, under the acts, the action does not die, but survives to certain persons named. But it is an action for the same injury, and upon the basis of the same negligence. The acts accomplish the preservation of a right of recovery, but they do not give, or assume to give, another and additional remedy to other parties for the same injury. If they would bear such a construction, it would follow that, by force of the acts, there was a right to recover for the injuries to the husband, considered only as injuries to himself, and, in addition to that, a new and other and independent right of action to the widow in her own right, and for her own benefit, and for the injury to herself. No such purpose is avowed in the act, and no such meaning is within its language.

We do not think the act of April 26, 1855 (P. L. 309), affects this view of the subject, or makes any change in the fundamental character of the previous legislation. It simply enlarges the designation of the persons entitled to recover damages for an "injury causing death," so as to embrace children or parents of the deceased, and expresses the mode of distribution of the damages recovered. The right of action was in its origin the sole property of the husband, and, of course, subject to his control. If he exercised it, and conducted it to verdict, judgment, and satisfaction in the courts, that was the end of it. Neither he nor any one else could maintain a second action for the same injury. So, also, he could compound it, and could adjust the amount to be received from the offending party, and could agree that the amount received should be a full solatium for the injury and the damage sustained. That would be a necessary incident to his ownership of the right of action. Such an adjustment would be the full equivalent of a verdict and judgment in an adversary proceeding. In either event the remedy would be exhausted. It would have to be conceded that this must be so if, subsequently

to the adjustment, some other and more serious consequences resulted from the injury than any that was anticipated when the settlement was made; and we know of no reason why this would not be true when such ulterior consequence was the death of the party injured.

The very question we are considering has been adjudged in the queen's bench in England in the case of *Read v. Railway Co.*, L. R. 3 Q. B. 555. The English statute of 9 & 10 Vict. c. 93, is almost precisely like our act of 1851, and was probably the model upon which our act was framed. In the case referred to, the husband had sustained an injury on the defendant's road, and had subsequently settled with the defendant, and executed a release of all damages arising from the injury, and afterwards died. The defendant pleaded the release to which the plaintiff demurred. In disposing of the demurrer, Blackburn, J., said: "I think the plea is a good plea. The question turns upon the construction of section 1 of 9 & 10 Vict. c. 93. Before the statute, the person who received a personal injury, and survived its consequences, could bring an action and recover damages for the injury, but, if he died from its effects, then no action could be brought. To meet this state of the law, 9 & 10 Vict. c. 93, was passed, and 'whenever the death of a person is caused by a wrongful act, and the act is such as would, if death had not ensued, have entitled the party injured to maintain an action, and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued shall be liable for an action for damages notwithstanding the death of the party injured.' Here, taking the plea to be true, the party injured could not 'maintain an action in respect thereof,' because he had already received satisfaction. Then comes section 2, which regulates the amount of the damages, and provides for its apportionment in a manner different from that which would have been awarded to a man in his lifetime. This section may provide a new principle as to the assessment of damages, but it does not give any new right of action. * * * The intention of the enactment was that the death of the person injured should not free the wrongdoer from an action, and, in those cases where the person injured could maintain an action, his personal representative might sue." Lush, J.: "I am of the same opinion. The intention of the statute is not to make the wrongdoer pay damages twice for the same wrongful act, but to enable the representatives of the person injured to recover in a case where the maxim '*Actio personalis moritur cum persona*,' would have applied. It only points to a case where the party injured has not recovered compensation against the wrongdoer." The English statute is somewhat broader than ours, because it is not limited to cases in which an action had been brought by the injured party, and he had died

pending the action, nor yet to cases in which no action has been brought by the injured party in his lifetime, and the remedy is given without qualification in all cases. The second section authorizes the jury to give such damages "as they may think proportioned to the injury resulting from such death to the parties, respectively, for whom and for whose benefit such action shall be brought;" that is, damages may be had for the death, as declared in our nineteenth section of the act of 1851, but yet the person injured has such a right in the cause of action as that he may release the offending party from all damages. The assignments of error are not sustained. Judgment affirmed.

173 Pa. St. 601.

SOFFERSTEIN v. BERTELS.

(Supreme Court of Pennsylvania. Nov. 11, 1896.)

MASTER AND SERVANT—NEGLIGENCE—CREDIBILITY OF WITNESSES.

1. Contributory negligence is matter of defense, the burden of establishing which is on defendant, unless it appears from plaintiff's evidence.

2. Where plaintiff discovered that a machine with which he was working was defective, and informed the superintendent, who fixed it and told him it was all right, and subsequently plaintiff was injured by reason of the same defect, it does not follow that he was chargeable with contributory negligence, or that the injury was caused by an unforeseen accident, against which human imperfection cannot provide.

3. The fact that a witness has testified to a particular in regard to which he was successfully contradicted, or which is inconsistent with known circumstances, does not render him unworthy of belief.

4. A specification of error is not sufficient where it contains an offer of evidence, but does not include any part of the testimony admitted under it.

5. Evidence that the machine by which plaintiff was injured while working at it was defective before he began work, and that his predecessor quit work on account of such defect, and that defendant refused to repair it, is admissible.

Appeal from court of common pleas, Luzerne county.

Trespass by Benjamin Sofferstein against William B. Bertels for damages for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

On the 8th of January, 1892, Benjamin Sofferstein, the plaintiff, lost his thumb and the two adjoining fingers of the right hand while operating a tin-stamping press in the defendant's factory, in Wilkesbarre, for which injury this action was brought. On the trial the defendant's eighth point, and the answer thereto, were as follows: "(8) If the jury find that the testimony of the plaintiff is inconsistent in itself, and inconsistent with known circumstances, then it is unworthy of credence, and he has failed to make out a case, and the verdict should be for the defendant. Answer. We affirm that, with this qualification: The fact that a man's testi-

mony may be contradicted in some particulars does not necessarily make him wholly unworthy of belief. The effect which is to be given to the successful contradiction of his testimony in any particular is to be considered by the jury in determining what weight it is to be entitled to; but the court cannot declare to you, as a matter of law, that the fact that a witness has testified to a particular in regard to which he was successfully contradicted, or which was inconsistent with known circumstances, would render him unworthy of belief. If, however, his testimony as a whole—and we so understand the point—is inconsistent in itself, and inconsistent with known circumstances, then it goes to show that he is unworthy of credence, and the jury may and ought to reject it." Defendant excepted to this, and also to the charge generally.

A. Ricketts, for appellant. Wm. H. Hines, Edward A. Lynch, and John T. Lenahan, for appellee.

McCOLLUM, J. The learned judge of the court below charged the jury that, under the testimony, the defendant could not be held liable for negligence in the selection of the machine, and that the plaintiff had worked upon it long enough to know that it was unnecessary and unsafe to put his foot on the treadle while his hand was on the die. The questions whether the defendant had provided a reasonably safe machine, and adequately instructed the plaintiff as to the manner of using it, were thus eliminated from the case.

The first specification of error complains of the answer to the defendant's second point, in which the court was requested to instruct the jury that the burden was on the plaintiff to prove that "he was not guilty of any negligence contributing in any degree to the injury he suffered." An unqualified affirmance of the point would have constituted plain error. The rule which defines the duty of the plaintiff in this particular is thus stated by the present chief justice in *Baker v. Gas Co.*, 157 Pa. St. 601, 27 Atl. 791: "Contributory negligence is matter of defense, and the onus probandi is on the defendant, unless the plaintiff's own evidence sufficiently discloses the fact of contributory negligence. In that event the plaintiff cannot recover, and, of course, the defendant is relieved from the necessity of proving what has already been established by the plaintiff's evidence. If, however, the plaintiff makes out a prima facie case, without disclosing contributory negligence, the defendant must assume the burden of making out his defense." See, also, *Canal Co. v. Bentley*, 86 Pa. St. 30; *Mallory v. Griffey*, 85 Pa. St. 275. As the instruction complained of is in exact accord with the rule as above stated, the first specification is overruled.

The second specification of error is based

on the refusal of the court to affirm the defendant's fourth point. The point requested the court to hold that, upon the plaintiff's own testimony, he was guilty of contributory negligence, or that the injury he received "was caused by one of those unforeseen accidents against which human imperfection cannot provide." The conclusions were not warranted by the testimony referred to in the point. It does not follow, as a principle of law, that because the plaintiff discovered and informed the superintendent on Wednesday that the machine was out of order, and continued to operate it after the superintendent had done some work upon it and pronounced it all right, he was chargeable with contributory negligence, or that the injury he received was caused by an "unforeseen accident, against which human imperfection cannot provide." The cases cited to sustain this branch of the plaintiff's contention are plainly distinguishable in their facts from the case at bar, and we find no sufficient warrant in any of them for an affirmation of the fourth point. The plaintiff testified that the plunger dropped twice on Wednesday when his foot was not upon the treadle. This was notice to him that the machine was defective or out of order. He also testified that he notified the superintendent of the condition of the machine; that the latter came on Thursday and fixed it, and then told him it was all right, and to go ahead; that on Friday, while placing the tin bottle or cover in the die, the plunger dropped, inflicting the injury of which he complains. His testimony was corroborated by the testimony of Abram Engle and Max Shoenfelt.

The third, fourth, and fifth specifications of error may be considered together. They are based on the refusal of the court to affirm the defendant's fifth, sixth, and seventh points. The fifth point assumes that the uncontradicted evidence of all the witnesses familiar with the manner of operating the machine shows that, in putting the bottle or cover into the die, there was no necessity for the exposure of the fingers, or any part of the hand, to danger or injury; and the sixth point asserts that the uncontradicted evidence shows there was no necessity for the exposure of anything more than the ends of the fingers, in operating it. In the fifth point the conclusion was reached, from all the evidence referred to therein, that the plaintiff "unnecessarily exposed himself to danger, and that the injury he suffered was in consequence of such unnecessary exposure"; and in the sixth point a like conclusion was drawn from the testimony mentioned in it, and the character of the injury itself. The seventh point asserts that it appears from the evidence as to the operation of the machine, the plaintiff's own testimony in connection therewith, and the character of the injury suffered, that the plaintiff was guilty of contributory negli-

gence, and concludes that "the verdict must be for the defendant." The learned judge of the court below negatived these points because an affirmation of them would withdraw from the consideration of the jury questions of just what he thought it was their province to decide. We do not think that he erred in his answers to the points. The credibility of the witnesses who testified in support of the defendant's theory that it was not possible for the plunger to fall unless the foot was on the treadle, or it was touched in some way, was for the consideration of the jury, as well as the credibility of the witnesses who testified that they saw the plunger fall when they saw the treadle was not touched. The same may be said of the witnesses who testified that, in putting the bottle or cover into the die, there was no necessity for the exposure of the fingers or any part of the hand to danger or injury, and of the witnesses whose testimony on this point was directly opposed to theirs.

The sixth specification is founded upon the answer to the defendant's eighth point. The point was affirmed with a qualification intended to prevent a misapprehension of it. We think the answer to the point was not erroneous or objectionable, and that the defendant has no good reason to complain of it.

The seventh specification rests upon the refusal of the court to affirm the defendant's ninth point. The point was that, "under the pleadings and all the evidence in the case, the verdict should be for the defendant." It will be seen from what we have already said that we cannot sustain this specification.

The eighth specification is not according to rule. It contains the offer of evidence, but does not include any part of the testimony admitted under it. But, waiving this, we think the evidence offered and received was competent. It was offered and admitted for the purpose of showing that the machine was defective or out of order shortly before the occurrence in question. It showed that the plunger dropped while the boy who preceded the plaintiff in operating the machine was there, and further that, in that case, as in this, the foot of the operator was not upon the treadle when the plunger dropped. It also showed that the boy quit work because his employer would not fix the machine for him.

We cannot say that the charge was inadequate. The principles governing the action were carefully and clearly defined in it, and all the issues of fact were plainly and correctly presented to the jury for their consideration. The evidence was not reviewed in it, and there was no request that it should be. It was absolutely impartial, and there was no expression or statement in it having the slightest tendency to mislead the jury in any particular. There is not an omission or instruction in it which furnishes any ground for reversing the judgment. It may be that the jury should have found for the defend-

ant. But, as we are clearly of opinion that the evidence in the case presented issues of fact which it was their province to decide, we refrain from any discussion in regard to the credibility of the witnesses on either side, or the weight of the testimony. The specifications of error are overruled, and the judgment is affirmed.

(39 Me. 46)

THOMPSON v. ROBINSON et al.

(Supreme Judicial Court of Maine. March 24, 1896.)

FRAUDULENT CONVEYANCE.

A conveyance made by a debtor for the express purpose of protecting his interest in the property against a pending suit is fraudulent and void as against the plaintiff in that suit, and equally fraudulent and void as against the debtor's assignee in insolvency.

(Official.)

Appeal from supreme judicial court, Cumberland county.

Bill in equity by Edward F. Thompson, assignee in insolvency of Edgar R. Robinson, asking the court to declare void the conveyance of an equity of redemption in real estate from the insolvent to his mother, who was made a party to the bill. The bill alleged that the conveyance was made by the insolvent during the pendency of a suit arising from a breach of promise to marry, and charged that it was made especially to defraud the plaintiff in the breach of promise suit. The material portions of the bill are as follows:

"First. That on the 27th day of November, A. D. 1894, the said Edgar R. Robinson, on his own petition of that date, was declared an insolvent debtor by our court of insolvency for said county of Cumberland, and that the complainant is assignee of said insolvent debtor, lawfully chosen and qualified, and having filed a bond for the faithful performance of the duties thereof, which was approved by said court.

"Second. That prior to the filing his said petition, to wit, on the 2d day of April, 1894, said Edgar R. Robinson, being then the owner of the equity of redemption, of the value of sixteen hundred dollars, in and to a certain lot of land in said Portland [description of property], did, with intent to delay, hinder, and defraud his creditors, fraudulently convey said equity of redemption to said Olive J. Robinson, by deed bearing date the 2d day of April, 1894, and recorded in the registry of deeds for the county of Cumberland (book 612, page 57), a copy of which deed is filed as Exhibit A with this bill.

"Third. That, at the time of said conveyance of said equity of redemption, there was pending in the superior court for Cumberland county a certain suit, begun on the 5th day of November, A. D. 1893, by Arletta Blake, of said Portland, against said Edgar R. Robinson, for breach of contract upon a cause of action which accrued previous to

making said conveyance; that judgment was rendered in said suit in favor of said plaintiff against said Edgar R. Robinson on the 3d day of November, 1894, which said judgment remains in force and wholly unpaid, and still is wholly unsatisfied, and was proven against the insolvent estate of said Edgar R. Robinson, and allowed by our court of insolvency in and for the county of Cumberland. * * *

"Fourth. That your complainant is informed, and believes it to be true, that said Edgar R. Robinson, at the time of said conveyance at said Portland, did then and there, with intent to delay, hinder, and defraud his prior creditors, and particularly with intent to delay, hinder, and defraud said Arletta Blake, then being a prior creditor as aforesaid, convey said equity of redemption to said Olive J. Robinson, and the said Olive J. Robinson was a party to said conveyance, with the like intent to delay, hinder, and defraud the prior creditors of said Edgar R. Robinson as aforesaid, and particularly to delay, hinder, and defraud said Arletta Blake.

"Therefore your complainant prays:

"(1) That said respondents may answer the premises.

"(2) That said conveyance of said equity of redemption by said Edgar R. Robinson to Olive J. Robinson may be declared void as against the complainant in his said capacity as assignee.

"(3) That your complainant may have such further and other relief in the premises as the nature of his case shall require, and to your honor shall seem meet."

"The answer of Edgar R. Robinson who says: First. He admits that on the 27th day of November, A. D. 1894, he was declared, on his own petition, an insolvent debtor, by the court of insolvency for said Cumberland county, and that the said complainant is assignee, lawfully chosen and qualified, as he alleges; and this defendant believes, if he had any interest in any real estate or personal property at the time he was adjudged insolvent, it became vested in the said assignee, by his assignment in insolvency, and that he should not be required, in this action, to make any further or other transfer than that which is already made.

"In answer to the second complaint, this defendant says: That on the 28th day of August, A. D. 1893, he made a purchase of the real estate in Bramhall Place, described in complainant's bill. That this purchase was made for the benefit of Edgar Robinson and Olive J. Robinson, parents of this defendant, and that this defendant took the title to the said property in his own name on said 28th day of August, A. D. 1893, for the sake of convenience in perfecting the said purchasing and completing the same. The purchase price of said property was five thousand dollars, and was paid for in the following manner, to wit: Defendant gave the Port

land Savings Bank, of Portland, a mortgage of three thousand dollars on the same, bearing date the 2d day of April, 1894. At the time of the purchase he assigned and transferred to said Meaher the Rice mortgage, amounting to six hundred five dollars and eighty-nine cents, and which belonged to his father, Edgar Robinson. He gave a mortgage, subject to the bank mortgage, to said Meaher for four hundred dollars. He paid E. G. S. Ricker one hundred dollars in cash to bind the bargain, which money was taken from the bank account of Olive J. Robinson. He also transferred the bank book of Olive J. Robinson to said Meaher, on which were eight hundred ninety-two dollars and ninety-eight cents, and the balance, amounting to one dollar and thirteen cents, said Meaher received from the rent of the house. These several amounts make a total of five thousand dollars. It was agreed at the time of the transfer, on the 28th day of August, A. D. 1893, that this defendant should manage the real estate, collect the rents, and occupy the premises, just the same as if all the papers had been completed and passed; that he should pay the interest on the mortgages, taxes, water rates, and insurance, in the same manner as if all the papers had passed. Though the business was done on the 28th day of August, A. D. 1893, the papers were not executed for the bank until the 2d day of April, A. D. 1894, but in the meantime the property was managed as if the business had been all completed on the 28th day of August, A. D. 1893. Much of the delay was caused by the absence of Mr. Noyes in the meantime.

"Edgar Robinson, father of this defendant, a part of whose money went into this property, was away in Cuba at the time the trade was made and has been away from this city ever since. Olive J. Robinson, mother of this defendant, a part of whose money went into the purchase of this property, has been sick much of the time, and most of the business has been transacted by this defendant. The transfer of the property to Olive J. Robinson gives her so much of the property as belongs to her under her own payments, and the rest she holds as trustee for her husband, Edgar Robinson, who is now in Cuba.

"This defendant, long about the last part of August, A. D. 1893, had five hundred ninety-three dollars and sixty cents in the Cumberland Loan & Building Association, which money defendant drew out and placed in the Portland Savings Bank. From this sum, defendant owed Olive J. Robinson one hundred fifty dollars borrowed money, with which he purchased a bicycle and he further owed a three-years board bill, from August 4, 1890, to August 4, 1893, which would amount to six hundred twenty-four dollars, at a low estimate. So what money he had in the Portland Savings Bank in his own name he transferred to Olive J. Robinson on the 7th day of October, 1893, and this defendant had no mon-

ey of his own, or standing in his own name, at the time these payments were made on the purchase price of the 'Bramhall Place Property,' so called.

"After this defendant had completed the arrangements and made the final payments for the purchase of the aforesaid property, to wit, on the 2d day of April, A. D. 1894, he conveyed all his interest in the said property to his mother, who holds the equity either in her own right, or as trustee for her husband. Defendant says, in doing this business he had no intention to delay, hinder, or defraud any of his creditors, and it was a simple act of justice when he made the conveyance as he did, which is recorded in book 612, page 57, as complainant alleges. * * *

"The answer of Olive J. Robinson, one of the said defendants, who comes and says: * * *

"Second. She is informed and believes that the said Edgar R. Robinson held in his name, and apparently in his own right, as far as the records go, an equity in the Bramhall Place property, described in complainant's bill, but she is informed and believes to be true that he held said title simply as trustee for this defendant and for her husband, Edgar Robinson, who is now away in the West Indies, and has been away since November, A. D. 1892; and she is informed and believes to be true that the said Edgar R. Robinson has no real interest or ownership in the aforesaid property, and there was no transfer made by him to delay, hinder, or defraud any of his creditors. * * *

"Fourth. This defendant denies that the said Edgar R. Robinson ever conveyed to this defendant the aforesaid property with the intent to delay, hinder, or defraud his prior creditors, or particularly with intent to delay, hinder, or defraud the said Arletta Blake as said prior creditor, and this defendant further denies that she was any party to any conveyance with an intent to delay, hinder, or defraud any prior creditor of the said Edgar R. Robinson, or particularly to delay, hinder, or defraud the said Arletta Blake; and this defendant further says that, in receiving the conveyance of the aforesaid property in her name, she held the same in part as her own in her own right, and in part as trustee for her husband, Edgar Robinson, in which said capacity the same being conveyed to her indirectly by her husband, cannot be conveyed by her without his joining.

"This defendant is informed and believes that her title to said property commenced about the 28th day of August, A. D. 1893, and on the 1st day of September, A. D. 1893, she went into the possession and occupancy of the said property in Bramhall Place, and has resided there, making the same her home, up to the present time.

"And this defendant further says that the aforesaid property is mortgaged for thirty-four hundred dollars; that her husband, Edgar Robinson, paid six hundred five dollars

and eighty-nine cents towards the purchase price, in his transfer of the Rice mortgage; and that she paid over nine hundred ninety-four dollars and eleven cents on the purchase price, a part of which money belonged to her husband, and a part of which belonged to herself. And, if the said complainant wishes for a reconveyance or conveyance of this property to him, she respectfully asks that the court will order a decree that he repay to her all the money that she has paid out, either on her own account or on her husband's account, or their joint account, in procuring the same.

The case was heard in the court below on bill, answer, and proof, where a decree was made sustaining the bill. The defendants appealed.

The proof to sustain the bill consisted of copies of the deeds referred to in the bill, and the insolvent's examination in the proceedings in the court of insolvency. The deed sought to be vacated was a quitclaim, in which the consideration was stated to be one dollar.

The following is a portion of the insolvent debtor's examination:

"Ques. 118. On the 2d day of April, 1894, you made a transfer of this property to Olive J. Robinson, in consideration of one dollar. What did you receive for that property from Olive J. Robinson?

"Ans. I didn't receive anything from her.

"Ques. 119. Why did you make the transfer?

"Ans. To protect her.

"Ques. 120. Against what?

"Ans. Against anything that would come up against me.

"Ques. 121. What were you expecting?

"Ans. I was expecting this breach of promise suit. These papers were made over before this case came up.

"Ques. 122. How long had you been aware that it had been coming up?

"Ans. They told me at the time of the separation that they were going to sue me.

"Ques. 123. What was the date of the separation?

"Ans. May, '92, I think.

"Ques. 124. Then there was nothing passed from your mother to you at the time this transfer was made to her?

"Ans. No, sir."

The defendants offered no proof. Judgment for plaintiff. Defendants appeal. Affirmed.

Wilford G. Chapman, for plaintiff. D. A. Meaher, for defendants.

WALTON, J. It appears that Arletta Blake has recovered a judgment against Edgar R. Robinson, for the modest sum of \$325, as damages for the breach of a promise to marry her. It also appears that, in less than a month after the recovery of the judgment, the defendant went into insolvency, on his own petition, and that the plaintiff in the present suit was appointed his assignee. The

assignee asks the court to declare void the conveyance of an equity of redemption of real estate from the insolvent to his mother, made pending the breach of promise suit, on the ground that it was fraudulent, and made especially to defraud the said Arletta Blake, and thereby prevent her from levying upon the equity of redemption so conveyed to satisfy her judgment, if she should recover one, in her then pending breach of promise suit.

The cause was fully heard in the court below by Mr. Justice Foster, and he found, as a matter of fact, that the conveyance was fraudulent, and ordered the insolvent debtor's mother to execute and deliver to his assignee a deed of her pretended title to the equity of redemption so conveyed to her, free and clear of all incumbrances created by her, or by persons claiming by, through, or under her. From this decree the defendants appealed.

We have examined the evidence with care, and we cannot for a moment doubt that the conveyance was made for the express purpose of protecting the grantor's interest in the property against the breach of promise suit. Such being its purpose, it was, of course, fraudulent and void as against the plaintiff in that suit, and equally fraudulent and void as against the defendant's assignee in insolvency; and our conclusion is that the decree of Mr. Justice Foster in the court below was right, and must be affirmed.

Decree affirmed, with additional costs since the appeal.

(89 Me. 17)

BENNETT et al. v. DYER et al.

(Supreme Judicial Court of Maine. March 12, 1896.)

SPECIFIC PERFORMANCE—ORAL CONTRACT—EQUITABLE ESTOPPEL—PART PERFORMANCE.

1. It is settled law that if one induces or knowingly permitz another to perform in part an oral agreement for the sale of land, on the faith of its full performance by both sides, and it clearly appears that such acts of part performance were done in pursuance of the contract, that damages recoverable in law would not adequately compensate the plaintiff, and that fraud and injustice would result to him if the agreement be held void, then, on the principle of equitable estoppel, a court of equity is authorized to compel specific performance by the other party, in contradiction to the positive terms of the statute of frauds.

2. But on all these points the evidence must be full, definite, and conclusive; and, ordinarily, no importance can be attached to acts of part performance done by the defendant or party to be charged. If the defendant chooses to waive the benefit of his own act of part performance which would entitle him to allege a fraud on the part of the plaintiff, it cannot be that the plaintiff may force him to rely upon them; thus, in effect, himself setting up his own fraud.

3. *Held*, that the act of part performance relied upon in this case is not only found to have been done solely by the defendants, but, from every point of view, it is manifestly insufficient to justify the court in decreeing specific performance. The act of "plowing a driving park

upon the land" did not occasion any injury or damage for which a remedy a law would not afford full and just compensation. The plaintiffs can be restored to their former position without specific performance of the contract. The principle of equitable estoppel does not apply.

(Official.)

Exceptions from supreme judicial court, Cumberland county.

Action by Elbridge G. Bennett and others against Howard E. Dyer and others. From a judgment, plaintiffs except. Exceptions overruled.

John C. & F. H. Cobb and George Libby, for plaintiffs. Eben Winthrop Freeman and Robert Treat Whitehouse, for defendants.

WHITEHOUSE, J. This cause is presented to the law court on exceptions to the ruling of a single justice, as shown by the following statement, which constitutes the entire record in the case, to wit:

"This cause came on for hearing on bill, answer, and proofs.

"It is a bill in equity to compel the specific performance of an agreement for the purchase of land.

"The plaintiffs signed an agreement in writing to convey land to the defendants, and delivered the same to them to be signed. Next day defendants inquired of plaintiffs' attorney about the title, and refused to then sign the agreement, unless the attorney would say that it was good. He would not say that, but only that he believed it was good. The defendants then took the agreement to see about the title. Meantime, with plaintiffs' assent, they entered upon the land (about thirty acres), and plowed a driving park upon it. This was late in the fall. They held the agreement all winter, and would neither sign it, nor accept deeds tendered them by plaintiffs according to its terms. Therefore this suit was brought the next April. I find that the deeds tendered were sufficient, and would have conveyed the estate described in the agreement.

"I rule as matter of law that the plaintiffs are barred of remedy by the statute of frauds, and therefore

"It is ordered, adjudged, and decreed that plaintiffs' bill be dismissed.

"To which ruling as to the statute of frauds the plaintiffs except."

It is provided in section 25 of chapter 77 of the Revised Statutes that "either party aggrieved may take exceptions to any ruling of law made by a single justice, the same to be accompanied only by such parts of the case as are necessary to a clear understanding of the questions raised thereby: * * * provided, that no question of fact is open to the law court on such exceptions. And upon request of either party the justice hearing the cause shall give separate findings of law and fact."

In this case there would seem to be possible ground for apprehension that the excep-

tions are not "accompanied by such parts of the case as are necessary to a clear understanding of the question raised." It is stated to be a "bill in equity to compel the specific performance of an agreement for the purchase of land," and it was ruled "as a matter of law that the plaintiffs are barred of remedy by the statute of frauds." The statute of frauds applicable to such a case declares that no action shall be maintained "upon any contract for the sale of lands" unless "the contract, or some memorandum or note thereof, is in writing, and signed by the party to be charged, or by some person thereunto lawfully authorized." But it is a familiar and well-established principle of equity that this statute, having been enacted for the purpose of preventing frauds, should not be used to aid in the accomplishment of a fraud. Hence it has long been settled law in England and nearly all the states of this Union that if one induces or knowingly permits another to perform in part an oral contract for the sale of land, on the faith of its full performance by both parties, and it clearly appears that such acts of part performance were done in pursuance of the contract, that damages recoverable in law would not adequately compensate the plaintiff, and that fraud and injustice would result to him if the agreement be held void, then, on the principle of equitable estoppel, a court of equity is authorized to compel specific performance by the other party, in contradiction to the positive terms of the statute of frauds. *Foxcroft v. Lester*, 12 Vern. 456; *Coles v. Pilkington*, L. R. 19 Eq. 174; *Williams v. Morris*, 95 U. S. 457; *Potter v. Jacobs*, 111 Mass. 32; *Woodbury v. Gardner*, 77 Me. 68. See, also, 3 Pom. Eq. Jur. § 1409.

The argument of the learned counsel for the plaintiff proceeds upon the confident assumption that the sitting justice had substantially found as a matter of fact that, although the written agreement for the sale of the tract of land in question in this case was never signed by the defendants, there was still a subsisting oral contract between the parties, by which the defendants agreed to purchase the land, and thereupon invokes the principle of equity above stated, claiming that there were acts of performance on the part of the defendants sufficient to exclude the operation of the statute of frauds.

With reference to this point the authorities all agree that the party making the attempt to take the case out of the statute of frauds must establish the existence of the oral contract by clear and satisfactory evidence. *Williams v. Morris*, 95 U. S. 457. The proof must show the terms of the contract clearly, definitely, and conclusively, leaving no *jus deliberandi* or *locus poenitentiae*. *Purcell v. Miner*, 4 Wall. 513. "To be enforceable, the agreement must be concluded, unambiguous, and proved to the satisfaction of the court." *Woodbury v. Gardner*, 77 Me. 68.

It is earnestly contended in behalf of the defendants that the findings of the court do not show that any contract of any kind was ever completed between these parties; and it must be conceded that a careful examination of the record strongly supports this contention. It appears from the findings that the plaintiffs signed an agreement to convey the land to the defendants, and delivered it to them to be signed; that the defendants refused to sign it without a positive assurance that the title was good, but "took the agreement to see about the title"; and that they held the agreement all winter, but would neither sign it, nor accept the deeds tendered to them by the plaintiffs according to the terms of the agreement. There is an entire absence of a definite and explicit finding that an oral contract had been concluded between the parties for the purchase of this land. All of the findings of the sitting justice are perfectly consistent with the theory that, in response to a request from the defendants for the terms of sale, the plaintiffs delivered to them the written agreement in question, which they refused to sign; that no other negotiations ever took place; and that no agreement whatever was ever completed between them. When the language employed in the different parts of the decree receives the construction in all respects most favorable to the plaintiffs' contention, it can, at most, only justify the inference that the parties were "in treaty with a view to an agreement," and that, possibly, the defendants had agreed to purchase on condition that the title should be found satisfactory, but refused to sign the agreement because the condition was not fulfilled. In view, however, of the fact that this was a subject-matter with respect to which contracts are required to be in writing, and of the further fact that, pending this investigation of the title, a special arrangement appears to have been made for the defendants to "enter upon the land, and plow a driving park upon it," the conclusion is irresistible that it was not then understood by the parties that the defendants were to be bound until they signed the written agreement. *Steamship Co. v. Swift*, 86 Me. 248, 29 Atl. 1063. The presiding justice, it is true, ruled that the plaintiffs were barred of remedy by the statute of frauds; and, if he found that no agreement of any kind was ever concluded between them, there was no occasion to invoke the statute of frauds as the basis of the decision, since the plaintiffs were barred of a remedy independently of that statute, for want of any agreement at all. The ruling, however, by no means warrants the inference that the sitting justice found as a matter of fact that an oral agreement was concluded between the parties, but rather that the acts of part performance by the defendants were not of such a character as to defeat the operation of the statute. He may have found that all the terms of the proposed contract for the first time became the subject of negotiation after they had been em-

bodied in the written agreement delivered to the defendants; and in that event there would be no incongruity in ruling that the plaintiffs were barred of remedy by the statute of frauds, because this written agreement was not signed by the party to be charged.

But, if the findings of fact disclosed by the case could be deemed susceptible of the construction claimed by the plaintiffs, the defendants contend that there is still an insuperable objection arising from another defect or ambiguity in the record.

When the existence of an oral agreement for the sale of land has been clearly proven to the satisfaction of the court, and acts of part performance are relied upon to defeat the operation of the statute of frauds, it must appear in the first place that such acts of performance had unequivocal reference to the agreement, and were done in pursuance and execution of it. *Woodbury v. Gardner*, supra. As stated by Mr. Justice Clifford in *Williams v. Morris*, supra: "The act of part performance must be of the identical contract set up and alleged. It is not enough that the act of part performance is evidence of some agreement, but it must be unequivocal and satisfactory evidence of the particular agreement charged in the bill or answer." Upon this point the finding of the justice is thus expressed: "The defendants then took the agreement to see about the title. Meanwhile, with plaintiffs' assent, they entered upon the land (about thirty acres), and plowed a driving park upon it. This was late in the fall." This finding by no means shows that the act of plowing had "unequivocal reference to the agreement alleged, and was done in pursuance and execution of it." The language is equally consistent with the contention that the defendants sought and obtained permission from the plaintiffs to enter and plow under an arrangement entirely independent of the contract set up by the plaintiffs.

In the view thus taken of the findings of the court, it may be unnecessary to consider further the effect of the alleged act of part performance upon the agreement set up by the plaintiffs; but, as the counsel have exhaustively argued the question, we will briefly examine it.

As already intimated, the court is never authorized to nullify the imperative provisions of this statute, and decree specific performance of an oral contract for the sale of land, unless sufficient part performance is made out to show that fraud and injustice would result if the contract should be held inoperative. The doctrine is based on the principle of equitable estoppel, and it must appear that one of the parties has been induced or allowed to change his position on the faith of the contract to such an extent and in such a manner that all legal remedies would be inadequate to compensate him for the damages sustained, and nothing but specific performance would restore him to his original position. And the evidence must be full, definite, and conclusive. *Burns v.*

Daggett, 141 Mass. 373, 6 N. E. 727; Glass v. Hulbert, 102 Mass. 32; Woodbury v. Gardner, supra; Ash v. Hare, 73 Me. 403; Tilton v. Tilton, 9 N. H. 390; Williams v. Morris, supra; Moyer's Appeal, 105 Pa. St. 432; Lord's Appeal, Id. 451; McKown v. McDonald, 43 Pa. St. 441; Brown v. Brown, 33 N. J. Eq. 660.

In the first place, it should not be overlooked that in this case the plaintiffs, claiming to be vendors, are relying upon acts of partial performance done by the defendants to compel the latter to accept the deeds, and pay for the land, according to the alleged contract. But numerous authorities are aptly cited by the defendants' counsel in support of the proposition that the acts of part performance relied upon by the plaintiff must be acts done by himself, and that, ordinarily, no importance can be attached to acts of performance done by the party sought to be charged. In Browne, St. Frauds, § 453, it is said: "If the defendant chooses to waive the benefit of his own acts of part performance which would entitle him to allege a fraud on the part of the plaintiff, it cannot be that the plaintiff may force him to rely upon them, thus, in effect, himself setting up his own fraud." See, also, Bisp. Eq. (4th Ed.) 448; Buckmaster v. Harrop, 7 Ves. 341; Caton v. Caton, L. R. 2 H. L. 127; Glass v. Hulbert and Williams v. Morris, supra.

While this may not be accepted as an arbitrary rule, and it is possible that exceptional cases might arise where a plaintiff would be placed in such a position by the act of performance on the part of his opponent that damages at law would fail to compensate him for the injury, it must always be a consideration of great weight in determining whether the court is required to grant the relief of specific performance.

In the case at bar the act of part performance relied upon is not only found to have been done solely by the defendants, but, from every point of view, it is manifestly insufficient to justify the court in decreeing specific performance. The finding is that, with the plaintiffs' assent, the defendants entered upon the land, and "plowed a driving park upon it." It requires no argument to show that this act did not occasion irreparable injury to the plaintiffs. It cannot reasonably be claimed that the plaintiffs suffered any damage in consequence of this act for which a remedy at law would not afford full and just compensation. If, in any material respect, the plaintiffs do not occupy their original position, they can be restored to it without specific performance of the alleged contract for the sale of the land. The principle of equitable estoppel is not applicable to the facts of this case. "The decided inclination of the judicial mind appears to be against extending, beyond those limits to which it has been carried by clear authority, the doctrine of enforcing oral contracts in equity on the ground of part performance." Browne, St. Frauds, § 492.

Exceptions overruled.

(39 Me. 41)

STATE v. SINNOTT et al.

(Supreme Judicial Court of Maine. March 21, 1896.)

FISH AND GAME—ENFORCEMENT OF PENALTIES—JURISDICTION—SACO MUNICIPAL COURT.

1. Since St. 1891, c. 126, prosecutions for the violation of the fish and game laws, as therein provided, may be begun and finished upon complaint before judges of municipal and police courts and trial justices. This mode of prosecution, which had been omitted, apparently by inadvertence, from the Statutes of 1887 and 1889, was expressly revived by that act of the legislature.

2. The Saco municipal court has jurisdiction to render final judgment of conviction and sentence in such prosecutions, subject to the right of appeal. Rev. St. c. 133, § 13.

(Official.)

Exceptions from supreme judicial court, York county.

Austin L. Sinnott and William Stone were convicted of violation of the game and fish statute, and appeal. Exceptions overruled.

Willis T. Emmons, Co. Atty., for the State. B. F. Hamilton and B. F. Cleaves, for defendants.

PETERS, C. J. The two respondents were convicted and sentenced to pay each a fine of \$57.50 by the Saco municipal court upon a complaint for unlawfully having in possession 115 short lobsters, contrary to the statute. Rev. St. c. 40, § 21, as amended by Acts 1885, c. 275, Acts 1887, c. 144, and Acts 1889, c. 292. They thereupon appealed to this court, in York county, and there moved for a dismissal of this particular prosecution upon the ground that they could not be convicted of the offense upon a complaint, but only after an indictment.

Must their conviction be preceded by an indictment, or may it be had upon a complaint? In the act of 1885 (chapter 258) it is expressly declared that judges of municipal and police courts and trial justices within their counties have by complaint original and concurrent jurisdiction with the supreme judicial and superior courts in all prosecutions under Rev. St. c. 40 (the fish and game statute), and under the acts amendatory of said chapter. In the act of 1891 (chapter 126) it is again expressly declared that all fines and penalties under any law relating to game, fish, or shellfish may be recovered by complaint, indictment, or action of debt. These two statutes make it sufficiently clear that a conviction under these fish statutes may be had upon a complaint, and in a municipal court. The power of the legislature to provide for such a conviction for such an offense is indisputable. State v. Oram, 84 Me. 271, 24 Atl. 853.

The respondents, however, contend that the act of 1885 (chapter 258) was repealed upon this point by the act of 1887 (chapter 144, § 7), which enacted that all fines and penalties under that act should be recovered by indictment or action of debt, and made no

mention of a complaint as a mode of recovery. They also contend that it was again completely repealed by act of 1889 (chapter 292), which re-enacted in section 6 the above limitation of modes of prosecution to indictment and action of debt, and by section 8 enacted that "all laws, acts and parts of acts inconsistent herewith are hereby repealed."

But the still later act of 1891 (chapter 126), above cited, expressly restored the mode of prosecution by complaint which had been omitted apparently by inadvertence from the acts of 1887 and 1889. It must be evident, after the act of 1891, that the will of the legislature is that prosecutions under the fish and game laws may be begun and finished upon complaint.

The respondents further contend that, even if a prosecution can be begun and finished upon complaint, it cannot be so finished in the Saco municipal court, which, by the act creating it, is limited in jurisdiction to offenses punishable by fine not exceeding \$20. It was competent, however, for the legislature to afterwards enlarge that jurisdiction by special or general statutes. The legislature has once declared that municipal courts should have concurrent (i. e. joint and equal,—Webst. Dict.) jurisdiction with the upper courts over these proceedings. It has again declared that all the penalties imposed by the fish and game laws may be enforced by complaint,—a mode of prosecution cognizable in a superior court only after conviction in and appeal from a municipal or police court or trial justice. Rev. St. c. 123, § 13. Under these explicit declarations of legislative will, it must be held that the Saco municipal court has jurisdiction to render final judgment of conviction and sentence in prosecutions like this, subject, of course, to appeal.

Exceptions overruled.

(39 Me. 66)

STEINFELDT et al. v. JODRIE et al.

(Supreme Judicial Court of Maine. March 25, 1896.)

TRUSTEE PROCEEDS—DISCLOSURE.

A trustee will be discharged when he asserts positively and directly that there was nothing due from him to the principal defendant at the time of the service of the trustee writ upon him, although some of his answers are indefinite as to the amounts of his payments to the principal defendant, and also as to the time when a final settlement was had between them, but he asserts positively that such a settlement was had before the service of the trustee writ upon him, and that a balance was then found to be due from the principal defendant to him, and there is no evidence that contradicts him. In this case the plaintiff called the principal defendant as a witness, but he failed to obtain any contradictory evidence from him. He corroborated the statement of the alleged trustee that a settlement was had between them, and that a balance was found to be due from him to the trustee, and that this settlement was before the service of the trustee writ. *Held*, that

upon the evidence there is no ground on which the trustee can rightfully be charged.

(Official.)

Exceptions from supreme judicial court, Oxford county.

Assumpsit by Solomon Steinfeldt and another against Thomas Jodrie, in which Charles P. Bartlett was summoned as trustee. There was a finding against the trustee, who brings exceptions. Sustained.

J. P. & J. C. Swasey, for plaintiffs. R. A. Frye, for trustee.

WALTON, J. The trustee in this case asserts positively and directly that there was nothing due from him to the principal defendant at the time of the service of the trustee writ upon him. Some of his answers are indefinite as to the amounts of his payments to the principal defendant; also as to the time when a final settlement was had between them. But he asserts positively that such a settlement was had before the service of the trustee writ upon him, and that a balance was then found to be due from the principal defendant to him of \$98, or thereabouts. And there is no evidence that contradicts him.

The plaintiff called the principal defendant as a witness, but he failed to obtain any contradictory evidence from him. He corroborates the statement of the alleged trustee that a settlement was had between them, and that a balance was found to be due from him to the trustee, and that this settlement was before the service of the trustee writ.

Upon the evidence before us, we fail to discover any ground on which the trustee can rightfully be charged. We think the entry must be, exceptions sustained, trustee discharged, with costs. *Hamilton v. Cole*, 86 Me. 137, 29 Atl. 956; Rev. St. c. 86, §§ 80, 79.

Exceptions sustained.

(39 Me. 26)

CLARK v. INSURANCE CO. OF NORTH AMERICA.

(Supreme Judicial Court of Maine. March 12, 1896.)

CONTRACT OF INSURANCE—CANCELLATION—NOTICE—ASSENT.

1. Where a valid contract of insurance has been effected, and the assured has accepted the policy in a particular company, the agent of the company has no right to cancel such policy, or place the assured in any other company, without the authority or request of the assured.

2. Where, by the terms of the policy or contract of insurance, an insurance company reserves the right to cancel the policy by giving five days' notice to the assured, such cancellation can be effected only by giving such notice, or by the assent of the assured.

3. Without some stipulation authorizing it, an insurance company cannot cancel a contract of insurance once entered into, except with the assent of the assured.

4. Nor will such notice by the company be available after the liability of the company has become absolute by a destruction of the property by fire.

5. The contract of insurance is to be tested

by the principles applicable to the making of contracts in general. The terms of the contract must have been agreed upon.

6. If the contract is incomplete in any material particular, or the assent of either party is wanting, it is of no binding force.

7. The property insured must be in existence at the time the contract of insurance is made, in order to render such contract valid.

(Official.)

Report from supreme judicial court, Knox county.

Action by Arthur A. Clark against the Insurance Company of North America. On report. Judgment for defendant.

C. E. & A. S. Littlefield, for plaintiff. Wm. H. Fogler, for defendant.

FOSTER, J. The plaintiff desired to procure an insurance of \$1,200 for six months on his carriages, sleighs, and stock in a building owned by him at Rockport. Accordingly, on the 6th day of December, 1893, he left instructions at the office of F. A. Packard, who was agent of the Commercial Union Insurance Company, and five other companies, including the defendant company. The plaintiff gave no instructions as to what company the insurance should be placed in, this matter being left wholly to the agent. The policy was made out in the Commercial Union Insurance Company, and the plaintiff, on the 16th day of December, paid the premium, and received the policy of that company, which policy he retained in his possession until two days after the property insured was destroyed by fire, which occurred at 1 o'clock in the morning of December 19th, which was Tuesday. During that time he had no notice that the company intended or desired to cancel his policy. On December 15th the Commercial Union Insurance Company wrote the agent to cancel the policy. This letter reached Camden, where the agent resided, on the 16th, which was Saturday, in the evening, and was taken from the office by the agent on Monday, the 18th. Upon receiving this instruction to cancel the policy, the agent instructed his wife, who was his clerk, to write a new policy in the defendant company. The agent was in the office in the evening, and, finding that nothing had been done in reference to the policy, wrote a "daily report" of the insurance in the defendant company, and it remained in his office until the afternoon of the next day, Tuesday, when the policy in suit was written. After the daily report had been written, but before it was mailed, and before the policy was made out or entered in the register, the plaintiff notified the agent that the property insured had been destroyed by fire. When the plaintiff notified the agent of the destruction of the property that Tuesday morning, the agent told him he had just received word from the company to cancel the policy in the Commercial Union. That was all the conversation that was had

in relation to the cancellation of the policy. The plaintiff testifies that he went over to the agent's office about 8 o'clock on the morning of Tuesday, the 19th, and notified him that it had been burned, and he said he was just reading a letter he had received from the company to cancel the policy. At the time the plaintiff left the agent's office, he had no knowledge that any attempt had been made to cancel the policy which he then held upon his property, which had then been destroyed, and had no knowledge that any act had been done towards placing the insurance in another company. The policy which the agent wrote in the defendant company on the afternoon of the 19th, and after the plaintiff had given notice of the loss, was antedated December 6th, and the record of cancellation of the other policy, December 18th, as of the date when notice was received by the agent to cancel the policy in the Commercial Union, and when the "daily report" was written for the defendant company. Two days after the fire, the policy in suit, in the Insurance Company of North America, bearing date December 6, 1893, was sent to the plaintiff by the agent through a Mr. Andrews, who said he had another policy, and he would take the old one, and give the plaintiff a new one, and that it would be all right. The plaintiff testifies that he hesitated about doing it, but at last gave him the first policy, and took the new one upon his assurance that it would be all right, and that he would be protected. The record of cancellation was not entered on the register of the Commercial Union until Mr. Andrews returned with the policy from the plaintiff, though the record was dated December 18th, the day before the fire. On the afternoon of Tuesday, the 19th day of December, the agent mailed to the defendant company the daily report which had been written the evening before, informing the company of the insurance, and also in a separate envelope notice of the loss.

The premium paid by the plaintiff for the policy in the Commercial Union was transferred to the account of the defendant company, and remitted, with other money, in the due course of business, and this is still retained by them.

On December 25th, a special agent of defendant company, in reply to the notice of loss, notified the agent that he would come down the next week. The defendant company, on learning the facts concerning the loss, making of the policy on the 19th of December and antedating it as of the 6th, and the alleged cancelling of the policy in the Commercial Union, disaffirmed the acts of the agent, claiming they were wrong and illegal, and that the Commercial Union was the company liable, and not the defendant.

The plaintiff, as the case shows, has another action pending against the Commercial Union, and has made due proof of loss

to that company. In his proof of loss against the defendant company he states that he was insured in the Commercial Union; that they claim it was canceled before or at the time the insurance was effected in the defendant company, but which claim he states he does not admit, nor does he waive or surrender any rights that he may have against that company by filing his proof of loss against the defendant company.

Such, in substance, are the facts upon which the plaintiff seeks a recovery in this action against the defendant company.

We do not think he can maintain this action.

There was a valid contract of insurance existing between the plaintiff and the Commercial Union Insurance Company on and after December 16th, when he paid the premium and received his policy. Up to the time of the fire, the plaintiff had received no notice of the intended cancellation of that policy. He had neither authorized nor requested any other insurance of his property, nor had he requested or assented to a cancellation of his policy in the Commercial Union. By the terms of the policy the company could cancel the policy by giving to the assured five days' notice. No such notice was given, and the policy remained uncanceled, and in full force in the hands of the assured, on the 19th day of December, when the loss occurred, and when he notified the agent of the loss. Without such a stipulation, or some stipulation strictly authorizing it, an insurance company cannot cancel a contract of insurance once entered into, except with the assent of the assured. 1 May, Ins. § 67; Insurance Co. v. Swift, 10 Cush. 433.

And when the policy contains such a stipulation, the notice must be unequivocal. It is not enough to give notice of a desire to cancel, or to deliver the policy for cancellation. *Lyman v. Insurance Co.*, 14 Allen, 329; *Griffey v. Insurance Co.*, 100 N. Y. 417, 3 N. E. 309.

The only notice ever given by the company that had entered into a contract with the plaintiff was that given on the 15th of December in a letter to their agent. He was not the agent of the assured for the purpose of receiving notice of the cancellation of the policy which he himself had written and delivered to the assured as agent of that company.

A case significantly similar to the one at bar was before the court in New Hampshire in *Stebbins v. Insurance Co.*, 60 N. H. 65, and there, as here, the attempt was made to change the risk from one company to another after the contract had become fixed and binding, and without any authority from the plaintiff; and in the course of the opinion the court say: "The right to terminate the insurance upon giving notice and refunding the premium for the unexpired term was reserved in the policy; and it appears that

the company, upon being informed of the risk, notified their agents that they preferred not to carry it, and advised that it be placed elsewhere, and that the agents attempted to change the risk and place it in the Lancashire Company. But the act of the agents in canceling the policy upon their books, and writing a policy in the Lancashire Company, and forwarding it as a proposed substitute, was ineffectual to terminate the contract of the North British Company until notice had been given to the plaintiff or his agent; and no such notice was received by the plaintiff, his agent, Barber, or Doolittle, until after the liability of the North British Company had become fixed by the destruction of the property by fire. After the liability of the company had become absolute, notice of their previous election to terminate the risk was of no effect. The North British policy was in force at the time of the fire. *Massachusetts Steam Mills Co. v. Western Assurance Co.*, 125 Mass. 110. The Lancashire policy never became a binding contract. When insurance on the plaintiff's building to the required amount had been secured in the Commercial Union and North British Companies, the plaintiff's application had been filed, and no authority remained for placing other insurance upon the property. The Lancashire policy therefore was unauthorized by the plaintiff, and, although written in good faith by the authorized agents of the company, and designed as a substitute for the North British policy, it could have no operative force until it was accepted by the plaintiff. It was not an acceptance of a proposition for a contract of insurance, like the case of a policy issued on a previous application, which, as in the cases cited by the plaintiff, takes effect upon the acceptance of the application. As neither the plaintiff nor his agent had any knowledge of the existence of the policy previous to the fire, it was not an existing contract of insurance when the loss happened, and the subsequent delivery was ineffectual to give it validity." See, also, *Wilson v. Insurance Co.*, 140 Mass. 210, 5 N. E. 818.

At the time of his loss, the plaintiff held the policy of the Commercial Union, uncanceled, and in full force, and had a right of action against that company for the amount of his loss.

He had not applied for or assented to any other insurance, had no knowledge that other insurance was contemplated, and had not at the time of loss any right of action against the defendant company.

It is contended in support of this action that by surrendering his policy in the Commercial Union, and accepting the policy in suit, the plaintiff ratified the acts of Packard, and thus, on the 21st of December, in making the exchange of policies with Andrews, under the circumstances which we have stated, completed a contract of insurance with the defendant company upon prop-

erty which had been destroyed three days before.

But, taking the testimony of the plaintiff, it negatives the claim of cancellation of his first policy and the acceptance of the one in suit in lieu thereof. More than a month after the alleged cancellation and transfer of risk, in his proof of loss to the defendant company, he states that he does not admit the claim of the Commercial Union that his policy in that company had been canceled before the loss, nor does he "waive or surrender any rights" that he may have against the Commercial Union. His testimony in relation to what was done when Andrews came to him shows no consent to such cancellation or change of risk, and the most that can be said in relation to it is that he hesitatingly exchanged policies upon the assurance that "it would be all right, and he be protected." Nor was the plaintiff, at the interview with Packard on the morning after the loss when he conveyed notice to him of his loss, in any way notified that his insurance in the Commercial Union was canceled, or attempted to be canceled, or the risk changed, and he went away ignorant of any such fact.

We cannot agree to the plaintiff's position that there was a contract of insurance effected between the plaintiff and this defendant company by the act of the agent in writing the "daily report" on the evening of December 18th. That would undoubtedly be true had the plaintiff applied for further insurance. *Walker v. Insurance Co.*, 56 Me. 371, 379. But in this case the agent had no authority, express or implied, to effect any insurance for the plaintiff beyond what had already been completed. His authority was to procure for the plaintiff \$1,200 insurance in one of the companies which he represented; and having done that to the acceptance of the plaintiff, his agency, so far as the plaintiff was concerned, was accomplished, and he had no authority to make further insurance in behalf of the plaintiff. Nor was it the intention, even, on the part of the agent, to effect additional insurance. It was, at most, an attempt to transfer a risk from one company to another at the instance of the company then carrying the risk, and without the consent of the assured. The attempted cancellation and the effort to place the risk in the defendant company were parts of the same transaction, with no consent of the assured. Unless the cancellation was valid, the second risk did not attach. It is not pretended that the plaintiff was aware of any intention or attempt at cancellation till the morning after the loss occurred. Until the five days' notice provided in the policy should be given him, or he should consent to such cancellation, the first policy would remain in force, and the second would not become operative as a legal subsisting contract. *Wilson v. Insurance Co.*, 140 Mass. 210, 212, 5 N. E. 818; *Stebbins v. Insurance Co.*, 60 N. H. 65; *Massasoit Steam*

Mills Co. v. Western Assurance Co., 125 Mass. 110.

There was no contract between this plaintiff and the defendant company at the time the loss occurred. There was a subsisting contract between the plaintiff and the Commercial Union. The unauthorized attempt on the part of the agent of the defendant company to make such a contract by entering in his "daily report" the memorandum of such contract was not enough. The contract of insurance is to be tested by the principles applicable to the making of contracts in general. The terms of the contract must have been agreed upon. This necessarily implies the action of two minds, of two contracting parties. If it is incomplete in any material particular, or the assent of either party is wanting, it is of no binding force.

Thus, in the case of *Insurance Co. v. Young*, 23 Wall. 85, 107, the supreme court of the United States, in speaking of the contract of insurance where a question similar to the one under consideration arose, say: "The company assented to the policy, but the applicant never did. The mutual assent, the meeting of the minds of both parties, is wanting. Without it there is none, and there can be none." *Insurance Co. v. Ewing*, 92 U. S. 377, 381.

In this case the action of the agent in the transaction relative to the attempted change of risk to the defendant company was entirely *ex parte*. If we assume that he was acting with authority from the company, it was then no more than a proposition which had not been made known to the plaintiff. To give it validity required his knowledge and his consent. At the time of the loss, knowledge had not been conveyed to him, and his acceptance had not been given. The rights and liabilities of the parties are to be determined by their legal status at the time of the loss. It is inconceivable that the defendant company can be held liable for indemnity against loss when no contract for indemnity existed at the time the loss occurred.

And if the property had been burned before any contract was entered into with the defendant company, even if we assume such contract to have been afterwards made, that fact was known to the agent, and the defendant company would not be liable. The property must be in existence to render a contract of insurance valid. *Stebbins v. Insurance Co.*, 60 N. H. 65; *Mead v. Insurance Co.*, 158 Mass. 124, 126, 32 N. E. 945.

Stress is laid upon the fact that the defendant has received and retained the premium paid by the plaintiff. But the plaintiff has never paid any premium to the defendant company. He paid his premium to the Commercial Union when he received his policy under an insurance contract entered into between him and that company. He has paid no other premium. The money so paid became the money of the Commercial Union. If the agent, in order to carry out

his plan, has included any portion of that amount in a lump sum remitted by him to the defendant company, that matter must be adjusted between the two companies. Such a scheme, in the face of the express disaffirmance of the transaction, both by the defendant company and the plaintiff, cannot place this risk where it does not otherwise belong.

Judgment for defendant.

(89 Me. 121)

In re BROCKWAY MANUF'G CO.

Ex parte MITCHELL.

(Supreme Judicial Court of Maine. April 9, 1896.)

CORPORATIONS—DEFAULT OF OFFICERS—INSOLVENCY—RIGHTS OF CREDITORS.

1. In the allowance of debts and claims in bankruptcy and insolvency the court proceeds upon principles and considerations that are equitable in their character.

2. The stock and property of a corporation is to be regarded as a trust fund for the payment of its debts, and its creditors have a lien thereon, and the right to priority of payment over any stockholder.

3. Stockholders of a corporation have no rights until all other creditors are satisfied. They have the full benefits of the profits made by the establishment, but cannot take any portion of the funds until all other claims on them are extinguished. Their rights are not to the capital stock, but to the residuum after all demands on it are paid.

4. Creditors may hold the company's agents liable for wasting assets which are needed to satisfy their claims, on the ground that it constitutes a misapplication of trust funds.

5. Where the funds of a corporation are used by its treasurer to pay for its stock purchased by him and other stockholders for themselves with the consent of all the stockholders and directors, *held*, that the treasurer thereby became responsible for the whole amount of the money so converted.

6. So long as he holds the money in the treasury of the corporation, it is there to answer for its debts, if necessary; and it should be devoted to that object so long as it may be required for that purpose. If he withdraws it, except according to law, he does so subject to that trust,—the trust for the payment of debts of the corporation, and needed for that purpose; and it is immaterial whether he got the money by fair agreement with his associates or by a wrongful act.

See 32 Atl. 1015, 87 Me. 477.

(Official.)

Exceptions from supreme judicial court, Androscoggin county.

A claim in favor of one Mitchell, assignee of Isaac N. Haskell, insolvent, against the Brockway Manufacturing Company, insolvent, was presented for allowance to one Robinson, assignee of the company. From a decree of the judge of insolvency disallowing the claim in part, claimant appealed. The appellee interposed a set-off against the claim on appeal, and to a decree of the presiding justice allowing the same in part only appellee excepts. Appeal dismissed, and decree of the judge of insolvency affirmed.

N. & J. A. Morrill and J. W. Mitchell, for appellant. A. R. Savage and H. W. Oakes, for appellee.

PETERS, C. J. After the previous decision in this case, as see 87 Me. 477, 32 Atl. 1015, the appellant, Mitchell, the assignee of Haskell, the insolvent debtor, was allowed to amend his claim agreeably to that decision, by substituting therefor an account for cash paid by said Haskell for the use of the Brockway Manufacturing Company, and interest, amounting in all to \$1,571.73. At the hearing on the appeal in the court below, Robinson, the assignee of the corporation, was allowed to amend his objections to the claim as originally filed; and, in addition to a general objection alleging that upon a full settlement there was nothing due from the corporation to said Haskell, he specifically stated, as a further ground of objection, that "on the 26th day of December, 1888, said Haskell, jointly with five other individuals, signed and delivered to one Samuel G. Damren six notes, each for the sum of four hundred and fifty dollars, with interest, and payable, respectively, in four, eight, twelve, sixteen, twenty, and twenty-four months from date; that said Haskell, without lawful authority, took and appropriated the funds of the Brockway Manufacturing Co. for the payment of said notes with interest thereon, amounting in all to the sum of twenty-eight hundred and eighty-nine dollars, and that said Haskell thereby became bound to account for said sums to the Brockway Manufacturing Co., and to pay the same to the said Brockway Manufacturing Co., for the benefit of its creditors; and said Robinson claims to offset said amount, * * * together with interest thereon, * * * the whole amount being thirty-one hundred and seventy-seven dollars and ninety cents, against the claim of said Mitchell, as assignee of said Haskell, as aforesaid."

At the hearing in the court below the following facts were admitted by the parties: That on the 26th of December, 1888, I. N. Haskell and five others bought out all the shares of the Brockway Manufacturing Company which had then been issued, from the original owners, with the exception of 4 which were retained by said owners, and in payment therefor gave the 6 notes above referred to in the amended objection filed by the appellee; 27 of said shares, of the par value of \$100 each, being transferred directly to the purchasers of said stock, and a portion, at a later date, viz. January 9, 1889, but as a part of the same transaction, being surrendered to the treasury as treasury stock by the original holders. That by this transfer the signers of said notes received stock as follows, viz.: I. N. Haskell, 5 shares; the others, various amounts aggregating 22 shares; and 42 shares were surrendered into the treasury and canceled. That I. N. Haskell was then made director and treasurer of said corporation, and continued to hold both offices until the filing of the petition in insolvency, August 26, 1892. That from time to time, as the above notes matured, they

were paid by said Haskell from the funds of the Brockway Manufacturing Company. That this was done without fraudulent purpose on the part of said Haskell or the other stockholders, and with the assent of all the stockholders and directors of the Brockway Manufacturing Company, including the signers of the notes, and was in accordance with the understanding between the parties to said transfer at the time when the notes were given, December 26, 1888, but without any vote, either by the stockholders or directors, authorizing such payments; and that no account of such payments appears upon the account books of the corporation.

The appellee, admitting that Haskell had paid, for the use of the company, the sums specified in the claims filed against the corporation in this case, claimed that there should be allowed in set-off or recoupment against Haskell's claim the full amount of money applied, as aforesaid, by him to the payment of the six notes dated December 26, 1888, or so much thereof as would be sufficient to cancel the claim of \$1,571.73; while the appellant claimed that at most only Haskell's proportionate part of said amount, viz. five twenty-sevenths, agreed to be the sum of \$610, should be allowed.

The presiding justice thereupon ruled that the appellee would be entitled to be allowed in set-off against the claim of the appellant said sum of \$610, and no more, and entered a decree accordingly.

To this ruling the appellee excepts, and prays that his exceptions may be allowed.

We think that in this proceeding Haskell must answer for the full amount, or so much of it as is necessary to balance the claim here preferred by his assignee.

Whatever rule might obtain if this were a proceeding to enforce the liabilities of a stockholder under our statutes, we think that the case discloses in its facts a diversion of its property and assets to the detriment of creditors. The case is very like that of a trustee secretly applying the trust property to his own use. To hold otherwise would be a contradiction of the plain proposition that the stock and property of every corporation is to be regarded as a trust fund for the payment of its debts, and that its creditors have a lien thereon, and the right to priority of payment over any stockholder. The payment of the amount claimed by Haskell for the benefit of the corporation amounted in law to an application of that sum in reduction of his indebtedness to the company, and therefore a reduction of its assets to that extent. It is well settled by numerous authorities that the stockholders of a corporation have no rights until all other creditors are satisfied. They have the full benefit of the profits made by the establishment, but cannot take any portion of the funds until all other claims on them are extinguished. Their rights are not to the capital stock, but to the residuum after all demands on it are paid. *Wood v. Dum-*

mer, 3 Mason, 311, Fed. Cas. No. 17,944; *Sanger v. Upton*, 91 U. S. 60. Creditors may hold the company's agents liable for wasting assets which are needed to satisfy their claims, on the ground that it constitutes a misapplication of trust funds.

We are of the opinion, therefore, that Haskell from time to time had these funds in his possession, belonging to the corporation, which he was bound to apply only to the legitimate purposes of the corporation; and that, if he chose to apply them otherwise while acting as treasurer or director, either for his own benefit or for the benefit of any one else, he thereby became responsible for the whole amount so converted. So long as he held the money in the treasury of the corporation, it was there to answer for its debts, if necessary; and it should have been devoted to that object so long as it might be required for that purpose. If he withdrew it, except according to law, he did so subject to that trust,—the trust for the payment of debts of the corporation, and needed for that purpose (*Williams v. Bolce*, 38 N. J. Eq. 364); and it is immaterial whether he got the money by fair agreement with his associates or by a wrongful act (*Bartlett v. Drew*, 57 N. Y. 587).

The defendant, in his argument, admits that the transaction detailed above amounted undoubtedly to a withdrawal of a portion of the principal of the capital stock of the company, within the meaning of Rev. St. c. 40, § 37; and that the payment for the 27 shares of stock out of the funds of the company, by which transaction Haskell received the par value of his stock without cost to himself, was illegal as against its creditors. But he argues that the only duty of Haskell as treasurer was as agent of the company; and he urges that his only duty in relation to the funds of the company was to keep them safely, and to pay them out, or otherwise dispose of them, as he might be directed by the corporation. And he cites from the opinion in the case of *Taylor v. Taylor*, 74 Me. 584, that "he is accountable to the corporation and to the corporation alone, and to the corporation he has done no wrong." That case was a bill in equity by an assignee in insolvency to vacate a fraudulent preference, and it was sought to sustain the bill upon the further ground of a breach of trust. But the court held that under the allegations in the bill it could not be supported upon the ground. It was sustained as a fraudulent preference under the insolvent law. It will thus be seen that the two cases are dissimilar. In our view, as already expressed, he is accountable, and because he has done wrong to the corporation by an unwarranted withdrawal of its funds for an illegal purpose whereby creditors have been wronged.

In the allowance of debts and claims in bankruptcy and insolvency the court proceeds upon principles and considerations that are equitable in their character. It has been ac-

cordingly held that an assignee may vacate a preference which was given by the directors of an insolvent corporation to a firm of which a director was a member, although it was given more than four months before the commencement of the proceedings in bankruptcy. *Bradley v. Farwell*, 1 Holmes, 433, Fed. Cas. No. 1,779.

According to the agreement of the parties, the entry will be made.

Decision of the judge of insolvency affirmed. Appeal dismissed.

(89 Me. 54)

MAINE RED GRANITE CO. v. YORK.

(Supreme Judicial Court of Maine. March 24, 1896.)

GURANTY—CONSTRUCTION.

1. A guaranty should receive a fair and reasonable interpretation, so as to retain the object for which it is designed.

2. The Machiasport Company received an order for some stone, which the company was unable to fill, and application was made to the Red Granite Company for assistance. The latter company declined to deliver stone on the credit of the Machiasport Company, but expressed a willingness to do so on the credit of the defendant. Thereupon the defendant wrote a letter, addressed to the manager of the Red Granite Company, of the following tenor: "Dear Sir: Mr. Pattengall advises me that he is in need of about \$200 worth of Red Beach stock. Kindly fill such orders as he may give you, and I will attend to the payment of same as they become due. Geo. W. York, Treas. of the Machiasport Granite Company." *Held*, that the defendant became personally bound by this letter.

3. The addition, "Treas. of the Machiasport Granite Company," does not relieve the defendant from a personal liability as guarantor.

4. The use of the words "about \$200 worth," in the guaranty, *held* to be no more than an estimate; and a verdict of \$254.70 was sustained. (Official.)

Exceptions from superior court, Cumberland county.

Action by the Maine Red Granite Company against George W. York. Judgment for plaintiff, and defendant excepta. Exceptions overruled.

Augustus F. Moulton, for plaintiff. Benj. Thompson, for defendant.

WALTON, J. The defendant is sued as guarantor of a debt due from the Machiasport Granite Company to the Maine Red Granite Company, and the question is whether a letter written by the defendant to an agent of the Red Granite Company justified that company in delivering stone to the Machiasport Company on the defendant's credit. We think it did.

It appears that the Machiasport Company received an order for some stone, which the company was unable to fill, and that application was made to the Red Granite Company for assistance; that the latter company declined to deliver stone on the credit of the Machiasport Company, but expressed a will-

ingness to do so on the credit of the defendant; and that thereupon the defendant wrote a letter, addressed to the manager of the Red Granite Company, of the following tenor:

"Dear Sir: Mr. Pattengall advises me that he is in need of about \$200 worth of Red Beach stock. Kindly fill such orders as he may give you, and I will attend to the payment of same as they become due. Geo. W. York, Treas. of the Machiasport Granite Company."

It is urged in defense that this letter was not intended to bind the defendant personally, and that the language used will not justify such a construction of it. It is insisted that no one should be compelled to pay another's debt, unless the proof of his obligation to do so is clear; and that a writing, claimed to be a guaranty of another's debt, should be construed as favorably for the writer as the language used will allow.

Some authorities do so hold. Others hold that the words are to be taken as strongly against the party giving the guaranty as the sense or meaning of them will allow. In *Douglas v. Reynolds*, 7 Pet. 115, Judge Story said that guaranties are of extensive use in the commercial world, upon the faith of which large advances are made and credits given, and care should be taken to hold the party bound to the full extent of what appears to be his engagement. And again, in *Lawrence v. McCalmont*, 2 How. 428, the same learned judge said: "We have no difficulty whatever in saying that instruments of this sort ought to receive a liberal interpretation. By a liberal interpretation we do not mean that the words should be forced out of their natural meaning, but simply that the words should receive a fair and reasonable interpretation, so as to attain the object for which the instrument is designed, and the purposes to which it is applied. We should never forget that letters of guaranty are commercial instruments, generally drawn up by merchants in brief language, sometimes inartificial, and often loose in their structure and aim; and to construe the words of such instruments with a nice and technical care would not only defeat the intention of the parties, but render them too unsafe a basis to rely on for extensive credits, so often sought in the present active business of commerce throughout the world. * * * If the language used be ambiguous, and admits of two fair interpretations, and the guarantee has advanced his money upon the faith of the interpretation most favorable to his rights, that interpretation will prevail in his favor; for it does not lie in the mouth of the guarantor to say that he may, without peril, scatter ambiguous words, by which the other party is misled to his injury."

These extracts have been thought to express very happily and accurately the rule that ought to prevail in the construction of letters or other writings claimed to be guaranties, and upon which credits for money or goods have

been obtained. *Gates v. McKee*, 13 N. Y. 232.

And the same rule for the construction of guaranties seems to prevail in England. In *Mason v. Pritchard*, 12 East, 227, the court said that the words were to be taken as strongly against the party giving the guaranty as the sense of them would admit; and in *Hargreave v. Smee*, 6 Bing. 244, Chief Justice Tisdale said that "there is no reason for putting on a guaranty a construction different from what the court puts on any other instrument," and that "with regard to other instruments the rule is that, if the party executing them leaves anything ambiguous in his expressions, such ambiguity must be taken most strongly against himself."

In *Hotchkiss v. Barnes*, 34 Conn. 27, the defendant wrote the plaintiff a letter, saying: "Sir: You can let Mr. Day have what goods he calls for, and I will see that the same are settled for," and the court held that the letter not only constituted a guaranty, but a continuing guaranty.

In the case now before us, the defendant wrote the plaintiff's managing agent a letter, saying: "Kindly fill such orders as may be given you, and I will attend to the payment of same as they become due." True, he annexed to his signature a statement of the fact that he was treasurer of the company desiring to obtain the goods; but it is well settled in this state that such an addition to the name of the signer of an obligation will not relieve him from personal responsibility. *Sturdivant v. Hull*, 59 Me. 172; *Mellen v. Moore*, 68 Me. 300; *Rendell v. Harriman*, 75 Me. 497; *McClure v. Livermore*, 78 Me. 390, 6 Atl. 11.

It seems to us that in the case now before us the language of the letter is stronger, and more clearly creates the liability of a guarantor, than the language of the letter in the Connecticut case. In the Connecticut case the language of the letter was, "And I will see that the same are settled for." Here, the language of the letter was, "And I will attend to the payment of the same as they become due." It seems to us that the latter is the stronger of the two promises, and more clearly creates the obligation of a guarantor; and if the former was rightly held to create the obligation of an obligor (and we do not doubt that it was), a fortiori, the latter should be held to create such an obligation. And it is the opinion of the court that it did create such an obligation, and that the ruling in the court below upon this point was correct.

Another question raised at the trial in the court below was with respect to the amount. It was claimed that if the defendant was liable at all, he should not be held for more than \$200; and the court was requested to so instruct the jury. The court declined. We think the requested instruction was properly withheld. True, the defendant stated in his letter that he had been advised that "about" \$200 worth of Red Granite stock would be needed; but this was no more than an esti-

mate, and the use of the word "about" shows that entire accuracy was not intended. If the amount delivered had been very much in excess of the amount named, it might, perhaps, be regarded as evidence of bad faith, and require a limit to be fixed to the defendant's liability. But no such excess is shown, and the amount of the verdict is only \$254.70. It is the opinion of the court that this sum cannot be regarded as so largely in excess of the estimate as not to come fairly within the terms of the defendant's guaranty.

Motion and exceptions overruled.

(89 Me. 58)

EATON v. GRANITE STATE PROVIDENT ASS'N.

(Supreme Judicial Court of Maine. March 25, 1896.)

PROOF OF AGENCY.

1. Evidence that a third person, by his declarations and acts, assumed to be the agent of a corporation, does not amount to proof of such agency in an action against the corporation.

2. Agency cannot be established against an alleged principal by showing the words and acts of the alleged agent.

(Official.)

Exceptions from superior court, Kennebec county.

Action by Harvey D. Eaton against Granite State Provident Association. Judgment for plaintiff, and defendant moved for a new trial, and excepts. Motion sustained.

Wm. T. Haines and Harvey D. Eaton, for plaintiff. S. S. Brown, for defendant.

EMERY, J. The plaintiff, at the request of one Hicks, performed services, as he supposed, for the Granite State Provident Association, the defendant. Mr. Hick's employment of the plaintiff was with the assent and concurrence of two other men, W. C. Scarboro and H. G. Scarboro. The plaintiff had no conversation nor correspondence with any other person in relation to his employment.

The defendant company did not accept the plaintiff's services, nor receive any benefit from them, though this was through no fault of the plaintiff. Therefore, to recover of the defendant company compensation for his services, the plaintiff must establish by competent evidence that either Hicks or one of the Scarboros was the agent of the defendant company, with authority to employ the plaintiff to render the services in question.

That all three of these men assumed to be such agents, and talked and acted as though they were such agents, is beyond question; but agency cannot be established against an alleged principal by showing the words and acts of the alleged agent. The defendant company is sued as a corporation; but no corporate vote, no vote of the directors, no word or act of any of its officers, is shown tending to prove that either of these three

men assuming to act as agent had the least authority to do so.

The plaintiff testified that he once met these three men in the "general office" of the defendant company, at No. 88 Exchange street, Portland; but here, again, no corporate vote, no directors' note, no word or act of any appropriate corporate officer, is shown tending to prove that the company had or recognized any place in Portland as a general office. The plaintiff evidently supposed the place to be the company's general office, and hence called it so in his testimony; but his belief and consequent statement are no evidence of the truth of the proposition as against the company.

The case shows that Hicks and the Scarbors were present at the trial, but this was only their act. It does not appear that any officer of the company requested their attendance, or was aware of it; nor would such request be evidence of their prior agency. They might have been summoned as witnesses to disprove any agency.

There is visible to the careful reader a wide difference between this case and the case of *Cloran v. Houlehan*, 88 Me. 221, 33 Atl. 986. In that case an attorney at law, acting for the plaintiff, had discharged the account for a small sum. The question was whether the attorney was the attorney of the plaintiff. The attorney himself testified that he had received letters from the plaintiff's house instructing him to return the money to the defendant, and bring an action. This was direct evidence of employment as attorney, and, if true, was sufficient. In this case the only evidence is the plaintiff's own testimony as to the acts and declarations of the supposed agent. No act or declaration of any officer of the defendant company is testified to.

The plaintiff too confidently assumed that these men, or some of them, were authorized to act for the defendant company, and neglected to adduce competent evidence of such authority.

Motion sustained.

(89 Me. 60)

ELLIS v. CITY OF LEWISTON.

(Supreme Judicial Court of Maine. March 25, 1896.)

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—ACTION FOR INJURIES.

Where the jury return a verdict, and it appears that no questions of law were reserved, and none of the rulings of the presiding justice were excepted to, that the questions of fact were fairly submitted to the jury, that they exercised an honest judgment, and that there was evidence tending to sustain all the allegations necessary for the plaintiff to prove, the court considers that the verdict cannot be set aside.

In this case the plaintiff recovered a verdict of \$500 against the city of Lewiston for a broken leg. He claimed that the injury was caused by a defect, or want of repair, in the

street, arising from a street railway, from which the snow having been removed, the street was left with a rut where the rail of the horse railway ran, and that there were shoulders of ice on each side of the rails, by which the runner of the sleigh was caught and tipped over. It was admitted that the street railway was lawfully there. The plaintiff claimed that by reason of the railway some increase of risk for travelers occurred, and that the obligation still remained upon the city to keep the street in safe and sufficient condition. The defendant claimed that the snow was rightfully removed from the track, and that the city had done all that could be reasonably required to make the street safe and convenient.

(Official.)

Case by Edgar Ellis against the city of Lewiston, in which there was a verdict for plaintiff. On motion for new trial. Overruled.

A. R. Savage and H. W. Oakes, for plaintiff.
R. W. Crockett, City Sol., for defendant.

WALTON, J. The plaintiff has obtained a verdict against the city of Lewiston for an injury claimed to have been caused by a defect, or want of repair, in one of its public streets. The injury was a broken leg, and the amount recovered, \$500. The amount is not excessive, and there is no reason to believe that the jury were influenced by other than honest motives. But the defendant's counsel insists that the verdict is clearly and manifestly against the weight of evidence, and ought to be set aside.

The dangerous condition of the street was caused by a street railway along the center of it. The snow had been removed from the railway track, and left upon the sides of the street, thus leaving the street in a condition too familiar to every one to need a description. The plaintiff says that his sleigh slewed on the track, and that for 30 or 40 yards he pursued his way on the track; that he then saw a horse car approaching, and he attempted to turn out, and, as he attempted to turn out, the sleigh tipped over, and he fell out and broke his leg; that at that time, at that place, the track was covered with water to the depth of several inches.

It is insisted in defense that the street railway was rightfully there, and that the snow was rightfully removed from its track, and that the street commissioner of Lewiston had done all that could reasonably be required of him to make the street safe and convenient for travelers.

The case is a close one, and, if the action had been tried by the court without a jury, perhaps a different result would have been reached. But no questions of law have been reserved, and none of the rulings of the presiding justice have been excepted to. The questions of fact appear to have been fairly submitted to the jury, and there is no reason to doubt that they exercised an honest judgment. There is some evidence tending to sustain every allegation which it was necessary for the plaintiff to prove. Its sufficiency was a question for the jury. And upon the whole

it is the opinion of the court that the verdict is one which the court cannot rightfully set aside.

Motion overruled.

(39 Me. 67)

WINSLOW v. REED.

(Supreme Judicial Court of Maine. March 25, 1896.)

DEED—BOUNDARY ON PRIVATE WAY.

When land is bounded on a highway, it extends to the center of the way; but it is equally well settled in this state, whatever the rule may be elsewhere, that when land is bounded on a private way it extends only to the side line of the way. *Bangor House v. Brown*, 33 Me. 309; *Ames v. Hilton*, 70 Me. 86, affirmed. (Official.)

Exceptions from supreme judicial court, Sagadahoc county.

Action by James A. Winslow, against Isaac B. Reed.

This was a real action brought to determine the title to a lot of land on the north side of Court street, in the city of Bath, or to that part of the lot upon which the defendant had erected a building extending into Winslow Court, a private way. The defendant claimed a fee to the center line of the private way.

Prior to 1874, the plaintiff owned a large tract of land on the north side of Court street, and subsequently sold to various parties parcels of this land, through which he had laid out a private way, bounding the lots thus sold on this private way. The plaintiff claimed that he retained the fee of the private way, and that he had by his deeds granted to the purchasers an easement only in such private way. Prior to bringing this action, the plaintiff had conveyed all the land on each side of Winslow court, or private way, and the only question submitted by the exceptions was whether the defendant's title in fee extended to the western or side line of Winslow Court, or to the center of the same.

The defendant moved for a nonsuit, after the plaintiff had closed his evidence, upon the ground that the testimony showed that the erection of the building by the defendant of which complaint was made was entirely within the center line of the court; that Winslow, by his deed, had conveyed to the center of the court; that, if the plaintiff had any right to the land upon which the building was erected, it could amount to no more than an easement,—a right to have that portion of the way free from erections of any kind; and that a writ of entry could not be brought to recover an easement.

The presiding justice sustained the motion, and ordered a nonsuit. Thereupon the plaintiff took exceptions. Exceptions sustained.

The description of the land conveyed to the defendant is as follows:

"Beginning on the east corner of land of said Isaac B. Reed and Court street; thence running northerly on said Reed's line to land

of one George Blange; thence on said Blange's east line to 'Winslow Court,' so called; thence in a southwesterly direction on said court to first-mentioned bound."

George E. Hughes, for plaintiff. F. L. Noble and R. W. Crockett, for defendant.

WALTON, J. Exceptions to a compulsory nonsuit. The presiding justice seems to have assumed that when land is bounded on a private way the same rule applies as when land is bounded on a highway, and that land so bounded extends to the center of the way. This was erroneous.

It is undoubtedly true that when land is bounded on a highway, it extends to the center of the way; but it is equally well settled in this state, whatever the rule may be elsewhere, that when land is bounded on a private way it extends only to the side line of the way. *Bangor House v. Brown*, 33 Me. 309; *Ames v. Hilton*, 70 Me. 86.

Exceptions sustained.

(39 Me. 70)

HAMMOND v. PHILLIPS.

(Supreme Judicial Court of Maine. March 26, 1896.)

APPEAL—CONFLICTING EVIDENCE—NEWLY-DISCOVERED EVIDENCE.

Where the evidence was conflicting, the case appears to have been fairly and carefully tried, and no reason is apparent why the evidence claimed to be newly discovered, if true, could not, by the use of due diligence, have been discovered before as easily as after the trial, the court considers that the verdict ought not to be disturbed.

(Official.)

Action by Thomas W. Hammond against Phebe Phillips. Verdict for defendant. Motion for a new trial. Overruled.

E. O. Greenleaf and F. W. Butler, for plaintiff. Jos. C. Holman, for defendant.

WALTON, J. The plaintiff worked for the defendant during the season of 1893, and this is an action to recover compensation for his labor.

The defendant does not deny that she owed the plaintiff for the labor sued for; but she claims that by his order she paid the amount due him to her daughter, or to her daughter's husband, in part payment for a horse which he had bought of them. The plaintiff denies that he bought a horse of them, or either of them. He says that he contracted to buy a horse of the defendant, and agreed to turn his wages in part payment for the horse, and that her son-in-law afterwards claimed to own the horse, and came with an officer and took him away, and the result is that he has neither the horse nor the pay for his labor; and it was urged at the trial that the evidence disclosed a plan to defraud the plaintiff out of the horse and his

summer's work; and it seems as if the jury must have taken that view of it.

The evidence was conflicting. The case appears to have been fairly and carefully tried. No reason is apparent why the evidence claimed to be newly discovered, if true, could not, by the use of due diligence, have been discovered before as easily as after the trial; and upon the whole it is the opinion of the court that the verdict is one that ought not to be disturbed.

Motion overruled.

(89 Me. 77)

CAYFORD v. BRICKETT.

(Supreme Judicial Court of Maine. April 8, 1896.)

CHATTEL MORTGAGE—SUFFICIENCY OF DESCRIPTION.

The following chattel mortgage, duly recorded, held sufficient to apprise a subsequent purchaser of the identity of the property, of the condition in the mortgage, and that it is apparently unfulfilled: "Waterville, Maine, April 27, 1893. I this day make and bill of sale to C. A. Hill one five year old grey colt I had of C. P. Crommet. One top buggy one harness and all the cows in my stable except those recovered from J. P. Hill on a judgment against my wife and this bill of sale was made in order to secure the said C. A. Hill against any loss by the signing of a bond for the recovery of four cows from J. P. Hill, that the said property shall be owned by the said C. A. Hill until after a judgment from the June term of court which sits in Waterville on the second tuesday of June. Frank N. Weeks."

(Official.)

Exceptions from superior court, Kennebec county.

Replevin by Charles H. Cayford against Asa C. Brickett to recover five cows. Verdict for defendant, and plaintiff excepts. Overruled.

Geo. W. Field, for plaintiff. Chas. F. Johnson, for defendant.

EMERY, J. The cows replevied in this action were once the property of Frank N. Weeks, under whom both parties claim. While owning the cows, Weeks gave to C. A. Hill the paper dated April 27, 1893, called the "bill of sale." This was done to secure Hill against loss as surety on a bond for Weeks in another replevin suit. That suit is still pending, and the liability of Hill on that bond still continues. The identity of the cows here replevied with those in the bill of sale is established by the verdict. The bill of sale was duly recorded as a mortgage of personal property, and the defendant justifies under it as the servant of Hill. The plaintiff, who claims under a subsequent mortgage bill of sale from Weeks, insists that the prior bill of sale to Hill did not give Hill any title or lien against him, a subsequent purchaser without actual notice.

The plaintiff argues, first, that the description of the cows in the Hill bill of sale is too indefinite to be a notice to subsequent purchasers. Not so. The bill of sale includes

all the cows in the vendor's stable, with four cows excepted. This is sufficiently comprehensive to give information to a subsequent purchaser of cows from Weeks that they were incumbered.

The plaintiff argues, again, that the condition is too vaguely expressed to inform an intending purchaser of what was to be done to extinguish the lien. We think not. Mr. Hill's liability as surety upon the replevin bond was definite, and the amount could be ascertained whenever the liability became fixed.

The plaintiff argues, lastly, that, by the terms of the bill of sale, the mortgagee's lien was to expire at the close of the following June term of the superior court in Waterville. This construction is much too narrow. It defeats the very purpose of the instrument. The evident meaning of the whole is that Mr. Hill shall have a lien upon the property until his liability is extinguished or made good. It was supposed that this would be done at the following June term, but no judgment was rendered then or since. The liability and the lien continue.

Exceptions overruled.

(89 Me. 79)

INHABITANTS OF FRIENDSHIP v. INHABITANTS OF BREMEN.

(Supreme Judicial Court of Maine. April 3, 1896.)

APPEAL—REVIEW—QUESTIONS OF FACT.

On motion to set aside a verdict rendered in favor of the defendant in a pauper suit, on the ground that it is against law and the weight of evidence, it appeared that the only question between the parties is, in which of the two towns had the pauper acquired a settlement. No questions of law were reserved, and, there being no exceptions to the rulings and instructions of the presiding justice, it is considered by the court that the only question is one of fact, and that the motion be overruled.

(Official.)

Action by the inhabitants of Friendship against the inhabitants of Bremen. Verdict for defendant, and plaintiff moves for a new trial. Overruled.

W. H. Fogler, for plaintiff. C. E. & A. S. Littlefield, for defendant.

WALTON, J. This is an action by the town of Friendship against the town of Bremen to recover for supplies furnished an aged female pauper; and, it not being denied that the pauper once had a settlement in Bremen, the only question appears to have been whether she subsequently acquired a settlement in Friendship by having a home therein for five successive years without receiving supplies as a pauper. The jury returned a verdict in favor of Bremen, thus practically affirming that the pauper had acquired such a settlement in Friendship.

The town of Friendship claims to be aggrieved by this verdict, and asks the court

to set it aside on the ground that it is against law and against the weight of evidence.

No questions of law are presented. So far as appears, the rulings of the presiding justice, and his instructions to the jury, were satisfactory. The only question presented is one of fact. There was much evidence tending to prove that the pauper had a home in the town of Friendship for five successive years, and there was much evidence tending to prove the contrary.

The jury must have come to the conclusion that the evidence preponderated in favor of such a home, and it is the unanimous opinion of the court that the parties must abide by the result.

Motion overruled.

(39 Me. 88)

BELCHER et al. v. KNOWLTON.

(Supreme Judicial Court of Maine. April 6, 1896.)

MORTGAGE—FORECLOSURE—EXECUTION.

1. In a real action to foreclose a mortgage under the statutes of this state it is no valid objection to the foreclosure that, after judgment was granted, one of the demandants having died, and the first execution not having been used in his lifetime, a second execution was issued, under Rev. St. c. 104, § 40, in the name of the parties as they previously stood in the record, and under which possession was taken of the mortgaged premises.

2. Executions may be renewed, from time to time, at common law and under acts governing procedure in probably all the states. This general rule applies in such cases of foreclosure, and the power conferred by Rev. St. c. 82, § 140, is general enough to authorize an alias execution in such proceeding.

(Official.)

Exceptions from supreme judicial court, Franklin county.

Petition by Francis C. Belcher and another against Henry T. Knowlton for partition.

Plaintiffs' title is by virtue of the foreclosure of a mortgage given by Selden Knowlton to Abraham W. F. Belcher and Jason Knowlton. Defendant owns the title of Jason Knowlton by virtue of the mortgage. An action upon the mortgage was commenced by A. W. F. Belcher in his lifetime and Jason Knowlton, and judgment as on mortgage was rendered at the March term of the supreme judicial court, 1885. After the judgment, and before the writ of possession issued, A. W. F. Belcher died, and a writ of possession issued in the name of A. W. F. Belcher and Jason Knowlton the same as though said Belcher was not dead. On the 31st day of October, 1889, a second writ of possession issued in the name of said A. W. F. Belcher and Jason Knowlton, without an application to the court for a second writ of possession, as defendant claimed was required by statute. Defendant has the title of Jason Knowlton to the mortgage, and also to an undivided half of the farm.

Defendant claimed that no legal foreclosure has ever been made, and that the second writ of possession was irregularly issued, and that petitioners are not entitled to partition.

The court ruled that the foregoing facts, if true, constituted no defense to this petition for partition; and, there being no other ground of defense interposed, the court ordered judgment for partition, and that commissioners be appointed to make partition as prayed for. To these rulings the defendant excepted. Overruled.

S. Clifford Belcher, for plaintiffs. J. C. Holman, for defendant.

PETERS, C. J. Section 40 of chapter 104 of the Revised Statutes provides as follows: "The writ of possession shall be issued in the name of the original demandant against the original tenant, although either or both are dead; and when executed, it shall inure to the use and benefit of the demandant, or of the person who is then entitled to the premises under him, as if executed in the life-time of the parties."

The case in hand involves the question whether the petitioner is entitled to have partition of certain premises, the title of his portion of which was obtained through a mortgage and the foreclosure of the same. The foreclosure was effected by means of a real action, and such subsequent steps as the statute requires to complete the proceeding. After judgment in the real action was granted, and before execution was issued thereon, one of the demandants died. Notwithstanding such death, however, a writ of possession was taken out in the names of the parties as they previously stood in the record, by virtue of the direction contained in the section of the statute above quoted; and afterwards, the first execution not having been used in its lifetime, a second execution was issued, on the application of the petitioner, to the clerk, in the same manner as before. The respondent contends that the second or alias execution could not legally be obtained in such way; and this is the only point which the case presents.

We can see no objection to the course pursued by the petitioner in procuring a foreclosure. Executions, in general are issued upon final judgments as a matter of course. The judgment itself is an order or direction that it be done. By the common-law practice and by the acts of procedure in probably all the states it is permissible to renew such executions from time to time. We do not perceive any difficulty in applying this rule of renewal in such cases as the present any more than in cases generally. If the present case be regarded as special even, still the general rule just as consistently applies, so far as affecting any proceedings of foreclosure. Section 140 of chapter 82, Rev. St., provides that "an alias or pluries execution may be issued within ten years after the day of the return of the preceding execution, and not afterwards."

This is general enough to authorize the alias execution in the proceedings in question here.

There might possibly be exceptions to an adherence to the rule after long delay in taking out a second execution, but no circumstances requiring any such exception appear in the present facts.

Exceptions overruled.

(39 Me. 96)

PEABODY v. FRATERNAL ACC. ASS'N OF AMERICA.

(Supreme Judicial Court of Maine. April 6, 1896.)

ACCIDENT INSURANCE—NOTICE OF INJURIES—WAIVER.

1. It is a well-settled principle of law that, when an insurance company accepts or assists in preparing second proofs of loss, it thereby waives any defects in the first proofs.

2. The plaintiff, holding an accident policy in the defendant company, met with an accident, October 19, 1893, which caused him considerable injury. He sent the company a written notification on November 2d, but it was not received until after the 10 days required by the policy. He contended, however, that the unreasonableness of the notice was afterwards waived by the acts of the company.

The acts thus relied on are of the following character: A preliminary proof was sent to the company by the plaintiff upon a form furnished by it containing conditions and reservations. No objection being taken to this, the company forwarded a second form, which was apparently a final proof, and with no conditions or reservations. On March 27, 1894, an officer of the company, with a medical expert employed by him, called on the plaintiff at his home, where he submitted himself to a personal examination. At the close of this interview this officer demanded of the plaintiff the surrender of the second blank form as the result of what was claimed to be misrepresentation of material facts, and for other reasons; and in a few days afterwards the company rejected the claim. On May 7, 1894, the company received the second form, properly filled out by the plaintiff, who demanded the compensation claimed by him for his injuries.

The case was submitted on a report, which, admitting that the plaintiff received an injury, stipulates that the only question submitted for decision is whether the notice is sufficient; or, if not sufficient, whether its insufficiency was waived by the company or not.

Held, that all these facts, taken together, in effect constitute a waiver by the company of a merely technical forfeiture created by its receiving the notice of the injury a few days later than was stipulated in the contract.

(Official.)

Report from supreme judicial court, Andros-coggin county.

Action by John L. Peabody against the Fraternal Accident Association of America on an accident insurance policy. Submitted on report. Defendant defaulted.

N. & J. A. Morrill, for plaintiff. Geo. C. Wing, for defendant.

PETERS, C. J. The plaintiff, holding an accident policy in the defendant company, on October 19, 1893, met with an accident which caused him considerable injury. A provision of the policy requires that the company shall

receive written notice of the accident within 10 days after its occurrence. On November 2, 1893, the plaintiff sent a written notification, which was not received by the defendants until after the 10 days had expired,—being a few days too late. The plaintiff contends, however, that the unseasonableness of the notice was afterwards waived by the acts of the company, and a contention over this point is the only question here.

Upon the receipt of plaintiff's letter to them, the company sent to him a printed blank (called "Form No. 1"), containing a long schedule of inquiries to be answered as a first proof of loss, and to be returned within a short time to the company. The blank contained the following notice: "This blank is not intended for final proofs, and, where the disability is likely to continue for a considerable time, a blank (No. 2) will be mailed claimant (on receipt of this blank properly filled up), to enable him to make final proofs, unless settlement shall be made on receipt of this blank."

And the following note was also added to the blank: "Having received notice of your intention to claim benefits under your policy for injuries just received, we herewith send you this blank form, requesting that you fill up the same at once (also obtain statement of attending physician), and return same to this office within seven days from this date at the latest. The furnishing of this form shall not be held to be a waiver of any of the conditions of the policy as to notification, or as an admission of any claim. No claim can be entertained without the certificate of a duly-qualified and registered medical practitioner."

There was also attached to the blank form this memorandum for the plaintiff to sign: "I do hereby warrant the truth of the foregoing particulars in every respect, and that I have not abstained from my usual occupation, either wholly or partially, longer than necessary; and I agree that if I have made, or in any further declaration do make, any false or untrue statement, suppression, or concealment, my right to benefits under my policy shall be absolutely forfeited, and the policy be void."

The plaintiff filled out the form, answering all inquiries fully, and, obtaining also a certificate from his attending physician, seasonably sent the papers thus completed to the company. Thereupon the company, on some day in November, 1893, without any objection or condition whatever, forwarded to the plaintiff another blank form, called "Form 5," to be filled out by him as a further, and apparently a final, proof of loss. This form is without condition or reservation.

No other communication took place between the parties after this until March 27, 1894, when a person, who was at the time secretary and treasurer of the company, together with a medical expert employed by him, called on the plaintiff at his home in Lewiston, and by his permission subjected him to a personal examination. At the termination of the

interview, the secretary, in a letter to him, demanded of the plaintiff a surrender of the blank known as "Form 5," which the company had furnished him; "as a result of what we claim to be a misrepresentation of material facts, and for other reasons." The company also wrote, March 29, 1894, the plaintiff, that it had decided to reject any claim he might make upon it for injuries received by him. On May 7, 1894, the form No. 5 was received by the company, filled out and signed and sworn to by the plaintiff, who demanded the compensation claimed by him for his injuries. Alongside these facts it should be noticed that in the report of the case it is admitted that the plaintiff received an injury, and it is stipulated by the parties that the only question shall be whether the notice was sufficient, or, if not sufficient, whether its insufficiency was waived by the company or not; a default to be entered if the plaintiff prevails on this point.

Did all these acts, taken together, in effect constitute a waiver by the company of a merely technical forfeiture created by its receiving the notice of injury a few days later than was stipulated in the contract? We think that by deciding this question affirmatively we shall reach a just and equitable conclusion. The requirement of forwarding a notice so that it shall be received within 10 days after the accident is of itself so stringent and unreasonable that a legislative act has been passed since the date of this policy allowing notice in all such cases to be given within 60 days instead of 10. Laws 1893, c. 223.

The act of the company in sending the blank form No. 1 to the plaintiff was strong evidence of waiver. It amounted to at least a conditional waiver, the implied condition being that no fraud was, in the opinion of the company, perhaps, being practiced upon it. It would have been an inexcusable imposition to invite the plaintiff to make up proofs of loss when the intention of the company was to wholly disregard the same, whatever might be the result of their investigation. And still the company has abandoned any defense on the merits of the claim. Their secretary, in his letter, intimates some wrong on the part of the claimant, but no particular act of fraud or wrong ever has been specified.

But we need not rely on this first act of the company as conclusive evidence of waiver. The sending of the second blank (form No. 5) unconditionally, and the fact of the bodily examination made by the agents of the company and submitted to by the plaintiff, taken in connection with the confession that the company finally abandons its charges of fraud as a defense to the action, relying only upon the want of a strict compliance with the contract in the matter of notice, all these facts, aided by the other conduct of the company as before considered, certainly establish a waiver of any technical forfeiture that might have been created by the lateness of the notice. There are

many cases which recognize the principle that when an insurance company accepts or assists in preparing second proofs of loss it thereby waives any defects in the first proofs. And that is as logical a conclusion as is the same principle when applied in the matter of pleading,—an instance which the books give in illustration of the doctrine of waiver generally. If a defendant pleads the general issue or any plea in bar of the action, he cannot afterwards plead in abatement. Every one must take advantage of his rights at the proper time. *Trippe v. Society*, 140 N. Y. 23, 35 N. E. 816; *Insurance Co. v. Gibbs*, 56 N. J. Law, 679, 29 Atl. 485. Our own cases are more or less strongly of the same effect.

Defendant defaulted.

(89 Me. 81)

STATE v. PARKER.

(Supreme Judicial Court of Maine. April 8, 1896.)

GAME—POSSESSION—DEER PARK.

1. The respondent was complained of for killing a deer in close time in the inclosed deer park on Petit Menan Point, in the town of Steuben, the park being the property of the Petit Menan Company, and the respondent being the owner of one-fifth of the deer in said park.

2. The deer was caught alive, when a fawn, on township No. 29, M. D., by another person in close time, and sold the following year after his capture to another person, who disposed of it to the respondent, the latter putting it into the park with other deer, and was in his possession continually until killed by him, on the 19th day of June, 1894.

3. Held that, waiving all question of illegality in capturing the animal alive originally, a proper construction of the statute applicable to the facts does not admit of a conclusion that the deer in question was under such dominion and control of the respondent and his associates as to allow them to kill or hunt such animal in close time. Their so-called "possession" was not actual and complete enough; was more fictitious than real.

4. The most that the proprietors can claim is that they possess, by artificial means, some facilities for capturing or recapturing deer within their woods, contained in a territory of seven or eight hundred acres, and perhaps for obtaining actual possession of the same, dead or alive; and, while that may be denominated an approach towards possession,—a step in the direction of possession,—to style such a condition of things as an absolutely actual possession, thereby giving the respondent complete property in the animals, would be far-fetched and visionary.

5. *Com. v. Chace*, 9 Pick. 15, approved. (Official.)

Agreed statement from supreme judicial court, Washington county.

Fred O. Parker was convicted of killing a deer in close time, and appeals. Submitted on an agreed statement. Affirmed.

T. W. Vose and Fred I. Campbell, Co. Atty., for the State. Geo. B. Googins, for defendant.

PETERS, O. J. The respondent was complained of for killing a deer in close time, and the question of his liability to be prosecuted therefor is presented to this court up-

on the following statement of facts, agreed to by the parties:

"The respondent had in his possession at Steuben, in Washington county, on June 19th, 1894, parts of a deer, which said respondent killed on June 15, 1894, being in close season, to wit, between the 1st day of January and the 1st day of October, in the inclosed deer park on Petit Menan Point, in said Steuben; said park being the property of the Petit Menan Company, so-called, and said respondent being the owner of one-fifth of the deer in said park, in common with said company. Said deer was caught alive, when a fawn, on township No. 29, M. D., by Charles Haycock, in the month of June, 1888, being the close season, as aforesaid. That said Haycock sold said deer the following year after his capture, to Horace F. Willey, of Cherryfield, by whom it was kept until the month of November, 1890, when he (said Willey) sold it to said respondent, who then put it into the park aforesaid, in company with other deer therein confined, and was in his possession continually until killed by the respondent as aforesaid. The respondent was arrested by Game Warden Charles I. Corliss, and on the 5th day of July, 1894, was arraigned before Jacob T. Campbell, Esq., a trial justice in and for said Washington county, at said Cherryfield, on complaint of said Corliss, charging said respondent with having in his possession at Steuben, June 19, 1894, one deer and parts of a deer killed in close time, as aforesaid; whereupon said respondent waived examination, was found guilty by the magistrate, and sentenced to pay a fine of forty dollars and costs, from which sentence respondent appealed; the law court to affirm or disaffirm the decision of said magistrate, as the law and facts in the case warrant."

The respondent contends, upon the strength of the cases of *Allen v. Young*, 76 Me. 80, *James v. Wood*, 82 Me. 173, 19 Atl. 160, and *State v. Beal*, 75 Me. 289, that the deer was so far within his dominion and control in open time as to have become his absolute property, with which he could at any time do as he pleased. The doctrine of the above cases has been lately emphasized somewhat by the decision of the court in *State v. Bucknam*, 88 Me. 385, 34 Atl. 170, in which it has been distinctly held that, under our statutes, one who lawfully obtains the ownership of game in open time (in that case carcasses of deer) is not criminally liable for having the same in his possession in close time afterwards. Some of the states have decided that laws which do make such acts criminal are not unconstitutional, but that question did not arise in the case referred to.

We think, however, that, giving the respondent the fullest scope of protection which the doctrine of those cases can afford him, he fails to find in them any sufficient justification for his act. We refer to

the act of killing the deer within close season, waiving now all question of illegality in capturing the animal alive originally.

Probably it would not be questioned that in particular instances animals *feræ naturæ* may be so far reclaimed and domesticated, or, if not reclaimed, may be so closely subjected to confinement by a person, as to be regarded as under his dominion and control, and to become his property; and, if captured or obtained at a proper season and in a lawful manner, there might be no reason why such person should not control such property at all seasons as he might any other, subject, however, to any restraint upon the use of the same which may be imposed by our game laws.

But we think that a proper construction of the statute applicable to the facts in the case at bar does not admit of a conclusion that the deer in question was under such dominion and control of the respondent and his associates as to allow them to kill or hunt such animal in close time. Their so-called "possession" was not actual and complete enough; was more fictitious than real. The deer was roaming wildly over a park covered mostly by woods, as was stated when the case was reported, containing between seven and eight hundred acres of territory, and surrounded on all sides by the sea, excepting at a narrow strip or neck connecting this, an almost natural park, with the main land; and artificial structures were placed across this neck to prevent the escape of animals therefrom. Animals kept within these wide boundaries cannot be said to be thereby either reclaimed or held in close confinement. Should they escape from the park either by sea or land into other woods, it would be preposterous for the proprietors of the park to set up an ownership in such animals against other persons who might kill or capture them off of their premises. The most that the proprietors can reasonably claim is that they possess by artificial means some facilities for capturing or recapturing deer within their woods, and perhaps for obtaining actual possession of the same, either dead or alive; and, while that may be denominated an approach towards possession,—a step in the direction of possession,—to style such a condition of things as an absolutely actual possession, thereby giving the respondent complete property in the animals, would be far-fetched and visionary.

The ideas which we entertain on this subject are aptly illustrated by the remarks of the court in *Com. v. Chace*, 9 Pick. 15, a case involving the question as to how far and under what conditions doves might be the subject of larceny, and we quote largely therefrom:

"It is held in all the authorities that doves are *feræ naturæ*, and, as such, are not subjects of larceny, except when in the care and custody of the owner; as when in a dovecot

or pigeon house, or when in the nest before they are able to fly. If, when thus under the care of the owner, they are taken furtively, it is larceny.

"The reason of this principle is that it is difficult to distinguish them from other fowl of the same species. They often take a flight, and mix in large flocks with the doves of other persons, and are free tenants of the air, except when, impelled by hunger or habit, or the production or preservation of their young, they seek the shelter prepared for them by the owner. Perhaps when feeding on the grounds of the proprietor, or resting on his barn or other buildings, if killed by a stranger, the owner may have trespass; and if the purpose be to consume them as food, and they are killed or caught or carried away from the inclosure of the owner, the act would be larceny. But in this case there is no evidence of the situation they were in when killed, whether on the flight, a mile from the grounds of the owner, or mingled with the doves of other persons, enjoying their natural liberty. Without such evidence, the act of killing them, though for the purpose of using them as food, is not felonious."

Judgment below affirmed.

(89 Me. 117)

STATE v. MARTIN.

(Supreme Judicial Court of Maine. April 8, 1896.)

CRIMINAL LAW—ADMISSION OF EVIDENCE—DISCRETIONARY POWER.

1. It is entirely within the discretion of the judge presiding at a jury trial to vary the ordinary order of procedure whenever, in his opinion, the occasion requires it, and at any stage of the trial to permit evidence to be offered which had been admitted through inadvertence, or which had not before come to the knowledge of counsel; and the exercise of this discretion is not subject to revision on exceptions.

2. In the trial of an indictment alleging a single sale of intoxicating liquors, after the arguments for the respondent and the state had been concluded, the presiding justice allowed the county attorney, against the respondent's objection, to call a witness to testify to the place where the sale had been made, about which there had been no testimony up to that time.

Held, that this was not the subject of exception.

(Official.)

Exceptions from supreme judicial court, Franklin county.

Lawrence Martin was convicted of an illegal sale of liquor, and excepts. Exceptions overruled.

E. E. Richards, Co. Atty., for the State.
H. L. Whitcomb, for defendant.

WISWELL, J. In the trial of this case, an indictment alleging a single sale of intoxicating liquors, after the arguments for the respondent and the state had been concluded, the justice presiding allowed the county

attorney, against the respondent's objection, to call a witness to testify to the place where the sale had been made, about which there had been no testimony up to that time. To this proceeding the respondent takes exception.

This is a matter entirely within the discretion of the presiding justice. Whenever, in his opinion, the occasion requires it, he may vary the ordinary order of procedure, and at any stage of the trial permit evidence to be offered which had been omitted through inadvertence, or which had not before come to the knowledge of counsel. Nor is the exercise of this discretion subject to revision on exceptions. *McDonald v. Smith*, 14 Me. 99; *Ruggles v. Coffin*, 70 Me. 468.

It is argued in support of the exceptions that, by allowing the evidence to be introduced at that time in the trial, the respondent was left without an opportunity to introduce evidence in rebuttal, and his counsel without an opportunity to comment upon this testimony. If either had been desired, it should have been asked for; and it is safe to assume that such a request would have been readily granted.

Exceptions overruled.

(89 Me. 140)

WING v. FORD.

(Supreme Judicial Court of Maine. April 9, 1896.)

BILLS AND NOTES—LIQUORS—INDORSE—BURDEN OF PROOF.

1. Rev. St. c. 27, § 56, provides that no action shall be maintained upon any claim, demand, or promissory note contracted or given for intoxicating liquors, but the same statute contains this clause: "This section shall not extend to negotiable paper in the hands of the holder for a valuable consideration, and without notice of the illegality of the contract."

Under this section, therefore, the defense that a note was given for intoxicating liquors cannot prevail against any holder for a valuable consideration without notice of the illegality of the contract; and it makes no difference whether such holder acquired the note before or after its maturity. Nor is the fact that a note was purchased after maturity, whether protested or not, any evidence that it was given for intoxicating liquors or for other illegal considerations.

2. Whenever a defendant sets up and proves as a defense that the note in suit was given for an illegal consideration, it becomes incumbent upon the plaintiff to prove that he is a holder for value without notice of the illegality of the contract. A holder makes out a prima facie case by proving that the note was indorsed to him for value, and can rely upon a presumption arising from his having given value for the note, that he obtained it without notice of the illegality, until this presumption is overcome by rebutting evidence; but, where there is evidence upon both sides as to the several propositions necessary to be proved by the plaintiff, then the general burden of proof is upon him to make them out. It is not sufficient to defeat his recovery that the indorsee took the note under circumstances that ought to excite suspicion in the mind of a prudent man. It is simply a question as to whether or not the indorsee had actual knowledge.

3. *Held*, in this case, that there was ample evidence to authorize the jury to find that the plaintiff acquired title to the note in suit for a valuable consideration, without notice of the illegality of the contract in its inception.

(Official.)

Exceptions from supreme judicial court, Hancock county.

Action by Henry K. Wing against Abby Ford, in which there was a verdict for plaintiff. On exceptions and motion for a new trial. Overruled.

H. E. Hamlin, for plaintiff. F. L. Mason, for defendant.

WISWELL, J. This is an action upon a negotiable promissory note, brought by an indorsee. The defense was that the note was given for intoxicating liquors sold in violation of the law of this state. The verdict was for the plaintiff, and the case comes to the law court both upon exceptions and motion for a new trial.

1. Exception is taken to the refusal of the presiding justice to give the following requested instruction: "That where it has appeared that this note was protested when it was due, that if the jury are satisfied that this man wasn't the holder of the note at that time, that that is notice of some defect or illegality, and that he does not stand in the position of an innocent holder for value. When this note was due, it was protested. Now, if he bought it after protest, there was a notice to the world of some defect in that note."

The refusal to give this instruction was correct. At common law, the fact that a note was given for intoxicating liquors would be no defense to a suit upon it either by the payee or indorsee. This is made a defense in certain cases by Rev. St. c. 27, § 56; but the same section contains this provision: "This section shall not extend to negotiable paper in the hands of a holder for a valuable consideration, and without notice of the illegality of the contract."

Under this section, therefore, the defense that the note was given for intoxicating liquors cannot prevail against any holder for a valuable consideration, without notice of the illegality of the contract; and it makes no difference whether such holder acquired the note before or after its maturity. Nor is the fact that a note was purchased after maturity, whether protested or not, any evidence that it was given for intoxicating liquors or for other illegal consideration. *Field v. Tibbetts*, 57 Me. 358; *Hapgood v. Needham*, 59 Me. 442.

2. Motion: Whenever a defendant sets up and proves as a defense that the note was given for an illegal consideration, it becomes incumbent upon the plaintiff to prove that he is a holder for value, without notice of the illegality of the contract. The holder makes out a prima facie case by proving that the note was indorsed to him for value, and can rely upon a presumption arising from his having

given value for the note, that he obtained it without notice of the illegality, until this presumption is overcome by rebutting evidence; but, where there is evidence upon both sides as to the several propositions necessary to be proved by the plaintiff, then the general burden of proof is upon him to make them out. *Cottle v. Cleaves*, 70 Me. 256; *Kellogg v. Curtis*, 69 Me. 212. Nor is it sufficient to defeat his recovery that the indorsee took the note under circumstances that ought to excite suspicion in the mind of a prudent man. *Farrell v. Lovett*, 68 Me. 326. It is simply a question as to whether or not the indorsee had actual knowledge.

Applying these general rules in relation to the burden of proof to the evidence in this case, we are satisfied that there was ample evidence to authorize the jury to find that the plaintiff acquired title to this note for a valuable consideration, without notice of the illegality of the contract in its inception.

Motion and exceptions overruled.

(39 Me. 87)

MARSHALL v. BOARDMAN.

(Supreme Judicial Court of Maine. April 4, 1896.)

SHIPPING—MASTER PRO HAC VICE—OWNER.

1. A part owner of a vessel let to the master on shares is exonerated from a personal liability to pay seamen's wages, although the part owner procured the charters for the two trips made by the vessel during which the wages of the seamen were earned.

2. The simple statement that a master "sails" or "hires" or "takes" the vessel on shares implies that he fully controls the management of the vessel for the time being.

3. Conditions and qualifications which would deprive owners from exemption from such liabilities are not to be presumed; they must be proved. It is like the hiring and letting of any other kind of property, whether real or personal. The letter yields, and the hirer takes possession, and dominion and control presumably follow the rightful possession.

4. No such conditions and qualifications of the part owner's liability exist when it appears that the seaman's wages were earned after the former procured the charter, and the latter was not connected in any way with the terms of the contract; that the procurement of the charter was not without the master's consent and direction; and the part owner was not pretending to exercise any personal right as owner.

5. It would seem inconsistent for the master to pay all the running expenses, and to be entitled to the greater part of the earnings, if he were merely an agent for the owners.

(Official.)

Report from supreme judicial court, Washington county.

Assumpsit by George Marshall, pro. am, against Howard Q. Boardman. From a judgment for plaintiff, defendant appeals. Submitted on report. Judgment for defendant.

George E. Googins, for plaintiff. George A. Curran and H. H. Gray, for defendant.

PETERS, C. J. It appears, from the facts agreed upon by the parties, that the plaintiff

was employed as a seaman on a schooner one-sixteenth of which was at the time owned by the defendant, the plaintiff claiming to recover his full wages of the defendant as such owner; that the schooner was sailed by the master "on shares," he taking three-fifths of her earnings, and paying the running expenses, and the owners taking two-fifths of the earnings; and that the defendant procured the charters for the two trips made by the vessel during which the wages of the plaintiff were earned.

The question arising on these facts is whether the master can be said to have had such possession and control of the vessel as to exonerate the owners from a personal liability to pay seamen's wages. We think an affirmative answer must be given on this proposition.

It is said the master must have the exclusive control in order to clear the owners of such personal liabilities. But the simple statement that a master "sails" or "hires" or "takes" the vessel on shares implies that he fully controls the management of the vessel for the time being. That must be the presumption. Of course, there may be various conditions or qualifications annexed to the contract of hiring or letting vessels on shares which would deprive owners of any such exemption from liability. But conditions or qualifications affecting the contract are not to be presumed; they must be proved in some way. It is like the hiring and letting of any other kind of property, whether real or personal. The letter yields, and the hirer takes possession, and dominion and control presumably follow the rightful possession.

It is contended by the plaintiff that there is evidence that the master had not the exclusive control of the vessel, in the fact that the defendant procured the charters for her employment for the two trips during which the plaintiff's wages were earned. This admission appears to have been made as a part of the case, without any explanation whatever. But it should be noticed that these services of the defendant took place after the contract between owners and master was consummated, and nothing appears to connect his acts in any way with the terms of the contract itself. We take it that it was merely a gratuitous assistance, rendered for the benefit of the master, although operating perhaps beneficially for all concerned. It cannot be an uncommon thing for owners who are out of the possession and control of their vessels to assist masters in such a way. There is no suggestion that the procurement of the charters was without the consent and direction of the master himself, and no indication that the defendant was pretending to exercise any personal right as owner. It would seem to be inconsistent for the master to pay all the running expenses, and be entitled to the greater part of the earn-

ings, if he were merely an agent for the owners.

The practice of letting vessels on shares, so as to constitute the master an owner pro hac vice, was an ancient one, held in great favor in this and our mother country during those commercial periods when the business of transportation was carried on in a much smaller way, and by the means of a much smaller class of vessels, than at the present day. Among the very many adjudged cases growing out of such business, we have not noticed any decision militating against the views expressed by us in this discussion. We need refer to but a few of the cases in effect supporting our conclusion. In the early case of *Reynolds v. Toppan*, 15 Mass. 370, it was held that, "to render an owner of a vessel liable for the contracts of the master, it must be proved that the vessel was in the employment of the owner, that the master was appointed by him, and that the master acted in making such contracts within the scope of his authority." In other words, the presumption that the master is in possession for himself, and not for the owner, must be overcome by some evidence. In *Taggard v. Loring*, 16 Mass. 336, the court held that where a master hired a vessel for six months, rendering to the owners a moiety of the earnings, and sailed in her himself as master, he was so far the owner of the vessel that he could not be charged with barratry. The case of *Manter v. Holmes*, 10 Metc. (Mass.) 402, decides that when the owners of a vessel have let her on shares for a certain time to the master, who is to victual and man her, they cannot maintain an action for freight earned by the vessel during that time, and that such an action can be maintained by the master only. In *Howard v. Odell*, 1 Allen, 85, it was decided that one who received from his debtor a bill of sale of a vessel, absolute in terms, but intended only as collateral security for a debt, but who never took possession nor had the control of the vessel, nor held her out to the world as his property, was not liable for supplies or repairs furnished for her, although registered in his name. In the case of *Thompson v. Snow*, 4 Me. 264, it appears that the master took the vessel "on shares," those words alone expressing the contract; and this was understood by the court as being a letting, by which the master became owner of the vessel pro hac vice in the customary manner of such letting, and the case was heard and determined upon that theory. The case of *Somes v. White*, 65 Me. 542, decides that the rule of excepting general owners from liability exists in relation to claims sounding in tort, as well as in cases of contract, where the vessel is in the possession of the master sailing her on shares. The claim in that case arose from a collision between two vessels.

Judgment for defendant.

(89 Me. 100)

HURLEY v. HEWETT.

(Supreme Judicial Court of Maine. April 6, 1896.)

PROBATE—DISTRIBUTION—DECREE—SIGNATURE OF JUDGE.

1. An administrator having made distribution of the money in his hands coming from a conversion of all the personal assets of the estate except 100 shares of bank stock, appraised at the value of \$120 per share, he petitioned the probate court, representing that he had in his hands "property to the amount of twelve thousand dollars" according to its appraisal in the inventory, and asked that a distribution of "such balance" be ordered among the heirs.

After due proceedings thereon the court decreed "that the sum of \$12,000 in the stock of the American National Bank, at appraised value, now in the hands of * * * administrator, * * * be distributed among the heirs of said deceased, whose names and distributive shares are as follows." After the signature of the judge to this decree follow the names of the distributees, with the amount of the share to each, and all amounting to \$12,000.

There was no appeal from this decree, and the administrator accordingly tendered the appellant, one of the heirs, an assignment of her share thereof, which she refused to receive, but which she could have at any time she might consent to accept.

In the next settlement of the administrator's accounts he was allowed for the \$2,400 thus tendered to the appellant, and she appealed from the decree allowing the same, objecting that a distribution in kind cannot be ordered unless the petition prays for a distribution in kind.

Held, that such a distribution in effect, and by the strongest implication, was called for by the petition. It speaks of "property" in the administrator's hands, and not of money. It describes it as a "balance" according to the appraisal. There was no other property in his hands of any kind or amount. The reference to the inventory perfectly identified the property to be divided, and the appellant necessarily knew these facts or is presumed to have known them.

2. Also, that the judge could order a distribution under the permissive statute (Rev. St. c. 65, § 28) without the aid of appraisers, which can be executed with mathematical certainty.

3. There may be some irregularity in a portion of a decree being before and a portion being after the name of the judge; but *held*, that this is not enough to render a decree void, there being no contradiction or inconsistency between the several clauses; and such merely formal irregularity can be readily corrected by amendment, if necessary.

(Official.)

Report from supreme judicial court, Knox county.

Petition by James H. H. Hewett, administrator of Samuel Pillsbury, deceased, for the allowance of an account. From the allowance of a certain item thereof Frances E. Hurley, a distributee, appealed. Submitted on report. Appeal dismissed, and decree affirmed.

W. H. Fogler and T. P. Pierce, for plaintiff. D. N. Mortland and M. A. Johnson, for defendant.

PETERS, C. J. The appellant is a distributee of one-fifth of the personal estate of her late father, Samuel Pillsbury, who died in

the month of January, 1890. In February of the same year administration was taken out on his estate,—an estate containing different kinds of property. Among the parcels were 100 shares of stock in the American National Bank of Kansas City, of the par value of \$100 each share, but appraised in the inventory of the estate as worth \$120 a share. The present value of the stock is little or nothing, the bank having failed some time afterwards.

The administrator having made a distribution of the money in his hands coming from a conversion of all the personal assets of the estate excepting this stock, he petitioned the judge of probate, at the August term of court, 1894, representing that he had in his hands "property to the amount of twelve thousand dollars" according to its appraisal in the inventory, and asking that a distribution of "such balance" be ordered among the heirs. The proceedings were in due form, and due notice was given of the petition returnable at the next term of the court in September following. At that term the petition was considered, and a decree passed, the portion of it which may be essential to the questions arising here being as follows:

"Upon the foregoing petition, due notice having been given thereon pursuant to law and the order of court, it is decreed that the sum of \$12,000 in stock of the American National Bank at appraised value, now in the hands of J. H. H. Hewett, administrator of the estate of Samuel Pillsbury, late of Rockland, deceased, be distributed among the heirs of said deceased, whose names and distributive shares are as follows. C. E. Meservey, Judge."

[Here follow the names of the distributees with amount of share to each, and all amounting to \$12,000.]

"The above is in stock of the American National Bank of the par value of \$10,000, and appraised at \$12,000 in the inventory of the estate, and is to be distributed in kind."

There being no appeal from this decree, the administrator, in pursuance of its directions, made an equal division of the stock among the distributees, and tendered to the appellant an assignment of her share thereof, which she refused to receive, but which she can have at any time she may consent to accept the same. In the administrator's next settlement of accounts he was allowed for the \$1,200 thus tendered to Frances E. Hurley, one of the heirs and distributees, and she appealed from the decree allowing the same.

The appellant now contends that the decree ordering the distribution in kind was void, and therefore not binding on her, because, under the terms of the petition, the judge had no jurisdiction enabling him to make such a decree. She insists that notice on the petition would not inform any one that a distribution of the bank stock was

contemplated. In other words, her position is that a distribution in kind cannot be ordered unless the petition prays for a distribution in kind. The answer to this objection is that such a distribution was, in effect, and by the strongest possible implication, called for by the petition. It speaks of "property" in the administrator's hands, and not of money. It describes it as a balance of \$12,000 according to the appraisal. There was no other property in his hands of any kind or amount. The reference to the inventory perfectly identified the property to be divided, and she necessarily knew these facts, or is presumed to have known them.

But, says the appellant, no appraisers were appointed by the judge to make a division among the heirs. There was not any need of appraisers. The judge may—not must—appoint, is the language of the statute touching the subject. Rev. St. c. 65, § 23. The judge could order a distribution which, without the aid of appraisers, might be executed with mathematical certainty.

It is said that a portion of the decree is written before the judge's name and a portion after it. There may be, perhaps, some irregularity in this. But it was so written and recorded, and there is no contradiction or inconsistency between the different clauses. This is not enough to render the decree void, and such mere formal irregularity could be readily corrected by amendment if necessary.

It is urged that the administrator was guilty of negligence for not disposing of the stock by sale when it was in better demand in the market. The case discloses nothing upon which this objection can avail anything.

After all, how could the appellant be benefited, even if the objectionable decree should be declared void? It is not supposable for a moment that either law or equity would allow her any greater proportion of the actual proceeds of the estate than the other heirs receive, and in the end nothing would be gained by her opposition to the proceedings which she now objects to.

Appeal dismissed. Decree below affirmed, with costs.

(89 Me. 111)

FEENEY v. SPALDING.

(Supreme Judicial Court of Maine. April 8, 1896.)

PHYSICIAN—NEGLIGENCE—VERDICT.

1. In the trial of an action against a physician, who holds himself out as having special knowledge and skill in the treatment of the eye, to recover for an injury claimed to be caused by him in performing an operation upon the eye, his professional services being sought while he was passing through the town in which the patient lived, it is incumbent upon the plaintiff to prove, before he is entitled to recover a verdict, that the injury complained of was caused either by the defendant's want of that

degree of skill and knowledge which is ordinarily possessed by physicians who devote special attention and study to the treatment of the eye, or by his failure to exercise his best judgment in the application of his skill to the particular case, or by his failure to use ordinary care in the performance of the operation, and in giving such instructions as should have been given by a surgeon who was only to perform the operation, and who was temporarily in the locality where the patient lived.

2. At the trial, the plaintiff relied almost entirely upon the result which, it was claimed, followed the operation. As to this the evidence was conflicting; but there was no evidence of any want of the requisite skill, knowledge, or care upon the part of the defendant, while the evidence for the defense was positive and uncontradicted that the operation, which was for strabismus, was a proper one, that it was performed in a skillful and careful manner, and that it was a physical impossibility for the operation (said to be a very simple one) to have caused the injury complained of. *Held*, that a verdict for the plaintiff was unauthorized, and should be set aside.

(Official.)

Case by Genevieve Feeney, pro am, against James A. Spalding, for malpractice, in which there was a verdict for plaintiff. On motion for a new trial. Sustained.

J. F. Lynch, for plaintiff. T. L. Talbot, for defendant.

WISWELL, J. The defendant is a physician and oculist, practicing in Portland. In the summer of 1891, while on a trip to Machias, to visit patients, he stopped over for a short time at Cherryfield. While he was there, the plaintiff, at that time a girl seven years old, who had been cross-eyed in one eye since she was a year and a half old, was taken to the defendant by her father for examination and operation, if thought desirable.

After an examination by the defendant, he performed the usual operation for a difficulty of this kind, bandaged the child's eye, gave certain directions to the father, and proceeded upon his journey.

It was claimed by the plaintiff that, prior to this operation, the sight of this eye was, at least, fairly good; that, in fact, no defect whatever in the vision had ever been complained of by the plaintiff or observed by her parents or teacher; and that, after the operation, the sight of the eye operated upon was entirely gone. She alleges in her writ that this result was caused by the ignorance and want of skill of the defendant, and by his carelessness in the performance of the operation. The trial resulted in a verdict for the plaintiff.

Before the plaintiff was entitled to recover a verdict, it was incumbent upon her to prove that the injury complained of was caused either by the defendant's want of that degree of skill and knowledge which is ordinarily possessed by physicians who devote special attention and study to the treatment of the eye, or by his failure to exercise his best judgment in the application of his skill to the particular case, or by his failure to use ordinary care in the performance of the operation,

and in giving such instructions as should have been given by a surgeon who was only to perform the operation, and who was temporarily in the locality where the patient lived.

At the trial, the plaintiff relied almost entirely upon the result which it is claimed followed the operation. Upon this question the evidence was conflicting. The plaintiff, her parents, and others testified that before the operation there was no defect in vision, or that they had never observed any; while the expert testimony upon the part of the defense was to the effect that an examination of the eye showed conclusively that the defective vision had existed from birth, and that it was as good at the time of the trial as it ever had been.

Even if there was sufficient evidence to authorize the jury to find for the plaintiff upon this question, such a finding was not sufficient to warrant a verdict for the plaintiff, when there was no evidence of any want of the requisite skill, knowledge, or care upon the part of the defendant, and when the evidence for the defense was positive and uncontradicted that the operation was a proper one, that it was performed in a skillful and careful manner, and that it was a physical impossibility for this operation (said to be a very simple one), performed as it was, to have caused the injury complained of.

We feel certain that a verdict in favor of the plaintiff was not authorized by the evidence, and we believe that sympathy for the plaintiff unduly influenced the jury in rendering such a verdict.

Motion sustained. New trial granted.

(89 Me. 113)

LEBROKE et al. v. DAMON et al.
(Supreme Judicial Court of Maine. April 8, 1896.)

PROBATE DECREES—COLLATERAL ATTACK—LICENSE TO SELL—LIMITATION OF ACTIONS.

1. The decrees of the probate court upon matters within its jurisdiction, when not appealed from, are conclusive upon all persons. Such decrees are in the nature of judgments, and cannot be impeached collaterally.

2. The power to grant an administrator license to sell the real estate of his intestate for the purpose of paying debts, expenses of sale and of administration, is conferred upon the probate court by statute. Such a license, when the proceedings are regular, and in accordance with the statute, is therefore conclusive, and cannot be collaterally attacked.

3. When an administrator petitions for such license, it is incumbent upon him to show that a sale of the real estate, or at least some portion of it, is necessary for the purpose of paying legally enforceable debts; but a judgment against the goods and estate of an intestate in the hands of the administrator is not barred by the statute of limitations because it was recovered more than two years prior to the time of filing the petition for license to sell real estate.

4. In an action of forcible entry and detainer the title to the premises was in dispute. The plaintiffs claimed under the sale and deed of an administrator, whose intestate owned the premises at the time of his death. The defendant was one of the heirs of the intestate. The

administrator's sale was under a license from the probate court, in obtaining which, and in making the sale under it, all the requirements of law were observed. The deed was in proper form. *Held*, that the plaintiffs obtained a good title under the administrator's sale and deed, and were entitled to judgment for possession.

(Official.)

Report from supreme judicial court, Piscataquis county.

Forcible entry and detainer by Jacob N. Lebroke and another against Emma Damon and another. From a judgment for plaintiffs, defendants appealed. Submitted on report. Affirmed.

J. B. Peaks, for plaintiffs. P. H. Gillin, for defendants.

WISWELL, J. Action of forcible entry and detainer against the defendants as disseisors. From a judgment of the lower court in favor of the plaintiffs, the defendants appealed. The case comes to the law court upon report.

The defendant Emma Damon is one of the heirs of Eben Damon, who, it is admitted, had title to the premises at the time of his death. The plaintiffs claim title under a deed of the premises from the administrator of Eben Damon, and the only question presented is whether the administrator's deed to the plaintiffs conveyed the property therein described.

It is a familiar rule of law that upon the death of a person intestate his real estate descends to his heirs, and can only be taken from them by the adjudication of a court of competent jurisdiction, upon proceedings prescribed by statute, that a sale of some portion, at least, of such real estate is necessary for the purpose of paying debts, expenses of sale and of administration.

No question is raised as to the appointment of the administrator, which was made by the judge of probate of Piscataquis county at the May term, 1885, nor as to his acceptance of the trust, and due qualification therefor. At the June term, 1886, the administrator's first account was settled, showing a balance in his hands due the estate at that time of \$345.45. No other account has ever been rendered by him. Some time prior to the first Tuesday of August, 1888,—the case does not show when, but it is said in argument to have been at the June term, 1886,—commissioners were appointed by the probate court, under the statute, to pass upon a claim of \$1,831.88 against the estate, presented by Emma Damon. On the first Tuesday of August, 1888, the commissioners made their report to the probate court, in which they allowed the claimant the sum of \$300. From this allowance she appealed, and entered her appeal at the September term, 1888, of this court for Piscataquis county. The appeal was continued from term to term until the September term, 1890, when judgment was rendered in her favor for the sum of \$563.97, including costs.

At the September term, 1892, of the pro-

probate court, the administrator presented his petition for license to sell the real estate of the intestate, in which he alleged that the personal property was not sufficient to pay the debts and expenses of administration by about the sum of \$790, that it was necessary to sell some portion of the real estate for this purpose, and that by a sale of any portion of the real estate the residue would be greatly depreciated in value. Upon this petition public notice was ordered, as required by law, returnable at the October term following; and at that term, notice having been given in accordance with the order of court, the court adjudged that the allegations in the petition were true, and decreed that the administrator have license as prayed for upon his giving bond with sufficient sureties in the sum of \$2,000. At the same term a bond in the form required by statute and in the sum ordered was given and approved, and thereupon the license issued.

On October 10th the administrator was sworn, as was then required by statute, and on the 25th of September, 1893, after giving notice of the sale in the manner provided by statute, and as ordered by the license, the property was sold by the administrator at public auction to the plaintiffs, they being the highest bidders therefor. On the same day a deed in proper form was made, executed, and delivered by the administrator to the plaintiff.

All of these proceedings were in compliance with the statutes, and in obtaining the license and in making the sale under it, the administrator observed all the requirements of law.

The granting of this license was a matter within the jurisdiction of the probate court. The proceedings were all regular. Its decree, therefore, is conclusive, and the validity of the license cannot be attacked. It has been settled by numerous decisions of this court that the decrees of the probate court upon matters within its jurisdiction, when not appealed from, are conclusive upon all persons. Such decrees are in the nature of judgments, and cannot be impeached collaterally. *McLean v. Weeks*, 65 Me. 411; *Harlow v. Harlow*, Id. 448; *Decker v. Decker*, 74 Me. 465.

It is urged that this license should be treated as void because of the long lapse of time between the date of the administrator's appointment and that of the granting of the license, and that a license to sell real estate should not be granted to an administrator for the purpose of paying debts that are barred by the statute of limitations. It is certainly true that an administrator should not be licensed to sell real estate for the purpose of paying debts that are not legally enforceable. Whenever an administrator petitions for such a license, it is incumbent upon him to show that a sale of the real estate, or at least of some portion of it, is necessary for the purpose of paying legally enforce-

able debts. Until this is done, the heir can successfully resist the granting of such a license.

But in this case, when the petition for license to sell was filed, there was a judgment of this court in favor of one of these defendants for \$563.97 against the estate. This judgment was not barred by the statute, because it was recovered some two years prior to the filing of the petition for license to sell. The claim upon which the judgment was founded was presented to the administrator, it is said, and must be presumed, within the time allowed therefor.

It is said in argument that this judgment has never been enforced, but it is an existing and valid liability of the estate, and should be paid out of the funds in the administrator's hands.

Our conclusion is that the administrator's deed, under which the plaintiffs claim title, conveyed to them the premises in dispute. The entry will therefore be, judgment of the lower court affirmed.

(33 Me. 118)

HAGGERTY v. HALLOWELL GRANITE CO.

(Supreme Judicial Court of Maine. April 8, 1896.)

DEATH—MASTER AND SERVANT—NEGLIGENCE.

1. It is the duty of an employer, implied from the contract of employment, to exercise ordinary care, in view of the circumstances of the situation, to provide and maintain a proper place where his servant may perform his work with safety, subject only to such risks as are necessarily incident to the business, and unexposed to any dangers that may be prevented by the exercise of such care. If the employer fails in this duty, it is negligence for which he is liable to a servant who has been injured in consequence of such failure, without fault on his part, and without having voluntarily assumed the risk of the consequence of the employer's negligence, with a full knowledge and appreciation of the dangers to which he is exposed.

2. The plaintiff's intestate was in the employ of the defendant as a quarryman. While at work as one of a crew of men in removing stone which had been blasted, a detached rock, weighing about 800 pounds, suddenly and without warning, fell from a shelf in the quarry about 12 feet above the place where the crew was at work, struck the deceased, and instantly killed him.

About 2½ years before, this rock had fallen from still further above in the quarry, and during that time had remained in the place where it was immediately prior to the accident. There was evidence tending to show that the rock was so near one of the guys of a derrick as to be struck by it when the use of the derrick caused the guy to sway. In regard to this contention, and generally as to the position of the rock prior to its fall, the evidence was conflicting.

Held, that a verdict for the plaintiff, involving a finding that the defendant was negligent in leaving the rock in the position in which it was claimed by the plaintiff to be, and from whence it fell without anything unusual occurring to cause its fall, was authorized.

(Official.)

Case reserved from supreme judicial court, Androscoggin county.

Case by Hannah Haggerty, administratrix of Timothy P. Haggerty, deceased, against the Hallowell Granite Company, in which there was a verdict for plaintiff. On motion for new trial. Overruled.

F. L. Noble and R. W. Crockett, for plaintiff. O. D. Baker and F. L. Staples, for defendant.

WISWELL, J. This is an action brought by the plaintiff, as administratrix of Timothy P. Haggerty, under the act of 1891, c. 124, to recover damages for the death of the deceased, which, it is alleged, was caused by the negligence of the defendant. The trial resulted in a verdict for the plaintiff, and the case is here upon a motion to set the verdict aside.

At the time of the accident, on the 6th of September, 1893, the deceased was in the employ of the defendant as a quarryman in its quarry at Hallowell. While he was at work as one of a crew of men in removing stone which had been blasted, a detached rock, weighing about 800 pounds, suddenly and without warning fell from a shelf in the quarry about 12 feet above the place where the deceased was at work, struck the deceased, and killed him instantly.

About two years and a half before, this rock had fallen from still further above in the quarry, and had remained during all of that time in the place where it was just prior to the accident. It was claimed by the plaintiff that the rock was within two or three inches of one of the guys supporting a derrick, and so near that it was struck by the guy when the use of the derrick caused it to sway.

It is the duty of an employer, implied from the contract of employment, to exercise ordinary care, in view of the circumstances of the situation, in providing and maintaining a proper place where his servant may perform his work with safety, subject only to such risks as are necessarily incident to the business, and unexposed to any dangers that may be prevented by the exercise of such care. If the employer fails in this duty, it is negligence for which he is liable to a servant who has been injured in consequence of such failure, without fault on his part, and without having voluntarily assumed the risk of the consequence of the employer's negligence, with a full knowledge and appreciation of the dangers to which he is exposed. *Mayhew v. Mining Co.*, 78 Me. 100; *Mundle v. Manufacturing Co.*, 86 Me. 400, 30 Atl. 16.

The question of negligence, where the facts are in dispute, or even where they are undisputed, but intelligent and fair-minded men may reasonably arrive at different conclusions, is for the jury. *Elwell v. Hacker*, 86 Me. 416, 30 Atl. 64.

Here the testimony was conflicting, and the parties differ very materially as to the inferences and conclusions that should properly be drawn from the facts as testified to upon

the one side and the other. The plaintiff claims that it was negligence to leave this detached rock in a place from whence it might fall and injure those working below; that it was especially negligent upon the part of the employer in leaving it where it could be struck by the sway of the derrick guy; while the defendant says that, so far as a careful examination would disclose, the rock was in a safe place,—so embedded in dirt and small rocks that it could not be moved by hand,—and that there was no reason to anticipate that it would ever fall.

But from the fact that it was left in a place from whence it did fall, without anything unusual occurring to cause its fall, the jury were authorized to draw some inference of negligence. A careful examination of all the evidence in the case fails to satisfy us that the verdict was so clearly wrong as to justify its disturbance.

Motion overruled.

(30 Me. 74)

STATE v. CARVER.

(Supreme Judicial Court of Maine. April 1, 1896.)

ASSAULT—INTENT—SELF-DEFENSE.

1. The intent to do harm is an essential element in all criminal prosecutions for assault.

2. An instruction that a wanton motion, an angry motion, coupled with the ability at the time and under the circumstances to do harm, is an assault, and, if carried into effect, is an assault and battery, is erroneous, inasmuch as it omits the element of intent. The motion may be wanton, made in an angry manner, coupled with an ability to do harm, and yet no harm be intended, and, if harm should result, may be from pure accident.

3. A man, when assaulted, is not required to cowardly flee from danger, but may assert a manly self-defense, necessary for his protection.

4. An instruction that it is a man's duty, as a good citizen, to preserve the peace, and, when he finds he is in danger of being attacked in any way, it is his duty to try every other means, first by retreating, withdrawing from the scene, or by remonstrance, or by calling in assistance, is erroneous.

(Official.)

Exceptions from supreme judicial court, Androscoggin county.

James W. Carver was convicted of assault, and excepts. Exceptions sustained.

At the trial, he claimed that all the force which he used was proper in kind and degree, and, under the circumstances, perfectly justifiable and consistent with his rights; that he was on a public street, where he had a right to be; that, when he was first pushed or struck and knocked off the sidewalk, he was under no obligation to turn and run from the assailant, but he had a right to return to the walk, and, if the assault continued, to repel force with force.

J. P. Swasey and Edgar M. Briggs, for defendant. W. H. Judkins, Co. Atty., for the State.

HASKELL, J. Indictment for assault and battery. The defendant was convicted below. He excepts to two several extracts from the judge's charge, viz.:

1. "Well, no matter how slight this may be, if it amounts to a wanton motion, an angry motion, coupled with the ability at the time and under the circumstances to do harm, it is an assault, and, if carried into effect, it is a battery,—assault and battery; but it is indifferent which one it is, because they are both punishable, and are practically the same thing."

This instruction is erroneous, inasmuch as it omits the element of intent. The motion may be wanton, made in an angry manner, coupled with an ability to do harm, and yet no harm be intended, and, if harm should result, may be from pure accident.

2. "But a man should never resort to violence in self-defense until necessary. It is a man's duty, as a good citizen, to preserve the peace; and, when he finds he is in danger of being attacked in any way, it is his duty, as a good citizen, to try every other means, first by retiring, withdrawing from the scene, or by remonstrance, or by calling in assistance; but still, whenever the emergency is so quick and the danger is so present that there is no time left for anything of that kind, that you can't withdraw in season, and if you think you are liable to be hit in the back if you do withdraw, or are liable to be hit before an officer comes up, and a remonstrance will do no good, then, in self-defense of your person and in self-respect, you are authorized to strike the first blow in order to prevent an assault on you."

That a man when assaulted be required to cowardly flee from danger, and not assert a manly self-defense, necessary for his protection, does not seem to comport with the laws of a free and enlightened people, and, as said by the supreme court, we cannot give our assent to such doctrine. *Beard v. U. S.*, 158 U. S. 550, 15 Sup. Ct. 962.

Exceptions sustained.

(89 Me. 71)

HUNTER et al. v. PHERSON.

(Supreme Judicial Court of Maine. March 28, 1896.)

TRIAL—ADMISSION—BURDEN OF PROOF.

1. An admission made by a party to facilitate the trial of an action must be taken and construed as a whole. It must not be divided, and, by accepting a part and rejecting a part, give to the admission an effect not intended by the party making it. The whole of the admission must be taken together,—as well what is favorable to the party making it as what is unfavorable to him,—and be construed according to the true intent and meaning of the party making the admission.

2. When the defendant admitted that the goods sued for were delivered to him, that he took them and carried them away and used them, and claimed that they were delivered to him upon the order of a third party, to whom they should have been charged, *held*, that this

admission, if taken as a whole, and construed according to the intentions of the party making it, did not confess that the plaintiffs had a cause of action against the defendant. It confessed a cause of action against a third party, but it did not confess one against the defendant.

3. Also, that the burden of proof, by such admission, had not shifted from the plaintiffs to the defendant.

(Official.)

Exceptions from supreme judicial court, Somerset county.

Assumpsit by George H. Hunter and others against John E. Pherson, in which there was a verdict for plaintiffs. On exceptions by defendant to instructions. Sustained.

J. W. Manson, for plaintiffs. S. S. Hackett, for defendant.

WALTON, J. An admission made by a party to facilitate the trial of an action must be taken and construed as a whole. It must not be divided, and, by accepting a part and rejecting a part, give to the admission an effect not intended by the party making it. The whole of the admission must be taken together,—as well what is favorable to the party making it as what is unfavorable to him,—and be construed according to the true intent and meaning of the party making the admission. *Storer v. Gowen*, 18 Me. 174; 1 Greenl. Ev. § 201.

In the present case the defendant admitted that the goods sued for were delivered to him, and that he took them and carried them away and used them. But he did not admit that they were sold to him, or that he was ever liable to pay for them. He claimed that they were delivered to him upon the order of a third party, to whom they should have been charged. Clearly, this admission, if taken as a whole, and construed according to the intentions of the party making it, did not confess that the plaintiffs had a cause of action against the defendant. It confessed a cause of action against a third party, but it did not confess one against the defendant. The admission could not be treated as a plea of confession and avoidance, for the cause of action declared on was not confessed. It was traversed. It had been traversed by the plea of the general issue, and again by protestation at the time of making the admission, and as a part of it. This left the plaintiffs in a position requiring them to prove the alleged sale to the defendant,—such a sale as made him their debtor,—or fail in their action. The burden of proof still rested upon them. True, the defendant alleged, in effect, that the goods sued for had been sold to a third party, to whom they should have been charged. And this was an affirmative proposition, and, if issue had been joined on this proposition, the burden of proof would have rested upon the defendant. But issue was not joined on this proposition. The issue was upon the alleged sale to the defendant, and this was a proposition which the plain-

tiffs must sustain, or fall in their action. The burden of proof had not shifted from the plaintiffs to the defendant.

But the presiding justice instructed the jury otherwise. He instructed them that upon this issue the burden of proof was upon the defendant; that the plaintiffs having made out their case by proof of the delivery of their goods to the defendant, or by the defendant's admission, the law implied a promise to pay for them, and the defendant took the affirmative, and must satisfy them, upon a preponderance of all the evidence, that his claim was the right one.

It is the opinion of the court that these instructions were erroneous; that they gave too great an effect to the defendant's admission, and placed upon him a burden which he was under no obligation to sustain.

Exceptions sustained.

(89 Me. 37)

CUMMINGS v. KENNEBEC MUT. LIFE INS. CO.

(Supreme Judicial Court of Maine. March 21, 1896.)

LIFE INSURANCE—APPLICATION—FRAUD—VERDICT—SETTING ASIDE.

1. In a written application for a certificate of membership in a life insurance company, the insured "declared and warranted that his answers and statements are full, complete, and true," and agreed "that 'if there has been any concealment, misrepresentation, or false statement, or statement not true,' made therein, then the certificate shall be null and void." *Held*, in this case, that it is established by clear and convincing evidence that at least eight of the insured's answers to material questions asked by the medical examiner were not true; and, although it is not incumbent on the defense to prove that the insured knew them to be untrue, the conclusion is irresistible that at least five of these answers must have been fraudulent as well as false.

2. Where one asserts that certain statements are true, and that, if not true, this fact shall avoid the policy, the question whether they were actually material is not important, as parties have a right to make their truth the basis of the contract; but where the insured obtained from the medical examiner a recommendation to which he was not entitled, by means of willful false statements, and the intentional concealment of the truth, in relation to matters which were undoubtedly material to the risk, this the law denominates fraud, and sternly refuses to allow any person to profit by it.

3. When a verdict is unmistakably wrong, and appears to have been rendered under the influence of sympathy or prejudice, and in flagrant disregard of the substantial facts submitted in evidence, it will be set aside.

(Official.)

Action by Lizzie Cummings against the Kennebec Mutual Life Insurance Company, in which there was a verdict for plaintiff. On motion for new trial. Sustained.

E. S. Clark, for plaintiff. H. M. Heath, O. L. Andrews, and W. T. Haines, for defendant.

WHITEHOUSE, J. The verdict for the plaintiff in this case is unmistakably wrong,

and must be set aside. It appears to have been rendered under the influence of sympathy or prejudice, and in flagrant disregard of the substantial facts submitted in evidence.

The plaintiff is one of the beneficiaries named in a policy of life insurance, or certificate of membership, which was issued by the defendant to the plaintiff's husband, Thomas F. Cummings, July 23, 1892. The application is dated July 10, and the medical examination was made July 18, 1892. The insured died January 2, 1893, from hemorrhage of the bowels caused by tuberculous consumption.

By the terms of the policy, the application, including the medical examination, is made a part of the contract, and the certificate is declared to be issued and accepted "on condition that the statements made in the application by and in behalf of the member are in all respects true." In the application the insured, over his own signature, "declares and warrants that his answers and statements are full, complete, and true," and agrees that "if there has been any concealment, misrepresentation, or false statement, or statement not true," made therein, "then the certificate shall be null and void." At the close of the medical examination the insured again "declares and warrants" that his answers to the questions put by the medical examiner "are full and true."

Yet it is established by clear and convincing evidence that at least eight of the insured's answers to material questions asked by the medical examiner were not true, and, although it is not incumbent on the defense to prove that the insured knew them to be untrue, the conclusion is irresistible that at least five of these answers must have been fraudulent as well as false.

In the medical examination made July 18, 1892, the second question is: "Have you now, or have you ever had, any of the following affections or diseases?" And among other specifications and answers appear the following: "Spitting of blood? No. Chronic cough? No. Inflammation of the lungs? No. Pleurisy? No. Consumption? No."

To the seventh question, "Do you now possess a sound constitution and good health?" the answer is, "Yes."

To the fifteenth question, "How long is it since you were attended by a physician, or have professionally consulted one?" the answer is, "Four months."

To the seventeenth question, "Have any material facts regarding your past health or present condition been omitted?" the answer is, "No."

But in order to meet the requirements of the policy for satisfactory proof of the manner and cause of death, the plaintiff herself was compelled to introduce, as a part of her evidence, the "attending physician's certificate." In this certificate, made under oath, Dr. Chandler states that he was the "usual

medical adviser" of the insured after April, 1892; that the "duration of his last illness" was from April, 1892, to the date of his death, January 2, 1893; that the first time he prescribed for him was in April, and the last time December 28, 1892; that when he first prescribed for him he had hemorrhages from the lungs, and a constant cough, expectorated pus, and was emaciated and weak; and, finally, that the immediate cause of his death was hemorrhage from the bowels, as a result of tuberculous consumption. In his testimony as a witness for the defense, Dr. Chandler gives a detailed history of his treatment of the case, and only emphasizes the statements in the certificate. He testifies that he saw him and treated him professionally as often as once a week from the 1st of April until July; that his cough continued, and he had all the characteristic symptoms of consumption; that he prescribed the usual treatment for consumption; and that there was no question that he had consumption, and a well-marked case of it, from April, 1892, until the date of his death.

This evidence of Dr. Chandler is corroborated by the claimant herself, who is compelled to admit that her husband consulted Dr. Chandler professionally several times in "April and May," and that he had a cough at that time.

It is corroborated by Mr. Drew, the agent of the Maine Central Railroad at Bar Harbor, who testifies that he employed Cummings June 1, 1892, to work on the wharf, and noticed that prior to July 18th he was weak and coughed somewhat; that he was unable to do the work required of him without assistance, and looked like a sick man.

It is also corroborated by Dr. Morrison, of Bar Harbor, who treated him for influenza or grip in February and March, 1892. He testifies that he also prescribed for him for hemorrhage of the lungs, and for pleurisy with effusion, in February or March, and before March 20, 1892, and that he saw him in the summer, when his appearance was that of a man somewhat emaciated. He further testifies that in 1892 he was examiner for the defendant company, among others, and that, about the middle of July, Cummings came to his office, and asked him to examine him for life insurance in the defendant company, and that he positively refused to examine him; and distinctly stated to him that he was not a fit subject for life insurance, that he could not recommend him, and that he would only be rejected.

Dr. William Rogers kept a drug store at Bar Harbor, and testifies that the claimant frequently came into his store in the summer of 1892, and bought cough medicines and recognized remedies for consumption, saying that her husband was a sick man, and had a bad cough and hemorrhages.

Yet on the 18th day of July, accompanied by this claimant, he presented himself for

medical examination at the office of Dr. Hagerthy, of Ellsworth, another examiner of the defendant company, to whom he was an entire stranger. It appears to have been a week when his symptoms were more favorable, and his condition more indicative of health. He was bronzed by exposure to the sun on the wharf, and, in that respect, had the appearance of a laboring man in ordinary health. But conscious that he was not a proper subject for life insurance, and rightly apprehending from his interview with Dr. Morrison that he would not be recommended if he disclosed the truth in regard to his state of health for the four months next preceding, he suppressed all mention of his treatment by Dr. Chandler during that entire period, named Dr. Morrison, who had not prescribed for him after March 20th, as his "usual medical adviser," and stated that he had not consulted a physician for four months. He may be excused for not believing that he had consumption, but his denial that he ever had chronic cough, spitting of blood, inflammation of the lungs, and pleurisy, against the overwhelming testimony that he had been afflicted with all those troubles, and his statement that he had omitted nothing in regard to his past health or present condition, were manifestly false and fraudulent. He obtained from the medical examiner a recommendation to which he was not entitled, by means of willfully false statements, and the intentional concealment of the truth, in relation to matters material to the risk. This the law denominates fraud, and sternly refuses to allow any person to profit by it.

It is not incumbent on the defendant, however, to show that the answers were fraudulent. As stated by the court in *Cobb v. Association*, 153 Mass. 176, 26 N. E. 230, "Where one asserts that certain statements are true, and that, if not true, this fact shall avoid the policy, the question whether they were actually material is not important, as parties have a right to make their truth the basis of the contract." See, also, *Johnson v. Insurance Co.*, 83 Me. 182, 22 Atl. 107.

Motion sustained.

(89 Me. 48)

INHABITANTS OF ST. GEORGE v. CITY OF ROCKLAND.

(Supreme Judicial Court of Maine. March 21, 1896.)

MINOR PAUPER—SETTLEMENT—CONSTRUCTION OF STATUTE.

1. A legitimate minor child, whose deceased father had no pauper settlement in this state, instantly acquires the new settlement of the mother gained by her subsequent marriage.

2. The desire for greater conciseness or simplicity of language will usually account for changes or omission of words in the revision of general statutes. *Held*, that a change of language in such revisions does not necessarily,

nor even presumptively, indicate a change of legislative will.

(Official.)

Agreed statement from supreme judicial court, Knox county.

Action by the inhabitants of St. George against the city of Rockland. Defendant defaulted.

This was an action to recover for pauper supplies furnished Edith Wardwell, and was reported to the law court upon an agreed statement of facts.

The regularity of the furnishing of the supplies was admitted. Due notices and denials were given and made. The only question in controversy was the settlement of the pauper, depending upon the following facts:

Edith Wardwell was born January 29, 1890, and is the daughter of George W. Wardwell and Annie (Allen) Wardwell. The parents were married January 3, 1883. George W. Wardwell never had any pauper settlement in the state of Maine. At the time of the birth of Edith Wardwell the pauper settlement of the mother, Annie Wardwell, was in the town of St. George, and so remained until her subsequent marriage. George W. Wardwell died in the fall of 1893.

Annie Wardwell married Isaac T. Pettee, February 1, 1894. The pauper settlement of Isaac T. Pettee at the time of said marriage was, and ever since has been, in the city of Rockland.

The parties agreed that, if the pauper settlement of Edith Wardwell was in the city of Rockland, the case was to stand for the assessment of damages; otherwise the plaintiff to be nonsuited.

C. E. & A. S. Littlefield, for plaintiff. W. R. Prescott, City Sol., for defendant.

EMERY, J. The minor pauper in this case, at the time of her birth, had a pauper settlement in St. George, because her mother's settlement was there, her father having none in this state. Rev. St. c. 24, § 1, cl. 2. After her father's death, her mother married one Pettee, whose pauper settlement was in Rockland. By this second marriage the pauper settlement of the mother was at once changed from St. George to Rockland, the town of her new husband. Did that marriage also change the pauper settlement of her minor daughter (a legitimate child) from St. George to Rockland?

This question was expressly decided in the affirmative in *Parsonsfeld v. Kennebunkport*, 4 Me. 47; and that case is clearly decisive of this, unless there has been since then an effectual change in the statute fixing the pauper settlement of legitimate minor children. The decision in the case cited was based on the Massachusetts statute of 1793, c. 34 (re-enacted in this state in the act of 1821, c. 122), which declared that "legitimate children shall follow and have the settlement of their father if he has any in this state; but if he

shall have none, they shall in like manner follow and have the settlement of their mother." The words "shall follow and have" were continued in the statute down past the revision of 1841. In the revision of 1857 the clause is condensed so as to read as follows: "Legitimate children have the settlement of their father if he have any in the state; if he has not, they have the settlement of their mother within it." The language is the same in the revision of 1883 now in force. The word "follow" is omitted.

A change of language in the revision of general statutes does not necessarily, nor even presumptively, indicate a change of legislative will. The desire for greater conciseness or simplicity of language will usually account for the change or omission of words. In this case there was no occasion for a change in the law. It kept poor minor children with their mother. It had remained unamended for a generation. The condensation of the clause into more terse language does not indicate an intent to make such a radical change in the law itself as the defendant contends for.

If the statute had been first enacted in its present form, it would have borne the same construction. A comparison of this clause with the next succeeding clause will make this plain. In that clause (clause 3, § 1, of the "Pauper Act") it is declared that "illegitimate children have the settlement of their mother at the time of their birth." The words "at the time of their birth" were evidently inserted to prevent illegitimate children deriving any new or other settlement from their mother's change of settlement. The omission of these words in the next preceding clause (clause 2) concerning legitimate children indicates a different legislative will as to them,—a will that they shall have and continue to have the settlement of their mother, wherever that may be.

Defendant defaulted.

(39 Me. 103)

MORRISON v. CLARK.

(Supreme Judicial Court of Maine. April 7, 1896.)

JUDGMENT—RES JUDICATA—EASEMENT.

1. The two essential elements of the doctrine of *res judicata* are the identity of the parties to the suit, and the identity of the issue necessarily involved. It must also appear that the issue which terminated in the former judgment was between the same parties, in the same right or capacity. *Held*, in this case, that a former judgment did not operate as a personal estoppel against the defendant, acting in a different right.

2. The defendant and his wife were tenants in common of a right of way across the plaintiff's lot, on which the trespasses complained of in this action were committed. In a former suit the plaintiff recovered judgment against the defendant for trespasses committed on the easterly side of the lot, and it appeared from a special finding of the jury that the verdict in that case was based on the defendant's personal agreement to use a way on the westerly side of the lot.

In this action the defendant justifies the alleged acts of trespass on the ground that they were committed by license and authority of his wife, in the exercise of her right to have a reasonably suitable and convenient way across the lot, offering at the same time to prove that a way on the easterly side of the lot would be more convenient for himself and wife, and not unreasonably injurious to the plaintiff.

Held, that the former judgment against the defendant is not conclusive against him in this case, and that the evidence offered in defense should have been admitted. Tenants in common hold by several and distinct titles, and the wife had an equal right with her co-tenant to the use of a way that was reasonably suitable and convenient for the purpose for which it was granted. She was not bound by the separate agreement of her co-tenant, made without her knowledge or consent, and in disregard of her individual rights.

3. She was entitled to have the question of the reasonableness of the location of the way determined by a jury. If, in this case, the defendant was not acting in the exercise of any right of his own, but solely by authority of his co-tenant, the question of the reasonableness of the location is equally open to him in defense.

(Official.)

Exceptions from supreme judicial court, Knox county.

Trespass q. c. f. by Elmer E. Morrison against George E. Clark, in which there was a verdict for plaintiff. On exceptions by defendant. Sustained.

W. H. Fogler, for plaintiff. C. E. & A. S. Littlefield and C. M. Walker, for defendant.

WHITEHOUSE, J. This is an action of trespass *quare clausum*.

The defendant admits that the acts complained of in the plaintiff's writ were committed by him on the easterly side of the plaintiff's lot, but claims that they were done in the exercise of a right to pass over the lot acquired by grant to himself and wife, and by license of his wife.

The deed to the plaintiff of "lot 34," described in his writ, contains a reservation of a right of way to George E. Clark, the defendant, and Lilla B. Clark, his wife, to Rankin street.

The deed to the defendant and his wife shows title in them to an adjoining lot, and "also a right of way ten feet wide over, upon, and across lot 34, * * * on foot and with horse and carriage, to Rankin street." The defendant and his wife thus became tenants in common, not only of the lot of land conveyed to them, but of a right of way 10 feet wide across the plaintiff's lot. *Stetson v. Eastman*, 84 Me. 366, 24 Atl. 868; *Appeal of Robinson*, 88 Me. 17, 33 Atl. 652. It does not appear that, at the date of this deed to the defendant, there was any existing way in actual use across the plaintiff's lot. The deed does not specify upon which side of the plaintiff's lot the way should be located, or in what direction it should pass. The defendant and his wife were therefore entitled to have the use and enjoyment of a way as limited and described in the grant, and located upon the plaintiff's lot in such a manner that it would

not be unreasonably inconvenient or injurious to the plaintiff, and at the same time be reasonably suitable and convenient for the defendant and his wife, having reference to the purposes for which the way was granted, the situation of the lots in relation to each other and to the public street, and all the circumstances connected with the use of the lots and the way in question. *Atkins v. Bordman*, 2 Metc. (Mass.) 457; *Johnson v. Kinnicutt*, 2 Cush. 153; *Brown v. Meady*, 10 Me. 391; *Washb. Easem.* 285.

It appears that the plaintiff had recovered judgment against this defendant for a trespass on the same lot, in a prior suit, in which the defendant justified his acts on the ground that they "were done by virtue of a right of way ten feet in width across said lot of the plaintiff, which right of way was at the time of the alleged breaking and entering owned by said defendant." In addition to the general verdict of guilty found in that case, the jury also returned a special finding that the defendant had made an agreement with the plaintiff to use a right of way on the westerly side of the Morrison lot, as claimed by the plaintiff.

The defendant's co-tenant, Lilla B. Clark, was not made a party to that suit. Her name was not mentioned in the pleadings, and this special finding was distinctly restricted to this defendant, George E. Clark. Nor did it appear that, in making that agreement to use a way on the westerly side, the defendant acted with the knowledge and consent of his co-tenant, or in any respect in her behalf.

In the case at bar it appears that "the defendant offered to prove that the acts complained of in the plaintiff's writ were done by him under license and authority from his wife, Lilla B. Clark, and that they were committed by him within a right of way, ten feet wide, on the easterly side of the lot in question, where the way would be the most convenient for the defendant and wife, and not unreasonably inconvenient or injurious to the plaintiff, instead of upon the westerly side thereof, as mentioned in the judgment aforesaid, which evidence the court excluded, upon the ground that it affords no justification for the defendant by reason of the judgment against him already shown in evidence."

Thereupon the court directed a verdict to be rendered for the plaintiff for nominal damages, assessed at one dollar.

To these rulings, excluding the evidence offered in defense, and directing a verdict for the plaintiff, the defendant excepted, and on his exceptions the case is now before the law court.

It is the opinion of the court that the judgment in the former case is not conclusive against the defendant upon the facts disclosed in this action, and that the evidence offered in defense should have been admitted.

The two leading and essential elements of the doctrine of *res judicata* are the identity of the parties to the suit, and the identity of the

issue necessarily involved. *Bigelow, Estop.* 27-46. Hence, to ascertain whether a judgment is a bar in a given case, it is necessary to inquire whether the subject-matter in controversy was brought directly in question by the issue in the proceedings which terminated in the former judgment, and whether the former suit was between the same parties in the same right or capacity, or their privies claiming under them. *Lander v. Arno*, 65 Me. 26; *Bigelow v. Winsor*, 1 Gray, 299. And one of the most satisfactory and reliable tests of the question whether a former judgment between the same parties is a bar to the present suit is to inquire whether the same evidence will sustain both the present and former actions. The issue will be deemed the same whenever, in both actions, it is supported by substantially the same evidence. On the other hand, if different proofs are required to sustain two actions, a judgment in one of them is no bar to the other. *Freem. Judgm.* § 259, and cases cited.

With reference to the pending case, it is plain that the former judgment against this defendant would not be a bar if this action had been against Lilla B. Clark, the defendant's co-tenant. As already noted, she was not a party to the former proceeding, had no right to appear and take part in that trial, exercise any control over the proceedings, or take any measures to disturb the verdict rendered. The parties to the litigation would not be the same, nor would they stand in an attitude or relation to each other having the same effect as if they were identical. There was no such mutual or successive relationship between them to this right of way as would be required to establish a legal privity between them. 1 *Greenl. Ev.* § 189. As tenants in common, they were entitled to the use of one passageway, and only one. In no event would each be entitled to the use of a separate way without the consent of the plaintiff. In the absence of a definite location in the grant, it was competent for the parties to fix the location by a joint agreement between the co-tenants of the right of way, on the one part, and the plaintiff, the owner of the servient estate, on the other. In the absence of such an agreement, or in the event of a disagreement between the two owners of the right of way, the location must still be made by the plaintiff with due regard to the rights and convenience of all parties interested, and, if consistent with his own interests, in such a manner as to afford a reasonably suitable and convenient way for the defendant and his co-tenant, Lilla B. Clark.

It is sufficiently evident from the special finding of the jury that the verdict in the former action was based on the individual agreement of George E. Clark to use a way on the westerly side of the plaintiff's lot, and not on the easterly side, where the alleged trespass was committed. But it was not shown that Lilla B. Clark in any way participated in that agreement, or ever assented

to it or acquiesced in it. She had an equal right with her co-tenant to the use of a way that was suitable and convenient for the purposes for which it was granted. She would not be bound by the separate agreement of her co-tenant, made without her knowledge or consent, and in disregard of her individual rights. Tenants in common hold by several and distinct titles. With respect to his share, each co-tenant has all the rights except that of sole possession which a tenant in severalty would have. 1 *Washb. Real Prop.* 430. It has been uniformly held that one tenant in common cannot, as against his co-tenant, grant an easement in the common property to a stranger. *Clark v. Parker*, 106 Mass. 557; *Crippin v. Morss*, 49 N. Y. 67; *Marsh v. Trumbull*, 28 Conn. 183; *Merrill v. Berkshire*, 11 Pick. 274; *Washb. Easem.* p. 46. In *Crippin v. Morss* the court say: "A tenant in common cannot by grant, or by operation of an estoppel, or otherwise, confer any rights and privileges which he did not have himself. The most that can be claimed for such a grant or act of the owner is that it may operate by way of estoppel against him and his heirs and those claiming under him." In *Merrill v. Berkshire* an attempt was made to set up the agreement of one tenant in common as against his co-tenant, respecting the damages for laying out a highway over the common property, but the court said: "It is very clear that the land of one tenant in common cannot be incumbered, or in any way injuriously affected, by any agreement of his co-tenant."

But if one tenant in common of a right of way is authorized to fix the location of the way in accordance with his own personal preference or caprice by means of a private agreement made with the owner of the servient estate, in entire disregard of the rights and wishes of the co-tenant, it is plain that one tenant in common will always have it in his power, by his independent acts, to prejudice and "injuriously affect" his co-tenant. Such a doctrine would not only be in clear violation of the well-settled general principles governing the respective rights and obligations of tenants in common, but is manifestly unreasonable and unjust.

The authorities also uniformly support the general proposition that a judgment for or against one tenant in common of property is not only not conclusive evidence, but ordinarily no evidence at all, against his co-tenant. *Freem. Judgm.* § 171; 12 *Am. & Eng. Enc. Law*, 96, and cases cited.

It follows that, if Lilla B. Clark had been directly named as defendant in the pending action, neither the separate agreement of George E. Clark invoked in the former suit, nor the judgment there rendered, could have been invoked as an estoppel against her. Her liability might be determined upon different evidence, and be controlled by a different principle. In the case at bar the defendant offered to prove that a way on the

easterly side of the plaintiff's lot was more convenient for the defendant and his wife, and not injurious or unreasonably inconvenient for the plaintiff. It does not appear that this question of the reasonableness of the location has ever been determined. The defendant's co-tenant, Lilla B. Clark, would have had a right to have it passed upon. If the defendant did not act in the exercise of any right of his own, but solely under license and authority of his co-tenant, the question of the reasonableness of the location was equally open to him in this case. The former judgment was rendered against him for acts done in the assertion of his own right. In this case he seeks to defend acts done by him under the direction of his co-tenant in the exercise of her distinct and separate right. The fact that he was defendant in the former action may be immaterial, and his liability in the present suit not essentially different from that of any other agent who might be employed by Lilla B. Clark to drive her carriage over a way which she had a right to use across the plaintiff's lot. "It is a rule of both the civil and common law," says Mr. Freeman, "that a party acting in one right can neither be benefited nor injured by a judgment for or against him when acting in some other right." *Freem. Judgm.* §§ 156, 164, and cases cited.

The judgment in the former suit, therefore, will not operate in this case as a personal estoppel against the same defendant, acting in a different right.

Exceptions sustained.

(89 Me. 128)

WOODMAN v. WOODMAN et al.

(Supreme Judicial) Court of Maine. April 9, 1896.)

WILL—VESTED AND CONTINGENT REMAINDERS.

1. A vested remainder is an estate to take effect after another estate for years, life, or in tail, which is so limited that, if that particular estate were to expire or end in any way at the present time, some certain person, who was in esse and answered the description of the remainder-man during the continuance of the particular estate, would thereupon become entitled to the immediate possession, irrespective of the concurrence of any collateral contingency. A remainder is contingent when it is so limited as to take effect in a person not in esse, or not ascertained, or upon an event which may never happen, or may not happen until after the determination of the particular estate.

2. It is an elementary rule of construction, which has always been uniformly enforced, that no remainder will be construed to be contingent which may, consistently with the intention of the testator, be deemed vested.

3. A remainder is not made contingent by an uncertainty as to the amount of property that may remain undisposed of at the expiration of the particular estate, the life tenant having the power of disposal.

4. A testatrix, by the eighth clause in her will, bequeathed and devised all the residue of her estate, real, personal, and mixed, to her sons, and the survivor of them, to have and to hold the same in trust for the benefit and support of her husband and her daughter during the lives

of the beneficiaries and that of the survivor. By the same clause the trustees were authorized, "should it become necessary to perform the object of this trust, to sell and convey, by good and sufficient deed, the real estate, after first using therefor the personal estate, as the necessity for said purpose may require."

By a codicil to her will she made the following disposition of the property mentioned in the clause above referred to: "After the termination of the trust estate mentioned in the eighth article, by the decease of both my husband and Henrietta, I give, bequeath, and devise to my son Moses G. seven-sixteenths of my lot and store on Exchange street, Portland; to him and his heirs forever. To my daughter Susan, five-sixteenths of the same lot and store; to her and her heirs forever. To my son Charles M. G., the remaining fourth part of the same lot and store; to him and his heirs forever. And I make this distinction and difference, not from the slightest unequal affection, but only in consideration of the present financial differences in the respective conditions of my children. All the remainder of my estate, of every kind and description, I give, bequeath, and devise to my son Charles M. G., Moses G., and to Susan M. G. Newton, share and share alike; to them and their heirs forever. And, if either of my children die previous to my decease, it is my will and desire that my grandchildren shall inherit as the representative or representatives of the parent thus deceased."

The testatrix died in 1870, her husband in 1881, and the daughter Henrietta, the survivor of the beneficiaries in the trust estate, March 8, 1891. Charles M. G. died February 27, 1889, without issue, leaving a widow, the plaintiff. The Exchange street property was not disposed of by the trustees, under their power of disposal, during the lives of the beneficiaries.

Held, that it was clearly the intention of the testatrix to create by her will a vested, and not a contingent, remainder in the Exchange street property, and that the language used was appropriate for this purpose.

That the trustees took an estate for the lives of the beneficiaries, with a power of disposal if it should become necessary. That the remainder, upon the death of the testatrix, vested in her sons, Moses and Charles, and her daughter Henrietta, of which they might have been divested by an execution by the trustees of their power of disposal during the lives of the beneficiaries, according to the terms of the will.

5. Charles M. G., who took a vested remainder in one-fourth of the Exchange street property, and who died February 27, 1889, prior to the termination of the particular estate, left a will by which he devised to his sister "all the right, title, and interests which I may have at the time of my decease" in and to the homestead of his late mother. The second clause of his will is as follows: "All the rest, residue, and remainder of my estate, real, personal, and mixed, wherever found or situated, of which I may die seised or possessed, I give, devise, and bequeath unto my beloved wife, Eliza Jane Woodman [the plaintiff], and being in lieu of dower; to have and to hold the same to her, her heirs and assigns forever."

Held, that this language clearly shows an intention upon the part of the testator to dispose of all his property, and to give his wife all the residue of his estate, whether in possession or in remainder, and that it was appropriate language to carry out this intention; that the vested remainder, which the testator took under the will of his mother, was a part of the estate of which he was in possession at the time of his death, and was included in the devise in favor of the plaintiff.

Leighton v. Leighton, 58 Me. 67, affirmed. (Official.)

Agreed statement from supreme judicial court, Cumberland county.

Action by Eliza J. Woodman against Moses G. Woodman and others. Submitted on an agreed statement. Judgment for plaintiff.

F. C. Payson, H. B. Virgin, and H. M. Davis, for plaintiff. J. W. Symonds, D. W. Snow, and C. S. Cook, for defendant Moses G. Woodman. Wm. P. Hale, for defendant Susan G. Newton.

WISWELL, J. This is a real action to recover one undivided-fourth of a lot of land, and the store thereon, situated on Exchange street, in the city of Portland.

The plaintiff claims title as the residuary legatee under the will of her husband, Charles M. G. Woodman, who was one of the devisees in the will of his mother, Mary G. Woodman. It is admitted that Mary G. Woodman was the owner of the property in controversy at the time of her death. The questions presented are, what estate, if any, in the demanded premises, did Charles acquire under the will of his mother? and did that estate pass to the plaintiff by virtue of his will? These questions involve the construction of portions of both wills.

1. By the eighth clause in her will, Mary G. Woodman bequeathed and devised all the residue of her estate, real, personal, and mixed, to her sons, Charles and Moses, and the survivor of them, to have and to hold the same in trust for the benefit and support of her husband, Daniel Woodman, and her daughter Henrietta G., during the lives of the beneficiaries and that of the survivor. By the same clause the trustees were authorized, "should it become necessary to perform the object of this trust, to sell and convey, by good and sufficient deed, the real estate, after first using therefor the personal estate, as the necessity for said purpose may require."

By the ninth clause she bequeathed and devised all of her estate mentioned in the eighth article, real, personal, and mixed, remaining at the termination of the trust mentioned in the preceding article, to her sons, Charles and Moses, and her daughter Susan, in equal shares.

By a codicil to this will she made certain changes in other portions of the will, not necessary to be noticed here, revoked the ninth clause, and substituted the following provision in lieu thereof:

"After the termination of the trust estate mentioned in the eighth article, by the decease of both my husband and Henrietta, I give, bequeath, and devise to my son Moses G. seven-sixteenths of my lot and store on Exchange street, Portland; to him and his heirs forever. To my daughter Susan, five-sixteenths of the same lot and store; to her and her heirs forever. To my son Charles M. G., the remaining fourth part of the same lot and store; to him and his heirs forever. And I make this distinction and difference, not from the slightest unequal affection, but only in consideration of the present financial differences

in the respective conditions of my children. All the remainder of my estate, of every kind and description, I give, bequeath, and devise to my sons Charles M. G., Moses G., and to Susan M. G. Newton, share and share alike,—to them and their heirs forever,—and, if either of my children die previous to my decease, it is my will and desire that my grandchildren shall inherit as the representative or representatives of the parent thus deceased."

Mary G. Woodman died in 1870; Daniel Woodman, in 1881; and Henrietta G. Woodman, March 8, 1891. The Exchange street property was not disposed of by the trustees, under their power of disposal, during the lives of the beneficiaries. Charles M. G. Woodman died February 27, 1889, without issue, leaving a widow, the plaintiff.

The first question presented is whether, under this will and codicil, Charles took a vested or contingent remainder in one-fourth of the Exchange street store and lot.

"A vested remainder is an estate to take effect after another estate for years, life, or in tail, which is so limited that, if that particular estate were to expire or end in any way at the present time, some certain person, who was in esse and answered the description of the remainder-man during the continuance of the particular estate, would thereupon become entitled to the immediate possession irrespective of the concurrence of any collateral contingency. A remainder is contingent when it is so limited as to take effect to a person not in esse, or not ascertained, or upon an event which may never happen, or may not happen until after the determination of the particular estate." 20 Am. & Eng. Enc. Law, p. 838.

Chancellor Kent says that the following definition of a "vested remainder," given by the Revised Statutes of New York, appears to be accurately and fully expressed: "When there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate. * * * It is the present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, that distinguishes a vested from a contingent remainder." 4 Kent, Comm. p. 203.

And in Washburn on Real Property (book 2, c. 4, § 1) it is said: "The broad distinction between vested and contingent remainders is this: In the first, there is some person in esse, known and ascertained, who, by the will or deed creating the estate, is to take and enjoy the estate upon the expiration of the existing particular estate, and whose right to such remainder no contingency can defeat. In the second, it depends upon the happening of a contingent event whether the estate limited as a remainder shall ever take effect at all. The event may either never happen, or it may not happen until after the particular estate upon which it depended shall have determined, so that

the estate in remainder will never take effect."

An application of these definitions to the language of the will answers the question presented. An estate for the lives of the husband and the daughter, or the survivor of them, was given by the will to the trustees. The remainder after the termination of the freehold estate was given in the proportions named to the sons, Moses and Charles, and the daughter Susan, in fee. The remainder was so limited that it would take effect at once upon the termination of the prior estate. There were persons in being, definitely ascertained, during the continuance of the particular estate, who, upon the expiration of that estate at any time, were entitled to the immediate possession, irrespective of the concurrence of any collateral contingency. The will contains no language such as is ordinarily used for the purpose of expressing an intention that the vesting of the remainder was to depend upon a contingency, such as "if they are then living," or "to such of them as may be living at the termination of the precedent estate." The devise was of a present, fixed estate, the possession and enjoyment of which only were postponed until after the termination of the particular estate.

It is an elementary rule of construction, which has always been uniformly enforced, that no remainder will be construed to be contingent which may, consistently with the intention of the testator, be deemed vested.

We think that it was clearly the intention of the testatrix to create by her will a vested, and not a contingent, remainder in this property; and the language used was appropriate for this purpose, both upon principle and authority.

In *Leighton v. Leighton*, 58 Me. 63, a testator devised all the residue of his property to his wife during her natural life, she not to make unnecessary strip or waste. The will proceeded as follows: "Second. After the death of my beloved wife, Jane, it is my will that my third son, Ruel S. Leighton, have all the property, both real and personal, which may then remain." The court held that the clearly-manifested intention of the testator was to give his wife a life estate, and to his son Ruel a vested remainder in fee simple, and that the son took a vested remainder, which, upon his decease during the lifetime of the widow, descended to his heirs.

In *Kennard v. Kennard*, 63 N. H. 303, a testator gave his property, consisting of both real estate and personal property, to his executors, to be held by them in trust for the use and benefit of his wife during her life or widowhood, and at her decease or remarriage to revert to his heirs. One of the heirs died before the termination of the trust estate, and it was claimed that his interest in the share of his father's property never vested, and did not pass by his will; but

the court held that, as to the real estate, the limitation over by way of remainder created vested remainders. The court said: "The prior estate would terminate at all events upon the death of the life tenant, and, the time for coming to the enjoyment of the estate being fixed by an event certain, the right of enjoyment, by a person then in being, immediately upon the occurrence of the event and the termination of the prior estate, was established. It was not necessary to vesting the remainder that Manning Kennard should survive the first taker. It is the present right of future enjoyment whenever the possession becomes vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, that distinguishes a vested from a contingent remainder. When the event on which the preceding estate is limited must happen, and when, also, it may happen before the expiration of the estate limited in remainder, the remainder is vested."

In the case of *Blanchard v. Blanchard*, 1 Allen, 228, the limitation over came very much nearer to the dividing line between vested and contingent remainders. There a testator, after devising to his wife all the income of his real and personal property during her natural life, devised to five of his children all the property that might be left at the death of his wife, to be divided equally between them; and the will further provided that, if any of the five children died before his wife, then the property should be divided equally between the survivors. The court said: "The first clause of the devise to the children is certainly sufficient, if it stood alone, to create a vested remainder in all the children." The difficulty arose because of the proviso that, in case any of the children should die before his wife, the property should be equally divided between the survivors; and it was argued with much force that this clause made the remainder contingent, because it could not be told who the survivors might be. But the court held that each of the children named took a vested remainder in fee, subject to be divested upon a condition subsequent, with a limitation over on the happening of that condition. In the case under consideration the devise of the remainder contains no such clause as gave rise to the difficulty in the case last cited.

In *Marsh v. Hoyt*, 161 Mass. 450, 37 N. H. 454, a testator, after making certain specific bequests, gave the rest of his property to trustees to pay the net income to his wife during her life. After her decease a portion of the trust fund was still to be retained by the trustees, and the net income thereof paid to her niece; "and, to take effect at her decease, I give, bequeath, and devise said third part to her children in equal shares; to them, their heirs, executors, administrators, and assigns, forever." The court held that each

of the four children of the niece took a vested interest in one-fourth of the trust estate, in which their mother had an equitable life estate, at the death of the testator.

The provision in the codicil that, "If either of my children die previous to my decease, it is my will and desire that my grandchildren shall inherit as the representative or representatives of the parent thus deceased," if it applies at all to the devise of the remainder in the Exchange street store, in no way affects this question. None of the children of the testatrix died previous to her decease, consequently, during all the continuance of the precedent estate there were persons in being, definitely ascertained, who, upon the expiration of that estate, became entitled to the immediate possession, irrespective of the concurrence of any collateral contingency. The language of this clause is equivalent to that in *Gibbens v. Gibbens*, 140 Mass. 102, 8 N. E. 1, in which the devise was, "At the decease of my wife, all my estate, real and personal, shall go to and be equally divided among my children; the issue of a deceased child standing in the place of the parent." The court held that the children of the testator took vested interests, and that the provision that the issue of a deceased child should stand in the place of the parent did not affect the question as to whether the remainder was vested or contingent.

But it is argued by the defense that in this case the remainder was contingent, because it depended upon the exercise by the trustees of the power of sale given to them in the will; and several Massachusetts cases are cited in which there are expressions to the effect that where a life estate is created, with a power to sell and convey in fee, if necessary for the support of the life tenant, the remainder over is contingent on its not becoming necessary to exercise that power, and that this contingency makes the remainder contingent, and not vested. *Johnson v. Battelle*, 125 Mass. 453; *Bamforth v. Bamforth*, 123 Mass. 280; *Taft v. Taft*, 130 Mass. 461.

But in neither of these cases was this question necessarily raised. In *Johnson v. Battelle* the question was as to the power of the life tenant to sell and convey in fee the property in which he had a life estate. In *Bamforth v. Bamforth* the devise over was made, contingent by the words, "should either of them be living." In *Taft v. Taft* a bill was filed by the remainder-man against the life tenant to enjoin her from selling the real estate, and it was decided that the bill was not maintainable, because the defendant was given by the will full control of the property, with a right to sell and dispose of the same, during her life, "as she may think best."

Nor was this question necessarily raised in *Snow v. Snow*, 49 Me. 150, in which this language was used by the court in the opinion: "It depended on two contingencies,—one, whether anything would remain at the death

or the marriage of his mother; and the other, whether he would ever attain the age of twenty-one years." In that case a testator bequeathed to his wife the use of his personal property during her life or widowhood, she to use what might be necessary for her support, and, after her decease or marriage, one-half of what remained to descend to his son A, and the other half to his son B, who was not to come into possession until he should arrive at the age of 21 years. The court held that B took only a contingent interest, which lapsed upon his death before he had arrived at that age, and during the lifetime of his mother. The case was decided upon the ground that the time when the son B. would be entitled to the possession of the property was annexed to the legacy itself, and that, therefore, it was contingent upon his arriving at that age.

We think that, according to principle and the weight of authority, a remainder is not made contingent by an uncertainty as to the amount of the property that may remain undisposed of at the expiration of the particular estate, the life tenant having the power of disposal. Where an estate is devised to a person expressly for life, with a power of disposal, qualified or unqualified, the devisee takes an estate for life only. *Stuart v. Walker*, 72 Me. 145.

In this case the qualified power of disposal given to the trustees, should it become necessary in order to perform the purposes of the trust "after first using therefor the personal estate," did not enlarge the estate given to the trustees, expressly limited to the lives of the beneficiaries.

The trustees took an estate for the lives of the beneficiaries, with a power of disposal if it should become necessary. The remainder over, upon the death of the testatrix, vested in her sons, Moses and Charles, and her daughter Henrietta, of which they might have been divested by an execution by the trustees of their power of disposal during the lives of the beneficiaries according to the terms of the will.

In *Burleigh v. Clough*, 52 N. E. 267,—a frequently cited case,—a testator bequeathed to his wife the whole of his estate, for life, with the power of disposal; and what remained at her decease undisposed of by her he gave to D, and his heirs and assigns, forever. The court held that the widow took an estate for life, with a power to defeat the remainder, and that D. took a vested remainder.

In *Ducker v. Burnham*, 146 Ill. 9, 34 N. E. 553, a testator bequeathed and devised to his wife all the residue of his estate, real and personal, with full power "to use and exhaust such part of the principal of my estate, real and personal, as she may at any time think necessary for her support and maintenance." By a subsequent clause in the will he directed that all of his property and estate remaining at the death of his wife be equally di-

vided between his five children, share and share alike. The court held, in an exhaustive opinion, in which many authorities are collected, that a power of sale added to a life estate does not raise the estate to a fee; that a remainder limited upon a life estate, with a power of sale added, is not made contingent by the fact of its being uncertain whether such power will be actually exercised or not; and that the remainder given to the five children, after the termination of the life estate, was vested and not contingent.

The question was raised in *Hellman v. Hellman*, 129 Ind. 59, 28 N. E. 311, in which the court said, "The remainder is not made contingent by uncertainty as to the amount of the estate remaining undisposed of at the expiration of the life estate, but by uncertainty as to the persons who are to take."

In *Welsh v. Woodbury*, 144 Mass. 542, 11 N. E. 764, decided subsequently to the Massachusetts cases above referred to, it is said, "The objection to the uncertainty of what will be the subject of the limitation over, which was once thought to be a further ground for the doctrine of *Kelley v. Meins*, 185 Mass. 231, as applied to personal property, seems to be discredited by the later English decisions cited in that case, and never has been applied to a life estate coupled with a power." From which it appears not improbable that, when the question arises, the Massachusetts court will hold that a remainder does not become contingent because of the uncertainty as to what will be the subject of the limitation over, notwithstanding the dicta in the former cases.

And finally, in *Leighton v. Leighton*, supra, it was contended that the remainder was contingent, because the life tenant had the power of disposal; but this court, in considering that objection, simply said that in the cases relied upon in support of the contention the testators expressly directed the sale of their real estate.

2. Did this vested remainder in the Exchange street property pass to the plaintiff, under the will of her husband?

By his will, Charles gave to his sister "all the right, title, and interests which I may have at the time of my decease" in and to the homestead of his late mother. The second clause of the will is as follows: "All the rest, residue, and remainder of my estate, real, personal, and mixed, wherever found or situated, of which I may die seised or possessed, I give, devise, and bequeath unto my beloved wife, Eliza Jane Woodman,—and being in lieu of dower,—to have and to hold the same to her, her heirs and assigns, forever."

We think that this language clearly shows an intention upon the part of the testator to dispose of all of his property, and to give his wife all the residue of his estate, whether in possession or in remainder, and that appropriate language was used to carry out this intention. A vested remainder is an estate which may be conveyed or devised. *Loring v. Carnes*, 148 Mass. 223, 19 N. E. 343. The per-

son entitled to a vested remainder has an immediate, fixed right to future enjoyment, which passes by deed. *Pearce v. Savage*, 45 Me. 90.

The language of the will, "all the rest, residue, and remainder of my estate, real, personal, or mixed, wherever found or situated," could hardly be more comprehensive and expressive of an intention to include all property which the testator could devise. This vested remainder was a part of the residue of his estate. But it is argued that this language is limited by these words which follow, "of which I may die seised or possessed," and that the testator was neither seised nor possessed of any portion of the demanded premises at the time of his death. In support of this contention, counsel rely upon the case of *Leach v. Jay*, 6 Ch. Div. 498, subsequently affirmed, and reported in 9 Ch. Div. 42.

In that case the devise under consideration was, "all real estate (if any) of which I may die seised." The court held that the word "seised" had only a technical meaning, that it had no signification in ordinary language, and that as the testatrix had no seisin, either in law or in fact, of the real estate in controversy, nothing passed under the will to the devisee. The distinction between that case and this is very marked. Here the devise was not of "all the real estate of which I may die seised," but of all the residue of "my estate, real, personal, and mixed, wherever found or situated, of which I may die seised or possessed." It was not limited to the real estate of which he might be seised at his death, but it included all his estate of which he might be possessed at that time. He was possessed of a vested remainder in one-fourth of the demanded premises, that was a part of his estate at the time of his death.

Our conclusion is therefore that, by the will of Mary G. Woodman, her son Charles took a vested remainder in one-fourth of the Exchange street property, which he might devise by will before the termination of the precedent estate, and which he did devise to his wife, the plaintiff.

She is also entitled to one-fourth of the net rents and profits from March 8, 1891, the time of the termination of the precedent estate, by the death of the survivor of the beneficiaries, to the date of the writ. This one-fourth is admitted to be \$212.13.

The entry will be:

Judgment for plaintiff, for the demanded premises, and for \$212.13 rents and profits.

(19 R. I. 656)

WARREN et al. v. PROVIDENCE TOOL CO. et al.

(Supreme Court of Rhode Island. Dec. 12, 1896.)

LIMITATION—ACTIONS AGAINST EXECUTORS AND ADMINISTRATORS—SPECIAL STATUTE—APPLICABLE TO SUITS IN EQUITY.

Pub. St. c. 180, § 8, and c. 205, § 9 (statutes of limitation as to actions against executors and

administrators), are applicable to a suit in equity brought by a creditor, and may be pleaded in the answer.

Suit in equity by Charles H. Warren and others against the Providence Tool Company and others. Exceptions to answers of respondents. Overruled.

James, Wm. R. & Theodore F. Tillinghast, for complainants. Joseph C. Ely, Herbert Almy, Van Slyck & Mumford, Augustus S. Miller, Bassett & Mitchell, Edwards & Angell, John D. Thurston, Thomas P. Barnfield, Thomas C. Greene, James M. Ripley, John Henshaw, and Cooke & Angell, for respondents.

MATTESON, C. J. This case is before us on the question of the sufficiency of the allegations in the answers of several of the respondents setting up the statutes of limitations applicable to suits against executors, of which the same benefit is claimed as though they had been made by way of plea. The statutes relied on are Pub. St. R. I. c. 180, § 8, and chapter 205, § 9. These sections provide that no action, except in certain cases, not material to the present inquiry, shall be brought against any executor or administrator within one year after the will shall be proved or administration granted, nor after three years from such proof or grant, provided notice of his appointment be given by publication in some public newspaper in this state nearest to the place in which the deceased person last dwelt, or in such other manner as the court of probate shall direct; the periods named to be reckoned from the time of notice. We think the allegations of the answers setting up these statutes are a good defense to the suit. *Sayles v. Bates*, 15 R. I. 342, 5 Atl. 497; *New England Commercial Bank v. Stockholders of Newport Steam Factory*, 6 R. I. 154; *Atwood v. Bank*, 2 R. I. 192. The complainants, however, contend that these statutes are not applicable to the present suit, which is a suit in equity, and rely on *Stone v. Corcoran*, 17 R. I. 759, 24 Atl. 781, in support of their contention. In that case the only point decided by us was that the word "action," as used in the statutes, was not broad enough to include suits in equity. It is familiar doctrine that suits in equity are not within the letter of the statutes of limitations, but that these relate in terms to legal remedies only; courts of equity, though regarding themselves as bound by the statutes, applying them rather by way of analogy, and with less strictness where equities are involved than do courts of law. *Hovenden v. Lord Annesley*, 2 Schoales & L. 629; *Reynolds v. Hennessy*, 17 R. I. 176, 20 Atl. 307, and 23 Atl. 639. The only contention in *Stone v. Corcoran* was as to the scope of the word "action," the respondent executor conceding that the plea should be overruled unless the word "action" should be held to embrace suits in equity; and the plea was accordingly overruled. Moreover, these statutes limiting the bringing of suits against

executors and administrators have been construed to apply only to creditors' suits to recover a debt against the estate; and the suit of *Stone v. Corcoran* was not a creditors' suit, but one to recover the surplus proceeds of property held as security, and which were, therefore, in the possession of the executor not strictly as executor, but rather as a trustee for the complainant. *Randall v. Peckham*, 10 R. I. 548, 549.

The complainants except to the sufficiency of the answers of several of the respondents, because they do not specifically set forth in detail under what trusts they hold, and have heretofore held, the shares of stock of the Providence Tool Company set opposite their names in the fifth paragraph of the bill, and what property and estate they hold, and have heretofore held; under the same trusts. We see no reason for requiring from these respondent trustees the disclosures called for by the complainants. When their liability for the complainants' demands has been established, it will be time enough to compel the discovery which the complainants ask. Exceptions overruled.

(19 R. I. 619)

GREENE et al. v. GREENE et al.

(Supreme Court of Rhode Island. Nov. 10, 1896.)

TRUSTS—LOSS OF CORPUS—APPORTIONMENT—MANAGEMENT OF TRUST.

1. Where a portion of a fund held in trust for the benefit of one person for life and another in remainder is lost by reason of the failure of the business in which it was invested, the loss is to be apportioned between the life tenant and the remainder-man, so as to entitle the life tenant to a portion of the fund received on settlement of the business, to make up for the loss of income during the time the business was being settled.

2. Testator directed that the fund to be held in trust for one for life, with remainder to another, should remain invested in a certain business as a permanent investment. *Held* that, in the apportionment of a loss arising from the failure of the business, the corpus of the trust fund should be determined by finding the amount which, placed at legal interest at the time of the failure, would have reached the amount received after the business was wound up, the balance being payable to the life tenant as income.

3. Testator gave his real and personal property to trustees, and directed them to use the income of the personality to keep the realty in repair and insured, and to pay all taxes thereon, and, after giving the income of certain realty to certain beneficiaries, directed them to pay from the income of the residuary realty a certain sum to K., and to pay the remaining income to his wife and certain children for life. By reason of the loss of a portion of the personality the income therefrom became insufficient to keep the realty in repair, etc. *Held*, that the life tenant of the income from the residuary realty could not require that the corpus of the personality or residuary realty should be used to make up the necessary deficiency in the income from the personality, instead of using the income from the residuary realty.

4. Where personality and realty are given in trust to pay the income to one for life, with remainder to another, the trustees having authority to change the investment of the trust funds, it is proper to charge the corpus of the estate with the cost of permanent improvements, consisting

of bath rooms, water closets, and sewerage connected therewith, made necessary by municipal regulations, and for the more advantageous rental of the buildings.

5. The cost of putting improved realty purchased by the trustee in a tenantable condition is properly charged to the corpus of the estate.

6. Where personality and realty are given in trust, and the trustees are required to pay for the repairs of the realty, taxes, etc., from the income of the personality, a direction that a change of investment is to be to any other of a like nature, as near as may be, does not, in case a considerable portion of the personality is lost, prevent the trustees from investing personality in realty.

7. Trustees authorized to make conveyances of the trust realty have no power to mortgage.

Bill by Isaac O. Greene and others against Ellen Maria Greene and others for instruction in regard to a trust.

Joseph C. Ely and Herbert Almy, for complainants. John F. Lonsdale, for respondents.

MATTESON, O. J. This is a bill for instructions. Complainants are the trustees under the will of Rufus Greene, formerly of Providence, deceased, and the respondents are his widow, Ellen Maria Greene, a grandchild, Mary C. Greene, the only child of Rufus Greene, Jr., deceased, who was a son of the testator, and the testator's sons, Robert L. Greene, Archer Greene, and Howard Greene. A copy of the will may be found in *Robinson v. Greene*, 14 R. I. 182. The trusts created by the fourth, fifth, and sixth clauses of the will are terminated, and the respondents, with the complainant Isaac O. Greene, are all the persons in being beneficially interested in the remaining trusts of the will. By the seventh clause of the will the trustees were directed to retain that portion of the testator's personal estate invested in the business of Greene & Cranston, bankers, as it then was, so long as the testator's partner, in their judgment, should be physically able to manage the same, or until he should signify in writing to the trustees his unwillingness further to continue the business, or until, in the judgment of a majority of the trustees, the business should become hazardous and unprofitable. The bill sets forth that, at the making of the will, the larger part of the testator's personal estate, to wit, \$100,000, was invested in the business of Greene & Cranston, which was retained in that business after the decease of the testator, agreeably to the direction of the will; that in 1875 the firm of Greene & Cranston became embarrassed, and on December 17th of that year made an assignment; that the affairs of the firm were settled in the latter part of 1878 and early part of 1879, the trustees then in office receiving, of the \$100,000 invested by the testator in the business, \$61,692.45, paid to them in two sums, the average date of payment of which was December 9, 1878. This sum they credited to the corpus of the estate. The life tenants claim that this was erroneous, and that an allowance should have been made to them from the sum received for the loss of income suffered by them between the date of the assignment, December 17, 1875,

and the date when the sum was received, December 9, 1878. We are of the opinion that this claim is well founded. The authorities hold that when a fund is held in trust for the benefit of one person for life and another in remainder, and a part of the fund is lost because of the insecurity of the investment, the loss is to be apportioned between the life tenant and remainder-man. *Cox v. Cox*, L. R. 8 Eq. 343; *MacLaren v. Stainton*, L. R. 11 Eq. 382; *Roosevelt v. Roosevelt*, 5 Redf. 264; *Veazie v. Forsaith*, 76 Me. 190; *Parsons v. Winslow*, 16 Mass. 341; *Turner v. Newport*, 2 Phil. Ch. 14; *In re Tinkler's Estate*, L. R. 20 Eq. 456; *Moore v. Johnson*, 54 Law J. Ch. 432, 52 Law T. (N. S.) 510; *In re Anckettill's Estate*, 27 L. R. Ir. 331; *Hagan v. Platt*, 48 N. J. Eq. 206, 21 Atl. 860; *Tuttle's Case*, 49 N. J. Eq. 259, 24 Atl. 1. The only case which has come to our notice denying the right of apportionment is that cited by Mr. Spink, representing contingent interests of remainder-men not in being, viz. *In re Grabowski's Settlement*, L. R. 6 Eq. 12. But this case was overruled by *Cox v. Cox*, L. R. 8 Eq. 343. 2 Lewin, Trusts, *914. We are of the opinion, therefore, that an apportionment of the amount received by the trustees should have been made between the life tenants and remainder-men.

The question is raised as to the method in which the apportionment should have been made. The life tenants suggest that, as the \$100,000 invested in the firm of Greene & Cranston was intended by the testator to be a permanent investment, the proper mode of apportionment would have been to ascertain the average yearly profit earned by the investment prior to the assignment, multiply it by the $23\frac{1}{2}$ years during which the affairs of the firm were in liquidation, and then to divide the sum received in liquidation between the life tenants and remainder-men, in the proportion which the \$100,000 originally invested bears to the amount of income ascertained in the manner stated for the period specified. They have cited no authority which holds that such a method of apportionment in a similar case is proper. They have referred to *Westcott v. Nickerson*, 120 Mass. 410, in which the court passed on the relative rights of life tenants and remainder-men to a fund received on the winding up of a partnership. The testator had directed that the money which he had invested in the partnership should remain for a short term after his death, merely for the purpose of winding up the business and ascertaining the amount of the fund, and not as a permanent investment. Moreover, the amount received from the partnership, on the winding up of the business, was considerably in excess of the amount which would have been received if the business had been closed at the death of the testator; so that the court were called upon to apportion a surplus or profit on the fund invested, and not, as we are in the present instance, to apportion a loss of a part of the

principal. Though the court referred to the consideration that the direction of the testator was that the fund should remain in the business only for a short period, for the purpose of winding up the partnership, and intimated that it might have affected the decision if the direction had been that it should remain as a permanent investment, the case is too radically different from the case at bar to control our decision. Besides, there is no reason to suppose, the firm of Greene & Cranston having become insolvent, that the fund invested would have earned any profit during the years that the business was in liquidation. The most that can be presumed is that the ordinary rates of interest might have been received upon the assets remaining. Different methods of apportionment have been followed in the cases. Sometimes the apportionment has been made by computing interest on the amount realized from the investment during the period that the life tenant has been deprived of the income, and, the interest so computed being deducted from the amount realized, and paid to the life tenant, the remainder is held to constitute the future capital. This was the method adopted in *Parsons v. Winslow*, 16 Mass. 361; *Turner v. Newport*, 2 Phil. Ch. 14; *Re Tinkler's Estate*, L. R. 20 Eq. 456; *Re Hubbuck* [1896] 1 Ch. 754. And in *Hagan v. Platt*, 48 N. J. Eq. 206, 21 Atl. 860, and *Tuttle's Case*, 49 N. J. Eq. 259, 24 Atl. 1, it was held that the loss should be apportioned between the life tenant and the remainder-men in the proportion which the principal sum involved in the insufficient security bears to the interest due upon it at the time when the security is realized upon and the amount of loss is determined. *Cox v. Cox*, L. R. 8 Eq. 343, was a case in which the testator had bound himself, in his lifetime that £6,000 should be paid to the trustees within three months after his decease, to be held by them for the benefit of his widow for life, with the remainder to the children of the marriage. At his decease his estate was so involved that nothing was realized from it for several years, and finally not enough to pay the principal sum. The vice chancellor stated the proper mode of apportionment to be to ascertain what sum of money at the death of the testator put at interest would produce the amount finally realized, and to invest this as the principal fund, and pay so much as represented the interest to the tenant for life. This was the rule followed in *Roosevelt v. Roosevelt*, 5 Redf. 204. See, also, *Maclaren v. Stainton*, L. R. 11 Eq. 382; *Veazle v. Forsaith*, 76 Me. 190. This rule seems to us well calculated to do justice between the life tenants and remainder-men, and we therefore adopt it, and instruct the trustees to ascertain what sum placed at interest on the date of the assignment of Greene & Cranston would have produced the \$61,892.45 realized from the investment on December 9, 1878, when it was received and the loss determined, and to correct the account by substituting as a part of

the corpus of the estate the amount so found, instead of the full sum of \$61,892.45, and to credit the difference between these sums, representing the interest on the sum ascertained and carried to the corpus of the estate as stated, to the life tenants as income.

By reason of the loss to the personal estate of the part of the fund invested in the partnership of Greene & Cranston, as stated, the income of the personal estate became insufficient to keep the real estate in repair and insured, and to pay the taxes and assessments, as directed by the first clause of the will; and the deficiency at the time of the filing of the bill, amounting to \$42,802.93, has been made up from the income of the residuary real estate. It is suggested, in behalf of the life tenants, that it was the intention of the testator, manifested by the direction of the first clause of the will, that the beneficiaries under the eighth clause should receive the gross rents and profits of his residuary real estate, subject, only, to the annuity to Rosa Keelwa, just as his daughters received the gross rents and profits of the real estate directed to be paid to them by the fourth, fifth, and sixth clauses; and it is argued that, on the failure of the personality to afford sufficient income for the purposes specified, the deficiency should be made good out of the corpus of the personality, or of both the personality and realty. The question, therefore, is raised by the bill whether the trustees have authority to reimburse the life tenants out of the corpus of the personality, or of both the personality and realty, for moneys taken from the income of the residuary real estate to make good the deficiencies of the income of the personality for the purposes stated. The contingency that the income of the personal estate might become insufficient for the maintenance of the real estate and the payment of taxes and assessments on it, apparently, was not present to the mind of the testator in the framing of his will. If it had been, it is possible that he would have provided some method of making good the deficiency. But, as he has made no such provision, neither the trustees nor the court can make it for him. *Grinnell v. Baker*, 17 R. I. 41, 20 Atl. 8, and 23 Atl. 911. We are of the opinion that the ordinary rule which, in the absence of any provision to the contrary, requires the payment of expenses for repairs, insurance, taxes, etc., out of the income of the real estate, must apply, and we therefore decide that the trustees have no authority to reimburse the life tenants for the expenditures of the income of the residuary real estate in making up the deficiency of the income of the personal estate for the payments mentioned.

The bill sets forth that, in the management of the real estate, it has been found necessary, for the advantageous rental thereof, to make changes in the structure of the buildings to provide for modern improvements, notably for water closets and bath rooms, and the additions of plumbing and sewerage coincident

therewith, not contemplated by the testator, which have required outlays amounting to \$4,630.72; and the question is made whether the trustees are authorized to charge these outlays, and any future outlays of the same character to the corpus of the estate. We are of the opinion that the outlays specified, which have been or may hereafter be made for structures of a permanent nature, and not merely to renew or replace what has become defective, especially in view of the fact that these outlays have been rendered necessary to a considerable extent by municipal regulations, are not to be regarded as outlays for repairs, but rather as for improvements (*State v. White*, 16 R. I. 591, 594, 18 Atl. 179, 1038); and hence that, under the power to change the investment of the trust funds conferred on the trustees, these outlays may be charged by them to the corpus of the estate as sums invested in the respective properties benefited by these improvements (*Stevens v. Melcher*, 80 Hun, 514, 30 N. Y. Supp. 625; *Stephens' Ex'rs v. Milnor*, 24 N. J. Eq. 358; *Watts v. Howard*, 7 Metc. [Mass.] 478; *Sohler v. Eldredge*, 103 Mass. 345; *Abell v. Abell*, 75 Md. 44, 64, 23 Atl. 71, 74, and 25 Atl. 389; 13 Am. & Eng. Enc. Law, 218, and note).

We are of the opinion that outlays for putting improved real estate purchased by the trustees in tenantable repair are properly chargeable to the corpus of the estate. Such expenditures, being necessary to put the buildings in a condition to be occupied, may well be deemed a part of the original cost or purchase money; the expenses of subsequent repairs being, however, a charge on the income. *Parsons v. Winslow*, 16 Mass. 361; *Stevens v. Melcher*, 80 Hun, 532, 30 N. Y. Supp. 637; 2 *Perry, Trusts* (3d Ed.) 532.

As the will confers authority on the trustees to change, from time to time, if in the opinion of a majority of them it should become beneficial and necessary, the investment of any of the trust funds, and even the real estate if necessary, to protect any one or more beneficiaries, it would seem to follow that they would have power to build on vacant land held by them, and to use the trust funds for that purpose. In *Re Newman's Settled Estates*, 9 Ch. App. 681, 683, Lord Chief Justice James remarks: "The cases proceed on the principle that the erection of a building is substantially the same thing as the purchase of a new estate." And again, in *Drake v. Trefusis*, 10 Ch. App. 364, 366: "The spending money in building a house on a vacant piece of ground, forming part of the settled property, is in substance the same thing as buying the house." See, also, in *re Johnson's Settlements*, L. R. 8 Eq. 348; in *re Lord Hotham's Trusts*, L. R. 12 Eq. 76; *Stevens v. Melcher*, 80 Hun, 514, 531, 30 N. Y. Supp. 625, 636; *Sohler v. Eldredge*, 103 Mass. 345, 352. The only language in the power conferred on the trustees to change the investment of the trust estate which can be supposed to operate as a restriction is the direction that

the change of investment is to be "to any other and others of a like nature, as near as may be." We do not think that this language should be regarded as prohibitive of the power of the trustees to change the investment of the personality into realty, or the realty into personality, in the present situation of the estate, if, in the judgment of a majority of them, such change would be beneficial and necessary. It was the intention of the testator, as has been seen, that the expenses of caring for and managing the realty should be paid out of the income of the personality. For this reason, probably, he intended that the trust estate should remain divided between personality and realty, in substantially the same proportions as existed at his death; and he accordingly, with this intention in mind, suggests to the trustees that, in changing the investment of the trust estate, the change should be to other property of a like nature as near as possible,—i. e. that personality should be changed to personality, and realty to realty. That intention, however, has been frustrated by the loss to the personality resulting from the loss on the investment in the partnership of *Greene & Cranston*. The proportion between the personality and realty having thus been destroyed, there is no reason for the continued operation of the suggestion.

The power conferred on the trustees to make any and all conveyances which may become necessary in the performance of the trusts for the benefit of the estate is given in connection with the power to change the investment of the trust estate. We think it probable that it was intended to be merely ancillary to the latter power. But, apart from this, a power to sell given to trustees, it is held, does not confer a power to mortgage. *Rhode Island Hospital Trust Co. v. Commercial Nat. Bank*, 14 R. I. 629, and cases in note. Such powers are construed strictly, and we can see no reason why a power to make conveyances should receive a broader construction than a power to sell. As the power of the trustees to mortgage the trust estate is not clear, we think they should obtain the sanction of the court before making such mortgages. *Schulting v. Schulting*, 41 N. J. Eq. 130, 3 Atl. 526; *Rogers v. Rogers*, 111 N. Y. 228, 18 N. E. 636; in *re Jackson*, 21 Ch. Div. 786; *Glover v. Barlow*, Id. 788, note 9; in *re Morris*, 63 Hun, 619, 18 N. Y. Supp. 680.

WOOD v. WHAT CHEER LODGE, NO. 298, SONS OF ST. GEORGE.

(Supreme Court of Rhode Island. Dec. 1, 1896.)
BENEVOLENT SOCIETY—ACTION BY MEMBER—EXHAUSTING OTHER REMEDY.

Before a member of a society can maintain a suit against it, he must exhaust a remedy given by its by-laws.

Action by John T. Wood against What Cheer Lodge, No. 298, Sons of St. George. Judgment for defendant.

George Farnell, for plaintiff. Benj. M. Bosworth, for defendant.

PER CURIAM. The record shows that the plaintiff did not exhaust the remedies provided by the by-laws of the defendant society, as the law requires him to do, before bringing suit. See *Whitty v. McCarthy* (not reported; Equity, 3,690, Nov. Sess., 1893). We are of the opinion, therefore, that the nonsuit was properly granted. Exception overruled, and case remitted to the common pleas division, with direction to enter judgment for the defendant for costs.

DE FRONSAC v. NEWS CO.

(Supreme Court of Rhode Island. Dec. 7, 1896.)

LIBEL—CONSTRUCTION OF WORDS USED.

A newspaper publication concerning the plaintiff, in which it was stated that a certain person came to the conclusion that he was a tramp, and that, "whether viscount or tramp," he did not succeed in seeing such person, cannot be construed as charging plaintiff with being a tramp, or as sustaining an innuendo imputing to it a meaning that is defamatory and libelous.

Action for libel by Viscount De Fronsac against the News Company. Judgment for defendant.

Page & Owen, for plaintiff. Dexter B. Potter, for defendant.

PER CURIAM. We think that the publication concerning the plaintiff, complained of, is not to be construed as libelous, since the item contains no charge that the plaintiff was a tramp. It states that Mrs. Roelker, for the reason set forth, came to the conclusion that the plaintiff was a tramp, and proceeds to say that the plaintiff, viscount or tramp, did not succeed in seeing Mrs. Roelker, nor in getting a good look at anything but the surroundings of the house, etc. The statement, therefore, is merely that the plaintiff, whether viscount or tramp, without assuming to decide which he was, did not succeed, etc. We think that it would be a forced and unnatural construction of the language to hold it to import, as the plaintiff alleges, a charge that the plaintiff was a beat, tramp, and swindler, or to charge him with trying to obtain money and social recognition upon false pretenses, or with not being a member of the nobility, as he represented himself to be. Demurrer is overruled, and case remitted to the common pleas division, with direction to enter judgment for the defendant, with costs.

(19 R. I. 654)

In re DAVIS.

(Supreme Court of Rhode Island. Dec. 10, 1896.)

WILL—CONSTRUCTION—MISDESCRIPTION OF LEGATEES.

A will contained the following clause: "I give and bequeath the sum of \$1,000 each to such

of my three nieces (the daughters of my deceased sister Mary Fitzgerald, late of Dublin, Ireland) as shall survive me." The sister named had no daughters, but left three granddaughters, the only surviving daughters of her son, who were living at the time of the execution of the will, which facts were well known to the testator, and to the scrivener who drew the will, and the testator had no three nieces. *Held*, that the words "nieces" and "daughters" were evidently used inadvertently in the will for grandnieces and granddaughters, and that the grandnieces were entitled to the legacies.

Application for construction of the will of Thomas Davis, on case stated.

Benj. N. Lapham, Walter B. Vincent, and Cooke & Angell, for applicants.

STINESS, J. This is an application by the parties in interest for the construction of the second clause of the will of Thomas Davis, upon a case stated. The clause is as follows: "I give and bequeath the sum of one thousand dollars (\$1,000) each to such of my three (3) nieces (the daughters of my deceased sister Mary Fitzgerald, late of Dublin, Ireland) as shall survive me, and their respective heirs, executors, and administrators." By the case stated it appears that his sister never had any daughters, and so there never were any such nieces as are described in the will, but that, at the time of the execution of the will, there were three granddaughters, the only surviving daughters of a son of said Mary Fitzgerald, and grandnieces of Thomas Davis. The case also states that all these facts were known to Mr. Davis and to the scrivener of the will at the time it was drawn. While this fact makes it most surprising that the will should have been drawn as it was, it also shows, upon the presumption that the testator did not intend a sham or a nullity, that there must have been a mistake in the description. It is argued on behalf of the residuary legatees that, as the persons described in the will do not exist, a construction in favor of the claimants, the grandnieces, would be a reconstruction of the will. There can be no doubt that the intention of a testator is to be gathered from the will, and that extrinsic facts cannot be received to vary the terms of a will when they are clear. *Lewis v. Douglass*, 14 R. I. 604; *McGough v. Hughes*, 18 R. I. 768, 30 Atl. 851. But it is also well settled that a misnomer of a legatee or devisee is immaterial, if the person intended can be identified by the description in the will. *Pell v. Mercer*, 14 R. I. 412, 446, 447, and note; *Peckham v. Newton*, 15 R. I. 321, 4 Atl. 758; *Wood v. Hammond*, 16 R. I. 98, 17 Atl. 324, and 18 Atl. 196; *Swinburne, Petitioner*, 16 R. I. 208, 14 Atl. 850; *Cady v. Children's Hospital*, 17 R. I. 207, 21 Atl. 365. Applying these rules to the case at bar, we think that the will makes it certain that the testator intended the bequests in question for his grandnieces, the granddaughters of his sister, although they were misdescribed as nieces and as daughters of the sister. The testator pointed out three persons, to whom he gave lega-

cies, who were then living, and whom he distinctly had in mind, because the legacies were to go only to such as should survive him. The three persons were females, and descended from his sister, Mrs. Fitzgerald. There are three persons, and only three, who answer this description, and we therefore think that it is plain that these were the persons whom he had in mind, and that the misnomer or misdescription of them as nieces and daughters, instead of grandnieces and granddaughters, is immaterial. There were no other persons to answer such a description, and, as agreed, the testator knew this to be so. Consequently, the description must have been the result of some mistake or slip in designation. He could not have meant his niece Mrs. Newcombe, the daughter of another sister, for she was an only niece, and not three, and he would not have been likely to describe her as the daughter of Mrs. Fitzgerald. The omission of the prefix "grand" is by no means so uncommon or unnatural as to lead us to doubt that he meant the grandnieces. Our opinion, therefore, is that Alice Mary Peard, Henrietta Louisa Fitzgerald, and Maud Hope Fitzgerald are the persons to whom the legacies of \$1,000 each were intended to be given by the terms of the will, and that they are entitled to receive the same.

(178 Pa. St. 245)

REES et al. v. WILDMAN.

(Supreme Court of Pennsylvania. Nov. 9, 1896.)

ORPHANS' COURT SALE—COLLATERAL ATTACK.

A sale of land by an administrator, confirmed by the orphans' court, made on its order, on the administrator's petition alleging death of intestate seized of the land, the existence of the debt, the insufficiency of personal estate, and the necessity of selling the land to pay the debt, may be attacked collaterally, by the heirs claiming by descent, for want of jurisdiction of the orphans' court, because the debt was barred by limitations, and the land was, by provision of Act Feb. 24, 1834, relieved from the lien of the decedent's debt by the expiration of five years from his death, though the want of jurisdiction does not appear on the record. *Sterrett, O. J., and Mitchell and Fell, JJ., dissenting.*

Appeal from court of common pleas, Greene county.

Ejectment by Daniel Smith and others against William W. Adams. All the plaintiffs except John J. Smith and Cassa J. Rees took a nonsuit, and from a judgment for defendant these two appeal. Reversed.

Ray & Axtell and Iams & Brock, for appellants. W. A. Hook and Jas. E. Sayers, for appellee.

WILLIAMS, J. The question whether, under all the circumstances surrounding the parties to this action, it is or is not conscionable on the part of the plaintiffs, is not now before us. The evidence inclines us to think that the circumstances as there presented, while not amounting to an estoppel at law, are entitled to consideration in foro conscientie.

But the assignments of error present only a dry question of law to us. Was the orphans' court sale of the real estate now in controversy, made in October, 1872, operative to pass a title to the purchaser? This must depend upon whether the orphans' court had jurisdiction over the land to order its sale, and upon the legal effect of the order and of the decree of confirmation. Smith died in the spring of 1862, leaving to survive him a wife and five children. He was at the time of his death the owner of the farm which is the subject of this action. No administrator was appointed. His sister, Mrs. Lippencott, had lent him money to the extent of \$500 or thereabouts, which he had paid upon the land when he obtained his deed. For this money no security was given by him. He had not repaid it at the time of his death, and the widow and such of the children as were of age made some arrangement with Mrs. Lippencott under which she took the farm in payment of her debt. When she came to sell it, the purchaser objected to the title for the reason that two of the five children were still minors, and their title had not been secured. To remedy this defect in the title, and for no other purpose, an administrator upon the estate of Smith was appointed in 1872, 10 years after his death, and an application at once made for leave to sell the farm at administrator's sale for the payment of the debt which had been due to Mrs. Lippencott. The land had been relieved from liability for this debt at the end of five years after the death of the decedent by the operation of the act of 24th February, 1834. The debt had been barred by the statute of limitations at about the same time. But without any inquiry as to the time of Smith's death, or the time when the alleged debt was contracted, an order of sale was granted, a sale was made by the administrator to Mrs. Lippencott's husband, the money applied upon her death, and the sale duly confirmed by the orphans' court. The defendant holds under this sale, and is in actual possession. The plaintiffs bring this action as heirs at law of Smith, their father, and claim to have title by descent and the operation of the act of 1834. The defendant replies the orphans' court sale and the conclusive character of the decrees of that court under which the sale was made and confirmed. The learned judge of the court below took the defendant's view of the case, and held the decree of the orphans' court to be conclusive not only of the regularity of the proceedings, and the power of the administrator to sell and make a deed, but also of all claim by the plaintiffs upon the land. In support of this doctrine the defendant cites *Sager v. Mead*, 171 Pa. St. 349, 33 Atl. 355, and kindred cases, in which this court has declined to investigate the regularity of the preliminary proceedings after an administrator's sale has been actually made under an order of the orphans' court, been regularly returned to the court, and approved by it. The leading case upon this subject is

McPherson v. Gunliff, 11 Serg. & R. 422. In that case the administrators were appointed soon after the death of the decedent in 1795. The sales complained of were made in the same year and in 1796, for the payment of debts and the support of minor children. Some minor irregularities in the proceedings were alleged, but the chief objection made to the sale was that decedent had a living wife in Ireland at the time of his marriage to the mother of his children in this country, of which nothing had been known when the sales were ordered and confirmed. This court held, in an elaborate opinion by Justice Duncan, that the title taken by the purchaser was the title of the decedent, and that the court had jurisdiction over the subject-matter, and its decrees were, therefore, conclusive upon the subject covered by them. The reason for so holding he stated in these words: "The principle on which I hold the sentence or decree of the orphans' court conclusive is that it is a general rule of our law that when any matter belongs to the jurisdiction of one court so peculiarly that other courts can only take cognizance of the same subject incidentally and indirectly, the latter are bound by the sentence of the former, and must give credit to it." This makes the conclusiveness of the judgment or decree depend upon the jurisdiction of the court pronouncing it; and the converse of this proposition is equally clear,—that a decree of any court is a nullity if pronounced upon a subject over which the court has no jurisdiction. This is elementary law. It was no new doctrine announced by this court in *Torrance v. Torrance*, 53 Pa. St. 505, when we said, "Want of jurisdiction in the orphans' court is as fatal to its proceedings as to those of any other court." It is not indispensably necessary that the want of jurisdiction should appear affirmatively on the record. Ignorance of the law excuses no man. If an orphans' court should entertain a petition in divorce, hear the testimony, and make a decree, the whole proceeding would be a nullity for want of jurisdiction; but it would be necessary to go behind the record, and consult the statutes, before the want of jurisdiction would appear. In *Torrance v. Torrance*, *supra*, the executor presented his petition to the orphans' court for leave to sell real estate for the repayment to himself of money paid to a legatee, and for the payment to another legatee of a judgment recovered by him against the executor for a balance due him upon his legacy. The legacies had been charged by the will of the testator on certain real estate. The court, without inquiry, directed the sale, and subsequently made a decree of confirmation, and the deed was delivered. But in an action of ejectment we held the sale to be void. The court had, under the will, no jurisdiction over the land, and therefore its decree was without conclusiveness, and void. None of the facts that avoided the sale appeared on the record except the fact that the sale was sought in

order to pay legacies. The terms of the will, and the want of statutory power to sell for such a purpose, had to be sought outside the files of the court and the recitals upon its dockets. How does this doctrine apply to the case now before us? The statute gives the orphans' court power to authorize the administrator to make a sale of the real estate of a decedent in order to pay debts that cannot be paid out of the personal property. The administrator has no power over the land by virtue of his office. The land is made assets in his hands only when this becomes necessary for the payment of debts, and he must go to the orphans' court for leave to sell. He must satisfy that court that there are unpaid debts that are properly chargeable, under the law, to the land, because the personal estate is insufficient to pay, and the court thereupon authorize him to make the sale. If there are no debts, he cannot sell; nor can the court give him power to sell, unless it be for some other statutory reason. The existence of debts is a jurisdictional fact. In this case the debt was not secured by lien, and under the act of 1834 it had ceased to be chargeable to the land, but that had passed to the heirs at law absolutely free and discharged from it. It was not in the power of the administrator, or of the court, or both together, to defeat the positive provisions of the act of 1834, or to fasten upon that land, that had descended to the heirs, this debt, which for more than five years had ceased to be a charge upon it. This has been so often held by this court that it ought to be no longer debatable. In *Penn v. Hamilton*, 2 Watts, 53, it was held that, although the debt might have been reduced to judgment against the administrators, yet, if not regularly revived, "the lien is lost, whether the land be in possession of devisees or purchasers from devisees," after the lapse of five years. In *Quigley v. Beatty*, 4 Watts, 13, the single point ruled is stated in these words: "The debt of a decedent does not remain on his estate in the hands of an heir longer than seven [now five] years." The statute was characterized in *Kerper v. Hoch*, 1 Watts, 9, as a statute of repose, and the lapse of time fixed as operating to discharge the land from the debts of the decedent, whether in the hands of purchasers, heirs, or devisees. The last case was cited with approval in *Hemp-hill v. Carpenter*, 6 Watts, 22, and it was there further held that knowledge of the debts by the heir, or even a promise by the heir that the debt shall remain binding on the land, would not change the rule, or relieve against the statute. See, also, *Loomis' Appeal*, 29 Pa. St. 237; *Kessler's Appeal*, 32 Pa. St. 390; *Foster's Appeal*, 32 Pa. St. 495; *Buehler v. Buffington*, 43 Pa. St. 278. Such debts will not justify an order for the sale of real estate for payment of debts. *Pry's Appeal*, 8 Watts, 258. The same rule is stated in *Bindley's Appeal*, 69 Pa. St. 295, with the further proposition that previous orders of sale within five years of the death of the decedent would

not extend the lien of his debts beyond the period fixed by the act of 1834; and it was also held that: "The principal intention of the twenty-fourth section of the act of 1834 was to promote security in titles in heirs, devisees, and purchasers. No admission, however solemn, will dispense with an action." The effect of a sale for payment of debts made after the five years had expired, under an order that was granted before the end of the five years, was suggested, but not decided, in *Craig's Appeal*, 5 Wkly. Notes Cas. 243, and *Bowker's Estate*, 6 Wkly. Notes Cas. 254. A sale under an order of the orphans' court passes only the decedent's title. *Kline's Appeal*, 39 Pa. St. 463; *Bickley v. Biddle*, 33 Pa. St. 270. The rule applicable to all judicial sales is caveat emptor as to the title acquired. It has been distinctly held that the rule applies to orphans' court sales, and that disappointment in the title is no ground for relief. *Bashore v. Whisler*, 8 Watts, 490; *Bickley v. Biddle*, 33 Pa. St. 276; *Vandever v. Baker*, 13 Pa. St. 121. The purchaser at an orphans' court sale is also bound to see that the proceedings are sufficiently regular to authorize the sale. *Larrimer v. Irwin*, 4 Bin. 104. But all mere irregularities are cured by the decree of confirmation, which is an adjudication that the sale was made under the authority of the court. *Potts v. Wright*, 82 Pa. St. 498. But want of authority cannot be cured. Thus the confirmation of a sale ordered to pay legacies was held to be void for want of power to order the sale. *Torrance v. Torrance*, supra. The law does not authorize any such proceeding. An unauthorized decree of an orphans' court for the sale of lands will not stand until reversed in a regular course of appeal, but may be questioned in a collateral suit by or against a person claiming under that decree. *Messinger v. Kintner*, 4 Bin. 97; *Snyder v. Snyder*, 6 Bin. 483; *Sager v. Mead*, 164 Pa. St. 125, 30 Atl. 284.

The plaintiffs have shown a title derived by descent from the decedent, which had been relieved from his debts under the act of 1834 for more than five years. This was a title that the orphans' court had no power to take from them. They were the holders of an independent, and, as to these creditors, an adverse, title to the land; and stand in the same position, so far as the right to deny the jurisdiction of the orphans' court over their title, as would any other adverse claimant. The order of sale operated only on the land of the decedent; not on that of any other person. It is because the land is a part of the estate, and is liable for his debts, that the court is empowered to order a sale. When it is discharged from the debts by a positive statute, the orphans' court cannot subject it again to liability. The heirs, as the holders of a perfect title, free from liability to all unpaid debts of their ancestor, are, as we have said, adverse claimants to the land. Their title is, therefore, beyond the power of the court, and they may assert

it against the holder of the administrator's deed in any court in which its validity may be called in question.

In conclusion it is proper to say that the proceedings of the orphans' court in this case ought not to be followed. The court should be satisfied, before making an order for the sale of real estate, that there are unpaid debts properly chargeable upon the real estate of the decedent; that the real estate described in the petition is bound by the lien of the said debts, and that it is necessary to have recourse to the land to enable the administrator or executor to pay them. The most convenient way for presenting these facts to the court is to embody them in the petition, stating the date of the decedent's death, and whether the debts were at that time secured by mortgage or judgment. This practice would make such a blunder as was committed in this case impossible. It would make the duty of the purchaser easier of performance, and tend to the security and repose of titles in heirs and devisees as well as purchasers. The judgment is now reversed, and a venire facias de novo awarded.

STERRETT, C. J. (dissenting). The real question which underlies this case is whether a purchaser is bound to look beyond the jurisdictional averments expressly prescribed by the act of 1832 under which orphans' court sales are made. The facts set forth in the petition in this case are precisely those upon which the orphans' court is empowered to authorize sales of decedents' real estate for payment of debts. If this be sufficient, the sale made was within the jurisdiction of the court which made the decree, and collateral attack on the title thereunder is, by the express terms of the act, prohibited. Prima facie, it is sufficient. If the legislature had thought it necessary to impose other conditions precedent to the exercise of jurisdiction, it would doubtless have done so. But, having specified these, the purchaser had a right to assume that they were the only essentials. While the better practice would certainly have been to have made the petition fuller, failure to do so was a mere irregularity, which was cured by the decree of sale. It was not necessary that the purchaser should follow step by step the investigation of incidental details which it was the duty of the court to make. It was enough for him that the record showed those which the legislature had made the ground of its exercise. Being an innocent purchaser for value, he was entitled to protection, not only from direct, but, with much more reason, from collateral, attack. Once concede that he must inquire into relevant facts outside those which the act requires the "application" shall "set forth," it will logically follow that he must inquire into the truth of petitioner's averments; for the court must be presumed to pass on all the essential

facts, and may as readily make a mistake in respect of one set as of the other. If, in truth, there be no debt, a sale made by virtue of a decree of the orphans' court within five years after a debtor's death would, on this theory of construction, convey no title. The practical effect must be to seriously cripple an important branch of orphans' court jurisdiction, unsettle many titles bought for value in good faith, and bring a flood of litigation. The fifty-seventh section of the act of March, 1832, regulating the manner of proceeding in the orphans' court, prescribes that it shall be on the petition of a person interested "setting forth" facts necessary to give the court jurisdiction, etc. The nineteenth section of the act of 18th June, 1836, declares that such jurisdiction shall be exercised under the limitations and in the manner provided by law. And the proceeding under which the sale was made in this case was in exact accordance with that prescribed by law. This view is simply sustained by the authorities. The general principle which runs through all the cases is that, where a court of competent jurisdiction assumes to proceed, its record must set forth such facts as show jurisdiction; but it is not necessary that it set forth all the facts out of which jurisdiction springs. The application of this principle has given rise to the rule of evidence which is embedded in the maxim, "*Omnia præsumuntur rite esse acta donec probetur in contrarium*;" and nothing but want of jurisdiction, apparent on the face of the record, or fraud, is recognized as a basis of question. The act of 1832, in which it was enacted that the orphans' court should be a court of record, whose "decrees in all matters within its jurisdiction shall not be avoided collaterally in any other court," was simply declaratory of the law as it stood. *Merklein v. Trapnell*, 34 Pa. St. 42. In the leading case of *McPherson v. Cunliff*, 11 Serg. & R. 422, it was held that a decree of sale made by the orphans' court was an implied adjudication of the legitimacy of those who had been named in the proceedings as children of the decedent, which the heirs at law were estopped from denying. "A purchaser," said Mr. Justice Huston, "is not bound to look whether the court is mistaken as to the facts of debts or children. * * * The court has decided that there were debts, and children to support, and no personal estate to pay debts and support the children; and on that state of adjudged facts they decree a sale. Beyond this the purchaser is not bound to look. The inquiries upon an ejectment are, was there an administrator, and an order to sell, such as would authorize the administrator to make sale? * * * The irregularities or mistakes of fact after sale confirmed, money paid, conveyance executed, possession for twenty years, improvements of twenty times the value of the property, fair purchasers desiring title by subsequent convey-

ances, cannot affect the purchasers." So it was held in *Painter v. Henderson*, 7 Pa. St. 48, on the same principle, that jurisdiction to award a purparty to the widow in partition could not be questioned collaterally. So, in *Potts v. Wright*, 82 Pa. St. 498, the fact that the record did not show bond given by the administrator, as required by statute, was held to be an irregularity which was cured by the decree of sale. So it was held in *Shoenberger's Estate*, 139 Pa. St. 132, 20 Atl. 1050, that the decision of the register granting letters testamentary on a foreign will implied that he had judicially found the principal part of the estate to be located in the country, and it could not, therefore, be made the subject of collateral attack. So it was held in *Gilmore v. Rodgers*, 41 Pa. St. 120, that a mistake in the interest of the parties by the decree in partition was cured by the decree. In *Grindrod's Estate*, 140 Pa. St. 161, 21 Atl. 259, where an orphans' court sale was sought to be set aside on the ground that the petitioner was a minor, without guardian or notice, it was refused because of a delay of 10 years. "Something is due," said the court, "to the finality of judgments. The orphans' court, after such a lapse of time, has no power, unless perhaps in the case of fraud practiced upon it, to set aside the sale and vacate its own decree"; and much less can "any other court." Numerous cases to the same effect might be cited, illustrating the application of this principle, but there are enough to show the current of decision, and sustain defendant's title. The application here was made by the proper party, and set forth the existence of an unpaid debt, the insufficiency of personal estate, and the necessity of selling decedent's real estate in accordance with the directions contained in the act of 1832; and the decree of sale was an adjudication that these averments were facts, and the sale necessary. There was nothing on the face of the record to put the purchaser on inquiry as to want of jurisdiction. He had no notice of the actual date of death, but the grant of letters and decree of sale justified him in believing it was recent. He had a right to presume that all things had been rightly done. If, in these circumstances, having in good faith paid the purchase money, and retained the unquestioned and undisturbed possession for nearly 20 years, he can now be held responsible for the mistake of the court in its findings of fact. Such sales are, indeed, as was said by Mr. Justice Huston in *McPherson v. Cunliff*, *supra*, "snares for honest men."

On the other hand, these plaintiffs have no equity, either for direct or collateral attack. Those through whom they claim, having certainly had at least constructive notice by advertisement, both of the sale and the account and distribution of the proceeds, must be presumed to have acquiesced, and it is now too late to question their validity.

"Something is due," as was said in Grindrod's Estate, supra, "to the finality of judgments." So far as appears, the property was sold for a full price, which went for the payment of the decedent's just debts. The sale received the sanction of a court of competent jurisdiction, whose peculiar duty it was to protect, under the law, the rights of all parties interested; and yet these plaintiffs seek to recover this property from defendant without repayment of the purchase money, with its interest, or make compensation for the cost of valuable improvements. The injustice, to say the least, of this claim, is manifest. *Klingensmith v. Bean*, 2 Watts, 486; *Jacoby v. McMahon*, 174 Pa. St. 133, 34 Atl. 288.

The cases upon which plaintiffs rely are clearly distinguishable from the present. In *Pry's Appeal*, 8 Watts, 253, and *Oliver's Appeal*, 101 Pa. St. 299, no sales were made, but the appeals were from orders of sale. *Bindley's Appeal*, 69 Pa. St. 295, involved a question of distribution of the proceeds of a sale, the validity of which was conceded. In *Maus v. Hummel*, 11 Pa. St. 228, there was enough on the face of the record to put the purchaser on inquiry which would have led him to the knowledge of the date of the debtor's death, and consequent want of jurisdiction; and *Grier's Appeal*, 101 Pa. St. 412, was ruled on the ground that the record failed to show compliance with a statutory requirement. In *Torrance v. Torrance*, 53 Pa. St. 505, so much relied on in support of the plaintiffs' claim, want of jurisdiction appeared on the face of the record. The sale could not be sustained on the ground of the payment of debts, because there was no averment of such; nor on the ground of the payment of legacies, because of the want of proper parties. But in deciding thus this court was careful to note the alternative presumption of validity. "We are not unmindful," said Mr. Justice Agnew, "that general jurisdiction over the subject protects the decrees of the orphans' court from being assailed collaterally. But this is not such a case. Had the application been to sell the testator's estate for his own debts, their existence might be presumed; or, had it been to sell the devisees' estate for the payment of legacies charged upon it, the want of authority in the executor to petition would have been but an irregularity." This analysis of cases upon which plaintiffs' claim of title is mainly vested shows that the right of collateral attack on decrees of orphans' courts was recognized because, and only because, of want of jurisdiction apparent on the face of the record; and that they afford no color for the proposition that purchasers at orphans' court sales must, at their peril, inquire into relevant facts outside of those which the statute prescribes as the basis of jurisdiction. It will thus be seen that the sale in this case was within both the letter and the spirit of the law, and that the defendant

was an innocent purchaser for value, entitled to protection.

MITCHELL and FELL, JJ., concur.

(178 Pa. St. 296)

In re HARTZELL'S ESTATE.

(Supreme Court of Pennsylvania. Nov. 9, 1896.)

ACTION TO ENFORCE PAYMENT OF LEGACY—PARTIES.

Under Act Feb. 24, 1834 (P. L. 84) § 59, which vests the jurisdiction to enforce payment of a legacy charged on land in the orphans' court, and provides a remedy by bill or petition by the legatee, an administrator or executor is not a proper party to a petition seeking to enforce payment of such a legacy.

Appeal from orphans' court, Westmoreland county.

Petition by George M. Hartzell, executor of the estate of George Hartzell, deceased, for a rule on John G. Ruoff to show cause why he should not pay to petitioner a certain portion of a legacy given by deceased's will to Amanda Hartzell, which was made a charge on land devised to Lewis H. Hartzell, but which was sold under an execution against him to said John G. Ruoff. From a judgment dismissing the petition on the ground that the executor was not a proper party to present the petition, the petitioner appeals. Affirmed.

Geo. H. Rumbaugh, for appellant. Williams, Sloan & Griffith, for appellee.

MITCHELL, J. The fifty-ninth section of the act of February 24, 1834 (P. L. 84), vests the jurisdiction to enforce payment of a legacy charged on land in the orphans' court, and the form of the remedy is by bill or petition by the legatee. The cases on this act are uniform and emphatic that the jurisdiction of the orphans' court is exclusive. In the late case of *Brotzman v. Riehl*, 119 Pa. St. 645, 13 Atl. 483, it was so held, although there were questions of the sufficiency of provisions for complainant's support, and the deprivation of privileges in the homestead, which are usually and most conveniently enforced by bill in a court of general equity jurisdiction. The cases are equally emphatic that the form of remedy prescribed by the act must be pursued, and the petition filed by the legatee (or legatees jointly, where there are more than one), and they might be considered as equally uniform except for *Hart v. Homiller*. This was twice before the court. The first time, reported in 20 Pa. St. 248, was in an action of ejectment by the legatees against the second vendee of the land charged. The jury were instructed that the ejectment could be maintained in lieu of a bill in equity, and plaintiffs recovered a verdict, to be released on payment of the sum charged, with interest. On the merits of the case, that the land was still subject to the charge in the hands of the sheriff's vendee of the interest of one

of the heirs, and that the vendee did not purchase the interest of the heir in the sum charged, but only his interest in the land. This court was with the plaintiff, but reversed the judgment on the ground that the jurisdiction was in the orphans' court. This was all that the case really decided, but, in delivering the opinion, Lowrie, J. said, "This form of action cannot be sustained, and the executors, not the legal heirs, are the proper plaintiffs." Thereupon the executor filed a petition in the orphans' court, and the case came up again as *Hart v. Homiller's Ex'r*, 23 Pa. St. 39. The plaintiff in error made the objection that the legatees, and not the executor, were the proper parties to institute the proceeding; but in the opinion, also by Lowrie, J., no notice was taken of this point, and the money was ordered to be paid to the executor. The case, therefore, as it stands, is authority for the present proceeding, and we must inquire how far it is consistent with subsequent decisions. That it is contrary to the literal wording of the statute is plain, and the disposition of the court has been to adhere closely to the express language of the act. In *Conard's Appeal*, 33 Pa. St. 47, the testator charged an annuity to his widow on the residuary estate, consisting partly of ground rents. One of the latter was paid off, and the executors received the money, and included it in their account. The court below awarded the whole residuary estate to the executors, as a trust for the payment of the annuity, but this court reversed the decree, and, rather notably, speaking again through Lowrie, C. J., said: "By the common law, executors had nothing to do with legacies expressly charged on land, or that, by deficiency of personal estate, became charged on the residuary real estate, and this is not changed by the system created by our acts of assembly. It was only in equity that such legacies were enforced in England, and with us they are enforced only in the orphans' court, on petition by the legatee against the owners of the land charged, with notice to the executors and such others as may have any interest. We know not how we can treat this annuity in any other way. It is a legacy in lieu of dower, and becomes a charge by reason of a deficiency of the personal estate. This absolves the executors from all duty in relation to it." In *Fields' Appeal*, 36 Pa. St. 11, this court again said: "There was error also in bringing the suit in the name of the administrator with the will annexed. It is the duty of the executors or their substitutes to discharge legacies, so far as funds come to their hands. For deficiencies the legatees must proceed themselves against the devisees, or their assigns, whose land is charged with the payment. We know of no law authorizing the executors to attend to this duty;" citing *Conard's Appeal*. In *Baker's Appeal*, 59 Pa. St. 313, it was held that the legatees, if more than one, could join in the petition, and that the executors should be made parties, "though they may not petition for the payment of the

legacies." To the same effect, also, is *Knecht's Appeal*, 71 Pa. St. 333, where it was held that the executor is a proper party defendant, but where, the parties being in court, though on a petition informal in its mode of statement, the informality was not substantial, and could be amended. In *Re Weller's Estate*, 169 Pa. St. 66, 32 Atl. 101, the money appears to have been ordered to be paid to the administrator d. b. n. c. t. a., to become part of a fund in court for distribution; but the form of petition or parties petitioning do not appear, and the question of practice was not raised or discussed. These cases are all subsequent to *Hart v. Homiller*, and, while not disturbing the principle of that decision, must be accepted as establishing a different practice. In some respects the action by the executor is the more convenient remedy, especially in cases like the present, where the testator has directed something to be done (i. e. the several sums to be added together, and, after deducting costs, to be divided), and has not said by whom. But, as already said, the clear trend of the court has always been to adhere closely to the directions of the statute, not only as to the tribunal, but also to the form of the remedy, and it is not now desirable to begin a departure from it. The decree will therefore be affirmed, but, as the merits of the case are clearly with the legatees, the court below may, if the interests of justice should appear to be served thereby, reinstate the petition, and permit the legatees to come in upon it as parties plaintiff. Decree affirmed; costs to be paid by appellant.

(79 N. J. L. 306)

CLARK et al. v. WILLET.

(Supreme Court of New Jersey. Dec. 7, 1896.)

ASSIGNMENT OF JUDGEMENT—ACTION BY EXECUTOR—PLEADING.

1. The amendment to the practice act approved March 4, 1890 (P. L. 24), applies to judgments previously recovered.

2. Where an action accrues to an executor, upon a contract made with him as such, it should be brought in his proper name, describing himself to be such executor.

(Syllabus by the Court.)

Action by Daniel P. Clark and others against Theodore Willet. Heard on demurrer to declaration. Overruled.

Argued June term, 1896, before BEASLEY, C. J., and DIXON, MAGIE, and GARRISON, JJ.

Vall & Ward, for plaintiffs. W. Strong & Sons, for demurrant.

GARRISON, J. This is a demurrer to a declaration. The facts thereby established are that the plaintiffs are the assignees of a judgment recovered by their assignor against the defendant in the year 1875; that the said assignment was by deed, and for a valuable consideration; and that at the time of said

assignment the plaintiffs were the executors of one Martha Clark, deceased.

Two grounds for demurrer are set up. The first is that the said judgment was recovered prior to March 4, 1890, that being the date of the approval of the act that authorizes the assignees of judgments to sue in their own names. P. L. 24. The argument is that the act is in all respects prospective, and hence does not apply to judgments recovered prior to its approval. This does not seem to me to be sound. The title of the act, viz. "To regulate the practice of the courts of law," indicates that the subject-matter of its remedial features is one of procedure. To carry the language of the act to the aid of those assignees only whose rights accrued since the approval of the act would in no wise sustain the present contention. The grammatical form adopted, viz. "All judgments recovered in any of the courts of this state," certainly does not militate against its application to a judgment described in the past tense, as "recovered."

In the face both of this plain interpretation of unambiguous language, and of the clear spirit and reason of the legislative design, the contention of the demurrant cannot prevail. The second ground is that the claim is not one that can be maintained by executors. The force of this objection is gone, if, upon this demurrer, we must assume that the plaintiffs sue upon a contract made with them as executors. This is the allegation of the narr., and there is no allegation that the assignment was made upon any contract, express or implied, made with their testatrix. The furthest the plaintiffs' pleading can be carried is that the action accrued to them as executors, i. e. since the death of their testate. This brings the case within the previous adjudication of this court in *Stewart v. Richey*, 17 N. J. Law, 164, which disposes effectually of all contention in this respect.

The demurrer must be overruled.

(59 N. J. L. 235)

GRAHAM v. ORANGE COUNTY NAT. BANK.

(Court of Errors and Appeals of New Jersey. Nov. 17, 1896.)

BANKS—IMPUTABLE KNOWLEDGE OF OFFICERS.

If an officer of a bank, who is also a member of its discount committee, take part in discounting a note made to him individually for an unlawful purpose in which he participated, his knowledge of such illegality is not imputable to the bank.

(Syllabus by the Court.)

Error to circuit court, Passaic county; before Justice Dixon.

Action by the Orange County National Bank against James A. Graham. Judgment for plaintiff. Defendant brings error. Affirmed.

Eugene Stevenson, for plaintiff in error. Munson Force and Michael Dunn, for defendant in error.

GARRISON, J. The case upon which the court below directed a verdict for the plaintiff was this: Graham, the defendant in the suit, had made a note payable to and indorsed by G. W. Murray, which was discounted by the plaintiff. At the time the note was thus discounted, Murray, the payee of the note, was president of the plaintiff corporation, and, together with its cashier, constituted the discount committee. The defense was that Murray knew that the note was given to raise funds for an illegal purpose, and that his knowledge was imputable to the bank. The law upon the subject of imputable knowledge is laid down by this court in the case of *Willard v. Denise*, 50 N. J. Eq. 482, 26 Atl. 29. In the case before us Murray did not act at all for the bank. His conduct was actuated wholly by personal reasons; and, if he knew that he was taking part in an unlawful transaction, the bank cannot be charged by his guilty participation.

This disposes of the only error assigned. The judgment will be affirmed.

(59 N. J. L. 218)

HOBOKEN PRINTING & PUBLISHING CO. v. KAHN.

(Court of Errors and Appeals of New Jersey. Dec. 8, 1896.)

LIBEL—LIABILITY OF CORPORATION—PUNITIVE DAMAGES.

1. When a corporation is engaged in publishing a newspaper, and from the evidence it may be inferred that a libelous article published therein has been edited and published by some person employed for that purpose, the corporation will be liable to the person libeled to the same extent that an individual would be who had personally made such a publication.

2. Where the libelous article contained charges of dishonest, fraudulent, and criminal conduct, and, upon a retraction being demanded, a second article was published which might be construed as containing a covert and evasive reiteration of the original charges, it was not error to refuse to charge that no punitive damages could be awarded.

(Syllabus by the Court.)

Error to supreme court.

Action by Gustav Kahn against the Hoboken Printing & Publishing Company. Judgment for plaintiff. Defendant brings error. Affirmed.

William S. Stuhr, for plaintiff in error. Gilbert Collins, for defendant in error.

MAGIE, J. The writ of error in this case brings here the record of a judgment obtained by Kahn, the defendant in error, against the Hoboken Printing & Publishing Company, the plaintiff in error, in an action for libel. A previous judgment in Kahn's favor was reversed in this court, on account of the exclusion of evidence which a majority of the judges thought should have been admitted. *Publishing Co. v. Kahn*, 83 Atl. 382, 1060. A venire de novo having issued, Kahn obtained another verdict against the company, on which the judgment now before us was entered.

The assignments of error are directed to the conduct of the trial, and the first error alleged is that the trial judge refused to nonsuit Kahn at the close of his case. The bill of exceptions shows that the motion to nonsuit was put on two grounds: (1) That no damages had been proven; and (2) that it had not been shown that anybody had seen the printed articles which Kahn had put in evidence besides himself.

The first article put in evidence was that on which the declaration was founded, which reads as follows: "Gone with the Boodle. Gustav Kahn, who was employed as ticket taker at one of the entrances at the Eldorado, is among the missing. So is about two hundred (\$200) dollars of the gate receipts which were taken in Monday night. Detective Woods is looking for the festive Kahn, but up to date he can't be found. Kahn is said to be sequestering himself over on Long Island. Surely the Eldorado is having trouble upon trouble."

The second article put in evidence reads as follows: "Mr. Kahn Denies. A Story of Which Detective Woods is the Author. Gus Kahn is the assistant manager at the Eldorado, and says he is not, and never has been, ticket taker. A statement was published on Wednesday to the effect that, on Monday night, about two hundred (\$200) dollars of the gate receipts at the Eldorado was missing, and that Detective Woods was looking for Mr. Kahn, who, it is alleged, had gone to Long Island. Mr. Kahn called to-day at the Observer office, and said there was absolutely no truth whatever in the story. He added that no money was missing, and that he has been at no time ticket taker. The information in the matter was given to a reporter by Detective Woods. Detective John Woods, when seen to-day by an Observer reporter, said that he and Detective Clifford had heard from numerous persons the report that Kahn has skipped with the receipts. Detective Woods said, also, that he and Detective Clifford had made an investigation, and a considerable number of the employes informed them that they also had heard the story about Kahn's sudden disappearance, and that money had gone with him. An officer of the park is willing to swear that he found the office, which Kahn had charge of, open after the park closed. It was common rumor that Kahn had gone off with the 'boodle.' An usher said, in the presence of an Observer reporter and the two detectives, that he could not expect to get his pay now, as Kahn had gone off with the cash."

As the first article plainly imputed to Kahn conduct which was dishonest, fraudulent, and even criminal, evidence of any special damage was wholly unnecessary. Unless shown to be true, and to have been published for the ends and motives described in our constitutional provision on the subject, the publication of the article clearly entitled Kahn to recover damages. There was, therefore, no reason to nonsuit on the ground first alleged. In respect to

the second ground relied on for a nonsuit, the bill of exceptions shows that it was afterwards disclosed by the evidence that the Observer, in which the articles in question had been published, was a newspaper printed and circulating in the city of Hoboken, from which the jury might well infer that they were seen by others who read that newspaper. Where the ground for nonsuit is a defect in evidence which is afterwards supplied, it is well settled that no reversal should follow.

The second assignment of errors is based upon an exception to a portion of the charge of the trial judge, covering a page and a half of the printed case, and containing three distinct and disconnected propositions. This exception is so general that it is doubtful whether a reviewing court ought to consider the single point on which it is now argued that there was error. But that point is raised under the next assignment of errors.

The third assignment of errors is based on an exception taken to the refusal of the trial judge to charge, as requested, that the jury could not give punitive, but only compensatory, damages. That damages such as are called "punitive," or "vindictive," or "exemplary," may be awarded in actions of libel, is a doctrine established by a long line of decisions. Mr. Addison says that wherever injury has been done to the fair fame, reputation, or character of the plaintiff, juries are generally invited to give, and are justified in giving, such a sum as marks their sense of the maliciousness or recklessness of the wrongdoer in offering the insult and injury, their belief in the groundlessness of the charge, and their desire to vindicate the character of the plaintiff. *Add. Torts*, 968. I do not understand that the counsel for the company in this case challenges this doctrine. His contention rather is that there is nothing in the evidence to justify the award of exemplary damages. Nor does he deny the liability of a corporation to an action for libel, which was settled by this court in *Association v. McDermott*, 44 N. J. Law, 430; nor that a corporation engaged in the business of publishing a newspaper will be responsible for damages done to reputation by articles published therein by agents employed for that purpose. But the claim is that exemplary damages may not be awarded in such a case unless the corporation approves and adopts the act of its agents in making such publication, and in support of this claim reliance is put upon the doctrine laid down by the supreme court in *Haines v. Schultz*, 50 N. J. Law, 481, 14 Atl. 488. It appeared in that case that the proprietor of a newspaper in which a libelous article was published was ignorant of its publication until after it had appeared. It was held that he would not be liable to punitive damages for a publication, made without his knowledge or consent, except upon proof of his subsequent approval of such publication. But it is unnecessary to determine whether the doctrine of that case is sound. A corporation engaged in publishing a newspaper obviously must act by selected agents. Its directors or managers cannot formally pass on each publication, or determine

what is to be admitted therein. Such determination is necessarily committed to its agents. In making such determination, they are acting within the scope of their employment. The intent with which they publish must be imputed to the corporation which employs them to make the publications of the newspaper. If the intent is malicious, the corporation must be liable therefor, as it is for other tortious acts of its agents, done within the scope of their authority, and for the purposes for which the corporation was created and the agents were employed. *Gillett v. Railroad Co.*, 55 Mo. 315; *Samuels v. Association*, 75 N. Y. 604, approving the dissenting opinion of Davis, P. J., in *Id.*, 9 Hun, 288; *Johnson v. Dispatch Co.*, 2 Mo. App. 565; *Hewitt v. Press Co.*, 23 Minn. 178.

Now, the proof disclosed by the bill of exceptions was that the article upon which the action was brought was written by a reporter, and that it appeared in the paper with the headline, "Gone with the Boodle"; that Kahn, the day following its publication, demanded of the managing or city editor a retraction of the charge against him; and that the second article thereafter appeared. From this there was a plainly justifiable inference, to wit, that the article sued upon was received, edited, and published by some agent of the company intrusted with that duty, and that the second article emanated from and was published by some one having that power conferred upon him by the company. Upon that inference being drawn, the liability of the company is precisely the same as that which an individual would incur by publishing such articles. Looking, then, at the first article, which charges Kahn with fraudulent and criminal conduct (a charge which the company did not pretend to justify), I think it obvious, not only that its language indicated what the law calls "malice,"—i. e. absence of lawful excuse (*Odgers, Sland. & L.* *265),—but that its publication in a public newspaper indicated such a wanton and reckless disregard of Kahn's right to an unchallenged reputation that the jury might have been instructed to consider whether an increase of damages beyond those which would merely compensate him, and which would be sufficient to rebuke the malicious and reckless wrongdoer, and vindicate Kahn's character, ought not to be awarded. But, clearly, such an instruction was proper when the second article is considered. This was admissible in evidence under the doctrine laid down in this court in *Association v. McDermott*, supra. That it might be construed as a covert and evasive reiteration of the original charge is plain. If so, there was evidence in it of express malice and ill-will, which justified a refusal to instruct the jury that no damages of a punitive or exemplary character could be allowed. The result is that the judgment must be affirmed.

DIXON, J. (dissenting). By its course at the trial the defendant corporation seems to

me to have admitted its legal responsibility for the libels, but to have denied its responsibility for punitive damages. Such a position is a perfectly rational one, for the doctrine of respondeat superior might make the corporation answerable for compensatory damages, and not for vindictive damages. The position was also permissible on the proofs, for they utterly failed to show against the defendant any ground of liability whatever; and if the corporation chose to admit by its silence such obligation as the maxim above mentioned would impose, it was certainly nevertheless at liberty to demand that appropriate evidence should be produced, before any greater charge was fastened upon it. Without such evidence and in the face of the defendant's protest, it was erroneous to permit the jury to award exemplary damages; and for such error the judgment should be reversed.

(59 N. J. L. 255)

SUPREME LODGE OF KNIGHTS OF
PYTHIAS OF THE WORLD v.
ESKHOLME et al.

(Court of Errors and Appeals of New Jersey.
Nov. 17, 1896.)

BENEFICIAL ASSOCIATIONS—SUSPENSION OF MEMBERS—JURISDICTION.

1. To render the judgment of a benefit lodge concerning property rights valid, jurisdiction must appear, by evidence of compliance with the modes of procedure relating to notice to parties and in other particulars.

2. Irregularities of procedure in the course of the inquiry in such a case, which are contrary to general principles of law, may invalidate the conclusions reached.

3. Want of jurisdiction will obviate the necessity of appeal, under rules otherwise applicable.

(Syllabus by the Court.)

Error to circuit court, Essex county; Childs, Judge.

Action by Emma Frances Eskholme and others against the Supreme Lodge of Knights of Pythias of the World. Judgment for plaintiffs. Defendant brings error. Affirmed.

J. Franklin Fort, for plaintiff in error. Riker & Riker, for defendants in error.

BARKALOW, J. The defendants in error in this case brought a suit against the plaintiff in error in the Essex circuit court upon a certificate of insurance in the Endowment Rank of Knights of Pythias of the World, issued to Samuel Granger. The defense pleaded was that Samuel Granger had been suspended indefinitely from the subordinate lodge of which he was a member, and that the insurance was thereby forfeited. The case was tried by a circuit judge without a jury, upon an agreed state of facts, together with certain testimony, taken in another suit, which was made evidence in this case by agreement. Judgment was rendered for the plaintiffs by the trial judge upon his findings of facts, and upon a writ of error to the supreme court that judgment was approved, and is now brought

here for review. These findings, unless unsupported by evidence, must be accepted by us as the facts in the case. We do not find any error in this particular, except as to the conclusion that the committee of investigation was appointed by the lodge, and not by the chancellor and vice chancellor; but that conclusion seems to be without warrant in the testimony, so that we feel constrained to omit that alleged circumstance from consideration. All that appears with regard to it is as follows: "It is agreed that on November 1, 1887, the said charge was received by the lodge, and a committee was appointed to investigate the same, and that the minutes of the lodge on this subject are as follows: 'Nov. 1-1887. Moved that the charge of Bro. M. S. Crane be received, and committee be appointed. The same were as follows.'" And here the names are given. It is not stated by whom they were appointed. The facts in this case were largely the subject of agreement, and appear in writing in the "agreed facts"; and the pertinent sections of the constitution of the order also form a part of the case. It is unnecessary here to comment upon those particulars of this agreement which are not in controversy, or to reprint the documents referred to which appeared in the case. The following requirements of the established mode of procedure of this organization are the ones to be noted:

1. Constitution of La Mancha Lodge, art. 10, § 1: "Charges or complaints made against members of the lodge, under the penal provisions of the laws, rules, and regulations, shall be reduced to writing, and distinctly state the cause, on or about the time and place of occurrence; said charges or complaints to be presented to the lodge at a regular session thereof, read, received, and laid over to the next meeting of the lodge." It appears that on October 25, 1887, charges were preferred in writing against Samuel Granger, "read," and "laid over," and that on November 1, 1887, one week after, "the said charge was received by the lodge, and a committee was appointed to investigate the same." Such is the phraseology of the minutes. The article and section of the constitution already referred to further provides for service upon the accused of a copy of the charges, and also a "notice that the matter will be taken up at the next session of the lodge, giving day and date, when a committee of five members in good standing shall be appointed." No notice of the intended appointment of this committee appears to have been served upon Samuel Granger. The only notice which appears is one of November 9, 1887, commanding Granger to appear before the committee of trial on November 21st, then and there to answer to the charges and specifications preferred. This is the first error appearing in the proceedings which were necessary to give jurisdiction.

2. The second section of article 10 of the constitution of this body provides that, after having received all the evidence, and proofs

presented, a written report of the findings as to the guilt or innocence, together with the recommendations, of the committee in the case, the journal of their proceedings, and the testimony received, shall be presented to the lodge at the second meeting thereafter. On November 29, 1887, being apparently the second regular meeting of the lodge after November 21st, it appears that a report of the trial committee was read, and a minority report was laid on the table; then, that a motion was made that the report of committee on trial be again read and carried; that a motion was made that Granger be suspended indefinitely from the lodge; and, finally, a motion was made to notify Granger to appear before the lodge "on December 12, 1887, when action would be taken on his case." The minutes of this meeting are obscure, but they seem intended to indicate that the first two motions were carried. The motion to suspend Granger does not seem to have been put to a vote, and the same would be true of the motion to notify him that action would be taken on the 12th of December, did not the letter mailed to him imply that it was passed. It does not appear in evidence that the report of the trial committee was accompanied by a recommendation, or by the journal of their proceedings, or by the testimony received. So far as appears in the case, the motion to suspend was made without reference to any recommendation of the committee, and was postponed without action. This is the second error appearing in the proceedings.

3. It is to be observed that the notice to Granger to appear and "hear the report of the committee of trial," and "what other business pertaining to his case might come before the lodge," was given for the 12th of December. It is admitted that there was no meeting of the lodge, regular or special, held on that day; and this misleading notice constitutes, on general principles, a third error in procedure.

4. The third section of article 10 of that constitution provides that, upon consideration of such a report, "a vote shall be then taken, the question being—First, shall the lodge adopt the findings of the committee as to the guilt or innocence of the accused? which shall be decided by a majority vote; second, shall the recommendation of the committee stand as the judgment of the lodge?" On December 13th, the day after Granger was notified to appear to hear the report, the report was taken from the table, and no action taken upon it so far as the minutes show; neither was any reference made to any recommendation of the committee, but a motion was made, and carried by a two-thirds vote, that Granger be suspended indefinitely. Here, it will be seen, was no such vote as the constitution requires. The separate questions were not put as directed, and a simple motion to suspend was made and passed; and this constitutes a further irregularity.

In *Vivar v. Knights of Pythias*, 52 N. J.

Law, 455, 20 Atl. 36, it was held that a vote to suspend for 99 years was in effect to expel; and the same is true of a vote to suspend indefinitely. And it was also held, in that case, that "an attempt at expulsion, without conviction had in accordance with the rules of the society, or under the general principles of law, is nugatory. The membership of the individual continues." In this case it will be seen that jurisdiction was not acquired by proper notice of the appointment of a committee of trial, and that the proceedings were in other respects irregular, and not such as to justify or sustain a judgment. The want of jurisdiction does away with the obligation to seek relief by appeal, even when required by the constitution of a lodge in otherwise proper cases. "The obligation to appeal is not imposed when the judgment is void for want of jurisdiction. * * * The duty of an expelled member to exhaust, by appeal or otherwise, all the remedies within the organization, arises only where the association is acting strictly within the scope of its powers." Bacon, Ben. Soc. § 107.

The judgment rendered by the circuit court and approved by the supreme court should be affirmed.

(59 N. J. L. 186)

MAHER v. THROPP.

(Court of Errors and Appeals of New Jersey.
Nov. 23, 1896.)

NEGLIGENCE OF CO-SERVANT—LIABILITY OF MASTER—DEFECTIVE TOOLS.

1. It is the duty of the master to furnish proper implements to his servants for the performance of their work, and if he intrusts that duty to a co-servant the master is liable for the negligence of the co-servant in performing it.

2. But, if safe and proper tools are supplied by the master, he is not liable for an injury which his servant receives by using, under the direction of the foreman over such servant, a tool not furnished for or adapted safely to the work.

(Syllabus by the Court.)

Error to supreme court.

Action by James Maher against William R. Thropp. From an order directing a nonsuit, plaintiff brings error. Affirmed.

Barton & Dawes, for plaintiff in error. W. D. Holt and Chauncey H. Beasley, for defendant in error.

VAN SYCKEL, J. This is an action by a servant against his master to recover damages for personal injuries sustained in the master's employment. He was an ordinary workman, who assisted in the boiler-making shops, and at the time of the injury was engaged in striking with a sledge hammer upon the boiler. It is admitted that he was furnished with proper implements to do his work, but by the direction of the foreman of the boiler makers he undertook to do his work with other tools, in consequence of which he received the injury complained of. It is not open to controversy in this state that the boss or foreman of other men who

work under his direction is the fellow servant of those men. O'Brien v. Dredging Co., 53 N. J. Law, 291, 21 Atl. 324; Gilmore v. Nail Co., 55 N. J. Law, 39, 25 Atl. 707. The authority of these cases has been recognized in this court so recently that it is unnecessary to refer to other cases. Steamship Co. v. Ingebregsten, 57 N. J. Law, 400, 31 Atl. 619. Notwithstanding this relation which exists between the co-employés, there are certain duties which the master owes to his servant, and for the due performance of which he is responsible, although he intrusts the execution of them to a co-employé with such servant. This case will be solved, therefore, by determining whether the act which caused the injury to the plaintiff was one which the master himself was bound to perform, or the act of the foreman in the execution of his duty merely as foreman and co-employé of the plaintiff. If the master occupies the former position, he must respond for the negligence of the foreman; if the latter, the action cannot be maintained. The master was charged with the duty to furnish to the plaintiff proper implements with which to do the work in which he engaged. If he intrusted the discharge of that obligation to the foreman, he is undoubtedly responsible for the failure of the foreman to exercise due care in that respect. The injury to the plaintiff is in no way chargeable to the failure of the master to furnish proper tools. On the contrary, the accident is attributable wholly to the fact that the plaintiff, under the advice of the foreman, laid aside the safe tool, and used in its place a chisel and a pair of tongs. In doing this the foreman did not act as the vice principal, standing in the place of the master, but acted as a fellow servant, performing, with the assistance of the plaintiff, the work in which both were engaged and for which the master had provided the necessary implements with due care. In McAndrews v. Burns, 39 N. J. Law, 118, the liability of the master was denied where he had furnished the appliances necessary to secure the safety of his workmen, and the injury resulted from the neglect of a fellow servant to use them. This was conceded to be the law in O'Brien v. Dredging Co. and Gilmore v. Nail Co., supra. The question, therefore, does not arise in this case whether it was the duty of the master to see that the servant was properly instructed in the use of implements furnished by him for the execution of the work. The trial judge properly directed a nonsuit, and the judgment below should be affirmed.

(56 N. J. E. 795)

WARNER v. WITHROW et al.

(Court of Chancery of New Jersey. Nov. 23, 1896.)

FRAUDULENT CONVEYANCES—CONSIDERATION OF TRANSFER—EVIDENCE—DEED AS MORTGAGE.

1. On an issue as to whether the grantee in a deed sought to be set aside as fraudulent had paid

a certain sum for the transfer, a receipt, signed by the grantor, to the truth of which both he and the grantee testified, sufficiently shows such payment, though the manner in which the payment was alleged to have been made was improbable because of the state of the grantee's business affairs, though no writing passed between the parties, other than the deed and the receipt, and though the grantee took no active part in defending the transfer.

2. In a creditors' suit to reach property fraudulently transferred, where the price obtained was far below the market value of the property, and the grantor only took an active part in defending the transfer, the court will consider the transaction a mortgage, and decree that the complainant may redeem on paying to the transferee the actual sum paid, with interest.

Creditors' bill by Cornelius E. Warner against Andrew J. Withrow and others. Heard on pleadings and proof. Conditional judgment for complainant.

Howard Carrow, for complainant. Samuel E. Perry, for defendants.

PITNEY, V. C. The complainant is a judgment creditor of the defendant Risley Barlow, and by his bill seeks to have set aside a conveyance, made by Barlow to the defendant Withrow, of premises formerly owned by Barlow, situate in Atlantic City, N. J. The allegation of the bill is that the conveyance was made by Barlow to Withrow for the express purpose of defrauding the complainant, and defeating the collection of his debt, and that it was made without consideration paid by Withrow to Barlow, or, if any consideration was paid, still that Withrow had full notice of Barlow's object in making the conveyance. The proofs fully establish the first of these allegations, viz. that Barlow conveyed the premises to Withrow for the purpose of preventing the complainant collecting his debt. The circumstances are these: On or before the 25th of June, 1895, the complainant held the promissory note of Barlow for about \$10,000, with warrant of attorney to confess judgment, and Barlow had verbally promised the complainant to convey to him the premises in question in satisfaction of that note. On June 25, 1895, Barlow conveyed the premises to one Alcorn for the expressed consideration of \$14,000. They were, at that time, subject to two mortgages, amounting (principal and interest) to about \$7,000, and were worth about \$15,000. Barlow swears that Alcorn paid him \$1,000 or \$1,200 in cash on account of the purchase money, and agreed to pay the balance. On the same day,—June 25, 1895,—under pressure, Barlow confessed a judgment in the Atlantic circuit court in favor of one Turner, to secure \$534.71 debt and costs. Immediately after this conveyance, Barlow, Alcorn, complainant, and his counsel had an interview with regard to satisfying complainant's demand, which produced no results, in the course of which complainant charged Barlow with having made the conveyance to Alcorn for the purpose of defeating complainant's debt, and Barlow

declared that he would do or had done so. On the 29th of June complainant entered up judgment upon his note against Barlow in the court of common pleas of the city of Philadelphia. On July 29th he commenced a suit in the supreme court of New Jersey against Barlow, founded on the Philadelphia judgment. The summons was accompanied with a copy of the declaration and notice, which had the effect of hastening the judgment unless defense with merits was entered. Immediately after the commencement of this suit, on August 1st, Alcorn reconveyed the premises to Barlow, and on the same day Barlow mortgaged them to one McCormick to secure \$1,733.54. He filed a plea to the suit on the judgment in time to enable the complainant to notice the cause for trial at the Camden circuit on the 10th of September, 1895. On the 9th of September, the day before the Camden circuit opened, Barlow, together with his wife, conveyed the premises, by deed of that date, to the defendant Withrow, for the expressed consideration of \$11,397.35. This consideration, Withrow swears, was made up of the sum of the several mortgages, judgment, and taxes in arrears, with \$2,500 added thereto. The deed was recorded on the 10th of September, 1895. The cause of Warner v. Barlow was reached on the list on the 24th of September, verdict for the plaintiff promptly rendered, and judgment entered thereon on the 9th of October. No money was paid at the time the deed from Barlow to Withrow was actually executed and recorded. The defendant Withrow swears that he had paid Barlow \$1,150 on the previous 3d of September. A search for judgments in the supreme court was obtained under date of the 6th of September. Mr. Withrow's counsel in the matter was Mr. Samuel E. Perry, who was also the attorney for Barlow in the defense of the action at law brought by complainant, and is the solicitor of both defendants in this cause. He made the necessary searches, prepared the deed, and attended to its execution and recording. On the 10th of September, the day the deed was actually recorded, Withrow paid Barlow \$700, in two checks, of \$350 each, drawn on two different banks in Atlantic City; on the 14th of September, he paid him \$500, in two checks, one of \$150 and the other of \$350, drawn, severally, on the same two banks; and on the 25th, the day after the verdict was rendered, he paid him \$150, in three checks, one of \$20 and one of \$100 on one bank, and one of \$30 on the other bank,—making a total payment, proven by checks, of \$1,350. And, if the \$1,150, alleged to have been paid on the 3d of September, was actually paid, the payments aggregate \$2,500. The serious questions in the cause are: First, whether the price fixed—\$11,397.35—was so much below the ordinary market value of the property as to indicate fraud; second, whether the \$1,150, alleged to have been paid on the 3d

of September, was actually paid, or not; third, whether Withrow had notice that Barlow was making this conveyance for the purpose of defrauding his creditors; and, fourth, was the conveyance an absolute one, or by way of mortgage?

The only written evidence of the \$1,150 payment is a receipt in pencil, signed by Barlow, and dated on the day in question,—September 3d. Withrow, who is a furniture dealer in Atlantic City, swears that he paid the money to Barlow at his (Withrow's) place of business, on the day the receipt bears date, in eleven \$100 bank notes and one \$50 bank note. The allegation of such a payment, by a man who kept accounts in three different banks in his city, and who was making almost daily deposits in one or the other of these banks, challenges close scrutiny. In fact, I find it difficult to believe. The receipt forms the only contract in writing that was made between the parties, and it reads in this wise: "Atlantic City, New Jersey, 9-3-'95. Received of A. Withrow \$1,150, as first payment on property 1824, 1824½, and 1826 Atlantic avenue. Balance, to make up \$2,500, to be paid in thirty days." On that same day—September 3d—he deposited in one of his banks \$100. On the 10th of September, the day after the deed was executed, and on which he drew the two checks for \$350 each, he deposited in one of his banks \$600 and in the other \$500,—both even money. And, as he swore that he was in the habit of depositing daily the silver and small bank notes which he received in the course of his business, these deposits of September 10th must have been of large bills, and must have been over and above the alleged payment of \$1,150 on September 3d. In explanation of his having so large a sum of money in large bank notes in his safe, when he was doing business in a town where there were three banks, and keeping an account in each of them, Withrow swears that he frequently received, in the course of his business, these large bank notes from persons who were stopping temporarily in Atlantic City, and who paid in large notes, and not by check, and that he preferred to keep them on hand rather than deposit them, because, when he had occasion to pay his bills in Philadelphia or in New York, he preferred to pay them in bank notes rather than checks. This explanation is possible, but not probable, and its improbability was pointed out to him at the hearing. Then, at a later day, he produced his books of account in court, and attempted to show when and from whom he had received several of these \$100 notes. He accounted for it in this way: That certain persons paid him accounts due for less than \$100, offered him a \$100 note in payment, and he paid them the change. He said that it was his habit, during the summer season, when most of his sales were effected, to save all the large notes in his safe, and deposit in the bank the small notes and silver which he received, and that he kept three bank accounts, in order that he might

deposit such promissory notes as he had for collection in the particular bank where each was made payable. A close examination of his books did not furnish any evidence of the payment of large bank notes, but simply instances where, by his unaided memory, he was able to swear that he did receive a large bank note in overpayment of his bill, and gave change; and in one case—Snyder's—he fixed the payment on September 6th. None of his clerks were called to corroborate him in this respect, nor to support his statement that the \$1,150 was actually paid, although he says that some of them were near by when it was paid. In fact, Withrow was called, and, I believe, subpoenaed, by the complainant, and paid very little attention to, and apparently took little interest in, the defense, which seemed wholly in the hands of Mr. Barlow, who hunted up the witnesses on the part of the defense, and procured their attendance, and sat by counsel during the hearing. Withrow swears, in effect, that Barlow came to him, and requested him to buy this property, and that he applied to Mr. Perry to look after the title, and that he did so, and that the deed was drawn and executed under Mr. Perry's supervision, and sent by him to May's Landing to be recorded. He swears that he paid Barlow \$1,150 in advance of getting the deed, and trusted him on the sole faith of the receipt above mentioned, and that when the deed was delivered Barlow trusted him without anything to show, except his word, for the balance of the consideration money, and, further, that all these payments were made in the absence of Mr. Perry. His examination as to the time when the receipt was prepared is as follows: "Q. When was that receipt given? A. That receipt was given on the day the money was paid. Q. Not a fresh receipt? A. No, sir; does not look very fresh." My examination of it at the time, and afterwards in going over the case, results in finding indications that it had been purposely rubbed over by the fingers in order to give it an old appearance. Barlow, upon close examination, failed satisfactorily to show what disposition he made of the \$1,150, if it was paid.

And then there are other circumstances which it is difficult to reconcile with the actual payment of the \$1,150, as sworn to. On the 10th of September, the day of the record of the deed, Withrow made two deposits, in two banks, of even money,—\$600 in one, and \$500 in the other,—and then drew against those two banks two checks, of \$350 each. Now, why was that course taken? Seven days earlier he had paid, as he alleges, \$1,150 in bank notes to Mr. Barlow; and why should he make two deposits in bank on the 10th, and then draw checks against them? Why not make a direct payment of \$700 on that day out of the moneys that he deposited in bank? If it be true that he was handling these large bank notes, then we may fairly presume that the two deposits of \$600 and \$500 were made with large bank notes; but,

whether in large bank notes or small, they were still presumably bank notes, and capable of tradition directly to Mr. Barlow, without going through the act of depositing and drawing checks against them. Another circumstance arrests attention. Withrow swears that, at and before the signing of the contract of September 3d, Mr. Barlow stated to him the amount of the incumbrances on the premises, and that they added up, with the \$2,500 agreed to be paid, to the exact sum of \$11,397.35, and that that sum was the price agreed to be paid for the premises, and subsequently inserted in the deed of conveyance. He says that he relied upon Barlow's statement, but, before taking the deed, had it verified by Mr. Perry. That statement was inaccurate, to the extent, at least, of the interest, several years in arrears, on the complainant's mortgage, amounting to between \$400 and \$500. So that Withrow was under no obligation to pay to Barlow the whole sum of \$2,500, but was clearly entitled, under the contract, to withhold therefrom enough to pay the interest on complainant's mortgage, or whatever sum was necessary to reduce the whole purchase price down to the sum mentioned in the deed. And yet, apparently without any inquiry into the amount due for arrears of interest, he proceeded, after the delivery of the deed, to pay to Barlow the whole amount of \$2,500. Now, the question arises, why did he do that? Now, taking all these circumstances together,—the improbability of Withrow's having that amount of money lying in his safe; of his paying that amount to Mr. Barlow without anything in writing, more than the receipt, to show for it, and without any inquiry into his circumstances and the incumbrances on the property, other than what was stated to him by Mr. Barlow, and the subsequent dealings between the parties; and their conduct and behavior before the court, the apparent indifference of Mr. Withrow, and the strict attention paid to the case throughout by Mr. Barlow,—leaves my mind far from satisfied that any such money was paid. But both Withrow and Barlow were called as witnesses by the complainant, who thereby, in a measure, approved them as such. Their evidence is contradicted, except by the circumstances before pointed out. The courts in these cases are not to presume fraud, and there is not the least evidence that Withrow knew of Barlow's fraudulent intentions. He produces the receipt for the money, signed by Barlow, and swears that he paid it; and I feel constrained, notwithstanding the very grave doubts I have entertained, to find, as a matter of fact, that he probably did pay the whole \$2,500.

But that does not dispose of the case. I have said that Barlow's object was to defraud the complainant. He appears to have provided for several of his creditors in the mortgage to McCormick, and he swears that the object of making the sale was to get money in his pocket to live upon. The price ob-

tained for the property was \$2,000 to \$3,000 less than its fair market value. The conduct of the parties in the presence of the court, the interest taken by Barlow, and the indifference manifested by Withrow in the issue of the suit, and the fact that an even sum of money—\$2,500—was paid for the property over and above the incumbrances, indicate to my mind that the transaction was that of a mortgage, and that Barlow expects to get some further benefit from the property. A man in his circumstances has no right to give away his property, or to sell it at a price much below its value, for the sake of getting ready money, and preventing his property going to pay his debts; and I think that, when such a case arises, the inclination of a court of equity should be to hold the transaction a mortgage, instead of an absolute sale, as was done in the case of *Demarest v. Terhune*, 18 N. J. Eq. 532. I shall therefore advise a decree that the complainant have leave to redeem the property by paying to the defendant Withrow the sum of \$2,500, with interest; the latter to be charged with the rents and profits of the premises in the meantime, and credited with the expenses of repairs and taxes. For that purpose an account must be taken. If the complainant shall decline to take such a decree, the bill will be dismissed, with costs as to Withrow.

(59 N. J. L. 375)

STATE ex rel. TRUSTEES OF SCHOOL
DIST. NO. 7. v. SHERMAN, County
Superintendent.

(Supreme Court of New Jersey. Nov. 23, 1896.)

SCHOOL DISTRICTS—DISTRIBUTION OF STATE
MONEYS.

The county superintendent of public schools, in apportioning the state school money among the school districts in his county, on the basis of the last published school census, under the amendment of the public school act approved March 31, 1896, has no authority to inquire into the legality of the constitution of an existing school district, designated as such in said census.

(Syllabus by the Court.)

Application by the state, on the relation of the trustees of school district No. 7, for mandamus against Elmer C. Sherman, county superintendent. Denied.

Argued November term, 1896, before LUDLOW and DIXON, JJ.

Edward M. Colle, for relators. Adrian Riker, for respondent.

DIXON, J. The trustees of school district No. 7, Central Union, in the county of Essex, ask for a mandamus directing the superintendent of public schools in that county to apportion to them a share of the state moneys on the basis of the last published school census, without any deduction because of the number of children residing within the borough of Glen Ridge. The duty which it is thus sought to enforce is imposed by the first section of an amendment to the public school

act approved March 31, 1896 (P. L. 1896, p. 217), in the following terms: "It shall be the duty of the county superintendent of each county, on or before the fifteenth day of May annually to apportion to the districts of his county * * * the remainder of the school moneys belonging to his county on the basis of the last published school census." In making his annual apportionment in May, 1896, the county superintendent, notwithstanding the objection of the relators, allotted a share of the state school money to Glen Ridge as a separate school district, thereby diminishing the share of the relators. The ground of objection to this award is that Glen Ridge is not, in legal contemplation, a distinct school district, but the territory thereof forms part of the district over which the relators are entitled to control. It appears that on February 13, 1895, the borough of Glen Ridge became incorporated, and shortly afterwards elected borough officers, but did not elect school trustees. Thereupon the county superintendent, assuming that, under section 24 of the amendment to the public school act approved May 25, 1894 (P. L. 1894, p. 606; Gen. St. p. 3055), the borough was a separate school district, and that it had failed to elect trustees at the regular time, and therefore it had become his duty to act under section 3 of the same amendment, appointed such trustees, who at once organized themselves into a board of education. Against this action the relators appealed to the state superintendent of public instruction, under section 13 of the public school law (Gen. St. p. 3024), and he decided not to interfere with what had been done. On April 17, 1896, the borough of Glen Ridge regularly elected school trustees, who duly organized as a board, and these successive boards have had exclusive charge of the public schools within the borough since the first was organized in May, 1895. It further appears that in May, 1896, the state superintendent sent to the county superintendent a schedule, showing the amount of money awarded by the state to the county of Essex, the school districts among which it was to be divided, and the number of children in each district, which was to form the basis of apportionment. The latter data had been compiled by the state superintendent from the reports made to him in 1895 by the school census enumerators under the first section of the amendment to the public school act passed May 25, 1895 (P. L. 1894, p. 504; Gen. St. p. 3054). In this schedule Glen Ridge was designated as a separate school district, containing 344 children. According to the statement thus furnished to the county superintendent, he made the apportionment of which complaint is now made. In our judgment, he had no right to do otherwise. Whether legally constituted or not, Glen Ridge was in fact a school district, and was recognized as such by the school authorities superior in jurisdiction to the county superintendent. Moreover, the only evidence laid before or available to him of the "last published school census" showed

that Glen Ridge was a distinct school district, having 344 school children; and the mandate of the statute is explicit that he should make the apportionment according to that census. His duty was purely ministerial, and he could no more inquire into the legality of the constitution of the districts than he could into the accuracy of the enumerations. It is evident that such investigations would result only in a harmful disturbance of the system adopted for the support of public schools. The rule to show cause should be discharged, with costs.

(59 N. J. L. 248)

SUPREME ASSEMBLY, ROYAL SOCIETY
OF GOOD FELLOWS, v.
McDONALD.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1896.)

INSURANCE — ACTION ON BENEFIT CERTIFICATE —
EVIDENCE OF BAPTISM—NONPAYMENT
OF ASSESSMENTS.

1. In an action upon a benefit certificate issued by a society organized for social purposes and for the accumulation of a widows' and orphans' fund, guarantying the payment of a certain sum on the death of a member in good standing, the same rules of pleading and evidence will be applied as in an action upon an ordinary life insurance policy, as far as applicable.

2. A church register of baptisms, even when kept under circumstances which render it admissible as evidence, is proof only of the fact of baptism, and not of the age of the person, unless the age is at the same time duly recorded in the register.

3. When a society seeks to avoid liability upon a benefit certificate on the ground that the member failed to pay an assessment within the time required by its constitution and laws, the burden of proof rests upon the society to establish the failure; and such a defense should be specially pleaded, although the plaintiff has in general terms alleged compliance with all the rules, regulations, and demands of the society.

4. The defense, by a society, of forfeiture of benefits because of the nonpayment of an assessment at the time when due, will not be sustained unless it is first proved that the member charged with default had notice of the assessment in the way prescribed by the constitution and by-laws of the society.

(Syllabus by the Court.)

Error to supreme court.

Action by Eliza McDonald against the Supreme Assembly, Royal Society of Good Fellows. Judgment for plaintiff. Defendant brings error. Affirmed.

W. Holt Apgar, for plaintiff in error. Allen L. McDermott, for defendant in error.

NIXON, J. The plaintiff in error is a corporation organized under the laws of the state of Rhode Island, with power to institute and grant charters to subordinate assemblies in other states. In pursuance of such authority, a subordinate assembly was established in Jersey City, in this state. One of the objects of the corporation is to create a "widows' and orphans' benefit fund," from which, upon the death of any member in good standing, a sum not exceeding \$3,000 is to be paid to such member's family, as he may direct.

To constitute this fund, an initiation fee is paid by the members, who also become liable, upon the death of a member, to an assessment; the amount of the initiation fee and the subsequent assessments varying according to the age of the member, reckoned by a table of rates fixed by the constitution and laws of the supreme assembly. No person over 56 years of age or under 18 is eligible to membership. One John McDonald, a citizen of New Jersey, became a member of this corporation by initiation in the subordinate assembly instituted at Jersey City, having first complied with all the requirements of the constitution, rules, and regulations of the society, and received from the corporation a certificate entitled "Royal Society of Good Fellows' Benefit Certificate," for the sum of \$3,000, payable to Eliza McDonald, his wife, upon satisfactory evidence of his death, provided he remained in good standing in the order at the time of his death. The certificate is dated December 23, 1886, and duly attested by the officers of the supreme assembly. On the 15th of November, 1893, John McDonald died, and due proof of his death, as required by the laws of the society, was furnished to the supreme assembly. Payment of the \$3,000 stipulated in the benefit certificate being refused, Eliza McDonald, the widow and beneficiary, brought suit, and recovered judgment for that amount. The plaintiff in error, at the trial below, rested its defense upon two grounds, insisting—First, that John McDonald, in his written application for membership, falsely and fraudulently represented that he was under the age of 56 years; and, second, that he afterwards failed to pay one of the death assessments within the time prescribed by the constitution and laws of the society, and thereby was suspended at the time of his death from membership, and had forfeited all rights conferred by the benefit certificate.

The nature of the contract entered into by the parties to a benefit certificate such as was held by McDonald at the time of his death was stated by Justice Depue in the case of *Holland v. Supreme Council*, 54 N. J. Law, 490, 25 Atl. 369, in which the learned judge said: "The contract of the association with its beneficiary members is made up of the application for such membership, the certificate issued (which is an acceptance of the application), and the charter, constitution, and by-laws of the society, and in its construction and effect does not differ essentially from an ordinary policy of insurance." Therefore, by the well-settled law relating to life insurance policies, any false statement as to age in the application for membership, whether willfully or ignorantly made, whereby the insuring corporation was induced to make a contract it otherwise would not have made, or any failure by the insured to perform the obligations assumed by him in the contract, would be a sufficient bar to any action upon a certificate such as McDonald held. Article 3 of the constitution and laws of the supreme as-

sembly declares that only those who are between the ages of 18 and 56 years can become members. In the contention at the trial below that John McDonald was above the latter age when admitted, the plaintiff in error offered the deposition of one Peter Quinn, which was excluded by the trial judge from the consideration of the jury. The exclusion of this deposition is assigned for error. It was taken at Stewartstown, Ireland, by James B. Taney, United States consul at Belfast, who was duly commissioned for that purpose. Peter Quinn, the deponent, was the parish priest at Stewartstown, and was asked to produce, and did produce, the registry of baptisms of his parish, which, as he deposed, came into his possession when he assumed charge of the parish, and of which he has since had the custody. From this book, in answer to certain questions, he proceeded to read extracts giving the dates of baptism of certain children of Hugh and Sarah McDonald, the parents of John McDonald. But the name of John McDonald does not appear by this deposition to be upon the register at all, and the only probative effect it could have upon the question of his age is merely inferential, from the relative ages of other members of the family, reputed to be older or younger, for only the date of their baptism was recorded. It is a well-settled rule that a parish register showing only the date of a child's baptism is not evidence of the date of its birth or of its identity. The rule as to when the registry book itself is admissible does not seem so clear. In the case of *Childress v. Cutter*, 16 Mo. 24, it was held that "church registers are not admissible in evidence, except by statutory provision, unless the law of the country or state in which they are kept recognizes them as documents of an authentic and public nature." In the case of *Hunt v. Order of Chosen Friends*, 64 Mich. 671, 31 N. W. 576, the supreme court stated a somewhat different rule, and held that a sworn and examined extract from the parish record of a Catholic church, showing the baptism of the deceased party, and reciting the names of the parents and their description, and a statement of the age of the person baptized, supported by evidence of the priest that such a record was required by the rules of the church, which record is 30 years old, is admissible as evidence of age. Applying either of the above tests of admissibility, the incompetency of the deposition in question becomes apparent, for it fails to show by what law or authority the registry was kept, or by whom kept; neither does it state to what religious denomination the church at Stewartstown belongs. There was no error in excluding this deposition from the consideration of the jury.

Further error is alleged because the trial judge charged the jury in the following language: "Now, there is one part of this case that the court has concluded to deal with in such way that there will remain no difficulty

in your mind about it. It is contended here that he was not a member in good standing at the time of his death, in that he had not paid all the dues and assessments in the by-laws to be paid by him. The court has concluded to direct you not to consider that defense at all. As I perceive it here, that defense is not made out. The contention is not supported by any evidence, and the court directs you that you need not give that matter any consideration." In this action, as appears by the record, the plaintiff alleged the performance of all conditions precedent generally, and the plaintiff in error pleaded the general issue, and pleaded specially only the alleged misrepresentation as to age. At the trial, the defense was also made of the nonpayment of a death assessment within the time prescribed by the constitution and laws of the society. Section 126 of the practice act of this state requires such a defense to be specially pleaded. It has also been held in many cases that, unless the claim of forfeiture is specially pleaded, no such defense can be maintained at the trial. *Bittinger v. Insurance Co.*, 24 Fed. 549; *Gray v. Supreme Lodge*, 118 Ind. 293, 20 N. E. 833. But, leaving out of consideration any technical questions, it appears by the record that this part of the defense was based entirely upon some entries made in a book belonging to John McDonald, and purporting to be payments of assessments to the defendant corporation. There are 12 such payments recorded in the book, only one of which, the first, is alleged to have been made after the expiration of the time when due. But that the assessment was overdue is not proved by this book, for the same column which shows this one assessment to have been paid some eight days too late also shows two others to have been paid before they had been called. One assessment, entered in this book as called October 15th, is entered paid October 14th; and another, called November 15th, and paid November 6th. The book, therefore, failed entirely to prove the actual dates of assessments and payments. All the payments were received by one L. D. Kay, but by what authority does not appear. Law 3, § 1, of the constitution of the supreme assembly directs that each member shall pay his assessment to the subordinate assembly, and this one in question may have been paid to the assembly in due time. It further appears, by this book, that, within five months after this alleged default, 11 other assessments were paid by McDonald and received by the plaintiff in error. Law 7, § 1, of the constitution of the supreme assembly provides for the reinstatement of any member suspended for nonpayment of an assessment; and, if there had been sufficient proof of the nonpayment in due time of this one, the receipt of 11 subsequent assessments would create the legal presumption of reinstatement to membership, there being no evidence to the contrary. *Hoffman v. Supreme Council*, 35 Fed.

252; *Supreme Lodge v. Johnson*, 78 Ind. 110. There was no book or record or officer of either the supreme or subordinate assembly produced to show that all the payments recorded in this book were not legally made and duly received by the plaintiff in error, and, if not so made and received, the evidence to the contrary was in their possession.

Another fatal defect in this defense on the ground of forfeiture for the nonpayment of a death assessment within the required time is the failure to prove that the defaulting member had notice that it was due. Proof of notice is essential to sustain such a defense. *Bac. Ben. Soc. § 379*; *Supreme Lodge v. Johnson*, 78 Ind. 110; *Aid Soc. v. Helburn*, 85 Ky. 1, 2 S. W. 495. The form of notice and the manner of giving it may be determined by the rules of the society, but some form of notice must be given, or there can be no default. The constitution and laws of the supreme assembly recognize this right to a notice of each assessment; and section 2 of law 3 provides that "each subordinate assembly may, at its option, provide for notification of its members of the assessment calls, which may be by written or printed notice, or by a newspaper containing the supreme secretary's notice, and may be mailed or personally delivered to the members of the assembly." But there is no evidence whatever that notice of this assessment, default in the payment of which is alleged, was ever given to McDonald, either in writing or by printed notice, or that a newspaper containing the supreme secretary's notice was either mailed or personally delivered to him. There is no allegation of default by McDonald in the payment in due time of any other assessment than the one in question during the almost seven years of his membership in this society, and at the time of his death he continued to hold the benefit certificate originally issued to him by the supreme assembly. In *Tobin v. Aid Soc.*, 72 Iowa, 261, 33 N. W. 663, the court held that "in an action upon a certificate of membership in a mutual aid society, where the society sought to avoid liability on the ground that the member failed to pay an assessment stipulated in the contract, the society had the burden to establish such failure, notwithstanding the plaintiff in general terms had alleged compliance with the contract." The same rule is also stated in *Hodsdon v. Insurance Co.*, 97 Mass. 144.

There was no error in directing the jury that the defense that McDonald was not in good standing at the time of his death was not made out, and that the contention was not supported by any evidence, and that they need not give the matter any consideration. Having reached this conclusion, it is not necessary to review the remaining assignments of error, for they are only the corollaries of the one last considered, and must fall with it. We find no error in the record, and the judgment should be affirmed.

(55 N. J. E. 204)

LIVESEY v. JONES et al.

(Court of Chancery of New Jersey. Nov. 25, 1896.)

WILL—INDEFINITE CHARITABLE BEQUEST.

A bequest of the residue of testator's estate to "humanity's friend, * * * B., to use and expend the same for the promotion of the religious, moral, and social welfare of the people in any locality, whenever and wherever he may think most needful and necessary," since it includes objects not charitable, must fail for indefiniteness.

Bill to enforce a trust, brought by John Livesey against Samuel B. Jones, surviving executor of Henry Livesey, deceased, and others.

Samuel A. Besson, for complainant. Abel I. Smith, for the heirs. Isaac S. Taylor and Mr. Cowen, for Dr. Chadwick.

STEVENS, V. C. I think the trust under consideration in this case must fail, because it includes objects not charitable, and is, therefore, so general and indefinite that the court cannot see to its execution. The testator gives the residue of his estate to his friend and humanity's friend, the Rev. H. W. B., "to use and expend the same for the promotion of the religious, moral, and social welfare of the people in any locality, whenever and wherever he may think most needful and necessary." Now, in the first place, it seems to be plain that the words "religious, moral, and social" are not used conjunctively in such manner that every object to which the bequest may be applied must conduce at one and the same time to the advancement of religion and morality and to the social welfare of the people. To so hold would be to make the charity a religious one, contrary to the plain intention of the testator. It would be, moreover, in direct conflict with the decision in *Williams v. Kershaw*, 5 Clark & F. 111, where the devise was to "such benevolent, charitable, and religious purposes as the executors should, in their discretion, think most advantageous and beneficial," and where it was held that this language authorized the application of the bequest to other than strictly charitable purposes. This case I regard as authoritative, because *Beasley, C. J.*, in *Thomson's Ex'rs v. Norris*, 20 N. J. Eq. 523, said that it rested on a proper foundation, and reiterated this opinion in *De Camp v. Dobbins*, 31 N. J. Eq. 695, in the following vigorous language: "Nor can I go with that process of reasoning that concludes that when the word 'benevolent' is conjoined in the word 'charitable,' the two words become identical in meaning; as that implies that one of the terms is to be dispensed with, or that the lesser term swallows up the larger. * * * In such a naked case as I have supposed, for the court to strike out the broader of the descriptive terms may, indeed, uphold now and then a testamentary limitation, but at the same time one of the most important canons that the law has established for the construction of written in-

struments is impaired." I must therefore assume that any use of the property which, in the estimation of Dr. Bellows, would promote either the religious welfare of the people or the moral welfare of the people or the social welfare of the people would be fully justified by the language of the will. That a trust to promote the religious welfare of the people is charitable is admitted. Whether a trust to promote its moral welfare is so, I need not consider. I am clear that the trust to promote the social welfare of the people in the manner declared in this will is not. I think it may be said without much fear of contradiction that there are many ways of advancing the social welfare of the people which have nothing to do with charity. Money given to companies to build railways or canals, water or gas works, where none exist, money given to companies or individuals to build steamship lines or otherwise to advance commerce or agriculture, would be money given to promote the social welfare of the people certainly quite as much as money given to hospitals and almshouses, but would not be given for charitable purposes. *Kendall v. Granger*, 5 Beav. 300, is a case directly in point. The gift there was "for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility"; and of this gift Lord Langdale said that, if the sentence had ended with "individuals," it would have been a good charitable purpose, but he felt himself bound by the decisions to hold that the words "general utility" were large enough to include purposes which were not charitable, and the bequest was therefore void. In *Nightingale v. Goulburn*, 5 Hare, 489, the bequest was to "the queen's chancellor of the exchequer for the time being, to be by him appropriated to the benefit and advantage of my beloved country, Great Britain," and it was held to be a valid charitable bequest. This testamentary disposition stands in strong contrast to that under consideration. Had Mr. Livesey given the residue of his estate to the people of New Jersey for public purposes, it would, on the authority of the case just cited, have been good. It would have fallen within that part of Mr. Justice Gray's definition of charity—a definition which is no more than a generalization of the instances contained in *St. 43 Eliz.*—in which he says: "A charity, in a legal sense, may be defined as a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons, * * * by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government." In the case in hand, however, there is no intention to confine the gift to the people of the state regarded either as a sovereign entity or as individuals. The donee is "humanity's friend," the Rev. Dr. Bellows. His place of residence is stated to be New York. The gift is to the people; that is, presumably, the people who go to make up humanity. The gift is to be

expended in any locality, whenever and wherever he—that is, “humanity’s friend”—may think most needful and necessary. To restrict such a gift to the limits of the state of New Jersey for the public purposes of the state would be an utter perversion of the testator’s expressed purpose. In *Owens v. Society*, 14 N. Y. 409, Denio, C. J., said, in relation to a gift to a society whose object was “to diffuse more generally the blessings of education, civilization, and Christianity throughout the United States and elsewhere,” “the advancement of civilization generally is not classed among charities in the statute [of Elizabeth], and I have not been able to find an adjudged case in which it has been held to fall within the legal notion of charity.” Mr. Perry, in his work on Trusts (section 710), gives many instances of bequests held to be not charitable; among them a bequest creating a trust for the political restoration of the Jews, to secure the passage of laws granting women the right to vote and hold office, to establish a school which was not a free school. I do not see why any one of these objects would not come within the fair meaning of the words of the bequest we are considering. The trust here attempted to be created must therefore fail, because too general and indefinite, and by the course of decision in this state it must fail altogether.

Counsel also raised the question whether the trust did not fail by reason of the fact that Dr. Bellows died after the testator, but before the life tenant. The contention is that the trust was so personal to Dr. Bellows that the court would not appoint any other person of its own selection to execute it. As I find that the trust has failed altogether, it is unnecessary to consider this question.

(54 N. J. M. 692)

MIDDLETON v. MIDDLETON.

(Court of Errors and Appeals of New Jersey.
Dec. 2, 1896.)

CONSTITUTIONAL LAW—LIMITED DIVORCE.

1. An act permitting a limited divorce for adultery or desertion, attended by special consequences with regard to property rights, on the application of a person holding conscientious scruples against absolute divorce, and not otherwise, is contrary to the spirit of the constitution of this state and of the United States.

2. A classification defined only by inquiry into the private opinions of an offended party is not such as the principles of constitutional construction will sustain.

(Syllabus by the Court.)

Appeal from court of chancery.

Action by Benjamin Middleton against Ellen J. Middleton for divorce. Defendant filed a cross bill. From an order granting defendant a decree, complainant appeals. Reversed.

John J. Crandell, for appellant. Samuel K. Robbins, for respondent.

BARKALOW, J. The complainant in this case, Benjamin Middleton, filed a bill for di-

vorice on the ground of desertion; the respondent filed her answer, denying the charge of desertion, and setting up, by way of cross bill, extreme cruelty on the part of the complainant, and praying a limited divorce therefor; the complainant answered the cross bill, denying the charges therein; and the respondent subsequently amended her cross bill by adding charges of adultery and alleging conscientious scruples against absolute divorce. A decree was granted dismissing the complainant’s bill, granting respondent a decree of divorce from bed and board, and decreeing that complainant forfeit all right to curtesy and administration of or participation in the property of the respondent. From that decree the complainant has taken the appeal now before us.

The principal and governing question in this case is the constitutionality of the act of 1891, which provides that “for desertion, adultery or extreme cruelty in either of the parties the court of chancery may decree a divorce from bed and board forever thereafter, or in the case of extreme cruelty for a limited time, as shall seem just and reasonable; but in every such case, except for extreme cruelty, the party applying shall prove that he or she has conscientious scruples against applying for a divorce from the bond of matrimony; when such proof has been made, the court, in case it shall deem it just to do so, may also decree that the guilty party shall forfeit all right to dower, curtesy, and administration of or participation in the property or estate of the party in whose favor the decree is entered.” The wisdom of this law is not a question for the court. The legality of it is all that we are to determine. In this state both parties in the case of a divorce from the bond of matrimony may marry again. In the case of a limited divorce neither can. The parties to a marriage contract, whoever they may be, and whatever their opinions or beliefs, have in all cases, until the passage of the law under consideration, incurred the same obligations and acquired the same rights. The legislature may prescribe those rights and obligations, but it must do so within the limits fixed by the constitution of this state and of the United States, and those limits are to be ascertained by reference to the language of those instruments and to the spirit indicated by their expressions. It cannot be denied that the legislature has power to pass an act giving to all petitioners for divorce the right to apply for an absolute or a limited divorce as he or she may elect; for such an act would operate equally upon all persons, and would impose no special consequence and confer no exclusive privilege upon any. The act of 1891, is, however, not of this character, in that it does confer upon certain petitioners rights, and imposes upon certain offenders consequences, which are determined, not by the character of the offense, but by the opinions of the injured party. While

It is not declared that the constitution of this state in terms prohibits such legislation, it seems clear that this enactment is contrary to the whole spirit of that instrument. It is therein provided that "no person shall be denied the enjoyment of any civil right merely on account of his religious principles"; and surely the spirit of that provision cannot permit the religious or moral scruples of another person to deny to an offender, however culpable, the right to remarry after his offense, by reserving for him a form of divorce not applicable to other wrongdoers of the same kind, and one, too, which carries with it a special possibility in relation to property. The constitution of the United States forbids any state to "deny to any person within its jurisdiction the equal protection of the laws," and it certainly seems to be a true construction of that prohibition to hold that the laws which are operative should be laws which impress themselves equally upon all, without regard to the individual opinions of any. Accepted authorities, in treating of constitutional limitations, have laid it down that "a statute would not be constitutional * * * which would select individuals from a class, * * * and subject them to peculiar rules, or impose upon them special obligations or burdens, from which others in the same class are exempt." Cooley, Const. Lim. (5th Ed.) p. 391. The case of *Ho Ah Kow v. Nunan*, 5 Sawy. 552 (especially page 562, par. 1) 12 Fed. Cas. 256, also sustains this doctrine. The law under consideration selects individuals from a class of married offenders, and subjects them to "peculiar rules," and imposes upon them "special burdens." It singles out those whose consorts happen to hold certain scruples, subjects them to a peculiar rule of accountability, and imposes upon them consequences from which all other equal offenders are free. Where a different result is provided for dereliction on the part of one person from that which is attached to the same dereliction on the part of another, there is a discrimination applied to that offender which is contrary to the spirit of the constitution of this state and of the United States. Such discrimination can only, if at all, escape from that position of repugnance by being made to apply to a class so large, so consciously entered into, and so certainly defined that the classification is either originally patent or deliberately accepted by the members of it. A class which is only to be ascertained by inquiry into the private opinions of another than the person operated upon by the discrimination does not seem to be such as the principles of constitutional construction can approve. A law which imposes upon one person a kind of divorce which, for the same offense, it cannot apply to another, because the consort of the former holds certain opinions which the consort of the latter does not; is a law which does not classify in conformity with the requirements just enumerated; and the fact that the person who

suffers from such discrimination is an offender does not change the character of such legislation, nor justify an infraction of constitutional principles. The classifications which have been sustained by the courts of this state in the interpretation of the laws concerning taxes have been defined by political or municipal lines of boundary or population, and not by the existence of opinions or beliefs. The law of this state which permits an affirmation instead of an oath acts only upon the person himself who holds the scruple provided for, and is matter of indifference to all others, since the conscience of the one who affirms is bound. The Sunday laws constitute no precedent contradictory to the views here expressed, for they operate upon all alike. No law other than this under consideration appears upon our statute book which allows an individual to be judicially dealt with in conformity to the private opinions of another individual. Upon all of these considerations we are of opinion that the act in question is unconstitutional. The decree below should be reversed so far as it decrees forfeiture of curtesy and of right to administration of or participation in the property of the respondent, as authorized by the act of 1891, and should be affirmed so far as it allows a limited divorce for extreme cruelty under the general laws concerning divorce. Revision, p. 315, § 5.

Memorandum.

At the request of three members of the court, the vote was taken separately on these questions, viz.:

(1) Is the act entitled "A supplement to an act entitled 'An act concerning divorces'" (Revision, p. 314), approved March 27, 1874, which supplement was approved March 4, 1891 (Gen. St. 1274), unconstitutional? The vote on this question appears on Check List No. 1, the vote being an affirmative or negative of this proposition.

(2) Shall the decree, so far as it grants a divorce from bed and board, forever, and alimony, be reversed? The vote on this question appears on Check List No. 2, the vote being on the question of affirming or reversing this part of the decree.

(3) Shall the decree, so far as it decrees that the appellant shall forfeit all right to curtesy and administration of or participation in the property or estate of the respondent, be reversed? The vote on this question will appear on Check List No. 3, the vote being on the question of affirmance or reversal of this decree.

Vote on Check List No. 1: DEPUE, LIPPINCOTT, LUDLOW, MAGIE, VAN SYCKEL, BARKALOW, BOGERT, and NIXON, JJ., for affirmance. GUMMERE and HENDRICKSON, JJ., for reversal.

Vote on Check List No. 2: Unanimously affirmed.

Vote on Check List No. 3: Unanimously reversed.

(61 N. J. L. 554)

CONSOLIDATED TRACTION CO. v.
CHENOWITH.(Court of Errors and Appeals of New Jersey.
Nov. 16, 1896.)STREET RAILWAY—FAILURE TO SIGNAL—DIRECT-
ING VERDICT—INSTRUCTIONS.

1. Where the trial judge charged that it was the duty of the managers of a car operated by electric motors, at a high rate of speed, to give audible signals of the approach of the car, the nonperformance of which duty was evidence of negligence, which, if the proximate cause of the injury complained of, was actionable, *held*, that the charge was free from error.

2. Where, from the proofs at a trial, two conclusions of fact can reasonably be reached, one of which will justify the plaintiff's recovery, the trial court cannot direct a verdict for the defendant.

3. The trial court is not obliged, though specially requested to do so, to apply a legal principle, which it clearly states to the jury, to conditions of fact postulated by the defendant's counsel; particularly where such conditions do not include all the circumstances which should influence the conclusion of the jury.

(Syllabus by the Court.)

Error to supreme court.

Action by John B. Chenowith against the Consolidated Traction Company. Judgment for plaintiff. Defendant brings error. Affirmed.

For former report, see 34 Atl. 817.

Sherrerd Depue, for plaintiff in error. Howard W. Hayes, for defendant in error.

MCGILL, Ch. Error is assigned, in the first place, upon the refusal of the trial court to nonsuit the plaintiff below. The proofs exhibited that the plaintiff was the driver of a hook and ladder truck, belonging to the Newark Fire Department, which was drawn by two horses; that the distance from the front end of the pole, to which the horses were harnessed, to the rear end of the ladders, extending back of the truck, was 48 feet, and the weight of the truck, with its load, was about 7,000 pounds; that the driver's seat upon the truck was directly over the whiffletree, about 10 feet from the end of the pole; that under him was an alarm gong, which habitually was rung by him while the truck was in motion; that the truck was steered in front by the horses guided by the driver, and in the rear by a tillerman, who was seated back of the rear axle of the truck, at a wheel which was used by him to guide the back truck wheels; that the truck house was upon the westerly side of Plane street, 150 feet south of the intersection of Plane street with Orange street; that Plane street runs north and south, and Orange street runs east and west; that, about 150 feet west of Plane street, Orange street curves to the south, so that, from the southerly side of its intersection with Plane street, a person must advance into Orange street to see westerly beyond the commencement of the curve; that the roadway in Plane street is 30 feet wide, and the roadway in Orange street is 39 feet wide; that

the sidewalk in Orange street is about 13 feet wide; that in the Orange street roadway two railway tracks of the defendant company are constructed, upon which the company operates cars by electric motors; that Orange street, where it crosses Plane street, is upon a grade which rises to the west, and descends to the east; that on the morning of the 18th of November, 1894, at about 8 o'clock, an alarm of fire was given, and the truck in question was driven by the plaintiff below, from its house, into Plane street, and thence northerly to Orange street, it being the driver's intention to turn westerly, and go up the last-named street; that the horses were driven slowly out of the truck house, and until the truck was straightened in Plane street, and then they were put to a trot to Orange street, slowing up, however, before they reached Orange street, to enable two firemen to get on the truck as it moved, between the front and back wheels; that the truck gong was repeatedly rung as the vehicle approached Orange street; that on the southwest corner of Orange and Plane streets, around which it was proposed to turn the truck, there was erected a three or four story brick building; that this building so obstructed the view up Orange street from Plane street that the driver of a vehicle in the latter street could not see the approach of an electric car from the west until he should nearly reach the cross walks at the intersection of the streets; that the plaintiff below, just after he crossed the cross walk, and when his horses were about upon the east-bound railway track, saw one of the defendant's cars approaching Plane street from the west, at a high rate of speed, estimated at 12 or 15 miles an hour, about 123 feet from him; that, as the momentum of his heavy truck was too great to enable him to stop before getting on the track, he immediately urged his horses to a higher speed, and pulled them to the right, to give the tillerman more room to swing the back part of the truck out of the way of the car, but, before the truck had cleared the track, it was struck by the electric car, and overturned, and the plaintiff was thrown from his seat, and severely and permanently injured; that the electric car was 32 feet in length, rested upon two trucks, each having four wheels, and was very heavy; that it was running rapidly, as stated, upon a descending grade; that it was equipped with double motors and brakes and alarm gongs, and its motive machinery could be reversed, in case of necessity, so that, when running upon a level and at a reasonable rate of speed, it could be stopped within its own length; and that its gong was not rung to indicate its approach towards Plane street.

The motion for nonsuit was based upon the insistence that the plaintiff below was guilty of contributory negligence. The argument in its favor is that the plaintiff knew the locality, the width of the streets, the existence of the electric railway, and the frequency of its cars, the location of the building upon the

corner of Plane and Orange streets, and its obstruction of a view of the defendant's tracks to the west, and, by that knowledge, was chargeable with the realization that the intersection was a place of danger, the approach to which called for great care and caution upon his part, but that, notwithstanding this realization, he drove past the corner so fast that he could not check the momentum given to the truck until that vehicle was upon the defendant's track. It is insisted, as I understand the argument, that he should have so controlled the speed of his horses that he could have crawled forward to the defendant's track, and have been able at any moment that he should discern one of its cars rounding the curve in Orange street to stop the truck, and wait for the car to check its speed, and either stop or pass him. The trial court thought that it was a question for the jury whether, under all the circumstances presented, the driver of the truck used ordinary care and prudence in giving notice by the clang of his gong, and then moving as he did upon the defendant's tracks. The evidence admits the finding of these facts: That the plaintiff looked for a car when he reached Orange street,—that is, at the building line; that the distance from that line to the east-bound railway track is about 25 feet; that the curve in Orange street commences about 150 feet west of Plane street; and that the plaintiff did not see the car until his horses' heads were about at the east-bound car track, and then the car was 128 feet distant. When he saw the car, being 10 feet back of the horses' heads, he had gone some 15 feet beyond the building line of Orange street. Taking his rate of speed at five miles an hour, he would run about seven feet each second, and reach the place from which he first saw the car two seconds after he left the building line. In the same two seconds, the car, running 15 miles an hour, or 22 feet a second, must have gone 44 feet; that is, from a point 172 feet west of Plane street, or some distance around the curve, where in all probability it could not have been seen from the building line. When the driver had reached the track, he had gone too far to stop; but it does not appear that he could not have stopped if he had seen the car when he was at the building line. Was it negligence for him when he reached Orange street, and did not see a car, to go on? Had he not a right, in the exercise of reasonable prudence and judgment, to assume that if a car should round the curve, and approach him, it would be so in control of its motorman that it could be sufficiently checked within 125 or 150 feet, for which distance the motorman could see him coming upon the street, to afford him the seven seconds or less he would need to cross the track? It is deemed that the determination of these questions was involved in a decision of the question whether the defendant was guilty of contributory negligence, and that the determination of them was matter properly left to the

consideration of the jury, and, therefore, that the nonsuit was rightly refused.

In the next place, it is assigned as error that the trial judge charged the jury "that it was the duty of the defendant to give audible signals of the approach of its cars, and that nonperformance of this duty was evidence of negligence on the part of the defendant, and that, if the evidence satisfied the jury that a failure to give signals was the proximate cause of the injury complained of, that was actionable negligence." The statute law does not impose upon those who operate street cars by electric motors or other equal power the duty of giving audible signals of the approach of their cars, and hence it has been the rule with the courts to leave it with the jury to determine whether, under the circumstances of a given case, the use of such signals is necessary to the exercise of that due care and caution which the common law requires. The courts have been slow to realize that the use of greater motive power than horses in street-car propulsion inevitably leads to increased speed in the running of such cars, and a corresponding addition to the risk and hazard of accident to those who have equal rights with those cars in the highways, and also to realize the demand, which such changed conditions make, for the recognition of some of the plain, self-asserting requisites of care, commensurate with the danger to be avoided, as legal duty on the part of those who manage such cars. It has long been a dictate of common prudence to equip the engines and other movable apparatus of fire departments, and, as well, the ambulances of hospitals, which customarily move quickly through the streets, with gongs and bells to warn of their approach: and the managers of cars propelled by the new and greater motive power spoken of have almost universally, by providing such equipment, acknowledged, at least, the utility of similar appliances on their cars, as fitting safeguards against accident. The swift and almost noiseless movement of those cars, without the preceding clatter of horses' hoofs, emphasizes the practical wisdom and humanity of the provision thus made. We deem that, in the operation of such cars, the use of audible warning signals of their approach is so plain and constant a requisite of care and prudence that we should hold it also to be a legal duty. The use of dangerous greater motive power than has been customary and is safe in highways, apt to be crowded thoroughfares, is the creation of extra danger, which exacts as a duty from its creators the use of the extra precaution of audible signals. The principle invoked is not new. *Railroad Co. v. Matthews*, 36 N. J. Law, 531. Cogent reason for the recognition of this duty appears to be well illustrated by the case made by the testimony offered by the plaintiff in this cause: That the defendant's car was rounding a curve 150 feet from an intersecting street, upon a descending grade, at the rate of 15 miles per hour, so that it came into vision

from the curve, and reached and passed the intersection in less than seven seconds. A discharge of the duty will not involve a constant clang of the gongs of such cars, but the judicious use of them as intersecting high-ways are approached, and when persons are upon the car tracks, or are apparently about to go upon them. The question whether the omission of such a signal in the instance considered was the proximate cause of the accident was a question for the jury, which the judge properly left to it. We do not deem that in this respect there was error in the judge's charge.

Error is further assigned upon the refusal of the court to direct the jury to find for the defendant. It is deemed that he properly so refused. From the proofs, two conclusions as to the facts could reasonably be reached,—one favorable to the plaintiff's recovery, and the other unfavorable to it,—which conclusions related both to the question as to the defendant's negligence, and the question as to contributory negligence upon the part of the plaintiff. In such a situation, the case belonged to the jury. *Bahr v. Lombard*, 53 N. J. Law, 233, 21 Atl. 190, and 23 Atl. 167.

In the next place, the defendant assigns as error the failure of the trial judge to specifically charge the jury (1) that, if permanent obstacles intervened to prevent observation, reasonable prudence required the driver of the fire truck to have so regulated the speed of his horses as to have been in position to stop before going on the car track, if it was not safe to go on; and (2) that, in like case, similar prudence should require delay in going on the track until the driver could assure himself of safety; and (3) that reasonable prudence required that the judgment to have been formed by the driver should have been formed while it was possible for him to have acted prudently in view of the then conditions, not after he got himself into a position where the peril was already incurred. The trial judge charged the jury that "the plaintiff was bound to exercise, under the given circumstances, that degree of care that an ordinarily prudent man, under like circumstances, would feel called upon to exercise." Then, after referring to the plaintiff's knowledge of the locality of the accident, and of the character of the vehicle he drove, he added: "Now, it was under these circumstances that the plaintiff attempted to cross the track of the defendant corporation. The measure of the duty of the plaintiff in crossing a public highway, traversed by surface cars propelled by electricity, was to use such care for his safety as a reasonably prudent man would use under the circumstances." The correctness of this exposition of the law is not disputed. The objection is that the judge did not charge what, in point of fact, a reasonably prudent man should have done under suggested circumstances; that is, did not apply the rule as to reasonable prudence to conditions postulated by the defendant's counsel. He was not asked to declare a legal prin-

ciple, but to make application of the principle already declared, upon an assumption which the proofs show suggested part only of the circumstances which should have entered into and influenced the jury's conclusion. We agree with the supreme court that these requests treated of matter within the function which strictly belonged to the jury, and that it was discretionary with the judge whether he would comply with them, and not error for him to refuse to comply.

At the end of its opinion, the supreme court animadverted upon the form of the exception under which review of the court's failure to charge was sought. The defendant's request to charge involved six distinct propositions, stated in six paragraphs, each of which was numbered. The exception was "to the refusal of the court to charge specifically as requested." The criticism of the supreme court was that the exception treated the six propositions as a single request, every part of which should be well founded, or the whole should fail. While we do not commend the form of the exception, we deem that, under the request, it was intended to present to the court for its charge six separate propositions, and that the exception was intended, as the almost universal practice in our trial courts has established, and as the word "specifically" implies, to challenge the failure to charge each of the six propositions. In other words, being taken in the hurry of the conclusion of the trial, it was meant to answer the purpose of several distinct exceptions. The intention of the exception being clear, we think that the plaintiff in error should have the review the exception was designed to secure for it. The judgment will be affirmed.

(59 N. J. L. 153)

MYERS v. EDISON GENERAL ELECTRIC CO.

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1896.)

LIMITED PARTNERSHIP—FALSE AFFIDAVIT.

A certificate and affidavit filed for the purpose of forming a limited partnership, pursuant to the statute of the state of New York in such case provided (1 Rev. St. N. Y. p. 765, § 8), were dated and filed on the 5th of January, 1892. The former stated the sum contributed by M., the special partner; and the latter, that said sum had actually and in good faith been paid in cash. The partnership was to commence at the date above stated. The sum contributed by M. was not, in fact, paid until the 12th of January, 1892. *Held*, that the statement of the affidavit as to the payment was false, within the meaning of the statute, and that M. was liable as a general partner for the claim sued upon.

(Syllabus by the Court.)

Error to supreme court.

Action by the Edison General Electric Company against Charles R. Myers. Judgment for plaintiff. Defendant brings error. Affirmed.

D. J. Pancoast, for plaintiff in error. F. J. Swayze, for defendant in error.

MCGILL, Ch. This action is for the recovery of an indebtedness for rent, due to the defendant in error from the firm of Poggi & Co., composed of William E. Poggi, Edith A. Poggi, and Charles R. Myers, doing business in the city of New York. Charles R. Myers defends, upon the ground that he was a special partner in the firm, and that, because thereof, his liability for the debts of the firm is limited to the \$5,000, which he contributed to the capital, no part of which was withdrawn. The partnership was formed under the statute of the state of New York relating to limited partnerships, which, among other things, provides that, when the certificate of such a partnership required by the statute shall be filed, an affidavit by one or more of the general partners shall also be filed in the same office, "stating the sums specified in the certificate to have been contributed by each of the special partners to the common stock, have been actually and in good faith paid in cash," and also that, "if any false statement be made in such * * * affidavit, all the persons interested in such partnership shall be liable for all the engagements thereof as general partners." 1 Rev. St. N. Y. p. 765, § 8.

The case was tried before the circuit judge in Essex county, a jury having been waived, who found, as facts, that the partnership commenced on the 5th of January, 1892; and that on that day, in pursuance of the requirement of the statute, a certificate that Charles R. Myers had contributed the sum of \$5,000 as capital to the common stock of the partnership, together with an affidavit made by William E. Poggi, that "the sum of five thousand dollars, the capital to be contributed to said firm by the special partner, Charles R. Myers, has been actually and in good faith paid in cash," were duly filed; and, also, that the money so sworn to have been actually paid on or prior to the 5th of January, 1892, was not actually paid until the 12th of January in that year. The latter finding is, in effect, that the affidavit was false, within the meaning of the statute, in the particular that at its date the \$5,000 was actually paid. This finding of the judge appears to have been upon conflicting evidence, which would admit of his conclusion, and therefore not to be subject to review upon error. *Doolittle v. Willet*, 57 N. J. Law, 398, 31 Atl. 385. We deem the finding of the fact stated to be decisive of this case. Because of the false statement in the affidavit, the statute, as has been seen, expressly makes the defendant, Myers, liable for all the engagements of the partnership.

In *Durant v. Abendroth*, 69 N. Y. 148, the court of appeals in the state of New York dealt with a case in which the partnership was entered into on the 23d of December, 1870, on which day affidavit was duly made that the money specified in the certificate of partnership to have been contributed by the

special partner "has been actually and in good faith paid in cash," when the fact was that on that day the special partner gave his check, dated December 31, 1870, which was paid on the 2d of January, 1871. Upon this state of facts, the court held that the affidavit was false, within the meaning of the statute, and that the intended special partner was liable as general partner for the debts of the firm. Judge Rapallo, who delivered the opinion of the court, said: "The statute peremptorily requires an affidavit that the capital has been actually paid in cash, and withholds its protection from the special partner if the affidavit be not true. The object of this provision is to secure certainty, and to prevent equivocal transactions in the formation of these partnerships. Nothing but cash satisfies its requirement. No engagement or security, however good, can be substituted even temporarily, and the affidavit of the actual payment must be filed with the certificate. However honest the intention of the parties may be, if this affidavit is not absolutely true, the consequences prescribed by the statute must follow, and they cannot be averted by a subsequent payment, nor by the consideration that no injury resulted to any creditor from the affidavit not being true when made. The payment in this case was made by a check of the special partner, dated, and therefore payable, on the 31st of December, 1870. This, clearly, was not cash on the 23d, when it was delivered to the general partners, and the affidavit was made. It was, in fact, paid on presentation, on the 2d of January, 1871." So far as the question we consider is concerned, the case thus decided appears to be precisely in point. It is the deliverance of the court of last resort of New York, and it remains undisturbed. *Buck v. Alley*, 145 N. Y. 488, 494, 40 N. E. 236, 238. It coincides with our interpretation of the statute, and therefore it is not necessary that we shall determine its importance as an authoritative interpretation of the meaning of the law. *Print Works v. Lawrence*, 23 N. J. Law, 590; *Black v. Canal Co.*, 22 N. J. Eq. 422.

Other questions are presented by the assignment of error; but, as the point decided is sufficient to sustain the plaintiff's recovery, it is unnecessary to pass upon them. The judgment of the supreme court will be affirmed.

(59 N. J. L. 371)

STATE (TAPPAN et al., Prosecutors) v. LONG BRANCH POLICE, SANITARY & IMPROVEMENT COMMISSION et al.

(Supreme Court of New Jersey. Nov. 17, 1896.)

LONG BRANCH COMMISSION RULES—CONTRACTS—ENFORCEMENT.

1. The statutes establishing the Long Branch Commission do not require an order for the payment of a pre-existing debt to be in the form of an ordinance.

2. Those statutes constitute a majority (four)

of the commissioners a quorum for the transaction of business, and therefore a rule of the commission requiring five is void.

3. Those statutes empower the commission to contract for a general corporate obligation to meet the expense of paving streets by ordinary taxation.

4. When a municipal body, acting within the scope of its chartered powers, has entered into a contract for a public improvement, in pursuance of proceedings regular on their face, and such contract has been performed by the other party, the fact that the preliminary proceedings were irregular constitutes no legal defense to a suit upon the contract against the municipality.

(Syllabus by the Court.)

Certiorari by the state, at the prosecution of Robert Tappan and others, against the Long Branch Police, Sanitary & Improvement Commission and others. Affirmed.

Argued November term, 1896, before DIXON, J.

Thomas P. McKenna, for prosecutors. Wilbur A. Helsley, for defendants.

DIXON, J. This certiorari brings up a resolution adopted August 14, 1896, by the Long Branch Commission, directing the payment to the Barber Asphalt Company of \$900, for interest on notes of the commission held by said company. The reasons presented for setting aside the resolution are, in effect, these: (1) That the action of the commission should have been taken by ordinance; (2) that the votes of five members of the commission were necessary, while only four were received; and (3) that the commission had no power to pay the debt represented by said notes.

As to the first reason, I find nothing in the laws establishing the Long Branch Commission which requires such action as was here taken to be in the form of an ordinance.

As to the second reason, even if it be true that one of the standing rules adopted by the commission makes necessary the concurrence of five members in any order for the payment of money, that rule would be in contravention of the statutes establishing the commission, and, therefore, would be void. By the statute of April 8, 1875 (P. L. 1875, p. 477), the commissioners are to be seven in number (section 1) and a majority of the whole number constitutes a quorum for the transaction of business (section 31). The power thus conferred upon four members cannot be diminished by a rule or by-law of the corporation itself. *Breninger v. Treasurer of Town of Belvidere*, 44 N. J. Law, 350.

The third reason presents the serious question of the case. It appears that, in accordance with two similar acts of the legislature, passed in 1891 (P. L. 1891, p. 206) and 1892 (P. L. 1892, p. 146), and a supplement passed in 1893 (P. L. 1893, p. 109), the Long Branch Commission entered into a contract with the Barber Asphalt Company for the paving of certain streets in Long Branch, agreeing to make partial payments therefor monthly as the work progressed, and to make

full payment in four months after the whole work was completed and accepted. Under this contract the work was fully performed by the asphalt company, and the notes in question represent part of the price. Subsequently the commission caused assessments to be levied upon property benefited, for the purpose of meeting one-half of the cost of the improvement, in accordance with said act of 1892; and, some of those assessments having been brought before this court by certiorari, they were, in June, 1896, set aside, for the reason that the acts of 1891 and 1892 were special, and therefore unconstitutional. *Dobbins v. Long Branch Commission* (not printed). On these premises it is argued that the alleged contract was void,—that the commission is under no legal obligation to pay for the work, and under no moral obligation which it has authority to recognize. An examination of the laws establishing the commission, the validity of which is not denied, will, I think, demonstrate that, independent of the unconstitutional acts mentioned, the commission had power to contract for the paving of the streets of Long Branch, and to pledge the general credit of the municipality for the payment of the expense thereof. A supplement to the charter, approved April 8, 1875 (P. L. 1875, p. 477), declared (section 61) that it should be lawful for the board of commissioners, by ordinance, "to order and cause any street or section of a street to be * * * paved * * * at the expense of the owners of lands and real estate on the line of said street or section of a street, and at the expense of the property benefited thereby." It further declared (section 85) that the commissioners should have power to issue scrip for the payment of the paving until the same could be collected from the owners of property liable therefor, which scrip should bear interest at the rate of 7 per cent. per annum, and should be paid within three months of the time of the completion of the assessment; that the commissioners should be authorized (sections 33, 74) to borrow the amount necessary to pay such an assessment in anticipation of the collection thereof; and (sections 37, 38) that they might raise by tax in each year such sum as they should deem expedient for the payment of the district debt, both principal and interest. Although the sixty-first section, above cited, indicates a legislative purpose and expectation that the whole expense of paving streets should ultimately be raised by assessment upon the property benefited, yet this was not an essential feature of the grant of power to pave. *Watrous v. City of Elizabeth*, 40 N. J. Law, 278; *Hitchcock v. Galveston*, 96 U. S. 341, 348; *Cumming v. Mayor, etc.*, 11 Paige, 596. The other sections mentioned clearly show that the commission could contract for a general corporate obligation to meet the expense of such an improvement by ordinary taxation, the municipality having merely the right to reimburse itself, so far as practicable, by

special assessment on property benefited. It thus appears that what was done by the commission in accordance with the unconstitutional acts of 1891 and 1892 might have been done by it in accordance with the valid supplement of 1875.

From the papers submitted to me, I am unable to ascertain whether the proceedings of the commission relative to this improvement conformed to the directions of the sixty-first section of the supplement of 1875, or whether the paving was ordered by an ordinance, introduced after public notice calling for objections to the proposed improvement, and passed by the votes of a majority of all the commissioners. No lack of conformity is shown. If those directions were followed, then, of course, the present objection is futile. But if they were not strictly observed; if, instead, the steps prescribed in the acts of 1891 and 1892 were taken, as the prosecutors allege,—then we still have compliance with the main requirements of the law of 1875, the vote of a majority of all the commissioners in favor of the improvement, and full opportunity for all other persons interested to express their objections against it; for these invalid acts require the vote of a majority of the commissioners, the consent of a majority of the owners of real estate on the street to be paved, and the approval of a majority of the voters at a special municipal election publicly called to decide whether the improvement shall be made. The method of awarding and executing the contract under each of these enactments is substantially the same, and it was adopted in the present case. Under these circumstances, I think neither the corporation, nor its taxpayers, nor the owners of property benefited, can repudiate the contract. The rule seems to be that, when a municipal body, acting within the scope of its chartered powers, has entered into a contract for a public improvement, in pursuance of proceedings regular on their face, and such contract has been performed by the other party, the fact that the preliminary proceedings were irregular constitutes no legal defense to a suit upon the contract against the municipality. *Bigelow v. City of Perth Amboy*, 25 N. J. Law, 297; *Knapp v. Mayor, etc.*, 38 N. J. Law, 371; *Moore v. Mayor, etc.*, 73 N. Y. 238.

Lastly, the prosecutors urge that the proceedings are illegal because they are in contravention of section 201 of the crimes act (Gen. St. p. 1085), the aim of which is to confine municipal disbursements and obligations within appropriations previously made. It sufficiently answers this objection to say that the facts necessary for its support do not appear, and cannot be presumed in face of the maxim, "*Omnia rite acta presumuntur.*" *Atlantic City Waterworks Co. v. Atlantic City*, 48 N. J. Law, 378, 381, 6 Atl. 24. The resolution for the payment of the interest appears to have been legal, and should be affirmed, with costs.

(54 N. J. E. 659)

MILLS v. DAVISON et al.

(Court of Errors and Appeals of New Jersey.

Dec. 1, 1896.)

GIFTS TO CHARITABLE USES—CONSTRUCTION—PERPETUITIES—POWERS OF DONEE—FORFEITURE.

1. The rule against perpetuities does not apply to gifts to charitable uses. A gift to a charitable use, with a direction that no part thereof should at any time be alienated, does not create a perpetuity, in the sense forbidden by law, but only a perpetuity allowed by law and equity in cases of charitable trusts.

2. A conveyance of a lot of land on which an Episcopal church had been erected by voluntary contributions was made for a nominal consideration, and was therefore a gift by which the lot was conveyed to a religious society incorporated as a Protestant Episcopal church, and to their successors, "but not to their assigns," with an habendum in these words: "To have and to hold unto the said party of the second part and their successors forever, with this express condition and limitation: That neither the said party of the second part, nor their successors, shall at any time sell, mortgage, or in any way convey the said lands and premises, or any part thereof, and that no building shall be kept, maintained, or erected thereon, except for the purpose of public worship and teaching in accordance with the usages, rites, and ceremonies of the Protestant Episcopal Church in the United States of America, and also except the proper outbuildings appurtenant thereto." *Held*, that the grant was of the entire estate, to hold to the use exclusively for public worship and teaching in conformity with the usages, rites, and ceremonies of the Protestant Episcopal Church.

3. A conveyance in the form above set out does not create a condition, for the breach of which the grantor may enter as for a forfeiture of the estate, but creates a trust which the grantee taking the legal estate is bound to perform; to be enforced, not by a forfeiture of the title, but by those methods by which a court of equity compels the performance of such trusts.

4. The grant being to a religious society incorporated as a Protestant Episcopal Church, the object for which the donee was incorporated is an important element in the construction of the instrument by which a charity is created.

5. The deed of conveyance contained a consent by the grantors that the grantee might, by a mortgage on the property, raise a certain sum of money for the purpose of completing the church edifice. *Held*, that such consent did not destroy the entire trust, but had the effect only to validate the mortgage, and that upon a sale in foreclosure proceedings the surplus money which remained after payment of the mortgage debt, interest, and costs belonged to the grantee, to be held upon the original trust.

6. The donor, as the founder of a charity, has a standing in court to restrain the diversion of the property donated from the charitable uses for which it was given.

Dixon, Garrison, Magie, Hendrickson, and Nixon, JJ., dissenting.

(Syllabus by the Court.)

Appeal from court of chancery.

Action by William Davison against the rector, wardens, and vestrymen of Grace Church, Westfield, N. J., and others. From the judgment, Alfred Mills, one of the defendants, appeals. Reversed.

Alfred Mills, pro se. Craig Marsh, for respondent.

DEPUE, J. The rector, wardens, and vestrymen of Grace Church, in Westfield, were incorporated as a religious society by a cer-

tificate filed November 20, 1862, pursuant to the act to incorporate religious societies (Revision, p. 962, § 27). During the years 1874 and 1875 the corporation erected a church building on a lot of land in Westfield owned by Alfred Mills and Catharine, his wife. The building was erected and used for the purpose of public worship and teaching in accordance with the usages, rites, and ceremonies of the Protestant Episcopal Church in the United States of America. The cost of erecting and furnishing the building was about \$6,500. Of this sum, Mr. Mills and his wife gave \$2,900. To raise the money necessary to complete the building, after other voluntary contributions were applied, the sum of \$2,000 was borrowed of the Mutual Benefit Life Insurance Company. To enable the society to raise this money on mortgage, Mr. and Mrs. Mills made conveyance to the society by a deed made and executed on the 14th of June, 1875. On the same day the society, in its corporate name, made and executed a mortgage on the lot so conveyed to it, to the insurance company, for the said sum of \$2,000. The mortgage is now being foreclosed. On the 30th of April, 1894, William Davison recovered a judgment against the society, in its corporate name, for the sum of \$1,554.07. This debt was not in any way connected with the building of the church edifice. Mrs. Mills died before the filing of the bill in this case, and her title to the premises—whatever it is—became vested in her husband, Alfred Mills, and her son, Edward, who were made parties to the foreclosure suit. Davison, as a judgment creditor, was made a party by his petition. This controversy is over the surplus money that may remain after paying the mortgage debt. Davison, by his answer, claims that such surplus should be applied to the payment of his judgment. Alfred Mills has answered, and in his answer denies that the Davison judgment is a lien on the mortgaged premises, and, by way of a cross bill, claims that the surplus of the proceeds of the sale of the mortgage debt should be paid to him and his son. The church society has also answered, consenting to a sale of the mortgaged premises, and submitting to the determination of the court the question of the application of the surplus of the money realized from the sale, after payment of the mortgage debt, interest, and costs. On the motion of Davison, the chancellor made an order that the answer of Mills by way of a cross bill be struck out, and the cross bill be dismissed. From this order, Mills appealed.

The question that lies at the foundation of this controversy is whether the deed of conveyance made by Mr. and Mrs. Mills to the church society was a conveyance to a charitable use. The situation before the deed was made—the object for which the society was incorporated, the erection of a church edifice for religious purposes, by voluntary contributions, on a lot constituting a suitable curtilage for a building devoted to such uses, and

the need of the money borrowed on the mortgage to complete and furnish the building—has already been mentioned. The deed is to the religious society and to their successors, with the words “but not to their assigns” added. It was made for a nominal consideration, and was therefore a deed of gift. The word “successors,” in the granting part, created a fee, and the words added, excluding assigns from the succession, are unimportant, except when taken in connection with the habendum; as indicating the intent of the grantors. The habendum is in these words: “To have and to hold unto the said party of the second part and their successors forever, with this express condition and limitation: That neither the said party of the second part, nor their successors, shall at any time sell, mortgage, or in any way convey the said land and premises, or any part thereof, and that no building shall be kept, maintained, or erected thereon, except for the purpose of public worship and teaching in accordance with the usages, rites, and ceremonies of the Protestant Episcopal Church in the United States of America, and also except the proper outbuildings appurtenant thereto.”

The rule against perpetuities, as applied to private trusts, does not apply to gifts to charitable uses. Gray, *Perp.* § 590; 1 *Lewin, Trusts*, 2011; *Perry, Trusts*, § 384; *Perin v. Carey*, 24 *How.* 465, 495, 507; *Jones v. Habersham*, 107 U. S. 174, 184, 185, 2 *Sup. Ct.* 336, 345. In *Perin v. Carey*, Mr. Justice Wayne, delivering the opinion of the court, said: “Such gifts, from the purposes to which they were to be applied, and the ownership to which they are subjected, have had the protection of courts of equity, to prevent any alienation of them on the part of the person or body interested [intrusted] with the offices of giving them effect, and that in all such cases land has been decreed by courts of equity to be practically inalienable, or that a perpetuity of them exists in corporations when they are charitable gifts.” And in that case it was held that a devise of real estate to a charitable use, with a direction that no part thereof should at any time be alienated, did not create a perpetuity, in the sense forbidden by law, but only a perpetuity allowed by law and equity in the cases of charitable trusts. In *Jones v. Habersham* a devise of land to a society for the relief of distressed widows and the schooling and maintaining of poor children, “but on the express condition that said society shall not sell or alienate said lot, but shall use and appropriate the rents and profits of the same for the support of the school and charities of said institution, without said lot being at any time liable for the debts or contracts of said society,” was held to be a good charitable devise. The distinction is between the purchase of lands by a corporation created for charitable purposes, and a donation or gift of lands to such a corporation for uses that are charitable. In *Magie v. Evangelical Dutch Church*, 13 N. J. Eq. 77, an incorporat-

ed religious society purchased lands for a consideration, and procured from the vendor a deed of conveyance in fee, with an habendum to hold for the specific uses for which the society was incorporated, with a restriction against alienation or incumbering. Chancellor Green applied to this conveyance the rule of the common law, that alienation is an inseparable incident of an estate in fee simple, and could not be restrained by any provision or condition whatever, and that, therefore, a mortgage by the society was valid. But this decision was expressly placed upon the ground that the trust was not created by devise or gift; that the land was purchased for a valuable consideration, and a church was erected thereon by the funds of a corporation, and the trust was inserted in the deed by the society at its instance, and for its benefit and protection; and that a trust so created will not protect the property against the payment of debts. But he adds: "Where property is given to a corporation in trust for a charitable use, the trust is the creature of the donor. He may impose upon it such character, condition, and qualifications as he may see fit. The property being a gift, no wrong is thereby done to the creditors of the corporation, and a court of equity may well protect and enforce all the conditions of the gift." This case was affirmed in this court without an opinion; adopting, presumably, the opinion of the chancellor in the court of chancery. 15 N. J. Eq. 500.

When the charitable use is created by gift, the donor may impose conditions and limitations which shall prevent the diversion of the trust estate from the uses upon which the estate was granted, either by the voluntary or involuntary act of the donee. Indeed, the inalienability of the trust estate to other purposes than the uses for which it was donated results from the fact that the trust is created. The question is wholly one of construction. The dominating rule in the construction of deeds and other written instruments is to so construe them as to give effect to the intention of the parties, as far as is permitted by the rules of law. The prefatory words in the habendum in the deed in question are, "upon this express condition and limitation." In the court of chancery the word "condition," in this sentence, was construed as a condition designed for the benefit of the grantors, to defeat the estate granted. Such a construction, it seems to me, is contrary to the intent of the grantors in making the gift. A church edifice designed for religious worship in accordance with the usages of the Protestant Episcopal Church had been erected upon the lot conveyed. The grantors had contributed liberally toward the erection of the building, and, as will be seen presently, consented to a mortgage to raise money to complete it. I think it is obvious that the conditions and limitations inserted in the deed were designed and intended to secure and maintain the property donated, for the benefit of the religious society,

and not for the advantage of the grantor personally. The word "condition" is a term of flexible meaning. In leases it is often construed as a covenant. "Express words of condition shall be taken for a limitation, if the nature of the case requires it." 2 Com. Dig. 360, "Condition," T; 1 Eq. Cas. Abr. 105, note a; Den v. Hance, 11 N. J. Law, 244. Words of express condition are not inapt, as introductory to a declaration of trust. Every conveyance to a charitable use is a conveyance to hold upon the trust declared, and the execution of the trust is the condition upon which the estate is taken and held; to be given effect to, not by the forfeiture of the title, but by those methods by means of which a court of equity compels the performance of such trusts. In *Jones v. Habersham*, above cited, the charitable uses were declared in the form, and under the introductory words, of an "express condition." In a devise of lands to W. "upon this express condition," that he pay certain legacies, it was held by the queen's bench and exchequer chamber that the words "upon this express condition" did not create a condition, for breach of which the heir might enter, but created a trust, which the devisee taking the legal estate would, in equity, be bound to perform. *Wright v. Wilkin*, 2 Best & S. 232. Other precedents for the use of words of condition as a declaration of trust, and not as a condition on the non-performance of which a forfeiture will result, will be found in the following citations: *Attorney General v. Wax Chandlers' Co.*, L. R. 6 H. L. 1; *Merchant Taylors' Co. v. Attorney General*, 6 Ch. App. 512; *Goodman v. Mayor, etc., of Saltash*, 7 App. Cas. 633, 640, 642; *In re Richardson*, 56 Law J. Ch. 784; *In re Conington's Will*, 2 Law T. (N. S.) 535; 1 Lewin, *Trusts*, 140. In *Wax Chandlers' Case*, Lord Cairnes said, "If I give an estate to A. upon condition that he shall apply the rents for the benefit of B., that is a gift in trust, to all intents and purposes." In *Goodman v. Mayor, etc., of Saltash*, supra, Lord Selborne, speaking of a grant from the crown, said: "If an actual grant so qualified were produced, it would be immaterial whether the word used in it were 'trust,' 'intent,' 'purpose,' 'proviso,' or 'condition,' or whether the trust or duty imposed were cognizable in equity, or also at law. In such a grant there would be all the elements necessary to constitute what in modern jurisprudence is called a 'charitable trust.'" "A trust may be raised by a gift upon condition of doing a certain thing, even when followed by a gift over if the condition be broken. * * * The tendency in early times was to treat such a limitation as a conditional gift, and the tendency in modern times is to treat it as a trust." *Tysen, Charitable Bequests*, 508. "It is sufficient if it appears from the construction of the instruments that the property was intended to be held subject only to the execution of certain charitable trusts, or the performance of certain conditions in favor of charity." *Tud.*

Char. Trusts (3d Ed.) 50. The other word, "limitation," in its most technical sense, when used in the habendum, is an appropriate term under which to declare the nature and extent of the estate granted, and the uses for which the grant is made.

In the deed now in hand, the grant is to a religious society incorporated as a Protestant Episcopal church, and the habendum is to the grantees and their successors forever, with a limitation that no building shall be kept, maintained, or erected on the premises, except for the purpose of public worship and teaching in accordance with the usages, rites, and ceremonies of the Protestant Episcopal Church, and the proper out-buildings appurtenant thereto, with an express interdict that neither the grantee nor its successors shall at any time sell, mortgage, or in any way convey the said land and premises, or any part thereof; thus excluding all beneficial ownership or use of the property otherwise than for public worship and teaching in accordance with the rites and ceremonies of the Protestant Episcopal Church. The object for which the donee of a charity was incorporated is always an important element in the construction of the instrument by which a charity is created. Tud. Char. Trusts, 52; Attorney General v. Dean, etc., of Windsor, 8 H. L. Cas. 369, 405, 406; Miller v. Gable, 2 Denio, 492; People v. Steele, 2 Barb. 398, 405. The grant is of the entire estate in fee, to hold to the religious society and their successors forever; excluding, nevertheless, all beneficial ownership or use of the property, except for the religious purposes for which the grantee was incorporated. The language of the habendum plainly indicates a conveyance for use exclusively for public worship and teaching in conformity with the rites and ceremonies of the Protestant Episcopal Church. Annexed to the habendum is a consent by the grantors to the mortgage by the grantees to raise the money which was required to complete the church edifice. This is the mortgage now under foreclosure. The consent is set out at large in the chancellor's opinion. The mortgage debt is much less than the value of the property. Power to mortgage is frequently inserted in deeds of trust. Such a power, if executed, does not destroy the entire trust. The trust remains, incumbered only by the mortgage. The consent in this case will have the effect to validate the mortgage as a lien upon the premises conveyed. The purchaser at a foreclosure sale will take the premises by a title free from the trust, but the surplus money arising from such sale will belong to the society, to be held upon the original trust.

The defendant Mills, as the founder of the charity, has a standing to appear in court to restrain the diversion of the property donated from the charitable uses for which it was given. The specific prayer of the cross bill is that the surplus money arising from the

sale in the foreclosure proceedings, after paying the mortgage debt, interest, and costs, may be paid to him. This relief cannot be granted. The deed of the grantors having conveyed away the entire estate in the premises, a resulting trust will not arise in favor of the grantors by reason of an abuse of the trust. Sanderson v. White, 18 Pick. 328; 2 Perry, Trusts, § 744. But the facts stated in this opinion are all set out in the cross bill, exhibiting the purposes for which the deed was made, and there is also a prayer for such other and further relief. The bill, as framed, is sufficient to bring within the cognizance of a court of equity the construction of the deed, and relief by way of preventing a diversion of the property conveyed to purposes at variance with the charitable uses to which it was devoted. The order striking out the cross bill should be reversed, and the record be remitted, etc.

DIXON, GARRISON, MAGIE, HENDRICKSON, and NIXON, JJ., dissent.

(54 N. J. E. 669)

PRICE et al. v. FORREST et al.

(Court of Errors and Appeals of New Jersey.

Dec. 2, 1896.)

BOUNTIES—EXEMPTIONS—CLAIM AGAINST UNITED STATES—ASSIGNMENT—ACKNOWLEDGMENT—CHANCERY JURISDICTION—RECEIVERS.

1. A statute of the United States which authorizes and directs the secretary of the treasury of the United States to adjust the accounts of a former purser in the navy upon principles of equity and justice, and credit him with a sum of money paid over to and received for by his successor in office, although such payment was without governmental authority, and directing the payment of the sum that may be found due him upon such adjustment to him "or his heirs," is not a statute which bestows a mere gratuity or bounty, but it is the restitution of property which once belonged to him as assets for the liquidation of his pecuniary obligations, and, upon its restoration, it cannot be held to have assumed any new character. The words "or his heirs" are simply words of succession, and descriptive of his estate in the money found to be due him, and used in the statute in the sense of "personal representatives," and intended to secure the moneys to his estate in the event of his death before they were paid.

2. The assignment of a claim against the United States, ordered by the court of chancery to be made by a debtor, or his representatives, if he be deceased, to a receiver, in aid of proceedings in said court by a creditor to obtain satisfaction of a judgment at law recovered against the debtor, is not prohibited by, and is not a nullity under, the provisions of section 3477 of the Revised Statutes of the United States.

3. Such an assignment to the receiver, or an assignment to him by operation of law, in such proceedings, by virtue of his appointment as receiver, vesting in him, under the powers with which he is clothed, the right to take, receive, sue for, and distribute according to law, and the orders of the court from which he derives his appointment, is an exception to the provisions of section 3477 of the Revised Statutes of the United States, requiring assignments of such claims, or powers of attorney to receive the same, to be acknowledged by the persons executing them, and to be certified by the officer taking such acknowledgments.

4. The objects of section 3477 of the Revised Statutes of the United States are that the gov-

ernment may not be harassed by multiplying the number of persons with whom it has to deal, and that it might always know with whom it was dealing, until a contract is completed and an adjustment and settlement made; and none of these evils can happen upon an assignment for the benefit of the creditors of a claimant, either expressly ordered to be made by a court having jurisdiction, or resulting by operation of law.

5. The court of chancery has jurisdiction to determine the right of the distribution of such claim in payment and satisfaction of a judgment debt due from the claimant to his creditors, whenever the proper parties are before the court and the point decided be within the issues made by the pleadings.

(Syllabus by the Court.)

Appeal from court of chancery.

Action by Anna M. Forrest, administratrix of Samuel Forrest, deceased, and another, against Rodman M. Price and others, for injunction. From an order overruling their pleas, defendants appeal. Affirmed.

On appeal from the order of the chancellor overruling the pleas of the appellants. The bill of complaint in this case is filed by Anna M. Forrest, administratrix of Samuel Forrest, deceased, and Charles Borchering, receiver of the goods and chattels, rights, credits, property, and effects of Rodman M. Price, deceased, against Rodman M. Price and others, the children of the said Rodman M. Price, deceased, as defendants. To this bill of complaint two joint and several pleas have been filed, alike in form and substance, setting up in each precisely the same defense to this suit in equity.

This bill of complaint was filed July 5, 1894. It states that it is filed by permission of the court, as a bill of revivor and original bill, in the nature of a supplement to a bill which was filed on the 30th day of May, 1874, by the complainant, against Rodman M. Price, of Bergen county, in the state of New Jersey, now deceased, jointly with his wife, Matilda C. S. Price, and Francis Price. It is alleged that by such former bill of complaint it was set forth that on the 2d day of June, A. D. 1857, in the supreme court of New Jersey, the said Samuel Forrest, in his lifetime, recovered a judgment against Rodman M. Price, now deceased, for the sum of \$17,000 debt, and \$78.04 costs of action, and that upon said judgment a fieri facias was sued out and returned unpaid and unsatisfied; that on November 7, 1860, the said Forrest died intestate, with the said judgment still remaining unpaid and unsatisfied; that on or about January 2, 1874, administration of the goods and chattels, rights and credits, which were of the said Forrest deceased, was granted to the said Anna M. Forrest by the ordinary of the state of New Jersey; that shortly afterwards said judgment was revived by a writ of scire facias, and that on or about April 14, 1874, another writ of fieri facias was duly and regularly issued upon said revived judgment, which also was returned unpaid and unsatisfied; and that thereupon the former bill of complaint, by said Anna M. Forrest, as ad-

ministratrix aforesaid, was filed, alleging that the said Rodman M. Price, since deceased, was possessed of certain moneys, property, and things in action, either in his own possession, or held in trust for him by the other defendants, and praying for the appointment of a receiver of such property and things in action, and that the same be appropriated to the payment of the judgment aforesaid, and costs thereof, therein set forth, with the appropriate prayer for injunction and process. The bill of complaint in this case further states that on or about December 4, 1874, the defendants in said former bill filed their answer thereto, in which the recovery and force of the judgment against Rodman M. Price at the suit of said Forrest was admitted, but denying circumstantially that the said Rodman M. Price was possessed of any of the property as claimed in such bill of complaint, or that any property whatever was held by him, or in trust for him by the other defendants, and charging that the said Price had no title to or interest in any of the property then standing in the names of the other defendants. The bill further states that, after the filing of this answer, the cause slept until August 9, 1892, when the said Anna M. Forrest, administratrix aforesaid, and one of the complainants in this cause, filed a petition supplementary to the bill, reciting that several writs of fieri facias de bonis et terris had been issued upon the judgment aforesaid, all of which had been returned unsatisfied for want of any goods or lands whereon to make a levy, out of which to make the debt and costs. By this petition, as it appears by the bill of complaint, it was charged that the sum of \$45,000 was about to be paid to the said Price by the officers of the treasury of the United States, being the sum found to be due him by an accounting between the said Price and the government of the United States, and that such sum was to be paid by the delivery to Price or his attorney of a draft of the treasurer of the United States, or some other negotiable security made and issued by the financial officers of the government of the United States, payable to the order of said Price, and that said draft or other negotiable security was to be made and the transaction closed upon the 15th of the then month of August. By this petition it was charged that said Price, if he received such money, would put the same beyond her reach, and that the same would not be available to satisfy said judgment, and she therefore prayed that an injunction might issue to prevent said Price from indorsing such drafts to any one but the complainant in payment of said judgment, and that a receiver of such fund or draft or negotiable security be appointed, and that said Price be directed, immediately upon the receipt of the same by him, to indorse the same to said receiver, to the end that the amount thereof might be received by such receiver as an officer of the court of chancery, to be disposed of according to law, and the direction of that court. The

bill further recites that, upon such petition being filed on August 8, 1892, an order to show cause on that day was made, why the prayer of the petition should not be granted, and why an injunction should not issue, and a receiver be appointed according to the tenor of the prayer of said petition, and further directed that the said Price be restrained and enjoined from making any indorsement of any such draft, drafts, or other negotiable security of the United States as was set forth in said petition. This order was made returnable on September 12, 1892.

The bill of revivor further states that a certified copy of such order, under the seal of the court of chancery, was served on August 10, 1892, on the said Price; yet, on the 5th day of September, 1892, he received from the assistant treasurer of the United States four several drafts, one for the sum of \$2,704.08, one for \$13,500, one for \$20,000, and a fourth for \$9,000, and that on different dates between the date of the reception by him of the drafts and the 3d day of October, 1892, he indorsed such drafts, and collected the proceeds thereof, and devoted the same to his own use, and that on the 3d day of October he filed an answer to the petition, which, without admitting the indorsement of said drafts, alleged that the judgment of Forrest against him had been paid, and, further, that there was a sum of money due him from the United States, voted to him or his heirs by congress, and that about \$45,000 of it was paid, or about to be paid, but that, even if the said judgment was still unpaid and valid against him, yet this sum of money so voted to him was not amenable to the payment of such judgment, and could not be lawfully paid to any receiver, or otherwise appropriated to that purpose. The bill further alleges that such proceedings were had upon the former bill, and the petition aforesaid, that after the hearing on said rule to show cause, on October 10, 1892, Charles Borchertling was duly appointed receiver of the property and things in action belonging to, or due to, or held in trust for, said Price, at the time of the issuing of the executions on such judgment, or at any time afterwards, and especially of the four drafts aforesaid, with authority to the receiver to possess, receive, and in his own name to sue for such property and things in action, and to hold such drafts subject to the further order of the court; that such receiver was required to give bonds in the sum of \$40,000 for the faithful performance of his duties; and that in and by said order the said Price was enjoined and restrained from intermeddling with said receiver in regard to said drafts, and to put the same in the possession of the receiver, if the same were in the possession of said Price, or under his control: provided that, if said drafts, excepting the one for \$13,500, should be delivered with the indorsement of said Price to the clerk of the court of chancery on or before October 13th, then the order should be void. He was also enjoined and restrained from any indorsement

or appropriation of said drafts otherwise than to said receiver or to the clerk as aforesaid. The receiver gave the bond required, and filed his official oath, and entered upon his duties. The drafts were not so delivered by Price, whereby the order remained in full force. This order was served upon Price, with a written demand that, if the drafts, or either of them, were not in his physical possession, but were held by him or subject to his control, whether alone or jointly with any other person, that he give his consent and order in writing for their delivery to the receiver, or to his order, and that he do all things necessary within his power to put the receiver in possession and control thereof. The copy of the order and the demand were served upon Price shortly after the order was made, elsewhere than in the state of New Jersey, which was the place of his abode and residence, for the reason that he was not to be found within that state until July 22, 1893, when it was served upon him again. On the — day of —, 1892, an attachment was issued against Price for contempt of court in disobeying the order of August 8, 1892, and after due proceedings he was convicted of such contempt, and by order dated May 18, 1893, he was ordered to pay to the receiver the sum of over \$30,000 of this fund aforesaid, together with a small fine, and that, upon failure to comply with such order, he be imprisoned until said order was performed. The bill further alleges that the amount of such drafts were a part of a certain debt of \$76,000, or thereabouts, awarded to the said Rodman M. Price by the officers of the treasury department of the United States, under an act of congress passed February 23, 1891, and agreed to be paid to him in conformity with the directions contained in such act; and that the balance of said \$76,000, after the drafts were delivered to Price, was to be retained to answer a counterclaim of the United States for a debt alleged to be due by Price to the United States, but, after investigation, such determination to retain such balance was reconsidered; and that the treasury department were about to pay unto the said Price the sum of \$31,000, the balance of said fund; and that said Price and his agents were actively seeking to obtain payment of the same; and that, pending the proceedings to compel the said Price to consent that the treasurer of the United States pay to said receiver such balance, the said Price, on the 8th day of June, 1894, departed this life intestate; and that no letters of administration have ever been granted to any one upon his estate. The bill further alleges a further payment of \$9,000 was made out of said fund to said Price, thus reducing the balance of said fund apparent on the books of the treasury department of the United States to the sum of about \$22,000, and that demand had been made by the receiver upon the treasurer of the United States for the payment to him of said balance; that the treasurer neither consents nor refuses to make such payment, but is will-

ing to abide the determination of some lawful tribunal of the rights of the receiver in the premises, and is willing to pay over the balance of such fund in accordance with such determination; and it is believed by the complainants that on the decree of the court of chancery being made that the receiver is entitled to said balance, and notice thereof duly given, the treasury department will respect such decree, and pay over to the receiver the balance of said fund. The bill further alleges that the children of said Price, as his heirs at law, are endeavoring, upon their construction of the provisions of the act of 1891, to obtain the payment of this balance to them personally, on the ground that, under the act of congress awarding this amount to Price or "his heirs," the money belongs to them as his heirs at law, and not as representatives of his estate, and that the receiver has no right in law thereto, and that they have authorized John C. Fay, of Washington City, by power of attorney, to apply for and receive such balance in their behalf, and that they are now pressing their claim as aforesaid with the secretary of the treasury for such payment. Administration ad prosequendum of the estate of Price has been granted to Allan L. McDermott, the clerk of the court of chancery, who is joined as a defendant, simply for the purpose of this suit, to subject this fund to the payment of the debts of the intestate. Prayer is made that injunction issue against the defendants receiving any moneys of the officers of the treasury of the United States, and that the defendants be decreed to pay to the receiver any part of said money which they respectively have received or hereafter may receive.

The defendants have not answered this bill, but have filed two pleas thereto,—one, the joint and several plea of Madeline Price and Gouverneur Price, children of Rodman M. Price, deceased; the other is the joint and several plea of Francis Price, Rodman M. Price, Trenchard Price, and Matilda Price, other children of Rodman M. Price, deceased. These pleas are alike in form and substance. The act of congress, approved February 23, 1891, is set out, and under it these defendants, as the heirs at law of Rodman M. Price, deceased, contend that they are entitled to the balance of this fund. The facts set out by the defendant in these pleas are, substantially, that the said Rodman M. Price had no real or personal estate or property at the time of his death, and that they have not had, nor do they now have, the possession, ownership, or control of any personal estate from their said father, and that they have not received any moneys from the government of the United States, through their said father or otherwise, under the act of congress of February 23, 1891. The pleas set out the act of congress as follows, to wit: "An Act for the Relief of Rodman M. Price. Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that the secretary of the

treasury of the United States be, and he is hereby authorized and directed to adjust upon principles of equity and justice the accounts of Rodman M. Price, late purser in the United States navy, and acting navy agent at San Francisco, California, crediting him with the sum paid over to and receipted for by his successor A. M. Van Nostrand, acting purser, January fourteenth, eighteen hundred and fifty, and pay to said Rodman M. Price, or his heirs, out of any money in the treasury not otherwise appropriated any sum that may be found due to him upon such adjustment. Approved February 23, 1891." The pleas further set forth that, on or about the 6th day of December, 1848, in the early settlement and development of California, the said Rodman M. Price, deceased, was assigned to duty upon the Pacific coast, at California, as purser and fiscal agent of the government of the United States for the navy department of the United States, he then being a purser in the United States navy, and acting as such up to about December, 1849, or January, 1850, when he was detached by the government of the United States from such duty, and ordered to transfer all public money and public property remaining in his hands to his successor, or to such other disbursing officer of the navy as might be designated by the commanding naval officer of the naval station of California, and immediately after transfer to report to the city of Washington for the purpose of settling his accounts. Afterwards, in the month of December, 1849, A. M. Van Nostrand, referred to in the said act of congress, became the successor of the said Rodman M. Price, deceased, in California aforesaid, as acting purser in the navy of the United States. Afterwards, on or about the 31st day of December, 1849, Commodore Jones, of the United States navy, commanding the United States squadron at San Francisco, Cal., on behalf of the government of the United States, directed Acting Purser Van Nostrand aforesaid to call on Purser R. M. Price aforesaid, and receive from him all books, papers, office furniture, and funds, and anything belonging to the purser's department at San Francisco. In accordance therewith, and with the instruction aforesaid to said Purser Price, he paid over, on the 31st day of December, 1849, to the said Van Nostrand, acting purser of the United States navy at San Francisco station, in California, the sum of \$45,000, being all the public moneys of the United States in the hands of said Purser Price. Afterwards, on the 14th day of January, 1850, the said Rodman M. Price, out of his private moneys alone, and not of the government of the United States, advanced to the said Van Nostrand \$75,000, and took his receipt therefor, as follows: "San Francisco, January 14, 1850. Received from Rodman M. Price, purser U. S. navy, \$75,000, for which I hold myself responsible to the United States treasury department. \$75,000.00. [Duplicate.] A. M. Van Nostrand, Acting Purser." Which ad-

vance was without the approval and signature of said Commodore Jones, commanding officer of said Acting Purser A. M. Van Nostrand, although the said Rodman M. Price regarded the advance as an accommodation to, and made for the benefit of, the government of the United States, to be used by the said Van Nostrand, as acting purser of the United States navy, for the payment of the expenses of the navy at that station. The pleas fully exhibit the difficulties and embarrassments of the United States in obtaining funds for these purposes on the Pacific coast at this period of the history of California. The said A. M. Van Nostrand never returned or paid the sum of money, or any part thereof, to the said Rodman M. Price; neither did he account for this sum to the government of the United States. In the settlement of the accounts of the said Rodman M. Price, he made claim on the treasury department for a credit or allowance for the said sum of \$75,000, and has continued ever since to make such claim. In the year 1894 the then attorney general of the United States, acting under instructions from the secretary of the navy to investigate the claim of said Rodman M. Price for the reimbursement or payment to him of said \$75,000, gave an opinion that the government of the United States was not responsible for, and could not be charged with, the private fund paid by Rodman M. Price aforesaid to the said Van Nostrand, and which was so paid without the written approval of the said commanding officer, Commodore Jones. Annexed to the pleas is a copy of this opinion, with all other proceedings taken in this matter of the claim of the said Rodman M. Price against the government of the United States, by which it is shown that the money, said sum of \$75,000, was paid and advanced by the said Rodman M. Price in the belief that it would be an accommodation to the said government in the condition of things that existed in the history of California at that time, and that the same was advanced and paid to his successor in office, in good faith, for the use of the government of the United States and the United States navy, and that, apart from the lawfulness of the claim, it was one equitable and just to be allowed in the settlement of his accounts. The pleas further allege that, in accordance with the said act of congress, the secretary of the treasury of the United States, in August, 1892, adjusted these accounts of the said Rodman M. Price as late purser in the United States navy and acting navy agent in San Francisco, Cal., in accordance with the act of 1891, and credited him with the said sum of \$75,000, paid over as aforesaid, and receipted for by his successor, A. M. Van Nostrand, acting purser, January 14, 1850, leaving the sum of \$76,204.08 found due him; and they admit that he received four drafts from the government of the United States, and the money therefor, amounting to \$45,204.08, and that as to the balance thereof, of \$31,000, which was a part of the said

\$75,000 after deducting any other sum, actually paid to the said Rodman M. Price thereon in his lifetime by the government of the United States, the defendants in said pleas named claim that they are entitled to payment thereof to them, under and by virtue of the said act of congress and the adjustment aforesaid.

Argument was had before the chancellor on the bill and pleas, and on July 29, 1895, by order of the chancellor, the pleas were overruled, with costs, from which order an appeal has been taken to this court.

McGee, Bedle & Bedle, for appellants. Cortlandt & Wayne Parker, for respondents.

LIPPINCOTT, J. (after stating the facts). The first insistent of the defendants below, and appellants in this court, is that, as heirs at law of Rodman M. Price, deceased, they are entitled, under the act of congress of 1891, to the balance of the moneys in the treasury of the United States, amounting to about \$22,000, as admitted by the pleas in this suit; that congress, by this act, was bestowing a gratuity, and was at liberty to select its beneficiaries, and that in so doing it directed certain specific persons to whom it should go; and that, by the directions of this statute, in his lifetime it was a gratuity to Price, and in case of his death before payment then with the same qualities the gift devolved upon the persons who at the time of his death were his heirs. The facts set forth in the pleas, giving rise to the act of congress, effectually disposed of this insistent; and, in the consideration of the pleas, the act must be construed to some extent with reference to those facts, especially so far as there may exist in the statute any reference to them. The facts in these pleas exhibit a great pertinacity on the part of Mr. Price, continued through a lifetime almost, in pressing his claim for money believed by him to be due from the government of the United States. They were moneys which, indisputably, were paid out for the benefit of the United States, so admitted upon all sides and in all proceedings, but which, because of the want of the technical approval of his superior officer before the advance was made by him, became unallowable in the adjustment and settlement of his accounts with the government, but the justice of which, as a due to him, was distinctly recognized in the act of congress directing its adjustment and payment, either in whole or in part, upon principles of equity and justice. The act of congress directs the secretary of the treasury "to adjust upon principles of equity and justice, the accounts of Rodman M. Price, late purser in the United States navy, and acting navy agent at San Francisco, crediting him with the sum paid over to and receipted for by his successor, January 14, 1850, and to pay to said Rodman M. Price or his heirs, out of any money in the treasury not other-

wise appropriated, any sum that may be found due to him upon such adjustment." It was upon these "principles of equity and justice" that the secretary of the treasury of the United States adjusted his accounts as an officer of the United States having accounts with the government. A reading of this statute at once indicates that congress was not dealing with one upon whom a mere gift for honorable services was to be conferred. It was dealing with a claim of one who had expended his private moneys for the benefit of the government, in an emergency which demanded or justified this expenditure. Under this act, couched in the language in which it is, it cannot, as it seems to me, be contended that the government of the United States was conferring upon Price a bounty. It was restitution to him of moneys which he had advanced, and which he believed, at the time the advance was made, would be at once repaid, in the settlement of his accounts as a disbursing officer of the United States navy. I think that the act of 1891 was based upon the idea that the claim was a moral and equitable obligation, if not a legal one, on the part of the government, for money, to pay him the money "found to be due him," upon an adjustment of his accounts according to principles of "equity and justice," and not upon any considerations that a gift or gratuity was being conferred upon him. The learned chancellor, in his opinion in *Forrest v. Price*, 52 N. J. Eq. 16-26, 29 Atl. 215-220, after reviewing the facts in that case, which are precisely the same, in substance, as those set forth in the pleas herein, so far as Price in his lifetime was concerned, says: "I do not find in this situation even the bounty of a grateful government, partaking of the character of a pension or reward for a meritorious deed, but simply the restitution of property which had once belonged to the defendant as assets for the liquidation of his pecuniary obligations; and I fail to understand how, upon its restoration to the defendant, it can be held to assume a new character." In that case this question was elaborately discussed by the chancellor, and his views of the nature of the obligation of the government of the United States which was the foundation of this statute can be fully approved.

So far as the devolution of this money is concerned, upon the facts set up in the pleas and the situation as there expressed, the statute of 1891 cannot well bear any other construction than the one that the payment was intended to benefit the estate of Price, and to be within the reach of his creditors. The heirs of Price were in no sense personally intended to be the beneficiaries of the United States, by way of gift or gratuity to them as such. The language of the act could only be fulfilled by a payment to Price. If it could be called a gift, it occurred at the passage of the act; and the act in no sense intended that the heirs of

Price were to be included in the gratuity. But the reason of the act is such as to reveal the intention of congress to recognize an obligation on the part of the government, and upon its ascertainment to pay it to Price, or his representatives, in the same manner as a debt is paid to anyone. In his accounts with the government, upon such ascertainment, he was credited with the amount found to be due. The act in its terms speaks of the application of the principles of equity and justice in the adjustment of his accounts as "late purser of the United States navy and acting naval agent at San Francisco." The meaning of this statute is to be gathered from the construction of the whole statute, in view of the circumstances which led to its enactment, and the object to be accomplished. The chancellor, in his opinion in the case in 52 N. J. Eq. 16, 29 Atl. 215, to which reference has been made, says: "But it affirmatively appears that the money of which the statute authorizes payment, though not a legal claim, is not a pure governmental bounty. The provision in the act for the relief of the defendant Price, that payment should be made to him or his heirs, has been urged as indicative of the legislative intention that the payment was not intended to benefit creditors. I do not so understand the act. The expression 'or his heirs' was undoubtedly a provision against death before the day of payment, and there can be no substantial doubt that it is used in the sense of personal representatives, the thing dealt with being personalty, and appears in the act to secure the moneys to his estate in the event of his death before they are paid." The same holding was made by the comptroller of the United States in his written opinion on this question, of date of July 11, 1894, in the determination that the word "or," in the words "or his heirs," should be construed to mean "and." While this is the fair interpretation of this statute, taken as a whole, yet it seems to me to be immaterial whether such meaning be given to the word "or" or not; for it must be, on a fair and reasonable construction of this act, that its meaning is that the moneys were to be paid to Price in his lifetime, and after his death to his heirs at law, and these words, "his heirs," are simply words of succession and description of his estate in the money, and they are in this statute as representatives of his estate only. *Nevison v. Taylor*, 8 N. J. Law, 43; *Holcomb v. Lake*, 25 N. J. Law, 605, 24 N. J. Law, 688; *Abrahams v. English*, 17 N. J. Law, 280; *Wardell v. Allaire*, 20 N. J. Law, 19; *Englefried v. Woelpart*, 1 Yeates, 41; *Winterfield v. Stauss*, 24 Wis. 394. These cases illustrate the construction of the word "or" into "and," to give effect to the fair intention of the legislature. The many cases cited in 17 Am. & Eng. Enc. Law, tit. "Or," p. 218-222, fully illustrate the instances of this construction. It will

be noticed that, in the case of *Emerson v. Hall*, 13 Pet. 409, which is a case relied on by the defendants, the gift under the statute was by the express terms of the act of congress payable to the legal representative of Emerson and Lorraine, respectively, and the title of the act was "An act for the relief of Beverly Chew, and the heirs of William Emerson, deceased, and the heirs of Edward Lorraine, deceased." 6 Stat. 464. The body of the act expressly directs that it shall be paid to their "legal representatives." An examination of the case shows that the moneys could never, under the law, be paid to Emerson and Lorraine, and that, as to their heirs, it was a gratuity conferred upon them by congress. The court in that case held that the act evinced a purpose of congress to make a gift to these heirs, that there was no debt of the government, and that the act was simply a bounty, and that under statute the money had reached its proper destination when it was withheld from the creditors of Emerson; and this is founded in the fact that the institution by Emerson and Lorraine, as officers of the United States navy, of the proceedings of condemnation of the slave-trading vessel, and the slaves therein captured, was one purely voluntary on their part, and not at all in the line of their duty towards the government. The advance of money by Price was a benefit to the government, and necessary to be made for the expenditures of the United States navy. This fund, and the part remaining unpaid, therefore, became a part of the general estate of Price, and thus was liable for his debts, to be distributed according to the laws of the state of New Jersey, the place of his domicile at the time of his death.

Another question has been made, as to the jurisdiction of the court of chancery over the parties and the subject-matter involved. The pleas set up the claim of the defendants to this fund in preference to the creditors of Price, and the bill avers and the pleas admit that the defendants are endeavoring to secure payment of this fund to them, and to hinder, delay, and finally obstruct the complainants from recovering the same, to be appropriated to the payment of the debts of Price. It must be remembered that the suit is not against the United States, nor directly against the fund, but it is a proceeding against the parties, and operating upon them to compel them to an assent to the proper distribution of the fund according to the laws of the domicile of the intestate, and to give effect to the assignment, by operation of law, for this purpose, to the receiver. The decree of the court cannot operate upon the fund to any greater extent than may be permitted by the authorities of the United States treasury, but that furnishes no reason, if the proper parties are before the court, why the court should not decide upon the issues raised by the pleadings. Besides, the previous discussion and

decision of the merits of this matter fully answers the insistments of the defendants. The defendants have applied to the officials of the treasury to have this money paid over to them as the heirs of Price. The comptroller of the treasury has refused this application, and awaits the decision of the court of chancery, which has assumed jurisdiction of the case as between the defendants and the complainants representing the judgment creditor of Price. So far as this suit is concerned, as soon as the United States treasury passed to his credit, in the accounting, the moneys, the sum thereof became a debt due to him, or a legal obligation in his favor, and which he had the legal right at once to reduce to his possession, and which possession he could not deny in a suit against him by the receiver. This money was held by Price without authority to controvert the proposition that in law he had assigned it to the receiver. If the moneys were in private hands, instead of in the hands of the government, the receiver could bring suit for it, and neither Price nor his personal representatives could deny that it had been legally assigned to the receiver, and had passed to him; and as to the balance of the \$23,000 still remaining to his credit in the United States treasury, it is not the right of the defendants, as his personal representatives, to deny that it has been legally assigned to the receiver. The effect of the statute was to render this money to the estate of Price, and the defendants in suit here set up a distinct claim to it, and the court can treat them as if they were in its possession, in order to compel them to assign it to the receiver, or to give effect to the assignment to him by operation of law. *Harrison v. Maxwell*, 44 N. J. Law, 319; *Wilkinson v. Rutherford*, 49 N. J. Law, 245, 3 Atl. 507; *Williams v. Heard*, 140 U. S. 529, 11 Sup. Ct. 885. And the heirs at law, under their claim to these moneys, are just as much subject to the jurisdiction of this court as Price would have been in his lifetime. The discussion, and the principles laid down, and the conclusion to which the learned chancellor arrived, in the suit of *Forrest v. Price*, 52 N. J. Eq. 16, 29 Atl. 215, in these respects, are distinctly approved.

These conclusions would seem to dispose of the case. But it may be well to expressly notice a further insistment by the defendants, and that is that the receiver appointed by the proceedings under the original bill can have no standing to take and receive these moneys; that any assignment of a claim made contrary to the provisions of section 3477 of the Revised Statutes of the United States, which requires the assignment to be clothed with certain formalities, is void. While this is true as to assignments of claims between the parties made under that statute, the receiver appointed in this suit in equity takes title from Price or the defendants by operation of law, assisted by such actual assignment as may be decreed by the court; and

of such assignments the statute to which reference is made is not prohibitive. The receiver is an officer, an assignee, receiving his power from a court of competent authority and jurisdiction; and the title of Price or the defendants is vested in him by operation of law, to take, have, and possess the property and things in action of Price to satisfy the judgment and decrees of the court from which he derives his authority. It is entirely within the power of the court of chancery, in order to render effective its decree of appropriation of the fund to the payment of debts, to order the defendants to actually make and execute a formal assignment to fully accomplish the object of the decree. These classes of assignments to claims against the government of the United States have been upheld and sustained wherever the question has been fairly before the court of claims or in the supreme court of the United States. Thus full effect is given as well to assignments ordered by courts of competent jurisdiction as to those assignments which result by operation of law, by reason of the appointment of a receiver for the purposes contemplated by the present suit. Under the authorities, a receiver appointed by a court of competent jurisdiction will be sustained in asserting the same title to choses in action which might, as against the government, be asserted by assignees in bankruptcy under deeds of general assignment.

It may be well, in the light of authority, to consider the effect of section 3477 of the Revised Statutes of the United States, so long as it is contended, under it, that the court is without any jurisdiction to compel the defendants to execute an assignment, or to give effect to any assignment by operation of law. The statute is entitled "An act to prevent frauds upon the treasury of the United States," approved February 26, 1853 (10 Stat. 170); and is in the following language: "All transfers and assignments made of any claim upon the United States, or any part or share thereof or interest therein, whether absolute or conditional, and whatever may be the consideration thereto, and all powers of attorney, orders or other authorities for receiving payment of any such claims or any part or share thereof, shall be absolutely null and void unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments and powers of attorney must recite the warrant for payment and must be acknowledged by the person making it before an officer having authority to take acknowledgment of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment or warrant of attorney to the person acknowledging the same." The true meaning and pur-

pose of congress in this enactment was passed upon by Mr. Justice Woods in *Hobbs v. McLean*, 117 U. S. 576, 6 Sup. Ct. 874, who says that the object of the statute was "that the government might not be harassed by multiplying the number of persons with whom it has to deal, and might always know with whom it was dealing until the contract was completed and settlement made." In the case of *U. S. v. Gillis*, 95 U. S. 416, Justice Strong distinctly recognized that certain claims under this statute were assignable, and might be sued in the court of claims in the name of the assignee, without undertaking to determine what claims might be assigned, and says: "That there may be such claims is clearly stated in the act of 1853, and their devolutions of title, by force of law, without any act of parties, or voluntary assignments, compelled by law, which may have been in view." In the case of *Erwin v. U. S.*, 97 U. S. 392, the court said: "The act of congress of February 26, 1853, to prevent frauds upon the treasury of the United States, which was the subject of consideration in the *Gillis Case* applies only to cases of voluntary assignments of demands against the government, and does not embrace cases where there has been a transfer of title by operation of law. The passing of claims of heirs, devisees, or assignees in bankruptcy are not within the evil at which the statute aimed, nor does the construction given by this court deny to such parties a standing in the court of claims." The supreme court of the United States has sustained partial payments made at the treasury to an assignee. *McKnight v. U. S.*, 98 U. S. 179. It has been held that a general assignment, made for the benefit of creditors, including all rights, credits, effects, and property of every description, covered what might be due to the assignor under a contract with the government for carrying the mail. In *Goodman v. Niblack*, 102 U. S. 556, Mr. Justice Miller, in view of the language of the opinion in *Spofford v. Kirk*, 97 U. S. 484, says: "We held it did not include a transfer by operation of law, or in bankruptcy, and we said it did not include one by will. The obvious reason of this is that there can be no purpose in such cases to harass the government by multiplying the number of persons with whom it has to deal, nor any danger of enlisting improper influences in advocacy of the claim, and that the exigencies of the party who held it justified and required the transfer that was made. In what respect does the voluntary assignment for the benefit of his creditors, which is made by an insolvent debtor of all his effects, which must, if it be honest, include a claim against the government, differ from the assignment which is made in bankruptcy? There can here be no intent to bring improper means to bear in establishing the claim, and it is not perceived how the government can be embarrassed by such an assignment. The claim is not specifically mentioned, and is obviously

included only for the just and proper purpose of appropriating the whole of his effects to the payment of all his debts. We cannot believe that such a meritorious act as this comes within the evil which congress sought to suppress by the act of 1853."

Assignments of moneys due from the treasury department, to receivers appointed under supplementary proceedings for the benefit of a creditor, have been upheld by the court of claims. I think it may be said that the cases show that they have been uniformly sustained by that court, as well as by the supreme court of the United States. *Redfield v. U. S.*, 27 Ct. Cl. 393. In this latter case the plaintiff was a receiver appointed by the supreme court of the state of New York, city and county of New York. He also had the additional claim of being the assignee of all demands against the United States on the part of one Mitchell, the assignment being executed by Mitchell for the purpose of enabling the claimant to more effectually perform the duties of his receivership under his appointment by the supreme court of New York. Weldon, J., delivering the opinion in the court of claims, says: "It may be that the personal assignment by Mitchell to claimant, it being for the indebtedness of the United States only, would not have the effect to transfer the claim to him; but his appointment as receiver under the order of the court has, in our opinion, that effect. It was held, in the case of *Erwin v. U. S.*, 92 U. S. 392, that the act of congress of February 26, 1853, to prevent frauds upon the treasury of the United States, which was the subject of consideration in the *Gillis Case* [95 U. S. 407], applies only to the voluntary assignment of demands against the government. It does not embrace cases where there has been a transfer of title by operation of law. The passing of claims to heirs and devisees or assignees in bankruptcy is not within the evils at which the statute aimed; nor does the construction given by this court deny to such parties a standing in the court of claims."

The conclusion reached from these authorities is that the statute does not prohibit nor interfere with assignments in bankruptcy, nor general assignments for the benefit of creditors, nor assignments decreed by a court of competent jurisdiction, between parties, for the benefit of the creditors of the person or estate of the claimant, nor to assignments by operation of law, as recognized and enforced by the various courts of competent jurisdiction in the several states of the Union. Besides, this interpretation of the statute is entirely consonant and in furtherance of justice. The only case relied upon by defendants is that of *St. Paul & D. R. Co. v. U. S.*, 112 U. S. 733, 5 Sup. Ct. 366. An examination of the case will show that all that was decided in that case was that the voluntary transfer of a claim against the United States for compensation to a railroad company for carrying the mail, made to another company by way

of mortgage, does not fall within the principles of exceptions to the statute, such as an assignment by operation of law, or a voluntary assignment for the benefit of creditors. The court said, in that case, in effect, that the fact that the mortgage was foreclosed by judicial action did not constitute an assignment by operation of law. This case is no authority to sustain the point that the receiver of the property and things in action of a debtor, for appropriation to the payment of debts, deriving his authority from a court of competent jurisdiction, does not take, by virtue of an assignment by operation of law, a claim against the United States.

The conclusion reached is that the order of the chancellor overruling the pleas must be affirmed, with costs.

(84 Md. 346)

HARPER et al. v. CLAYTON.

(Court of Appeals of Maryland. Dec. 3, 1896.)

CREDITORS' BILL—WHEN LIES—UNASSIGNED RIGHT OF DOWER.

Where no express authority is given by statute, in the absence of fraud or other grounds for equitable relief, a creditors' bill will not lie to subject a widow's unassigned right to dower to the payment of her debts.

Appeal from circuit court, Kent county, in equity.

Creditors' bill, filed by George W. Harper and others against Rachel C. Clayton. From an order sustaining a demurrer and dismissing the bill, the complainants appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, PAGE, BRISCOE, BOYD, ROBERTS, and FOWLER, JJ.

Hope H. Barroll, for appellants. James A. Pearce and Lewin W. Wickes, for appellee.

FOWLER, J. The plaintiffs below are judgment creditors of the defendant, who is the widow of the late John S. Clayton, and as such widow she is entitled to dower in the real estate of her late husband. But it appears that her dower has never been actually assigned or set off to her, and it would, therefore, follow that she has not, at common law, any interest or estate in the lands of her husband until such assignment has been made. "Previous to the assignment of dower, her interest is a mere chose in action, nothing but a right by appropriate proceedings to compel the assignment to be made." *Freem. Ex'ns*, § 185. So long, therefore, as the common law prevails, the unassigned dower right cannot be taken in execution at law. It is contended, however, and this contention appears to be the main ground upon which the plaintiffs ask the aid of a court of equity, that, the law affording them no relief, equity must necessarily do so. And although an interesting question of equity jurisdiction is here presented which has been examined by some of the most learned jurists both of England and this country, it would be impossible in the court limits of this opinion to do more than

refer to and discuss some of the leading cases. In the early cases of England the jurisdiction here contended for, to subject choses in action to the claims of creditors by a creditors' bill, was sustained, but generally upon the ground of fraud, trust, or for some other reason which it was conceded would entitle the creditor to invoke its aid. Thus, *Taylor v. Jones*, 2 Atk. 600, lays down the doctrine that where a debtor has, in fraud of his creditors, assigned to trustees certain choses in action in trust for himself for life, and then over to his wife and children, a court of equity will favorably hear the application of such creditors, and decree such trust estate to be sold for the payment of their debts. And this was held to be so notwithstanding such choses in action were not subject to levy and sale upon execution at law. *Rex v. Marlissal*, 3 Atk. 192; *Edgell v. Haywood*, Id. 352; *Horn v. Horn*, Amb. 79; *Partridge v. Gopp*, Id. 596; *Smithier v. Lewis*, 1 Vern. 398. But even in cases like that of *Taylor v. Jones*, supra, and the others just cited, which would perhaps be now generally conceded to be within the limits of equity jurisdiction because of the allegation and proof of fraud, it was subsequently held in England that creditors could get no relief in equity, because they had no legal right which equity could enforce. *Dundas v. Dutens*, 1 Ves. Jr. 196; *Grogan v. Cooke*, 2 Ball & B. 230. In the case last cited Lord Manners quoted Lord Thurlow as having said: "The opinion in *Horn v. Horn* is so anomalous and unfounded that forty such opinions would not satisfy me. It would be preposterous and absurd to set aside an agreement which, if set aside, leaves the stock in the name of the person where you could not touch it." And in *Bayard v. Hoffman*, 4 Johns. Ch. 450, Chancellor Kent, after a most careful and elaborate examination of the English authorities, came to the conclusion that, while Lord Hardwicke had maintained the jurisdiction of equity thus to proceed against choses in action, it was afterwards denied and overthrown by both Lord Thurlow and Lord Eldon, although his own opinion, as expressed in *Bayard v. Hoffman*, supra, was that "the better reason is with the earlier authorities." But, notwithstanding this expression of opinion in the case just cited, the more recent cases upon this point in New York and some other states have vigorously annulled and maintained the doctrine that, aside from statute, and in the absence of fraud or some element of trust, chancery has no jurisdiction to subject choses in action to the payment of creditors because there happens to be no remedy at law; and it would seem that the chancellor himself had adopted this view, as will appear by reference to his Commentaries (volume 4, p. 61), where he refers to the New York statute as authority for the statement that in that state a chose in action may be reached by process in chancery for the benefit of creditors. The cases relied upon by the plaintiffs do not, we think, sustain their position. The first of those in point of time is the case of *Hamilton v. Mohun*, 1 P. Wms. 122. But in that case

there was no question of jurisdiction, as there is here, and it was very properly held, on a bill filed for an account by an heir at law against the widow as guardian, that a court of equity, in taking the account, should allow to the widow one-third of the profits for her right of dower; and this, too, whether dower had or had not been actually assigned. The question of jurisdiction was not involved in *Hamilton v. Mohun*, and it is therefore not an authority here. The plaintiffs also cited and relied upon three New York cases,—*Tompkins v. Fonda*, 4 Paige, 448; *Stewart v. McMartin*, 5 Barb. 438; and *Payne v. Becker*, 87 N. Y. 153. But it is sufficient to say, in regard to all of those cases, that they appear to be based upon the provisions of the New York statute which was in force when they were respectively decided. That statute, in effect and in words, provided that courts of chancery should have power to decree satisfaction of a judgment at law out of any money, property, or thing in action belonging to the defendant, whenever an execution against his property shall have been returned unsatisfied in whole or in part. The same observations may be made in regard to *McMahon v. Gray*, 150 Mass. 289, 22 N. E. 923, and *Boltz v. Stoltz*, 41 Ohio St. 540. In each of the states just named there were statutes expressly giving chancery courts jurisdiction to decree the sale of choses in action upon the application of judgment creditors. The case of *Davidson v. Whittlesey*, 1 MacArthur, 163, was much relied on by the plaintiffs. It was decided on the authority of *Tompkins v. Fonda*, supra, which, having been based on the New York statute, should have had no weight where, as in the District of Columbia, no such statute was in force. Nor are we satisfied to adopt the reasoning of the court in *Davidson v. Whittlesey*. After stating that at law the right to have dower assigned could not be reached, it is said: "But in equity it is otherwise. The widow has no right in conscience to deprive her creditors of the benefit of her right of dower for the satisfaction of their claims by continuing in joint possession with the heirs, and neglecting to ask for a formal assignment, which assignment, if made, would enable the creditors to reach her dower by execution." It must be remembered that in the case at bar there is not only no fraud alleged by the plaintiffs, but they have disclaimed any intention of charging bad faith or collusion between the defendant and the heirs at law who are in possession of the land in which she is entitled to have dower assigned to her. In the position she has assumed in this case she is only standing upon her legal rights. It is contended that at common law, aside from such statutes as have been evaded in some of the states, though not in Maryland, the defendant's right of dower is not liable for her debts. And while it may be said, perhaps, in one sense, that "in conscience she ought not to deprive her creditors of the benefit of her right of dower" for the payment of their just claims, yet the same may be said of any one who relies on the statute of limitations or exemption laws to de-

feat such a claim. If debtors could be required by a court of equity to abandon their legal rights, and to subject themselves to the dictates of conscience, or to some law regarded as higher than the law of the land, they would doubtless seldom plead the statute of limitations, or rely upon the provisions of homestead or exemption laws. But whenever these statutes are properly and reasonably pleaded, they are as binding in a court of equity, which is sometimes called a "court of conscience," as they are in a court of law. And, recognizing this right to stand upon one's legal rights, it has been held that the neglect or refusal to have dower assigned does not amount to fraud. *Maxon v. Gray*, 14 R. I. 641; *Buford v. Buford*, 1 Bibb, 305. This is only another application of the well-settled principle of equity that "where a rule, either of statute or common law, is direct, and governs the case in all its circumstances or the particular point, a court of equity is as much bound by it as a court of law, and can as little depart from it." 1 Story, Eq. Jur. § 64. Applying here, then, the conceded common-law rule that the creditor has no legal right to look to the unassigned dower (it being a chose in action) for the satisfaction of his claims, it follows that equity will not aid him.

Much reliance was also placed upon the language used by Chancellor Bland in the case of *Watkins v. Dorsett*, 1 Bland, 531. To the same general effect, also, is *Ager v. Murray*, 105 U. S. 128, where it is said that it is within the general jurisdiction of a court of chancery to assist a judgment creditor to reach and apply to the payment of his debts any property which, by reason of its nature only, and not by reason of any positive rule exempting it from liability for debt, cannot be taken on execution at law; as in the case of trust property in which the judgment debtor has the entire beneficial interest, of shares in a corporation, or of choses in action. While the rule thus stated may be, when properly applied, admitted to be correct, we cannot agree with the application of it sought to be justified by *Watkins v. Dorsett*, nor with the broad application of the rule, as in *Ager v. Murray*, to all choses in action. In the case first named Chancellor Bland said that the facts before him expressed one of the then-existing deficiencies of our Code; and, after stating that both real and personal property of a debtor had been subjected to be taken on execution at law, he says, "There are, however, still several kinds of property which a debtor may hold, lying beyond the reach of his creditors," and he mentions as in this class stock in corporations and things in action. The case from which we have quoted the foregoing language of the chancellor was decided in 1829. But very soon thereafter the act of 1832 (chapter 307), now codified, was passed, by which any interest of a debtor in stock of a corporation may be taken and sold under an execution at law. But no such act has ever passed in this state by

which the thing in action here attached could be so taken and sold. That there is no such statute is the main foundation of this proceeding in equity, for, if there were a remedy at law, the bill in this case was properly dismissed. It was held in *Watkins v. Dorsett* that, where a party cannot obtain relief at all, either by an ordinary execution or by the extraordinary remedy of outlawry or attachment of the person by reason of the peculiar situation of the property or the equitable nature of the bills, he may obtain relief by bill in equity. But we think it is apparent that this language, even if it was not so intended, should be limited so as to relate to enforcement of some existing legal right, for a court of equity, however broad and far-reaching its powers are, cannot create new rights, not before existing at law, and then take jurisdiction to pass upon and enforce them because the law affords no remedy. It is perhaps but fair to infer that the language of the chancellor related to property situated like that in *Harris v. Alcock*, 10 Gill & J. 228, to which case he refers, where it was held that the equitable interest of the defendant in personal property, which, under the circumstances of that case, could not be taken by execution at law, might be attacked in equity. Nor do we assent to this view that the mere abolition of the extraordinary remedies of outlawry and attachment of the person would confer jurisdiction or equity. Such a conclusion would be in conflict with reason, as well as with modern authority. It would certainly not seem to follow that, if the law had always and consistently refused to give an execution against things in action, and had allowed only the extraordinary remedies just mentioned, that upon the destruction of the latter the former would not only thereupon spring into existence, but become remedies appropriate for a court of equity. The contrary conclusion would, we think, be more reasonable, namely, that, the legislature having abolished execution against the person which was used for the purpose of getting satisfaction out of the debtor's effects which could not be reached by other executions, and having failed to provide any new remedy to take its place, it was not intended there should be any. And so it has been held in *Donovan v. Finn*, 1 Hopk. Ch. 59; *Buford v. Buford*, 1 Bibb, 305; *Greene v. Keene*, 14 R. I. 383, 397. "Equity follows the law," and, as we have seen, a rule either of statute or common law is as potent in a court of equity as in a court of law. 1 Story, Eq. Jur. § 64. Whatever may at one time have been the vague and general rule as to the limits and extent of equity jurisdiction, it is now well settled that "no court of chancery at this day would attempt to supply the defects of law by deciding contrary to its settled rules in any manner, to any extent, or under any circumstances, beyond the already settled principles of equity jurisprudence."

1 Pom. Eq. Jur. § 47. In reference to the New York cases cited in *Ager v. Murray*, supra, namely, *McDermutt v. Strong*, 4 Johns. Ch. 687, and *Spader v. Hadden*, 5 Johns. Ch. 280, it may be said that they were both prior to *Hadden v. Spader*, 20 Johns. 554, in which *Platt, J.*, said there was such a conflict of authority and dicta upon this question that he felt at liberty to decide it upon sound principles of justice and public policy, and that he was not prepared to extend the jurisdiction of equity to any other cases than those wherein the property itself was liable to execution at law, and which had been also assigned in fraud of creditors; holding also that the power to subject choses in action of the debtor had not been conferred upon the courts, and suggesting the necessity for legislation. It has been supposed that this expression of opinion led to the statute which was afterwards passed in New York conferring jurisdiction upon courts of chancery to entertain a bill like the one filed in this case.

It would seem to be reasonably clear from the authorities already cited and the discussion of them that, in the absence of a statute, and in the absence of fraud or some other ground of equity jurisdiction, a court of equity has no power to subject the defendant's unassigned right of dower to the payment of her debts. But this conclusion will, we think, be placed beyond doubt by a brief consideration of some of the adjudications of the highest courts of other states. In the case *Maxon v. Gray*, 14 R. I. 641, which was decided in 1885, the very question now before us was passed upon. That case, like this, was a bill in equity by judgment creditors for a decree for a sale of an unassigned right of dower, and in an able and elaborate opinion the court came to the conclusion, after reviewing many of the previous cases, that equity had no jurisdiction. To the same effect is *Greene v. Keene*, 14 R. I. 388. In *Creswell v. Smith*, 2 Tenn. Ch. 416, it was held that chancery has no power to reach stocks or things in action, even in the hands of third persons, unaffected with fraud or trust, without the aid of a statute. *Keightley v. Walls*, 27 Ind. 384; *Williams v. Reynolds*, 7 Ind. 622. In the case last cited it is said equity will not subject choses in action to the payment of a judgment creditor, because equity only aids the law, and will, therefore, not interfere, except as to such property as may be sold on execution at law. In the case of *Buford v. Buford*, supra, the same view was enforced in the absence of a statute, and in concluding its opinion the court said, "The bare circumstances of a debt cannot be made the foundation of a bill." The views upon the question of jurisdiction expressed in all these cases are in accord with the rule as laid down by Mr. Adams. "Equity," he says, "does not create new rights which the common law denies, but it gives effective redress for the infringement

of existing rights, where, by reason of the special circumstances of the case, redress at law is inadequate." Adams, Eq. p. 6; Phelps, Jud. Eq., see 158. The plaintiffs having failed to bring their case within the limits of equity jurisdiction as established and practiced in this state, their bill must be dismissed. "When a creditor," says Chancellor Sanford in *Donovan v. Finn*, supra, "comes into this court for relief, he must come not merely to obtain a decree or satisfaction of a judgment, but he must present facts which form a case for equity jurisdiction." Such facts the creditors who filed the bill now before us have entirely failed to set forth, and we therefore agree with the learned court below that the demurrer to the bill was properly sustained, and the bill was properly dismissed. Decree affirmed.

(84 Md. 437)

CONSUMERS' ICE CO. v. BIXLER et al.
(Court of Appeals of Maryland. Dec. 3, 1896.)

LANDLORD AND TENANT — LESSEE'S LIABILITY — ASSIGNMENT.

1. Though a lease for a definite term of years contains no express covenant to pay rent, yet the lessee cannot discharge himself from liability for future rent by an assignment of the lease without the lessor's consent.

2. Where the assignee of a lease covenants with the lessor that all the covenants and agreements in the lease on the part of the lessee shall be binding on him, he cannot escape liability for future rent, though the lease contained no express covenant to pay the same, by an assignment of the lease without the lessor's consent.

Appeal from superior court of Baltimore city.

Action by William H. H. Bixler & Co. against the Consumers' Ice Company. There was a judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, ROBERTS, and BOYD, JJ.

Edgar H. Gans and B. H. Haman, for appellant. Thomas M. Lanahan and Frank Gosnell, for appellees.

BOYD, J. The questions presented by this appeal were raised by a demurrer to the declaration, which was overruled by the court below, and judgment entered for the appellees, the plaintiffs in the case. The facts are set forth in full in the declaration, and we are called upon to determine the liability of the defendant, under the following circumstances: On December 31, 1889, the appellees leased to Jacob Frederick & Sons a lot of ground in the city of Baltimore for the term of 10 years, beginning on the 1st day of January, 1890, "subject to the annual rental of three thousand dollars, payable in quarterly installments on the first day of April, July, October, and January." On December 21, 1892, Frederick & Sons executed an assignment of the lease to Charles W. Morse, who on the next day assigned it to the defendant. On the

30th day of December, 1892, an agreement was entered into between Bixler & Co., of the first part, Frederick & Sons, of the second part, and the appellant, of the third part, wherein, after reciting the original lease and the above-mentioned assignments, the following provisions and agreements were made: "Now, therefore, these presents witness that for and in consideration of the premises, and the mutual covenants and agreements herein contained, and the further sum of one dollar to the parties of the first part by the party of the third part in hand paid, the said parties of the first part do hereby assent to the said two assignments of said leasehold interest, above referred to, to Charles W. Morse, and to the Consumers' Ice Company, of Baltimore, respectively. And it is further agreed between the parties of the first part and the party of the third part that all the covenants and agreements in the original lease of William H. H. Bixler et al., trading as aforesaid, to William T. Frederick et al., trading as aforesaid, shall be and remain in full force and effect between the parties of the first part and the party of the third part hereto. It is, however, expressly agreed, as stipulated, that the parties of the second part, in consideration of one dollar paid them by the parties of the first part, shall also remain bound by all the covenants and agreements contained in said original lease." Prior to this the lessors had not given their consent to the assignments, and they were made without their knowledge. The defendant accepted the assignments, entered into possession of the premises, and on December 13, 1895, assigned the lease to Anthony G. Hamburger, who accepted it without the knowledge or consent of the plaintiffs. This suit was brought to recover the quarter's rent falling due January 1, 1896, which was after the defendant assigned the premises to Hamburger.

The liability of an assignee of a term to the lessor rests upon the privity of estate, unless he enters into some contract with him, and only continues so long as that exists. As the defendant assigned the premises before the rent sued for was due, its liability as a mere assignee of the term had ceased. *Hintze v. Thomas*, 7 Md. 346; *Donelson v. Polk*, 64 Md. 501, 2 Atl. 824. And if the agreement of December 30, 1892, had not been executed, the case would be free from doubt. But, as we have seen, it was agreed that all the covenants and agreements in the original lease should remain in full force and effect between the appellant and appellees. It therefore becomes necessary to ascertain the extent of the liability of the original lessees. A lessee may be responsible for rent, either by virtue of an express covenant to pay it, or by reason of the privity of estate. If there be no such covenant, then the liability of the lessee rests upon privity of estate alone. Where there is such a covenant, the lessee cannot terminate his liability by an assignment of the lease, although the lessor may accept rent of the as-

signee, or give his consent to the assignment. If, however, there be no express contract to pay the rent, the lessee's liability will cease, if the lessor consents to an assignment; and such assent may be inferred by his accepting rent of the assignee, or other act recognizing him as his tenant. That is because the privity of estate is destroyed, and, as there is no privity of contract between them, there is no longer any obligation, express or implied, on the lessee. But, in order to destroy this privity of estate between lessor and lessee, there must be the concurrence of the landlord. It is not correct to state, as a rule of law, that a lessee, who has not made an express covenant to pay rent, may discharge himself of all future responsibility by assigning the lease. Take the lease before us, for example, and let us assume that there is no express contract in it to pay rent. The lessors have undoubtedly bound themselves for 10 years, if there be no default on the part of the lessees. They could not rent the property to any other tenant during that term, and could not interfere with the possession of the lessees so long as they do what the agreement or the law demands of them. When they executed and delivered the lease, the law held them liable on certain implied covenants,—that the lessees should have the quiet enjoyment of the premises during the term, etc. *Baugh v. Wilkins*, 16 Md. 85. And there was also an implied covenant on the part of the lessees that they would pay the rent at the times named in the lease. That implied covenant only continues so long as they hold the estate, and depends upon the privity of estate; but they cannot destroy that privity of estate without the consent of the lessors, because by the lease the lessors were entitled to have it continue for 10 years. Although it is said in *Tayl. Landl. & Ten.* § 371, that a lessee or an assignee may discharge himself of all future responsibility by assigning over, an examination of the authorities cited to sustain that position will show that they were applicable to cases of assignees, and not to those of lessees. The same author, in section 438, says: "Nor can a lessee discharge himself from the implied covenants by an assignment without the consent of the lessor, since the original privity of estate existing between them cannot be destroyed without the landlord's concurrence, but a consent may be inferred from the lessor's receiving rent from the assignee, or recognizing him in some other way as his tenant." To the same effect are 1 Washb. Real Prop. 493; *Sutliff v. Atwood*, 15 Ohio St. 194; *Lodge v. White*, 30 Ohio St. 569; *Shine v. Dillon*, Ir. R. 1 C. L. 277; *Smith, Landl. & Ten.* 292, 293.

If, then, it be true that Frederick & Sons were liable for rent for the whole term, does it not follow that the appellant became so by the execution of the agreement of December 30, 1892? After reciting the lease, and the assignments previously made, the lessors, in consideration of the mutual covenants and

agreements therein contained, and of the sum of one dollar paid to him, gave their consent to the two assignments. The appellees and the appellant then agreed that all the covenants and agreements in the original lease should be and remain in full force and effect between them. Remembering, then, that the most valuable part of the lease to the lessors was the payment of the rent, and that the original lessees were bound for it, we are forced to the conclusion that it was the intention of the parties to place the appellant under the same obligation that the lessees were under, which, among other things, was the payment of the rent during the term. The appellant and the lessors then stood in the same relation to each other as they would have done had the appellant been the original lessee; and hence, by assigning to Hamburger without the consent or ratification of the appellees, it did not relieve itself from liability for rent. The cases of *Adreon v. Hawkins*, 4 Har. & J. 319; *Rawlings v. Duvall*, 4 Har. & McH. 1; *Iggulden v. May*, 9 Ves. 330,—are somewhat in point. But, without reference to them, the meaning of the parties to the agreement seems to us clear, and conclusive of the question.

But, although we assumed above, *ex gratia* argumenti, that there was no express covenant to pay the rent during the term, we are of opinion that, by a proper construction of the whole lease, there is what amounts to an express covenant. By that we do not mean to say that the lessees, in so many words, entered into a formal covenant to pay the rent, in terms usual in leases, but that, from the language of the whole instrument, a covenant or agreement to pay the rent is fairly inferable. The property was leased "for the term of ten years, * * * subject to the annual rental of three thousand dollars, payable in quarterly installments," etc. The Fredericks were to have uninterrupted use of the wharf front, for the purposes of their business, with the privilege of extending a vessel through the pier. At the expiration of the lease they are to have the privilege of removing all their machinery, icehouses, and fixtures, but are to replace the pier as it existed when they cut through it. Bixler & Co. agreed to repair the wharf front thoroughly, "after which the said Fredericks are to keep the property in like good condition, at their own expense, during the term hereby created, excepting natural wear and tear." In the event of the wharf being damaged by any vessel other than those employed by the Fredericks, Bixler & Co. agreed to repair it with as little delay as possible. "During which time, however, no abatement of the rent shall be allowed." It was agreed that in the event of a condemnation of the property, as was contemplated, to such an extent as to render it unfit for their business, the Fredericks "may cancel the lease, paying the proportionate rent up to the time of actual dispossession." When we read these provisions together, the conclusion seems irresistible that it was contemplated, under-

stood, and intended to be agreed, between the parties, that the Fredericks should hold the property during the whole term. They agreed to keep it in repair, not while they occupied it, but "during the term hereby created." At the expiration of the lease they are required to replace the pier which they are authorized to cut through. In the event of the condemnation of the property to an extent that will render it unfit for their business, they are authorized to cancel the lease, but are required to pay the rent to the time of actual dispossession. Now, without meaning to say that the use of the words, "subject to the annual rental of three thousand dollars, payable in quarterly installments," was of itself sufficient to make an express covenant to pay, yet, when they are taken in connection with the other provisions, we think it was evidently the meaning and intention of the parties to bind the lessees for the rent during the term, and, as the lease was signed and sealed by the lessees, an action of covenant will lie. That being our opinion as to the liability of the lessees, what we have said above will sufficiently indicate our views as to the liability of the appellant,—not as assignee, but by reason of the agreement under seal entered into by it with the original lessors and lessees. It follows that the judgment must be affirmed. Judgment affirmed, with costs to the appellees.

(34 Md. 426)

CORBETT v. WOLFORD et al.

(Court of Appeals of Maryland. Dec. 3, 1896.)
STATUTE OF FRAUDS—DELIVERY OF GOODS—WHAT CONSTITUTES.

Defendant contracted to purchase of plaintiffs a quantity of hay, but at the time of the contract there was no memorandum made, or part performance, as required under the statute of frauds. A short time thereafter defendant sent his employees to bale the hay ready for shipment. *Held* that, in view of further testimony that the hay was to be delivered by plaintiffs to defendant at a certain railroad station after being baled, it was error to instruct the jury that the steps taken to bale the hay constituted a delivery, taking the contract out of the statute of frauds.

Appeal from circuit court, Washington county.

Action by Jacob O. Wolford and others against Walter S. Corbett. There was a judgment for plaintiffs, and defendant appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, PAGE, ROBERTS, and BOYD, JJ.

Alex. R. Hagner, for appellant. J. A. Mason and W. J. Witzzenbacher, for appellees.

BRYAN, J. Corbett contracted to purchase from the appellees 20 tons of hay at the price of \$8 a ton. The hay was contained in several ricks in an open field which belonged to Wolford and his wife, and was occupied by the Ripples as their tenants. The contract was verbal. According to the

seventeenth section of the statute of frauds, a sale of goods and chattels of the value of \$10 and upward is not valid, unless the buyer shall accept part of the goods sold, and actually receive the same, or give something as earnest to bind the bargain, or in part payment, or some note or memorandum in writing be made and signed, etc. Nothing was given as earnest to bind the bargain, or in part payment, and no note or memorandum in writing was made. Corbett was sued by the appellees for the price of the hay, and judgment was rendered against him. The evidence tended to prove that, shortly after the contract was made, Corbett ordered men who were in his service to go to the place where the hay was standing in ricks, and pack it; and that one of his men took some of the hay from the top of one of the ricks, and trimmed down the sides; and that, about 20 minutes afterwards, all the hay was accidentally destroyed by fire. The question at the trial was whether the title to the hay had vested in Corbett before it was burned up. On the prayer of the appellees, the court granted the following instruction: "The jury are instructed that if they believe, from the evidence, that the defendant bought the hay in controversy, and directed his hands or employes to bale the same, and said hands took possession of said hay, and by topping the same and cutting down the sides thereof prepared the same for such baling, and that such hay was afterwards destroyed by fire, then the jury are instructed that such acts are evidence of the receipt and acceptance by the defendant of the hay in controversy, and their verdict must be for the plaintiffs." The facts stated, if there had been no others in evidence, would have justified the jury in finding a verdict for the plaintiffs. We do not desire to be unnecessarily critical in considering the form of the instruction. It is well, however, to say that this court has on several occasions disapproved of this method of putting a case before the jury. Among other authorities, we refer to *Hurt v. Woodland*, 24 Md. 417; *Moore v. McDonald*, 68 Md. 336, 12 Atl. 117, 119; *Kennedy v. Commissioners*, 69 Md. 71, 72, 14 Atl. 524, 525. We would not, nevertheless, be willing to reverse the judgment if there were not a more serious objection to this instruction. We will state it. Corbett, in his testimony, says: "The hay was to have been delivered by the plaintiffs, after I had packed it, to Charlton station, or at the canal landing,—which place I was to determine after it had been packed,—and then the money was to be paid." This testimony was entirely excluded from the consideration of the jury by the court's instruction. It tended to show that, by the terms of the bargain, Corbett was not to accept the hay until it was conveyed by the plaintiffs "to Charlton station, or the canal landing"; and, if believed by the jury, it was competent for them to find that what

occurred at the hay rick was merely in preparation for the packing, which Corbett was to do, in order that the plaintiffs might deliver it to him at the appointed place. Whatever might be the belief of the jury on this point, they were required to find for the plaintiffs provided they believed the facts hypothetically stated in the instruction. When it is stated, in a prayer, that the plaintiff is entitled to recover, provided the jury find certain enumerated facts, it has been uniformly held that the effect of the prayer is to withdraw from the jury all other facts than those mentioned. It was so declared in *Riggin v. Insurance Co.*, 7 Har. & J. 280, and also in *Bosley v. Insurance Co.*, 3 Gill & J. 462, *Adams v. Capron*, 21 Md. 205, *Haines v. Pearce*, 41 Md. 234, and in every other case where the question has been raised. If the jury would be justified in drawing from the facts excluded from the prayer a conclusion different from that which the prayer requires them to find, it is a manifest corollary, from the ruling just mentioned, that it would be error to grant such a prayer. The cases just cited maintain this position. It was held, in *Belt v. Marriott*, 9 Gill, 335, that, "in order to satisfy the statute [of frauds], there must be a delivery of the goods, with intent to vest the right of possession in the vendee, and there must be an actual acceptance by the latter, with intent to take possession as owner." And this doctrine is fully sustained by the authorities. The facts excluded from the instruction tended to the inference that the acceptance of the hay by Corbett was to take place when it was delivered at Charlton station or at the canal landing. Of course, the jury may have refused to draw this inference, and they may have concluded that the other testimony in the cause proved that the purpose to deliver the hay at one of the places named had been changed, or they may have refused to believe the testimony altogether. But it was certainly their province to consider it, and to form their opinion upon it. Their verdict ought to be founded on all the facts in evidence which bear on the matter in controversy, and they must be submitted to their finding unless they are admitted to be true. For error in withdrawing evidence from them, the judgment must be reversed, and a new trial ordered. Reversed, and new trial.

(34 Md. 338)

KIRK et al. v. GARRETT.

(Court of Appeals of Maryland. Dec. 3, 1896.)

LARCENY — ARREST — CONSTABLE — AUTHORITY — FALSE ARREST — PARTNERSHIP — TORT — ADMISSIONS — GRAND JURY — EVIDENCE BEFORE — SECRECY.

1. An employé of a manufacturing silversmith, taking without the consent of his employer manufactured silver, and leaving in its place old silver, equal in weight, but not in value, is guilty of larceny.

2. A constable may arrest without a warrant

a person whom he has reasonable grounds to suspect has been guilty of a felony, though the suspicion arises out of information imparted to him.

3. Whether certain facts afford reasonable grounds of suspicion, so as to justify an arrest by a constable without a warrant, is for the court to determine.

4. In determining whether a verdict is to be directed for defendant, plaintiff's evidence must be taken as true in every particular.

5. Where a person arrested by a constable voluntarily remains in his custody, in order to prevent the publicity of an examination, the constable is not guilty of false imprisonment for failure to take the person before a magistrate within a reasonable time.

6. The members of a partnership are not liable for the act of one partner, in the name of the firm, in directing an unlawful arrest or false imprisonment.

7. The admissions of a party against interest are admissible in evidence against him, though he was not interrogated in regard thereto.

8. A grand juror may testify as to the testimony of a witness before the grand jury, to prove the falsity of the testimony of such witness given in an action by him.

9. The inability of counsel to state what a grand juror would testify to in regard to testimony before the grand jury does not render his testimony inadmissible.

Appeal from superior court of Baltimore city.

Action by Wilmer H. Garrett, an infant, by his father and next friend, Samuel H. Garrett, against Samuel Kirk & Son and others. There was a judgment for plaintiff, and defendants appeal. Reversed.

Argued before McSHERRY, C. J., and BRYAN, BOYD, FOWLER, and BRISCOE, JJ.

W. Pinkney Whyte, for appellants. Thomas C. Weeks and D. Eldridge Monroe, for appellee.

McSHERRY, C. J. This is an action of trespass for assault and false imprisonment. There are five bills of exception in the record. Two relate to rulings of the superior court on prayers for instructions to the jury, and three to the admissibility of proffered, but rejected, evidence. About some of the facts there is dispute and conflict. To these reference will be made as we proceed. They have relation to the ruling in the first and to some of the rulings in the fifth bill of exceptions. The uncontroverted facts that are material to an intelligent preservation of the questions involved in all the rulings complained of may be concisely summarized from the record without quoting extensively or literally from its pages.

Two of the defendants, Henry C. Kirk and Henry C. Kirk, Jr., constitute the firm of Samuel Kirk & Son, manufacturers and dealers in silverware. The equitable plaintiff, a youth of some 17 or 18 years of age, was one of their employes, and his duty was to polish the finished work. The other two defendants, Miller and Hardesty, were members of a detective agency; one of them, Hardesty, being a constable. The Messrs. Kirk, discovering that they were being subjected to repeated losses by larcenies, believed to have been committed by persons in their service, the junior

member of the firm engaged Miller and Hardesty to investigate, and to ascertain, if possible, the culprits. On the last day of July, 1894, the equitable plaintiff took from the shop of Kirk & Son a half dozen silver tablespoons, concealed in his pocket, and on the corner of St. Paul and Fayette streets handed them to a co-employé, to be engraved; the engraver having previously refused to take them from the plaintiff while in the defendant's shop. The detectives saw the plaintiff leave the shop with something hidden in the inside pocket of his coat, and they also saw him give the package to the engraver on the street corner. The next day the plaintiff, on leaving the shop, again took with him six tablespoons, which he carried, as before, in the inside pocket of his coat. As he proceeded up the street on his bicycle, he heard a whistle, and on looking around saw Hardesty, who motioned to him to stop. He did stop, and Hardesty went up to him, showed his badge as a constable, and requested the equitable plaintiff to accompany him to his (Hardesty's) office. Thereupon Miller joined them, and the three walked to the office of Miller and Hardesty, not far distant. When they reached there, and entered with the plaintiff, they locked the door, and then asked him whether he had any spoons in his possession. He replied that he had, and produced a half dozen tablespoons from his inside pocket, whereupon the detectives charged him with having stolen them, which charge he denied, and claimed that, though the spoons were stamped with the name of Samuel Kirk & Son, and were Kirk's silver, he had exchanged for them, without the knowledge of his employers, an equal amount in weight of old silver. Mr. Kirk, Jr., was then sent for, and upon his arrival made inquiries as to whether other employes had been guilty of stealing, and the plaintiff, according to one of his versions of the interview, informed Mr. Kirk that five others had exchanged old silver for manufactured silver, just as the plaintiff said he had done; but, according to the version of the interview given by Mr. Kirk and by Mr. Miller and Mr. Hardesty, the plaintiff admitted that five other employes were guilty of stealing articles from Kirk & Son's shop, and he gave the names of the parties, and described the articles, and signed a paper setting forth this information. He was then taken to Brawner's Hotel, as he says, without his consent, and against his will, but, as the other three declare, at his own instance and request. He was told by the detectives immediately after his arrest, so they and Mr. Kirk assert, that they would be obliged to take him to the station house, to be dealt with by the police department; but he appealed to Mr. Kirk to prevent this being done, as his arrest, if thus given publicity, would become known to his invalid mother, and the shock would probably cause her death. In consequence of this appeal, in view of his youth, and upon his promise to appear before the grand jury, and there testify against his co-employes, Mr. Kirk, Jr., consented that he

should not be taken to the station house; and the plaintiff himself suggested that he should be allowed to go with the detectives to an hotel, and be there kept until he could give his testimony before the grand jury. He was taken to Brawner's Hotel, and remained there all night. The next day he went back to Miller and Hardesty's office with them, and stayed there the entire day; and the night of that day he spent, still in the company of the detectives, at the Imperial Hotel. The next day he went before the grand jury, and testified, though, as he now says, he did not then inform the grand jury that the other men, named by him to Mr. Kirk, had been stealing from the firm. After appearing as a witness before the grand jury, he was permitted to return to his home. No accusation was lodged against him, and he was reinstated by the firm in his position as an employé, where he remained until within a day or two before this suit was instituted on the following 21st day of September. Henry C. Kirk, Sr., had no knowledge of the arrest of the equitable plaintiff when it was made, and according to the undisputed evidence had nothing to do with it; nor does he appear to have known what was done with the plaintiff when he was taken into custody. The spoons found in the possession of the equitable plaintiff when he was arrested were beyond doubt the property of Samuel Kirk & Son. They had been made for them out of their own silver, by their own workmen, bore their trade-mark, and the cost of their manufacture had been paid by the firm. That an employé, without their knowledge or consent, could surreptitiously take and carry away this property upon leaving with a fellow workman in its place and stead raw material, equal in weight, but not the equivalent in value, of the manufactured article, and yet be innocent of the crime of larceny, is a doctrine which finds no countenance or sanction in the law. When, therefore, the equitable plaintiff took and carried away from the shop of Kirk & Son, on the 31st of July, one half dozen tablespoons, and again on the day following an additional half dozen, he was incontestibly guilty of larceny. If so guilty, was his arrest or detention lawful or illegal?

The illegality of the arrest and the unlawfulness of the detention are indispensable elements in this form of action; and if, therefore, the arrest were lawful, and the detention were reasonable, there was, and could be in the very nature of the case, no false arrest or false imprisonment. From the earliest dawn of the common law, a constable could arrest without warrant when he had reasonable grounds to suspect that a felony had been committed; and he was authorized to detain the suspected party such a reasonable length of time as would enable him to carry the accused before a magistrate. And this is still the law of the land. It is wholly immaterial whether the suspicion arises out of information imparted to the constable by some one else, or whether it is

founded on the officer's own knowledge. In either event, what amounts to a sufficient ground of suspicion to justify an arrest by a constable without a warrant is for the court, and not for the jury, to determine. In Pollock on Torts this doctrine is thus stated: "What is reasonable cause of suspicion to justify arrest is—paradoxical as the statement may look—neither a question of law nor of fact. Not of fact, because it is for the judge, and not for the jury [citing *Halles v. Marks*, 7 Hurl. & N. 56]; not of law, because no definite rule can be laid down for the exercise of the judge's judgment [citing *Lister v. Perryman*, L. R. 4 H. L. 521, per Lord Chelmsford and Lord Colonsay]. It is a matter of judicial discretion, such as is familiar enough in the classes of cases which are disposed of by a judge sitting alone; but this sort of discretion does not find a natural place in a system which assigns the decision of facts to the jury, and the determination of the law to the judge. The anomalous character of the rule has been more than once pointed out and regretted by the highest judicial authority." Lord Campbell, in *Broughton v. Jackson*, 18 Q. B. 378; Lord Hatherly, Lord Westbury, and Lord Colonsay, in *Lister v. Perryman*, supra. "But," continues the author, "it is too well settled to be disturbed unless by legislation." Pol. Torts (Ed. 1887) 192; *Cohen v. Huskisson*, 2 Mees. & W. 477; *Warner v. Riddiford*, 4 O. B. (N. S.) 180; *Mure v. Kaye*, 4 Taunt. 34; 2 Add. Torts, § 841. It may be broadly stated that what amounts to probable cause in cases of malicious prosecutions will amount to such reasonable grounds for suspicion of felony as will justify and require an officer to make an arrest. Reg. v. Dadson, Temp. & M. 385; 2 Am. & Eng. Enc. Law (2d Ed.) 871. Now, do the facts show that Hardesty, the constable, had reasonable grounds to suspect that a felony had been committed, and that the equitable plaintiff was the guilty party? If they do, the arrest, though made without a warrant, was lawful. The constable had been informed by the younger Mr. Kirk that larcenies were being committed, and he saw, the day preceding the arrest, the plaintiff come from the shop, with something concealed in the inner pocket of his coat, and he further saw this package delivered on the street corner to another employé, whom Miller followed, and found to be Kirk's engraver. And then, on the day of the arrest, he saw the plaintiff with something again concealed in his pocket, and, upon arresting him, found in his possession the spoons that belonged to Samuel Kirk & Son. Here, then, was a case where the plaintiff had actually stolen his employer's property, for, as we have already said, his taking of the spoons, even under the conditions testified to by himself, was indisputably a larceny; and he was found with the stolen property in his possession. There was, therefore, not only reasonable ground to suspect that a felony had been committed,

but there was clear and conclusive evidence of the fact that the equitable plaintiff was guilty; and, had the officer taken the accused in a reasonable time before a magistrate to be committed or bailed for his appearance to answer the charge, the case would, on the plaintiff's own showing, have been at an end. It cannot be questioned that, when a person is arrested, either with or without a warrant, it becomes the duty of the officer or the individual making the arrest to convey the prisoner in a reasonable time, and without unnecessary delay, before a magistrate, to be dealt with as the exigency of the case may require. The power to make the arrest does not include the power to unduly detain in custody; but, on the contrary, is coupled with a correlative duty, incumbent on the officer, to take the accused before a magistrate "as soon as he reasonably can." 1 *Hil. Torts*, p. 223, § 19; *Wright v. Court*, 4 *Barn. & C.* 596; *Firestone v. Rice*, 71 *Mich.* 377, 38 *N. W.* 885; *Railroad Co. v. Cain*, 81 *Md.* 87, 31 *Atl.* 801; *Twilley v. Perkins*, 77 *Md.* 282, 26 *Atl.* 286; *Rohan v. Sawin*, 5 *Cush.* 251; *Com. Dig.* "Imprisonment," H, 4. If the officer fails to do this, and unreasonably detains the accused in custody, he will be guilty of a false imprisonment, no matter how lawful the original arrest may have been. 1 *Hil. Torts*, pp. 213, 214, § 9.

We are brought, then, to the prayer presented by the defendants at the close of the plaintiff's evidence. It asked an instruction that the plaintiff was not entitled to recover, but was rejected by the trial court; and this is the ruling brought up for review by the first bill of exceptions. At the close of the evidence on both sides the defendants again offered the same prayer, and it was again rejected, and this is one of the imputed errors complained of in the fifth bill of exceptions. Before such a prayer can be granted in any case, all the plaintiff's evidence must be assumed to be true; and if, when conceded to be true, it fails to show a right on his part to recover, it then becomes the duty of the court to withdraw the case from the consideration of the jury. But here, according to the plaintiff's own testimony, though he himself showed that he had been rightly arrested, he protested against being detained in the custody of the detectives; and, if his statement in this particular be accepted as true,—and this must be done for the purpose of determining whether such a prayer as we are now considering ought to be granted,—then he was detained for an unreasonable length of time, even though the detention was designed merely to secure his appearance before the grand jury. If, upon condition of his furnishing evidence that would lead to the arrest and conviction of other guilty parties, it was, with the sanction of the state's attorney, determined not to prosecute him, then he should have been taken before a magistrate to make formal complaint against the others, and he should not

have been held in custody against his will for his appearance before the grand jury, unless upon his failure to give a recognizance, when lawfully required by a justice of the peace, for his appearance as a witness. In the face of his testimony, the credibility of which was for the jury alone to pass on, it would have been erroneous to grant the prayer set forth in the first exception. The defendants proved by three witnesses in the most conclusive and satisfactory manner that the plaintiff was not taken before a magistrate only because he besought Mr. Kirk not to so deal with him, and that he himself suggested his willingness to go to an hotel, and to remain there and with the detectives until he could appear before the grand jury. Here, then, was a direct conflict of testimony. It was for the jury to say whether they would believe the plaintiff, on the one hand, or the three witnesses who flatly contradicted him, on the other. The court could not, under these conditions, withdraw the consideration of that question from the jury, and therefore could not grant the defendants' first prayer in the fifth bill of exceptions; that prayer being the same one presented at an earlier stage of the case, and set forth in the first exception. Had, however, the jury found as matter of fact, as they were clearly at liberty to do from the evidence before them, that the equitable plaintiff voluntarily remained in custody in order to appear before the grand jury as a witness, just as Mr. Kirk, Mr. Miller, and Mr. Hardesty unequivocally testified was the case, then he was not unlawfully restrained of his liberty. False imprisonment consists in the unlawful detention of one against his will. Where there is no restraint, and where the individual, of his own free choice and volition, remains where he is, though at liberty to depart if he pleases, he is not imprisoned at all. The defendants, therefore, had the undoubted right to have that view of the law submitted to the jury, and the refusal of the court to grant their third, fourth, and fifth prayers, embodying that principle, deprived them of a substantial defense, and was clearly erroneous.

The second prayer of the defendants ought also to have been granted. It sought an instruction to the effect that there was no legally sufficient evidence in the case to maintain the action against the firm of Samuel Kirk & Son or Henry C. Kirk, Sr., one of the members thereof. The evidence, as we have stated, failed to show that the senior Mr. Kirk knew anything about the arrest or detention of the plaintiff, or that he ratified it afterwards. There is literally nothing in the whole record connecting him in any way with the transaction from its beginning to its end. One of several partners cannot drag the firm or his co-partners into a trespass by giving authority for the doing of an unlawful act in the name of the firm of which he is a member; for one partner has no power to bind the partnership to the commission of a

wrongful act without the previous consent or subsequent concurrence of all the partners. *Petrie v. Lamont*, Car. & M. 96. If the act complained of is done by one partner for the benefit of the firm, and the firm afterwards takes advantage of it, and adopts the transaction, all the members of the firm may then become responsible for the act and its consequences. 2 Add. Torts, § 1321. If all the partners join in one trespass or tort, they may all be sued for the injury, not because they are partners, but because the right of action arises from their personal misconduct. "In general," says Colly. Partn. § 457, "acts or omissions in the course of the partnership trade or business, in violation of law, will only implicate those who are guilty of them." And in *Brown*, Partn. § 140, the rule is succinctly stated in this way: "If the firm is merely the occasion for a partner's tort, but not the agency in its commission, the co-partners are not liable." Obviously, under the proof in the record, the firm of Samuel Kirk & Son was not the agency in the alleged unlawful arrest and imprisonment; nor was Henry C. Kirk, Sr. The thefts from the firm were the occasion for the arrest, and, unless you identify that occasion with the agency that actually caused the arrest, there is nothing to connect the firm or the senior partner with the transaction. The plaintiff's second prayer ought to have been rejected, because it not only disregards the principle just stated, but, in spite of that principle, holds the firm, and each of the members thereof, liable if one partner aided, participated in, and approved of the detention of the equitable plaintiff. The third prayer of the plaintiff relates to the measure of damages, and is, in so far as it would not embrace the firm and the senior Mr. Kirk, free from objection; but, inasmuch as its terms are broad enough to include both the firm and Mr. Kirk, Sr., it ought to have been modified so as to exclude them; or, not being qualified in that way, should have been rejected altogether. The plaintiff's first prayer is also erroneous. In effect, it leaves to the jury the determination of the question as to whether the arrest and detention were lawful. It permits them to take the facts and circumstances of the case, and from a consideration of them to say whether these were such facts and circumstances as, in their opinion, would have induced "a reasonable and dispassionate man to have made such arrest, and to have so detained the said Garrett"; whereas, in cases of this character, it is for the court to say whether a given state of facts, if found by the jury, is in law sufficient to create a reasonable ground of suspicion that will justify a constable in making an arrest without a warrant, and whether a detention is or is not unreasonable.

This disposes of all the prayers, and we turn now to the three remaining exceptions, which relate to the admissibility of the rejected evidence offered by the defendants.

The second exception was taken to the refusal of the court to allow a question to be asked the witness Miller relative to six silver teaspoons alleged to have been stolen by one of the other employes of Samuel Kirk & Son. The ground upon which it was claimed the question was admissible was that the spoons were discovered through the equitable plaintiff's instrumentality. This, we think, was irrelevant. It tended to prove no issue in the case, and was wholly collateral thereto.

The fourth exception brings up the ruling of the court refusing to admit in evidence the indictments found by the grand jury against other employes of Kirk & Son. These indictments charged the accused with larceny, and among the names of the witnesses indorsed thereon was that of the equitable plaintiff. The proof of this fact would have reflected no light on the issues joined in this case. The accusations against these other men as contained in formal indictments could not tend to show the guilt of the equitable plaintiff, or that he was lawfully arrested or detained only for a reasonable time. Because of the irrelevancy of the proffered evidence, the superior court rightly refused to admit it.

The third exception presents, however, a different question. The plaintiff has testified that while in custody, and shortly after his arrest, he had informed Mr. Kirk, in the presence of the detectives, that he knew of other employes stealing silver, but that he was so intimidated by the threats they made to send him to the penitentiary he scarcely knew what he said. He further testified that when he went before the grand jury he told them he could not say positively that any of the workmen had been stealing, but that he knew they had had things made there, the same as he had. Now, the contention of the defendants was that the plaintiff was not prosecuted for the larceny he had committed, because he agreed to give information which would lead to the conviction of others; and that he voluntarily remained with Miller and Hardesty until he could go before the grand jury. When he took the witness stand in his own case, he, in effect, denied that he had given any evidence before the grand jury implicating others, and he emphatically denied that he voluntarily remained in custody. One of the grand jurors was thereupon called by the defendants, and asked what the plaintiff had testified to before the grand jury as to the charges against these men. To the admissibility of this question an objection was interposed, and upon the counsel for the defendants stating in reply to an inquiry by the judge that he did not know what the juror would say, the objection was sustained. We think there was error in this ruling. The plaintiff, as we have seen, admitted that he had given information against his co-employes and that he had given it as a condition of his not being prosecuted, and three of the defendants had unequivocally sworn that

the plaintiff voluntarily remained with the detectives until he could go before the grand jury to testify. Subsequently in his testimony in this case he denied that he had told the grand jury what Mr. Kirk and the detectives said he had revealed to them; and thus it became important to know what he did say before the grand jury, both for the purpose of contradicting him on a material matter of fact, and also for the purpose of showing that he had in reality voluntarily remained in custody precisely as it was alleged by the defendants that he agreed to do. If he made admissions before the grand jury that showed he voluntarily remained in custody, it was clearly competent to offer those admissions in evidence as independent facts, defeating his right to recover, even though he had not been first interrogated with respect to them when giving his testimony in this trial. The admissions of a party to the record, made against his own interest, stand on a different footing from the statements of a mere witness. A witness cannot be impeached by the proof of contradictory statements previously made by him, unless he is first asked with regard to them, and has his attention called to the time and place when and where, and the person to whom or in whose presence, the statements were made. But the admissions of a party to the cause adverse to his right to recover may always be shown without first questioning him concerning them. *Bartlett v. Wilbur*, 53 Md. 497. The two classes of admissions are wholly dissimilar. In the case of a witness his contradictory statements are admissible, not to prove a specific fact, but solely for the purpose of impeaching him. In the case of a party they are admissible to prove a fact adverse to his right to maintain the suit. Under the circumstances already alluded to, the calling of a grand juror to testify as to what the plaintiff had deposed to before the grand jury was not in contravention of any rule of law, and not repugnant to public policy. A grand juror may be called to prove that a witness swore in the grand jury room differently from the way he has sworn before the petit jury, and this is no violation of the grand juror's oath of secrecy. As we said in *Izer's Case*, 77 Md. 110, 26 Atl. 282, the grand juror's oath of secrecy is intended to further, and not to frustrate, the due administration of justice; and, while its observance is obligatory on him, and binds him for all time not to voluntarily disclose what has transpired in the jury room, it cannot be invoked to thwart the truth, or to mask and cover up falsehood, when the juror is called upon in a court of justice to divulge what he would otherwise, but for the mandate of the law compelling him to speak, be bound to keep secret. The inability of the defendants' counsel to state to the court what the grand juror would prove furnished no reason for the exclusion of the evidence. The counsel could not have known what the grand juror would

testify to unless the latter had, in violation of his oath, previously revealed it.

For the errors indicated in rejecting the defendants' second, third, fourth, and fifth prayers, and in granting the plaintiff's first and second, and in not restricting and qualifying the third, as also for the error in excluding the evidence proposed to be given as noted in the third bill of exceptions, the judgment in favor of the plaintiff must be reversed, and a new trial must be had. Judgment reversed, with costs above and below, and new trial awarded.

(34 Md. 383)

DASHIELL v. GRIFFITH et ux.

(Court of Appeals of Maryland. Dec. 3, 1896.)

MALPRACTICE—EXPERT TESTIMONY—PLEADINGS—ACTIONS BY HUSBAND AND WIFE.

1. One is not qualified, by the mere fact that she has nursed 20 or 30 cases of bone felon where lancing had been resorted to, to state, as an expert, that an incision in such a case was not half way to the bone, because "it did not lay open," and "when an incision is deep it always lays open."

2. Under a complaint alleging negligent and unskillful treatment of plaintiff's finger by defendant, resulting in injury, recovery cannot be had for failure of defendant, after treating it, to be present at his office, and render such services as the finger may have required.

3. While an action by the husband and wife is proper for negligent and unskillful treatment of the wife by a physician, yet mere nonperformance by the physician of a duty imposed by the contract of employment can be sued for only by the husband.

Appeal from Baltimore city court.

Action by George R. Griffith and wife against Nicholas L. Dashiell. Judgment for plaintiffs. Defendant appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, FOWLER, ROBERTS, and BOYD, JJ.

Edgar H. Gans and B. H. Haman, for appellant. E. C. Eichelberger and W. H. DeC. Wright, for appellees.

ROBERTS, J. This appeal is from the judgment of the Baltimore city court. The facts are that Mrs. Griffith, one of the plaintiffs, and wife of the other, was suffering from a disease commonly known as "bone felon," which was upon the index finger of her right hand. She visited the office of the defendant, a practicing physician, for the purpose of obtaining his professional assistance. He gave the plaintiff medical attention, as hereinafter stated. This action is brought by plaintiffs jointly, as husband and wife, to recover damages for the alleged negligence of the defendant in the treatment of the plaintiff, in consequence of which, it is claimed, the wife was obliged to have a portion of her finger amputated. In the progress of the trial in the court below the defendant reserved two exceptions, the first of which relates to the admissibility of certain proof; the other, to the refusal by the court to grant the defendant's

first prayer. We will consider the exceptions in the order in which they appear in the record.

The plaintiffs proved by Mrs. La Rose that she had nursed the plaintiff in her sickness while suffering with the bone felon, and went to her as nurse on the 17th of February, 1896, which was the day the finger was lanced by the defendant; that the incision made in the finger was a little over a quarter of an inch in length upon the surface; and then witness proceeded to say, "When an incision is deep, it always lays open." This statement was objected to by the defendant on the ground that such testimony was not legally admissible, unless it be shown that witness was an expert, and competent to testify in that character. For the purpose of ascertaining whether the witness was qualified to speak as an expert, she was asked "how many cases of bone felon she had nursed, when the diseased part has been lanced or opened." She replied "that she might have nursed twenty or thirty cases." She added "that she thought she had sufficient knowledge to give an opinion as to the depth of an incision from the size of the opening." To the competency of the witness to testify as an expert upon the question of the depth of the incision from the size of the opening the defendant objected, but the court overruled the objection, and permitted the witness to testify as an expert. The question presented by this exception is, we think, free from serious difficulty. The nurse who testified in this case had no other qualification entitling her to speak as an expert than that she had nursed 20 or 30 cases of bone felon where opening or lancing had been resorted to, and from the experience gained thereby she thought she had sufficient knowledge to enable her to say as an expert "that, in her opinion, the finger was not cut half way to the bone." This wound did not "lay open," and there is nothing in the testimony which shows that she probed the wound, or gave to it any internal examination. She simply said that it was not open at its surface, and then indulged in the merest speculation as to its depth. It seems to us that, if she had been a thoroughly skilled and competent expert, she would, under the existing circumstances of this case, have hesitated to express an opinion as to the depth of the incision made by the defendant. It is an unsafe practice; in the admission of testimony, to allow witnesses to speak as experts unless the court is well satisfied that they possess the requisite qualifications; not alone on this account, but the effect of such testimony is most difficult to estimate, from the fact that undue importance not infrequently attaches to it, and gives to it an influence upon the minds of a jury to which it is not fairly or reasonably entitled. An eminent author upon the law of evidence quotes with approval the language of Lord Campbell in the Tracy Peerage Case, 10 Clark & F. 191, that "skilled witnesses come with such a bias on their minds to support the cause in which

they are embarked that hardly any weight should be given to their evidence." 1 Tayl. Ev. § 58. While there is undoubtedly much truth in the observations of Mr. Taylor just quoted, we must not, however, be understood as intimating that there are not many cases to be found in which expert testimony has rendered valuable assistance in the solution of difficult and important questions arising in the courts for determination. Mr. Wharton, commenting upon the same subject, says that the true distinction between the expert and the nonexpert is "that the nonexpert testifies as to conclusions which may be verified by the adjudicating tribunal; the expert to conclusions which cannot be so verified. The nonexpert gives the results of a process of reasoning familiar to every-day life; the expert gives the results of a process of reasoning which can be mastered only by special scientists." 1 Whart. Ev. § 434. There is no evidence in the record which shows that Mrs. La Rose ever studied medicine, or ever before had been called upon to investigate or inquire into the subject of the depth of incisions, judged solely by their surface indications. The mere fact that she had nursed 20 or 30 cases of bone felon, without showing that she was possessed of any peculiar skill or knowledge in estimating the depth of incisions of like character with the one in question here, did not qualify her to speak as an expert, and we think there was manifest error in allowing her to do so. The rule allowing expert evidence will, in our opinion, be less objectionable, and more conducive to justice, if it be somewhat restricted, rather than relaxed. It is largely within the discretion of the trial judge, but always subject to the opinion of the appellate court. *Baron De Bode's Case*, 8 Q. B. 250-267; *Di Sora v. Philipps*, 10 H. L. Cas. 624; *Castrique v. Imrie*, L. R. 4 H. L. 434. We have, therefore, not hesitated to express our views upon the admissibility of such evidence, believing it to be properly reviewable by this court.

The second exception arises from the refusal of the court to grant the defendant's first prayer. As already stated, this action is brought in the names of the husband and wife jointly; and, if recovery is sought for the commission of an alleged tort against the wife only, the action is proper in form. *Railway Co. v. Kemp*, 61 Md. 74; *Wolf v. Bauereis*, 72 Md. 481, 19 Atl. 1045. If, however, the suit has not been restricted to the recovery of damages growing out of the tort to the wife, but has been permitted to apply to and include damages for a breach of the contract of employment, the rule is different. The prayer refers especially to the pleadings, and we must therefore determine the effect which they have had, or should have had, upon the trial in the court below. It is sought by the prayer to instruct the jury that: "If they find from the evidence that the plaintiff Mrs. Griffith came to the defendant on February 17, 1896, to be treated for a bone felon, and that she

returned on the 18th, 19th, 20th, and 22d of February, and was treated on all of said days for said disease, and that the said plaintiff did not see the defendant after the 22d until after the amputation of her finger, then the jury are instructed that, in order to find a verdict for the plaintiff for the said amputation, they must find, under the pleadings, that the condition of her finger which made such amputation on March 2d necessary resulted from a disease which would have been cured by the exercise of ordinary and reasonable care on the part of the defendant on the aforesaid days, when he so treated the plaintiff, and not from any negligence of the said plaintiff after February 22d, directly contributing thereto; and the jury are further instructed that the burden of proof is on the plaintiff to prove the negligence of the defendant, and it is not permissible for them to infer negligence of the defendant merely from the bad condition of the finger of the plaintiff on or about the time of the amputation, apart from the other circumstances of the case." It is contended by the defendant that under the pleadings he could be held liable only for improperly treating the finger of the plaintiff on the days upon which he had seen her at his office, which were February 17th, 18th, 19th, 20th, and 22d; the plaintiff being an office patient, and seen by the defendant only at his office on the days named. In consequence of the illness and death of defendant's father, he was continuously absent from his office, and did not again see plaintiff until after the finger had, on March 2d, been amputated. If the defendant had, in his treatment of the finger prior to the 24th of February, exercised reasonable care, skill, and diligence, and then, because of the illness of his father, had turned the plaintiff over to Dr. Cockrell, a competent physician, for the further treatment of her finger, and the plaintiff refused to go to Dr. Cockrell for treatment, then the liability of the defendant ceased, and the plaintiff assumed to herself the consequence of any injury resulting from the neglect of her finger, for it cannot be said that the defendant, under any and all circumstances, was required to continue the treatment of the plaintiff. If he provides for the further treatment of the patient in such manner as the defendant did in the case under consideration here, he has complied with every reasonable demand upon him. This court has seldom, be it said to the credit of the profession, been required to pass upon questions of medical malpractice, but the law is settled in numerous well-considered cases that a physician or surgeon, who holds himself out to the world to practice his profession, by so doing impliedly contracts with those who employ him that he possesses a reasonable degree of care, skill, and learning, and he is therefore bound to exercise, and is liable for the want of, reasonable care, skill, and diligence, and he is responsible in damages arising as well from want of skill as from neglect in the application of skill. Long

v. Morrison, 14 Ind. 595. The cases are generally agreed upon the proposition that the amount of care, skill, and diligence required is not the highest or greatest, but only such as is ordinarily exercised by others in the profession generally. *Patten v. Wiggins*, 51 Me. 594; *Tefft v. Wilcox*, 6 Kan. 46; *Smothers v. Hanks*, 34 Iowa, 236; *Ritchey v. West*, 23 Ill. 385; *Leighton v. Sargent*, 27 N. H. 460; *Almond v. Nugent*, 34 Iowa, 300; *Graham v. Gautier*, 21 Tex. 111. We fully agree with the plaintiffs' contention that, when a physician is employed to attend upon a sick person, his employment, as well as the relation of physician and patient, continues, in the absence of a stipulation to the contrary, as long as attention is required; and the physician or surgeon must exercise reasonable care in determining when the attendance may be properly and safely discontinued. *Ballou v. Prescott*, 64 Me. 305; *Lawson v. Conaway*, 37 W. Va. 159, 18 S. E. 564. While these cases seem to refer to the attention rendered by a physician or surgeon at the home of the patient, or where the physician or surgeon is compelled to leave his office to bestow such attention, yet, however, the principles of law controlling the right of recovery under such circumstances are practically the same. If an office patient fails to come to the office of the physician or surgeon whom he employs, and from whom he has received careful and skillful treatment, and then fails to return to the office for further treatment, and in consequence thereof suffers injury, he is not entitled to maintain an action against the physician, because it is his own default and misfeasance. But we forbear further discussion of this question, as the necessities of the case do not require it. Returning, then, briefly, to the question of the pleadings, the declaration is founded upon the single allegation that the "actual misfeasance, negligence, and want of skill" in the treatment of the finger of the plaintiff, is alleged to have caused the injury complained of; yet the plaintiffs have not restricted their claim for damages within the scope of the pleadings, but seek to include in their recovery damages for the failure of the defendant to be present at his office on the 24th of February and thereafter, and render such services as the plaintiff's finger may have required. No such recovery could be had, under the pleadings, for the reasons: First, that, if a recovery is sought for because of the failure of the defendant to attend at his office to render such service as he is claimed to have contracted to perform, such cause of action must be so laid in the declaration (*Bemus v. Howard*, 8 Watts, 255); and, secondly, the plaintiffs cannot sue jointly as husband and wife when the cause of action is the mere nonperformance of a duty imposed by the contract of employment, which would be solely in right of the husband, and in which the wife could have no interest as a party to the action. It would result in an action wherein there would be a joinder of tr.

inconsistent forms of action, the one *ex delicto*, the other *ex contractu*. The case of *Longmield v. Holliday*, 6 Exch. 761-767, was an action by husband and wife against the defendant, who was the maker and seller of certain lamps called the "Holliday Lamps." The husband bought one of the lamps, to be used by his wife and himself in his shop. The defendant warranted that the lamp was reasonably fit and proper for that purpose, whereas the lamp was dangerous and unsafe, and, when the wife attempted to use it, it exploded and injured her. Parke, B., held "that the action could not be maintained by the wife, there being no misfeasance towards her independently of the contract, which was with the husband alone." In this view we fully concur, and think that there was error in the refusal to grant the defendant's first prayer, notwithstanding the granting of his second prayer. For the reasons stated, the judgment must be reversed. Judgment reversed, with costs, and new trial granted.

(34 Md. 416)

SPENCER et al. v. PATTEN et al.

(Court of Appeals of Maryland. Dec. 3, 1896.)

PLEAS — DEMURRER — MOTION NE RECIPIATUR — BILL OF EXCEPTIONS — HARMLESS ERROR.

1. Motion ne recipiatur to a plea in abatement having been sustained, it will be presumed, in the absence of anything in the record to the contrary, that the plea was offered too late.

2. The sustaining of a motion ne recipiatur to a plea should be presented for review by a bill of exceptions.

3. A general demurrer to pleas amounting to nothing more than the general issue plea, which is also filed, is properly sustained.

4. Though the proper way to question the sufficiency of a plea was by demurrer for want of equity, yet, the plea being manifestly bad, disposing of the question by sustaining a motion ne recipiatur thereto is harmless.

Appeal from circuit court, Howard county.

Action by Thomas H. Patten and another against J. Herman Spencer and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, ROBERTS, and BOYD, JJ.

John E. Dempster, John S. Young, and J. J. Archer, for appellants. J. Wesley Falls, Geo. Y. Maynadler, and Wm. S. Evans, for appellees.

BOYD, J. The appellees sued the appellants, Philip M. Spencer and Jarrett Spencer, in Harford county, and the case was removed to Howard county. On the 28th day of March, 1896, a jury was sworn in the circuit court for the latter county to try the issues joined, and on April 9, 1896, there was a "motion to amend declaration and to strike out the names of Philip M. Spencer and Jarrett Spencer, two of the defendants, from the writ and all subsequent proceedings in this case." The next entry appearing on the very

imperfect record before us is, "Same day amended declaration filed as follows," and a declaration against these appellants is then set out, which contains three counts, all of which are to the same effect, excepting the trespasses are alleged to have taken place in different years. A demurrer was filed to the declaration, but it was not pressed in this court. The defendants filed on the same day, April 9, 1896, a plea in abatement to the amended declaration, which is set out in the record, with the following entry just below it: "Motion ne recipiatur to said first plea, and motion granted." On the same day four pleas in bar, marked second, third, fourth, and fifth pleas to the amended declaration, were filed. The second was the general issue plea, and the third, fourth, and fifth were demurred to, and the demurrers were sustained. On the 16th day of April, 1896, two other pleas, marked the sixth and seventh, were filed, and there is an entry in the record: "Demurrer to the sixth plea, and motion ne recipiatur to the seventh plea. Demurrer and motion ne recipiatur sustained." On the 17th day of April there was a verdict for the plaintiffs, and, after a motion for a new trial was overruled, judgment was entered thereon, and an appeal taken. The record shows that exceptions had been taken during the trial; but, as they are not in the record, we are confined in our inquiries to the questions presented by the rulings of the court below on the pleas.

The first point urged in this court is in reference to the ruling on the first plea, which was filed in behalf of all the defendants, and alleges that at the time of the issuing of the summons in the case "another suit or action was pending in the court of common pleas of Baltimore City, in this state, in which the said plaintiffs in this case are plaintiffs, against Joseph E. Spencer and J. Herman —, two of the defendants to this suit (and one Jarrett Spencer), on the same causes of action in said amended declaration mentioned and described, and which said suit is pending at this time." There is nothing in the record concerning the action of the court as to this plea, excepting the entry above mentioned. It was stated in argument that the motion was granted on the ground that the plea was filed too late, and we assume that to be correct. It is well settled that a plea in abatement cannot be pleaded after a plea in bar has been filed, unless the facts relied on to abate the action arise afterwards. If it be conceded, as contended by the appellants, that a plea in bar only waives matter in abatement then existing, and of which the party was aware at the time when his plea in bar was filed, this additional qualification cannot aid the appellants, as the plea does not allege that they were not aware of the facts stated when they filed the plea in bar. But it is contended that, when the plaintiffs amended their declaration, the defendants were required to plead to the

amended declaration, and therefore could then file the plea in abatement. The case of *Chapman v. Davis*, 4 Gill, 166, is a complete answer to that contention. There a plea in abatement, alleging a variance between the writ and declaration, was tendered; but the court refused to receive it, because the defendant had previously filed the general issue plea. Afterwards a demurrer to the declaration was entered and sustained, and the plaintiff filed an amended declaration. The defendant again tendered his plea in abatement, but the court below refused to receive it, and the court of appeals sustained that ruling. Judge Martin, in delivering the opinion, said: "As the variance which the defendant has presented as pleadable in abatement existed equally between the writ and original declaration and the writ and the amended declaration, the amendment of the narr. and the rule to plead anew could not in this respect change the rights of the parties. The matter relied on in abatement existed at the period when the plea in bar was filed, and, although the leave granted to plead *de novo* gives to the defendant the right to plead any plea to the action which he may select, it does not confer the right to raise dilatory objections, of which the party was aware when he exhibited his plea in bar, and which he had thus surrendered." In this case the plea was as applicable in a suit against the six original defendants as it was against the remaining four after the declaration was amended by striking out two. It is said by the appellants that they could not have filed this plea to the original declaration, because it was for a trespass committed by the four appellants, jointly with Philip and Jarrett Spencer, while now the suit is only against the appellants for a joint trespass committed by them, and therefore a different cause of action from the one in the original declaration. If that reasoning be correct, how can it be said, as this plea does, that a suit against Joseph E. Spencer, J. Herman Spencer, and Jarrett Spencer was on the same cause of action as that alleged against these four appellants? It is stated in the appellants' brief that the evidence showed there were two sets of alleged trespasses,—one committed by the appellants alone, and the other by Philip and Jarrett Spencer; and for that reason the plaintiffs amended by striking out one set of trespassers. If that be correct, it is manifest that a suit for a joint trespass by Joseph, J. Herman, and Jarrett Spencer would not abate this suit. It is certainly true that a suit for a joint trespass against those three would have been as much a matter of abatement in the original suit, to which those three and three others were parties, as in the action now prosecuted, where two of the three and two others are defendants. The law does not tolerate the interposition of a dilatory plea at such a time and under such circumstances as was attempted here. The

record does not show when the original suit was brought, but it does show that the plea was tendered after the case had been removed from Harford to Howard county and on the twelfth day after the jury was impaneled. The rule requiring dilatory pleas of this character to be filed promptly is an important one in the administration of justice, not only to save costs and prevent surprise to litigants, but to save the time of the courts from being uselessly occupied, and thereby avoid unnecessary expenditures of the public money in paying jurors and other court expenses.

We have not thought it necessary to discuss the form of this plea. We will only add that we do not think the practice adopted in bringing the question before us is the proper one. The motion *ne recipiatur* is presumably made before a plea is filed and made part of the record. A better practice would therefore be to present the question by a bill of exceptions. There may be a rule of court in force which governed the court below; and, if the plea is not received, and therefore not technically a part of the record, it may well be questioned whether this court is authorized, by an appeal such as this, to review the ruling of the court below, unless presented by an exception. The general subject is fully discussed in 3 Enc. Pl. & Prac. 392, and following pages; and, although the practice in this state may not be in accord with all the authorities cited by the author, the wisdom, if not necessity, of having a bill of exceptions, in a question of this kind, is made apparent. Certain it is that we must presume the action of the court below on a motion of this character was right, unless there be something on the record to affirmatively establish the contrary.

The rulings on the third, fourth, fifth, and sixth pleas will be considered together. The declaration alleges that the defendants did unlawfully, wrongfully, willfully, and maliciously break and enter the lands of the plaintiffs, and did then and there unlawfully, wrongfully, and maliciously use and occupy said lands "by placing thereon and using stationary floats and other contrivances and devices for fishing in the waters of the Susquehanna river adjacent to said lands, whereby the plaintiffs were deprived by the defendants of the beneficial use and enjoyment of said lands as a fishery, as well as deprived of other uses to which said lands were suited and profitable to the plaintiffs." These pleas are intended to raise the same question. The third, for example, alleges that the plaintiffs' closes are a part of the bed of the Susquehanna river, covered by the navigable waters of the river, where the tide flows and reflows, where there is a common fishery, wherein all citizens of the state have the right to fish; "that the defendants are fishermen, and during the said several times and places in said declaration referred to were engaged in fishing their seines for fish, in the said navigable

waters of said river, in the ordinary and usual manner of fishing seines in said waters." That plea cannot be said to be an answer to the declaration, the gravamen of which is that the plaintiffs were deprived of the beneficial use and enjoyment of their lands as a fishery by the defendants placing thereon stationary floats and other contrivances. If the plea intended to admit—and it does not in terms deny—that the land was the plaintiffs', then it is not an answer to say that the defendants were fishing in the ordinary and usual manner. If it was intended to deny the plaintiffs' title, then it merely amounted to the general issue plea, and was, therefore, bad. The fourth, fifth, and sixth were even more objectionable than the third. After repeating, in substance, the statements in the first part of the third plea, they allege that the floats were only temporarily anchored in said navigable waters, which is a mere denial of the declaration which charges they were stationary floats. If it be conceded that the plaintiffs' closes, mentioned in the declaration, are a part of the navigable waters of the Susquehanna river, where the tide flows and refloes, and that there was a common fishery there, where the public had the right to fish, yet, if the plaintiffs had title to the lands, the defendants had no right to place thereon obstructions which interfered with the plaintiffs' lawful use and enjoyment of them; and the statements that the floats were only temporarily anchored for the purpose of fishing are mere denials of the allegations in the narr. of the use of stationary floats. So, when we get at the pith and material parts of the declaration and those pleas which raise any issue, we find it alleged by the plaintiffs that the defendants used stationary floats and other contrivances that interfered with the use of the property, and denied by the defendants. If, therefore, the pleas answer the declaration at all, they do so in such way as to amount merely to the general issue. In *Miller v. Miller*, 41 Md. 623, the defendant pleaded, in an action of *quare clausum fregit*, that he was the true and lawful owner of the land upon which the trespass was alleged to have been committed, and had exclusive possession of the same. This court held that the plea "amounted to nothing more than a denial of the title of the plaintiffs, and was nothing more or less than the general issue plea, which was filed with the other pleas," and therefore the demurrer was properly sustained. In *Keedy v. Long*, 71 Md. 388, 18 Atl. 704, that case was affirmed, and it was held that such defect in a plea was one of substance, which a general demurrer will reach. We think, therefore, that these pleas were technically defective, because they amounted to the general issue, and the demurrer presented the question. If that were not so, we would hesitate to reverse this judgment for the rulings on these pleas, as it is perfectly clear that the evidence of what is

alleged in them could have been introduced under the general issue to the same effect and advantage as it could have been done under the special pleas. While it is true that that fact does not make a plea bad on demurrer, but the plea must amount to the general issue, yet, after a case has occupied three weeks at the trial below, and all the questions raised or intended to be raised by the pleas could be better presented by prayers or on the offers of testimony, we assume that such was done, especially when we see, from the record, that exceptions were reserved, and it was stated at the argument, without denial, that the questions raised by the pleas were fully considered during the trial of the case.

The seventh plea is defective. Objection is made to it having been disposed of by a motion *ne reciplatur*. The proper way to raise the question was by a demurrer for want of equity, but, as it is so manifestly bad, the defendants were not injured by the method adopted.

Although the question as to what rights the plaintiffs had in the navigable waters of the Susquehanna was argued at length, and with ability, we will not now determine it, as it is not necessary for the purposes of this case. There is nothing in the record to show when or how the title was vested in them, or the exact location of the plaintiffs' land with reference to the navigable waters. Acts 1862, c. 120 (Code, art. 54, §§ 44-46), has made material changes in the rights of proprietors of land bounding on any of the navigable waters of this state, and, without more information than we have in the record, it would be useless to discuss the question, especially when the appeal must be disposed of on other grounds. The judgment must be affirmed. Judgment affirmed, with costs to the appellees.

(84 Md. 430)

BUCHANAN v. MECHANICS' LOAN & SAVINGS INSTITUTE et al.

(Court of Appeals of Maryland. Dec. 3, 1896.)

NOTES—BONA FIDE PURCHASER—PARTNERSHIP—INSOLVENCY—DISTRIBUTION OF ASSETS.

1. A bona fide indorsee of a firm note payable to a member of the firm, taking the note from such member as security for his individual debt, is entitled, on the insolvency of the firm, to share with firm creditors in the firm assets.

2. The fact that a firm note is made payable to a member of the firm will not prevent an indorsee taking the note as security for the individual debt of the payee from claiming as a bona fide purchaser.

3. An indorsee taking a note as security for a pre-existing debt may claim as a bona fide holder for value.

4. The holder of a firm note taken as collateral security for the individual debt of a member of the firm is entitled to share in the assets of the firm, in case of its insolvency, as against other creditors, to an amount not greater than the debt, with interest, which was secured thereby.

Appeal from circuit court, Washington county, in equity.

Suit by William E. Stockslayer against Jacob C. Dayhoff and another for the dissolution of a partnership. From an order sustaining exceptions by the Mechanics' Loan & Savings Institute and others to the report of the master in regard to the distribution to H. L. Buchanan, Buchanan appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, ROBERTS, BOYD, and FOWLER, JJ.

Buchanan Schley, for appellant. Norman B. Scott, Jr., and J. A. Mason, for appellees.

FOWLER, J. The appellant was a creditor of John C. Yessler, who was a member of the firm of J. C. Dayhoff & Co. Yessler held the promissory note of his firm for the sum of \$2,000, payable to his own order one year after date. In the early part of March, 1894, Yessler indorsed this note before maturity to the appellant as collateral security for the payment of an indebtedness of \$815, \$500 of which was evidenced by a note of said Yessler for that amount, and the remainder consisted of an open account of \$315 for cash loaned at various times. Subsequent to the indorsement of the firm's note of \$2,000 by Yessler to the appellant, the firm became insolvent, and receivers were appointed by the circuit court of Washington county to wind up its business. During the progress of the distribution of the firm's assets the auditor of that court filed account designated "No. 1," in which the sum of \$5,911.36 was distributed among the general creditors, among whom the appellant was numbered, the auditor having allowed him \$749.88 on account of the \$2,000 note as part payment of the indebtedness of \$815. To this allowance the general creditors of the firm excepted. Their exceptions were sustained by the court below, and hence this appeal.

The exceptions were based upon a variety of grounds, as appears by the record, but the only ones relied upon here, and which we think necessary to consider, are: First, that, inasmuch as Yessler, the appellant's indorser, was a member of the firm, and would not, therefore, be entitled himself to share the distribution of the partnership assets until the payment in full of all the partnership debts, his indorsee stands in no better position; second, that the transfer of the \$2,000 note was fraudulent; and, third, that said note, having been passed to the appellant as collateral security for the payment of a pre-existing debt, was not, therefore, indorsed to him in the ordinary course of business, and that, consequently, he was not a bona fide holder for value without notice, within the meaning of the settled rules regulating the transfer of commercial paper.

The first exception appears to be founded on the general rule, about which, of course, there can be now no difference of opinion, that a partner cannot share in the partnership assets until all the firm creditors have been paid in full. Whether this rule can properly have any application to this case de-

pends altogether upon the legal effect of the indorsement by Yessler to the appellant. If that indorsement is to have its ordinary legal effect given to it by the well-settled rules applicable to the indorsement of commercial paper, the fact that the firm or its creditors had a good defense against the note in question while in the hands of Yessler would not avail them as against the appellant; but if, on the other hand, such indorsement is to be considered merely as an assignment, or if the note itself can be held as constituting notice to the indorsee of existing equities, then the appellant would stand in the shoes of Yessler, and would not be entitled, as against the creditors of the firm, to share in the distribution of its assets. What, then, is the legal significance of the indorsement? This question is answered by Mr. Bates in his work on Partnership (section 884), where he says that, while a partner cannot sue, yet the note in his hands is not void; but the difficulty is one attending the remedy, rather than the right, and vanishes on indorsement to a third person for value. The transfer, however, he says, must be bona fide, and not colorable only. In support of this view he cites many authorities, some of which relate to transactions like the one before us, where the rights of an indorsee of a member of the firm's paper are directly involved, and some of them involve only generally the rights of a bona fide indorsee for value. Thus, in the case of *Smyth v. Strader*, 4 How. 404, Stevenson, a member of the firm, drew two notes of the firm to his own order, and indorsed them to Strosen & Campbell, of New Orleans, who in turn indorsed them to the plaintiff in that case. Although these notes were fraudulent in fact, because Stevenson indorsed them to the first indorsee to pay an individual claim, yet it was held by the supreme court of the United States (McLean, J., delivering the opinion) that, while Stevenson could not recover because he was a partner, yet his bona fide indorsee could. See, also, to the same effect, *Smith v. Lusher*, 5 Cow. 688; *Nevins v. Townsend*, 6 Conn. 7; *Moore v. Denslow*, 14 Conn. 237; *Davis v. Briggs*, 39 Me. 305; *Thayer v. Buffum*, 11 Metc. (Mass.) 398; *Waterman v. Hunt*, 2 R. I. 302. But, independent of authority, we think this must be so for obvious reasons. Nothing is more common in the ordinary course of business than the drawing of paper to the order of and in favor of one of the firm, either for reasons of convenience or because the discounting bank may sometimes, either in order to comply with some rule of its own, or for some other reasons, prefer to have the paper payable to and indorsed by one member of the firm, rather than by the firm itself. And when such paper is indorsed bona fide and for value by a partner, we are unable to see why such transfer is not equally as valid as the transfer of any other well-known class of commercial paper would be under the same cir-

circumstances. In the case of *Smith v. Lusher*, supra, the custom of making firm paper in favor of a partner is referred to as one generally prevailing. It was contended in argument that to give the partner's indorsement its legal effect would put it in the power of a creditor of an individual insolvent partner holding an invalid claim of such partner to secure payment out of the partnership assets *pari passu* with the general creditors of the firm, although such individual partner himself would have no standing for that purpose in court. But in answer to this suggestion it is sufficient to say that it necessarily follows, if the appellant is a bona fide holder for value, his title and right to recover are not dependent upon the validity of the title of his indorser. It often happens that an indorsee of commercial negotiable paper stands in a better position than his indorser, and hence the well-settled rule which prevails everywhere, "that commercial paper having the quality of negotiability is privileged, and such of it as belongs to the class of bills and notes may be transferred in such manner as to give the indorsee a better right than the party making the transfer." That the appellant is a bona fide holder, except in so far as the nature of the paper, and the fact that he held it as collateral security for a pre-existing debt, precluded him from standing in such position, was not denied, for there is no evidence whatever of any actual fraud in the transaction between the appellant and Yeasler. It has been repeatedly held in this state and elsewhere that mere negligence on the part of the indorsee in failing to discover the fraud or bad faith, if there be any, will not be sufficient to defeat his title. "The question is one of fraud and bad faith on the part of the taker of the note, and that is as susceptible of proof by circumstances as by direct proof." *Bank v. Hooper*, 47 Md. 88; *Williams v. Huntington*, 68 Md. 590, 13 Atl. 336.

We have already said that, in our opinion, the nature or form of the paper affords no sufficient reason for imputing bad faith to the appellant, and we have found no evidence in the case of any actual fraud on his part. It only remains, therefore, briefly to consider the third and last ground of exception, namely, that the note, having been indorsed for and in consideration of a pre-existing debt, was not obtained by the appellant in the ordinary course of business. But since the case of *Maitland v. Bank*, 40 Md. 540, the contrary has been settled law in this state. In *Swift v. Tyson*, 16 Pet. 1, it was held (Story, J., delivering the opinion), "We are prepared to say that receiving it [the note] in payment of or as security for a pre-existing debt is according to the known, usual course of trade and business." And this view was expressly adopted by this court in *Maitland's Case*, supra.

Finally, it appears from the undisputed evi-

dence that the note in question was transferred to the appellant as collateral security, and it therefore follows that he is entitled to share in the distribution of partnership assets equally with the other general creditors to an amount not greater than the debt, with interest, which was secured by the \$2,000 note (*Daniel*, Neg. Inst. § 832a, and authorities there cited; also *Williams v. Huntington*, 68 Md. 605, 13 Atl. 336), the note held as collateral being taken as the basis of calculation of the amount of the dividend to be allowed the appellant. Order reversed, and cause remanded for further proceedings in accordance with this opinion.

(84 Md. 356)

BLAIR v. WINSTON.

(Court of Appeals of Maryland. Dec. 3, 1896.)

ATTACHMENT—NONRESIDENCE—MISJOINDER OF DEFENDANTS—AMENDMENT.

1. Defendant, who had been a resident of R., took up his residence in B., engaging a room. He made several attempts to get into business, and informed several people that he intended to remain in B. permanently. The newspapers published in B. reported that defendant had left that place, and gone to B. to reside. A short time after defendant arrived in B., he was asked by two persons if he intended to vote there, and replied that he did not, as R. was his home, but at that time he had not gained a political residence. Held, that the evidence was sufficient to warrant quashing an attachment based on the ground of defendant's nonresidence in B.

2. In attachment on a note, where the defendants were charged jointly, it appeared that, in fact, one was maker, and the other an indorser, of the note. Held, that an amendment striking out the name of the maker was not justified by the provisions of Code, art. 9, § 27, allowing amendments in attachment proceedings where the defect is one of form merely.

Appeal from superior court of Baltimore city.

Attachment brought by Lewis H. Blair against Lewis P. Winston and another. From a judgment quashing the writ, plaintiff appeals. Affirmed.

Argued before McSHERKY, C. J., and BRYAN, FOWLER, BRISCOE, ROBERTS, and BOYD, JJ.

Hyland P. Stewart, for appellant. W. T. Donaldson, for appellee.

BOYD, J. An attachment was issued out of the superior court of Baltimore city by the appellant against the appellee and one L. P. Routt, as nonresidents of this state. The appellee having made a motion to quash the attachment, the case was tried before the court, and the motion to quash sustained. The plaintiff asked leave to amend by striking out the name of L. P. Routt from the proceedings, which was granted, and the amendment made. The principal controversy was whether the appellee was a nonresident of this state, within the meaning of our attachment laws; and, although such questions involve both law and fact, this case must be determined mainly

from the evidence in the record, as there is but little difficulty about the law.

It was early held in this state that, to warrant an attachment on that ground, the non-residence of the debtor was as essential as his indebtedness, and that if, in point of fact, the defendant be a citizen of the state, and residing therein when the attachment is issued, the proceeding is in fraudem legis. *Barr v. Perry*, 3 Gill, 318. The original object of the proceeding by attachment against nonresidents was to compel an appearance, and require the defendant to give bail for his appearance; and although, since imprisonment for debt has been abolished in this state, the practice has changed, the reason for permitting such writs to issue, when there is not alleged to be fraud or other kindred cause, must still rest upon the theory that the defendant is presumably beyond the usual and ordinary process of the court, and cannot be reached by it. Of course, the fact that he can be or is summoned does not of itself defeat the attachment, if he be a nonresident; but, when he is summoned in the *capias* case, it is a circumstance to be considered in connection with the other facts. In this case the summons was served shortly after the attachment was issued, which was on the 7th day of November, 1895. The defendant was a resident of Richmond, Va., where he seems to have been a man of some prominence, and had been sheriff of that city. He was not married, and lived with his parents in Richmond, although he was 40 years of age. He arrived in Baltimore on the 15th day of August, 1895, and had been there constantly from that time until this proceeding was commenced. He testified that he went there with the intention of taking up his residence, and making that city his home. On the 21st day of August, 1895, he rented a room, which he was still occupying when the case was tried below. The *Baltimore Sun* announced that he had taken up his residence in Baltimore, and the *Richmond papers* also published the fact. He had business interests in the city of Baltimore before he came, and commenced at once to get others interested in different enterprises he had in view. He told a number of persons he intended to make Baltimore his home. Mrs. Raabbe, his landlady, testified, in answer to the question as to what his object was in going to her house on August 21, 1895, that "he wanted to get a room, and wanted to make Baltimore his permanent home." The testimony of Messrs. Hemsley, Slingluff, Satterwhite, Stratton, Winter, and Whitman was to the effect that he declared to them his intention of making Baltimore his home, and he seems to have been making efforts to establish himself in some kind of business there. The only testimony that is in conflict with his own evidence, the newspaper announcements and the above-named witnesses as to his intention to make Baltimore his home, is that of Messrs. Powell and Prior. They say that he told them in the lat-

ter part of October, 1895, that he considered Richmond his home, and expected to return there. The circumstances leading up to that statement as detailed by those witnesses are, to say the least, peculiar. Mr. Powell says he asked him "if he was going to vote; if he had gotten a transfer, and he said not." As the defendant had only been in Baltimore a few months, it is rather remarkable that such a question could have been seriously asked, and it may be, as the defendant testified, that he was jesting with Mr. Powell. But, however that may be, the statements attributed to him by those gentlemen are in conflict with the defendant's evidence and acts, with the published announcement in the *Baltimore Sun* and the *Richmond papers*, as well as those made by the defendant to six or more witnesses. It is evident that there was either some misunderstanding on the part of those gentlemen as to what he said or meant, or else he told them a different story from what he told others. Mr. Powell admits that he told him repeatedly "that Baltimore was good enough for him, and that he liked Baltimore, and at different times said that, if he could make a business arrangement there, he would have to do it." Mr. Prior said he saw in a *Richmond paper* the statement that "Mr. Winston had gone to Baltimore, which place he proposed to make his home." The impression made upon his mind was that the defendant had involved himself in some trouble, and would remain in Baltimore until that matter was settled, but there is no evidence in the record to justify us in reaching that conclusion. The weight of the evidence is decidedly to the effect that the defendant had settled in Baltimore with the intention of making it his residence. If an attachment had been issued in Virginia against him as a nonresident, and the evidence in this record had been produced at the trial, there would have been no hesitation in holding that he was no longer a resident of that state. It is true that he had not been in Baltimore long enough to acquire a political residence there, such as would enable him to vote, but that is not necessary to protect him against attachments. When a citizen of another state comes here with a bona fide intention of making this his residence, he cannot be proceeded against in this state as a nonresident, whether his residence has been long or short.

It has been intimated, however, that the defendant was in this state merely for the purpose of evading creditors or others in Virginia, and therefore was not a bona fide resident of Baltimore. But we do not find any evidence to sustain that position. Mr. Collins, an attorney from Richmond, who represented the plaintiff, testified, among other things, to an effort he made to have an interview with Winston; and the brief of the appellant refers to it, to show that Winston was hiding from Collins. The record, however, does not justify that statement. Mr. Collins said that he saw the defendant and

his brother John G. Winston, a practicing lawyer from Richmond, at the Rennett Hotel, in Baltimore; that the defendant was in the room with the door ajar, and he and John G. Winston were just outside of the room. When he requested an interview with the defendant in reference to Mr. Blair's matters, he declined. There was no hiding from Collins in such way as would reflect upon the bona fide of the residence of the defendant, but he only did what he had a perfect right to do,—decline to talk with the attorney representing the other side. There may be some evidence in the record tending to show that the defendant was possibly endeavoring to keep his money from the reach of his creditors, but that is not the question before us, and it was not presented in such way as to reflect upon the question of residence, *vel non*, of the defendant in this state. We think the court was right in quashing the attachment, on the ground that the evidence showed the defendant was a resident of Baltimore.

The only other reason urged before us for quashing the attachment was that the proceedings were fatally defective, because the suit was against Routt and Winston jointly, while the causes of action showed that there was not a joint liability, but that Routt was maker, and Winston indorser, of the notes filed. The affidavit states that "a certain L. P. Routt and Lewis Philip Winston, not being citizens of the state of Maryland, and not residing therein, are justly and bona fide indebted unto him, the said Lewis H. Blair," etc.; and the certificate of the notary before whom the affidavit was made states that Blair produced before him three negotiable notes, on and by which the said Routt and Winston are so indebted. Two of the notes are signed by L. P. Routt, and payable to "myself or order," and indorsed by Routt, and then by Winston, and the other is signed by Routt, payable to Lewis P. Winston or order, and indorsed by him. There is no allegation or suggestion in the short note that Routt and Winston were joint makers, but there are three counts on the notes in the form usual in declaring against an indorser and six common counts. It is manifest that the proceedings were fatally defective, unless they could be cured by amendment, under Act 1888, c. 507 (Code, art. 9, § 27). Prior to that act, the identical question had been settled in *Halley v. Jackson*, 48 Md. 254; and the court held that, as the law then stood, it could not permit an amendment of the affidavit made before a notary public, or the warrant of the justice of the peace, which was then required. Did the act of 1888 authorize amendments which would cure such defects as those suggested in these proceedings? It reads: "Attachment proceedings may be amended in the same manner and to the same extent as any other suits or any actions at law, so that the same may be tried on their real merits, and

the purposes of justice subserved; nor shall any attachment proceedings be quashed or set aside for any defect in mere matters of form." That would authorize an amendment of the writ and short note, and, if the affidavit is made before the clerk of the court, a defect of mere form might be corrected; but under no circumstances can the court change the substance of the affidavit, whether it be made before the clerk or some other authorized officer of the law. The very foundation of this proceeding was the affidavit, and in it the plaintiff swore, not that the defendant alone was indebted to him, but that "L. P. Routt and Lewis Philip Winston were indebted to him." If the name of one is stricken out, then the affidavit as it remains in the case differs materially from that upon which the attachment was issued. In some of the states the statutes permit new affidavits to be filed, and an opportunity given to the plaintiff to thus amend before an attachment can be quashed; but our statute has not authorized the substitution of a new affidavit for the one on which the attachment was based, and therefore, when there is a defect in the substance of the affidavit, it cannot be cured by amendment. The court below had no power to allow an amendment of the affidavit, and the attachment should have been quashed, because the affidavit included the two parties as jointly bound on the notes sued on, while the notes themselves show separate and distinct liabilities,—on the part of the one as maker, and of the other as indorser. *Halley v. Jackson*, 48 Md. 281. Either ground urged in this court was sufficient, therefore, to quash the attachment, and the judgment must be affirmed. Judgment affirmed, with costs to the appellee.

(84 Md. 195)

HOOPER, Mayor, v. CREAGER.

(Court of Appeals of Maryland. Dec. 8, 1896.)

For majority opinion, see 35 Atl. 967.

RUSSUM, J. (dissenting). Notwithstanding the high esteem in which I hold the judgments of my learned brothers, I am unable to concur in their conclusions in this case, and it is proper that I should give the reasons for my dissent. We agree in everything except the proper construction of the charter of Baltimore city, contained in article 4 of the Code of Public Local Laws, and the extent to which the acts of 1817 (chapter 148) and of 1828-29 (chapter 114) should control that construction. This court has in several cases considered the effect of the omission of acts and parts of acts from the Code of Public General and Public Local Laws, and laid down the rules by which the Code should be construed.

In the case of *Mayor, etc., v. Groshon*,

30 Md. 443, the controversy related to the act of 1847 (chapter 224), which authorized the mayor, aldermen, and common council of Frederick city to open and widen Carroll creek, in that city. The act was not included in the Code of Public Local Laws (tit. "Frederick County"), and it was contended that, being a franchise, it was still operative, notwithstanding the omission. Judge Alvey, in denying this contention, said: "It would involve the necessity of constantly examining the great multitude of public local acts in regard to the municipal corporations of the state, in the scattered and disconnected form in which they originally passed, and the doubt and controversy would be endless as to what were the rights and privileges of such corporations, existing at the adoption of the Code. The object * * * was to arrange and simplify the whole body of the statute law of the state; and the legislature, in adopting it as a substitute for all the public general and public local statute laws then existing, plainly intended an entire repeal of all such statutes of that character, then on the statute books, as were not embraced in the codification, for otherwise, instead of simplification, the greatest confusion would ensue." In the case of *Johns v. Doe*, 33 Md. 523, Judge Stewart, delivering the opinion of the court, said: "The legislature designed to preserve all that was needful, and to discard what was obsolete or inapplicable, and relieve the statute book from all useless matter. * * * Where its language is the same as that of any antecedent law, the well-established construction is to be regarded. If the terms are substantially different, they must have their plain and obvious interpretation, and not be strained to conform to previous legislation." It "is to be understood and expounded according to the law establishing it as a substitute, and such meaning must be given the language employed as a just construction will warrant." Again, in the case of *Trustees v. McKinstry*, 75 Md. 189, 23 Atl. 471, in which the omission of the second section of the act of 1884 (chapter 293), relating to the execution of wills, from the Code of 1888, was passed upon, this court, through the present learned and distinguished chief justice, said: "If the statute law of Maryland had stood, at the date of the death of Miss McKinstry, as it did stand before, and for more than five years after, the execution of her will, that paper would have been admitted to probate as a valid will of personal property. * * * But in the recent codification of the law, the second section of the act of 1884, which carefully and liberally protected from the operation of the act all wills made prior to August 1, 1884, was omitted, and is consequently no longer the law of the land."

Having these decisions in view, let us examine Acts 1817, c. 148, § 2, and Acts 1828-29, c. 114, and see how far they have been incorporated into article 4, Code Pub. Loc.

Laws, and are now a part of the charter of Baltimore city, and how far they have been "repealed," "discarded as obsolete," and, by its adoption, "are no longer the law of the land." The second section of the act of 1817 provides that the annual session of the city council shall begin on the first Monday in January; that two-thirds of each branch shall be a quorum to do business; that all persons holding offices under the corporation shall hold during the pleasure of the mayor, unless otherwise provided for by acts of assembly or by ordinances of the city,—and then proceeds as follows: "And the mayor of the city shall nominate, and by and with the advice and consent of a convention of the two branches of the city council, shall appoint all officers under the corporation, except the register of the city, and the clerks employed by the city, or under their authority." The act of 1828-29 (chapter 114), which was passed as a supplement to the act of 1817, and in accordance with a joint resolution of the mayor and city council, requesting that the charter be so changed as to empower the corporation to pass ordinances "regulating the manner" of appointing city officers, is as follows: "That the mayor and city council of Baltimore may pass ordinances regulating the manner of appointing persons to office, under said corporation, which they are now or may hereafter be authorized by law to appoint, anything in the second section of the act to which this is a supplement to the contrary notwithstanding." Section 30, art. 4, Code Pub. Loc. Laws, tit. "Baltimore City," reads as follows: "They may pass ordinances regulating the manner of appointing persons to office under the corporation which they are or may be authorized by law to appoint, but, unless such ordinances be passed, the mayor shall nominate and by and with the advice and consent of a convention of the two branches of the city council shall appoint all officers under the corporation, except the register," etc. A careful comparison of these acts of assembly with each other and with the Code will show (1) that, after the passage of the act of 1828-29, the power of appointment to office under the corporation was taken from the mayor, and transferred to the corporation, in obedience to the request of the mayor and city council; and (2) that, by the adoption of the Code, the charter was entirely changed, by the omission of all authority in the mayor to appoint persons to office, except in the event that ordinances were not passed "regulating the manner" of their appointment. The first of these propositions is conclusively proven by the language of the act of 1828-29, which authorized the "mayor and city council of Baltimore" to pass ordinances "regulating the manner of appointing persons to office under said corporation,"—meaning thereby the corporation whose name is the "Mayor and City Council of Baltimore." As was well said by the learned judge be-

low, "If it was intended by the legislature that they should each, or either, continue to be necessary constituents in the act of appointment, what possible purpose was there in the passage of the act?" The second of these propositions is proven by the addition in the Code of the words, "Unless such ordinances be passed, the mayor shall nominate, and by and with the advice and consent of a convention of the two branches of the city council, shall appoint all officers under the corporation, except the register," etc. The addition of these words made an entire change in the charter of Baltimore city, so far as the mayor's power of appointment of persons to office was concerned, by omitting therefrom the positive and unequivocal authority to make such appointments, and limiting it to the contingency of a failure on the part of the corporation to "pass ordinances regulating the manner" of making them. The act of 1817 (chapter 148), having been repealed by the adoption of the Code, cannot be revived by construction. *Pingree v. Snell*, 42 Me. 53; *Ellis v. Paige*, 1 Pick. 45; 23 Am. & Eng. Enc. Law, 487, and cases there cited. Any other construction would render the change made by the legislature meaningless, and operate as a judicial reconstruction of section 13, by excepting from its provisions all ordinances relating to the making of appointments to office. The cases of *State v. Popp*, 45 Md. 432, *Maurice v. Worden*, 52 Md. 283, and *Dorsey's Lessee v. Garey*, 30 Md. 499, do not conflict with this construction. In *Popp's Case* it was merely decided that, in construing the Code, all parts in pari materia must be read together, regardless of the heading under which they are found, and in the other cases, where the meaning of the original act was looked to, the language in the Code was either identical or substantially the same as that in the original acts, and they come fully within the canons of construction laid down by Judge Stewart in the case of *Johns v. Doe*, 83 Md. 523.

But it is claimed that the power to regulate "the manner of appointing persons to office" does not include the power to make the appointment, because that would destroy the right of a constituent element thereof (the mayor) to participate in such appointment; and the cases of *State v. Mott*, 61 Md. 297; *Whitman v. State*, 30 Md. 410, 31 Atl. 325; *Brown v. O'Connell*, 36 Conn. 432; and *Com. v. Crogan*, 26 Atl. 697, 155 Pa. St. 448, —are relied upon as supporting this contention. In the case of *Brown v. O'Connell*, the statute under consideration was in contravention, not of some supposed or inferential restriction, but of the express, positive, mandatory provision of the constitution of Connecticut. In *Mott's Case* and *Whitman's Case* the ordinance or statute under consideration was an absolute inhibition of a particular thing, such as the reducing to lime of any oyster shells within the limits of Baltimore city, and the sale of any liquor in the

Seventh district of Dorchester county. These are vastly different from the case under consideration. The ordinance in this case does not prohibit directly or indirectly the levy and collection of taxes, nor does it in any particular cripple the machinery for collecting them. The same breath that repeals, re-enacts with full force and vitality, and these cases are therefore clearly distinguishable from the one under consideration. By the charter of the city of Wilkesbarre the power of the corporation is vested in the corporate officers, the mayor being one of them. He was a constituent element in the exercise of the powers granted by the charter; and the ordinance under consideration, in *Com. v. Crogan*, 26 Atl. 697, 155 Pa. St. 448, having denied him his right to participate in the appointment of the officers therein mentioned, not being the act of the depository of the power, was declared invalid by the supreme court of Pennsylvania. The charter of Baltimore city vests no such power in the mayor. Whatever power he possesses is not inherent in the executive office, but must exist, if at all, by virtue of the authority conferred upon him by the sovereign power, to wit, the legislature. *Mechem*, Pub. Off. § 108, 109. There is no inhibition in this state which prevents the legislative branch of the government from exercising the power of appointment to office. This question was before this court, and expressly decided, in the case of *Mayor, etc., of Baltimore v. State*, 15 Md. 376. It was urged in that case that the act of assembly violated article 6 of the declaration of rights, which declared that the legislative, executive, and judicial powers ought to be kept separate. In denying this contention, Judge Tuck said, "We are not prepared to admit that the power of appointment to office is a function intrinsically executive, * * * namely, that it is inherent in, and necessarily belongs to, the executive department." And Judge Legrand, in an able and exhaustive concurring opinion, quoting *Crane v. Meginnis*, 1 Gill & J. 472, said, "The legislative department is nearest the source of power, and is manifestly the predominant branch of the government." Cities and counties are but local divisions of the state, organized for the more economical administration of the government. Every power they possess could be exercised by the legislature. *Daly v. Morgan*, 69 Md. 467, 16 Atl. 287. In the absence of a charter for Baltimore city, the legislature could levy all taxes, appoint all officers, and provide for everything necessary to govern the city. Not choosing to do this, it has granted a charter to "the inhabitants of Baltimore" by the name of the "Mayor and City Council of Baltimore," and delegated to them, as a corporation, all the powers it possessed that were necessary to an efficient government of the city, among which was the legislative authority to create offices, and the power of controlling (regulating) "the appointment of persons to office." The cor-

poration, having the power to create offices, and to regulate the appointment of persons thereto, possessed all the powers of the legislature over the subject, and that includes the power to appoint. Mayor, etc., of Baltimore v. State, 15 Md. 376; Township of Wayne v. Cahill, 49 N. J. Law, 144, 6 Atl. 621; Trowbridge v. City of Newark, 46 N. J. Law, 140; Bridges v. Shailcross, 6 W. Va. 591. The donee of a power who executes it cannot be said to have delegated it; and in passing the ordinance declaring that the city collector should thereafter be appointed by a convention of the two branches of the city council there was neither an unwarranted assumption nor a delegation of power, but merely the exercise of the power of the state conferred by the charter,—the exercise of the legislative function of predetermining what the law shall be for the regulation of all future cases falling under its provisions. Vide Bates v. Kimball, 2 D. Chip. 77; Newland v. Marsh, 19 Ill. 383; Cooley, Const. Lim. (5th Ed.) pp. 108, 109. This construction has received the sanction of the mayor and city council since 1829. Referring to the contemporaneous construction of the powers granted by the act of 1829, and the Code of Public Local Laws (article 4), as evidenced by the City Code of 1893, the learned judge below said, "The different modes of appointment therein provided for show that it has never been supposed, since 1829, that the statute law required the concurrence of the mayor and city council in the act of appointment, or that each of them was a necessary constituent of the act." This contemporaneous construction of the charter, of such duration, continuously practiced under, ought not to be shaken but upon the ground of manifest error and cogent necessity. The power having been exercised, in the manner provided in the ordinance under consideration, from 1829 to the present time, "ought to be deemed almost conclusive evidence of its possession." Kiersted v. State, 1 Gill & J. 248; Egerton v. Reilly, Id. 385; Bradford v. Jones, 1 Md. 369; State v. Mayhew, 2 Gill, 487; Harrison v. State, 22 Md. 491.

Finally, on a former appeal between the parties to this cause (Creager v. Hooper [April term, 1896] 35 Atl. 159), we remanded it, in order that "the ends of justice might be promoted" by a trial "upon its merits." The ordinance in question was set out in the petition, and the power to pass it denied by the answer, and the question argued in the briefs, and orally, at least, by the appellant. With great deference to my learned brothers, it seems to me that, so far as the question of ultra vires is concerned, we are concluded by that decision, since there could not possibly be any "merit" in, nor any "end of justice" to be promoted by, the trial of a case which had no other foundation than an ultra vires ordinance. I am therefore of opinion that the order directing the peremptory mandamus to issue should be affirmed.

(67 N. H. 333)

QUIMBY v. STODDARD.

(Supreme Court of New Hampshire. Coos. July 29, 1892.)

NOTES PAYABLE TO BEARER—TRANSFER AFTER MATURITY—NOTICE.

Where one, to whom notes payable to bearer have been delivered without indorsement, for safe-keeping only, transfers them after maturity, as his own, for a valuable consideration, his transferee is charged with notice, as against the owner, that the transferor held the notes merely as depositary.

Writ of entry by Sally Quimby against Fred Stoddard to recover mortgaged real estate. Heard on referee's report. Judgment for defendant.

Facts found by a referee: June 7, 1877, the defendant made and delivered to Zilpha A. Titus his six promissory notes, amounting in the whole to \$650, payable to her or bearer, one in the month of January of each year, beginning with January, 1879, and ending with January, 1884, with interest annually, and secured them by a mortgage of the same date to her, covering the land described in the writ. A year or two later, Mrs. Titus handed the notes and mortgage to her son-in-law, Harrison Annis, with the request that he deposit them for safe-keeping in the safe of E. H. Williams, then a trader in Colebrook. Annis put the notes and mortgage, with two notes of his own and other papers, into an envelope, sealed them up, and, having written his own name on the back of the envelope, delivered the package to Williams, to be put in his safe, for the only purpose of securing their safety. About June 7, 1882, Annis, by request of Mrs. Titus, procured the package from Williams, and carried it to her, and interest to June 7, 1882, was indorsed on the notes. Within a short time afterwards, she handed the papers back to Annis, requesting him to return them to Williams, as before. This he did, putting them in an envelope, which he sealed and indorsed with his own name, and handed to Williams, to be placed in his safe, as before. Mrs. Titus died, testate, in July, 1887. The executor of her will called on Williams for the notes, to be appraised, and put into the inventory of her estate. Williams declined to give them up unless he would return them, and claimed to hold them as collateral for claims against Mrs. Titus, amounting to \$168.52. That he so held them was not true. The executor took the notes, put them into the inventory, and returned them to Williams, as he agreed to do upon Williams' claiming a right to hold them as above. The above-described notes and mortgage constituted the whole of the estate, as shown by the inventory. The notes and mortgage were, by a residuary clause in the will, given to the defendant's wife. The defendant offered to prove that, to clear them from any claim by creditors of the estate, he paid, in full, all the debts, including that to Williams, and specific legacies given by the

will, amounting to \$629.82. About February or March, 1887, Williams fraudulently broke open the sealed package left with him as above stated, abstracted therefrom the Stoddard notes and mortgage, and pledged them to the plaintiff, to hold as collateral security for a loan which he had obtained from her, on the understanding that he was at once to make her secure. Williams assured her that he was the owner of the notes and mortgage in question, as well as of others pledged at the same time. He requested her to say nothing about the fact that he had put the securities into her hands; and the defendant claimed that this fact, together with others to be referred to, ought to have put her upon inquiry as to his title to the notes in question. The referee is of opinion, however, that the evidence does not warrant such a conclusion; and the finding is that the plaintiff took the notes and mortgage from Williams, as collateral security for her loan to him, without knowledge or suspicion that his title to them was not good. A short time after the death of Mrs. Titus, Williams went to the house of the plaintiff, in Pittsburg, and told her that he wanted to take the Stoddard notes, to have them appraised and allowed against the estate. She let him take them, and, in about three or four weeks afterwards, he returned them to her, saying they were allowed, and were all right. The referee is of opinion that this act was so performed by Williams that the plaintiff's suspicions as to the validity of his title to the notes and mortgage were not in fact aroused; that she had no knowledge of his actual and intended fraud, and did not knowingly or intentionally participate therein. It is true, however, that her act in allowing him to take the notes and mortgage enabled him to conceal his misappropriation of them, by furnishing them to the executor to be appraised. If she had refused to part with them, the fraud of Williams in removing the papers from the wrapper, and disposing of them, would, doubtless, have been discovered; and the defendant offered to prove that the reason he paid the debts of the estate was to discharge any claim of creditors upon the notes and mortgage, on the understanding that they were the property of the estate, and would pass to his wife by the will, when the debts were paid. The defendant claimed that his payment of the debts of the estate was the consequence of this act of the plaintiff in allowing Williams to take the notes and mortgage, and that the plaintiff was estopped thereby from claiming that her title to them was thereafter valid. The substance of the finding is that everybody connected with the transactions detailed, except Williams, was, in fact, honest, and the question is submitted to the court, which one must suffer by the fraud of Williams?

Edgar Aldrich, James W. Remick, and Bingham & Bingham, for plaintiff. James I. Parsons, for defendant.

SMITH, J. The notes in controversy, given by the defendant in 1877, were the property of Mrs. Titus when the plaintiff received them from Williams, as security for her loan to him. They had been deposited by Mrs. Titus with Williams for safe-keeping merely. Being payable to Mrs. Titus or bearer, they would pass without indorsement to a bona fide holder, before maturity, without notice of any defect in Williams' title. The plaintiff received them in 1887, more than eight years after the first, and more than three years after the last, note became due. The interest, payable annually, had not been paid since 1882. All the notes, having been long discredited, were therefore subject to any defense which might have been set up by the defendant against Mrs. Titus, the payee. It is not claimed that, as against the payee, the defendant had any defense. The plaintiff took the notes for an adequate consideration, without notice of any defect in the title of Williams, as the referee has found; and the question is; Which party, as between the plaintiff and the executor of the will of the payee, has the better title? However the law may be held in some other jurisdictions,—and the authorities are numerous and conflicting,—the question cannot be regarded as a doubtful one in New Hampshire. A bona fide holder of a promissory note payable to bearer, or indorsed in blank, taken after it becomes discredited, takes it subject, not only to any equities in favor of the maker against the payee, but also subject to any defect in the title of the person from whom he receives it. *Emerson v. Crocker*, 5 N. H. 159, decided in 1830, is a case exactly in point. Emerson, being the owner of two promissory notes payable on demand, deposited them with one Pratt for collection, after they had become discredited. Pratt delivered the notes to Crocker, in payment of his indebtedness to him, and Crocker collected the notes of the maker. In a suit by Emerson against Crocker for the recovery of the amount of the notes, it was held that Crocker was not entitled to retain the money as against Emerson. The court said: "The rule that, whenever one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it, * * * holds only in cases of innocent holders, into whose hands the note came in the regular course of business, before it became payable. If the note be overdue at the time the agent so transfers it, the person who takes it must stand in the situation of the agent." And it was further said that the rule that, if a note is negotiated after it is overdue, notice of its infirmities is to be presumed from that circumstance, may be applied with equal propriety in other cases as well as against the maker. In *Farnham v. Fox*, 62 N. H. 673, 675, the doctrine of *Emerson v. Crocker* is approved. In that case, an overdue note of the plaintiff, intrusted to her husband, was fraudulently transferred

by him to the defendant, Fox. This court said: "Taking the note dishonored, he took it subject to any claims or defenses existing while it was in the hands of a prior holder, and as to any want or defect of title in the person from whom he received it. He took no greater or better title than the plaintiff's husband had. To have acquired a better title, he must have become possessed of it before it was overdue, or received it from one who became a bona fide holder for value before it was due." See 1 Daniel, Neg. Inst. §§ 724, 782; 2 Para. Notes & B. 279, notes and cases cited; *Foley v. Smith*, 6 Wall. 492; *Weathered v. Smith*, 9 Tex. 622; *Farrington v. Bank*, 39 Barb. 645; *Osborn v. McClelland*, 43 Ohio St. 284, 1 N. E. 644; *Towner v. McClelland*, 110 Ill. 542; *Greenwell v. Haydon*, 78 Ky. 332; *Chase v. Whitmore*, 68 Cal. 545, 9 Pac. 942; *Clark v. Sigourney*, 17 Conn. 511; *Evertson v. Bank*, 66 N. Y. 14, 23. *Clement v. Leverett*, 12 N. H. 317, and *Tucker v. Bank*, 58 N. H. 83, are not in conflict with *Emerson v. Crocker and Farnham v. Fox*, but, on the contrary, confirm the doctrine of those cases. In the first case, the bills of exchange intrusted to Burley, and, in the second, the bond intrusted to Cogswell, had not matured when negotiated by them in fraud of the respective owners; and, of course, the purchasers, having no notice of the want of title in Burley and Cogswell, and taking the securities in the due course of business, were entitled to hold them against the real owners under the law, as recognized everywhere.

In this case, Williams was a mere naked depository of the notes, holding them merely for safe-keeping. The plaintiff, taking them long after they had become discredited, although, as the referee finds, without any notice of the infirmity in Williams' title, was put upon inquiry; and, if she had inquired either of Stoddard or of Mrs. Titus, she would have discovered Williams' entire want of title to the notes. She acquired, under the settled law of this state, no greater title than he had; and, as he had none, she acquired none as against the payee. Whatever considerations may have led to the adoption of a different rule in some other jurisdictions, no sufficient reason had been shown for departing from the law as it has been established in this state for more than 60 years, and which has worked practical justice to its inhabitants. Judgment for the defendant.

CLARK, J., did not sit. The others concurred.

(178 Pa. St. 253)

FENN v. DICKEY et al.

(Supreme Court of Pennsylvania. Nov. 9, 1896.)

CONTRACT—RATIFICATION—EVIDENCE—INSTRUCTION—AMENDMENT.

1. In an action against several persons for commissions for sale of lands, the jury having, in the course of the charge, been several times explicitly

told that as K., one of the defendants, did not buy an interest in the land till after the agreement with plaintiff was made, he was not a party to the original contract, and could only become so by ratification, they could not have been misled to suppose that he could have in any other way become a party thereto, by the statement that unless they found that all the defendants joined in the contract originally, or by ratification, plaintiff could not recover, or by the statement that ratification was the only means of bringing K. into the contract, "unless you would find that he was interested before the agreement."

2. Evidence that, the owners of land having come to execute a deed thereof, plaintiff was introduced to one of them (K.) as the man who had sold it for them, and that K. said they were all obliged to him for selling it, and that when another of the owners said to plaintiff, "I presume you want your money," K. said, "We will be ready for you shortly," justifies an inference that K. knew plaintiff was to be compensated by the owners, and shows acquiescence and ratification of the arrangement made therefor by the other owners.

3. The statement to plaintiff by one of the owners of land, "All right; go on and fetch your party, and we will do as we contracted to do," shows knowledge and ratification of the contract made by certain of the other owners to compensate plaintiff if he would get a purchaser.

4. There is no error in permitting an amendment to a statement which introduces no new cause of action.

Appeal from court of common pleas, Jefferson county; H. H. McClure, Judge.

Action by James V. Fenn against William Dickey, William McCain, F. X. Kreidler, and T. D. Collins, who survive E. H. Darrah. Judgment for plaintiff, and defendants Dickey, McCain, and Kreidler appeal. Affirmed.

The seventh, eighth, ninth, and tenth assignments of error were as follows:

"(7) The court erred in the following portion of the general charge, viz.: 'The question that you will have to determine is whether there was such a contract as alleged by Mr. Fenn, and sworn to by him, for the sale of this property; and if he had a contract for the sale of it with these defendants, representing the others, whether or not he procured a purchaser who was able, ready, and willing to accept the price named by them. If there was such a contract, and he furnished a purchaser able, ready, and willing, and this contract fell through, and the deal fell through, on account of a defect in the title, he is entitled to his commission.' Same day, in open court, before the jury retire, counsel for defendants except to the general charge of the court, * * * and at their request a bill of exceptions is sealed by the court.

"(8) The court erred in its answer to the plaintiff's first point, which point and answer are as follows: Point: 'That if the jury believe from the evidence that the plaintiff, James V. Fenn, was employed by the defendants to procure a purchaser for the timber upon the lands in Forest county owned by them, for the price of not less than \$400,000, and that the plaintiff, in pursuance of said employment, procured the defendants a purchaser for the said timber, at the price designated, in the persons of A. Pardee & Son,

to whom the defendants made a proposition of sale, and that the said Pardee & Son, in good faith, accepted said proposition, and entered into an agreement of purchase, dated August 13, 1886, and that the said A. Pardee & Son were able to comply with their part of said agreement, then the sale was made, so far as the plaintiff in this case was concerned, and the plaintiff is entitled to recover the full sum of the commission agreed upon between him and the defendants.' Answer: 'We affirm this point, with this qualification: That you should find, not only that Pardee & Son were able to comply with their part of the agreement, but that they were able, ready, and willing, as we instructed you in the general charge, to comply with it.' Same day, in open court, before the jury retire, counsel for defendants except * * * to the affirmative answers of the court to the plaintiff's points, * * * and at their request a bill of exceptions is sealed by the court.

"(9) The court erred in its answer to the plaintiff's second point, which point and answer are as follows: Point: 'That if the jury believe from the evidence that the defendants made a proposition for the sale of their timber in Forest county at the price designated in their arrangement with the plaintiff, if such arrangement was made, which the said Pardee & Son accepted in good faith, and were able to carry out, but that the sale to them failed to be consummated, by reason of the defendants' defective title to their timber, then the plaintiff is entitled to recover his full commission as per his agreement, if made, to wit, five per cent. on the sum of \$400,000, with interest thereon from the time when the said proposition was accepted by Pardee & Son, as evidenced by their agreement of August 13, 1886.' Answer: 'This point is also affirmed, with the qualification that you should find that A. Pardee & Son were not only able to carry out their part of the agreement, but were also ready and willing to carry it out.' Same day, in open court, before the jury retire, counsel for defendants except * * * to the affirmative answers of the court to the plaintiff's points, * * * and at their request a bill of exceptions is sealed by the court.

"(10) The court erred in admitting testimony for the plaintiff, against the objection of the defendants, as follows: Mr. A. B. McLain, called on behalf of the plaintiff, and duly sworn. Direct examination by Mr. McCarrell: * * * Q. State whether or not you met those three persons, Messrs. Dickey, Darrah, and Fenn, together, at any time in 1886. A. I did. * * * Q. About what time in 1886 was that, Squire? A. To the best of my recollection, it was along about the 18th or 19th of June. * * * Q. Did you have a conversation with either Mr. Dickey or Mr. Darrah at a later time in regard to their arrangement with Mr. Fenn? A. I did, with Mr. Darrah. Q. When was that? A. That was

but a very short time after— (interrupted). * * * Q. By Mr. Jenks: Mr. McLain, when was this alleged conversation with E. H. Darrah, to which you are about to testify? A. It was a short time—I can't tell you; probably ten days—after this meeting at Mr. Darrah's house on that morning. Q. By Mr. Jenks: It was about ten days after that alleged meeting? A. I think so. Probably it might have been more, and it might have been less. I did not pay very much attention to it. (Telegram having been shown witness.) Q. By Mr. McCarrell: Squire, will you look at that telegram, and tell the court and jury in whose handwriting it is? * * * A. Yes, sir; I sent that dispatch. That is my handwriting. Q. To whom did you send it, to what place, and at what date? A. I sent it from Brookville to James V. Fenn, at Lock Haven, at the date that purports there, June 28, 1886. * * * Q. What conversation did you have with Mr. Darrah about that time? (Defendants object to the declarations of Mr. Darrah made in the absence of the other defendants as not evidence, for the reasons—First, Mr. Darrah is not shown to be the agent of the other parties; second, he is not sued; third, he is dead; fourth, there is no claim of a contract, in the pleadings, to which he is made a party; and, fifth, this was at a time as to which there is no evidence that Mr. Darrah was authorized to speak for the others. By the Court: In addition to other evidence in the case, it seems that, on the Monday following, Mr. Darrah, Mr. McCain, and the plaintiff met at Pittsburg, and that Mr. McCain said to plaintiff, 'All right; go on and fetch your party, and we will do as we contracted to do'; showing that he had a knowledge of the action of Darrah in making the proposed sale of the property. We think, in this view of the case, the evidence is admissible. The objections are overruled. Exception taken by defendants, and bill sealed by the court.) Q. What conversation did you have with Mr. Darrah about that time? A. Now, I am not able to say that this conversation was at the date of that telegram. Q. Well, about that time? A. I said it was a short time after I had met Mr. Dickey, Mr. Darrah, and Mr. Fenn at his house, probably something like ten days. I am not clear about that. When I met Mr. Darrah, I rather twitted him, as he and I were very good friends, about this sale. I said, 'This man Fenn is going to make about \$50,000 off of you,' and he said: 'Well, that is all right. We are getting a good price for the land.' I said, 'Mr. Dickey, suppose that Mr. Fenn is not able to sell this land'— Q. By Mr. Jenks: Did you say Mr. Dickey? A. Mr. Darrah, I should say. 'Mr. Darrah, suppose Mr. Fenn is not able to sell this land for more than the \$400,000; where is he going to come in then?' 'Oh,' he says, 'we will give him a five per cent. commission. We can well afford to do that, and then make a nice little sum of money.'"

G. A. Jenks and Charles Corbet, for appellants. John Conrad, S. J. M. McCarrell, J. Rider Cady, and W. F. Stewart, for appellee.

PER CURIAM. Notwithstanding the number and the elaboration of the assignments of error, there is little in this case but questions of fact, which the jury have settled. The stress of the argument was put on the absence of sufficient evidence of a joint contract by all the parties defendant, and especially by Kreidler, as to whom it was admitted that he was not in the original agreement, and must have become party, if at all, by ratification. No just complaint can be made of the charge of the learned judge on this subject, as he several times, in the most explicit and forcible way, told the jury that unless they found that all the defendants joined in the contract originally, or by ratification, the verdict could not be for the plaintiff. The criticism of the charge in the fifth and sixth assignments, as putting to the jury an alternative of execution or ratification, which included all the parties in both categories, is overrefined. The jury were explicitly told more than once that, as Kreidler did not purchase a share in the land until July, he was not a party to the original contract, and could only become so by ratification. The jury could not have failed to understand the judge as directing that each and every one of the defendants must be shown to have joined in the contract, either by actual participation in making it, or by precedent authority to those who actually made it, or by ratification, and that, as to Kreidler, the last was the only way in which the evidence would permit including him. The appellants were certainly not entitled to ask anything more than this. In this connection the fourth assignment may be considered. In charging as to Kreidler, the judge called attention to the date of his purchase, and told the jury, as already discussed, that, "unless you would find that he was interested before the agreement," ratification was the only means of bringing him into the contract. It is now complained that this was submitting to the jury a fact of which there was no evidence. But this is not the fair and reasonable construction of the language used. Taking it in its connection with what precedes and follows, it clearly means, "Kreidler did not buy until July, and therefore he can only be brought in by ratification, unless you should find that he was interested before the agreement, which would be finding that he authorized Dickey or Darrah to sell property which he did not then own." It was a parenthetical remark, and, so far from submitting a proposition to the jury to find such previous interest, was intended to show them how absurd such a result would be, and thereby to emphasize the necessity of finding ratification, in order to include Kreidler. The jury could not have been misled by it.

Coming now to the evidence, we find it exceedingly conflicting, and it would be wear-

some and unprofitable to go over it in detail. There is a solid basis of uncontroverted facts with which we may start. The defendants were the owners of the land, and the plaintiff entered into negotiation with some of them as to the sale of it,—he says, in their behalf; they say, in behalf of the prospective purchaser. The plaintiff found such purchaser in the firm of A. Pardee & Son, with whom he made a written contract of option. All of defendants subsequently entered into a written contract of sale to Barton Pardee, and all parties met at Tionesta, and rescinded this contract because of inability of the defendants to make a marketable title. The plaintiff's case, thus outlined in undisputed facts, is further made up of his testimony as to the contract for his commissions, made first with Darrah and Dickey, and then communicated to the others and assented to by them; his finding of the purchaser, and bringing him to the owners, thus completing his part as agent or broker. Then we have the corroboration in part of the plaintiff by McLain, and in other part by Barton Pardee, who testified that the attention of his firm was called to the property by plaintiff; that the contract made in his own name was on behalf of his firm, and in consequence of plaintiff's original communication; and that he was able, willing, and ready to carry out the purchase, if the title had been good. This made a *prima facie* case, which could not have been kept from the jury, no matter how strong the opposing evidence.

The only point necessary to notice in any further detail was the evidence pointing specifically to the ratification by Kreidler. As already noticed, he bought an interest in the land in July, joined in the contract of August 13th to sell to Barton Pardee, and was present on September 2d, at Tionesta, for the purpose of joining in the deed. Plaintiff, also, was there, and testifies that he was introduced to Kreidler as the man "who had sold the timber for them" (the defendants), and Kreidler said "they were all obliged to me for selling the timber," and, in further conversation, Darrah, in Kreidler's presence, said to plaintiff, "I presume you want your money," and Kreidler said, "We will be ready for you shortly," referring to a meeting of the parties to be held on the same day at Mr. Tate's office. This testimony, if believed, justified, if it did not require, an inference that Kreidler knew that the sale of the timber that he had come to Tionesta for the purpose of concluding by the execution of a deed was brought about by plaintiff, and that plaintiff was to be compensated for his services by the owners there present, including himself; and his remark that "we will be ready for you shortly" shows acquiescence and ratification of the arrangement of which he was then informed, even in the very improbable contingency of his having previously joined in a contract of sale for the important sum of \$400,000 without knowing how such sale was brought about. There were other circumstances tending to corrob-

rate this testimony, but it was of itself sufficient to take the case to the jury, as to Kreitler, with the others.

The third assignment cannot be sustained. There was no evidence to justify the affirmation of the point that plaintiff could have sold for more than \$400,000, and did not do so. Pardee & Son had an option at \$450,000, but no binding contract at that price.

It is somewhat difficult to see upon what the seventh, eighth, and ninth assignments are based. The portions of the charge there specified were correct statements of the law, and the testimony of Barton Pardee was uncontradicted that the contract of August 13th, though made in his own name, was on account of the firm of A. Pardee & Son, the purchasers procured by plaintiff.

The tenth assignment, as to the admission of McLain's testimony, is sufficiently answered by the learned judge below, that McCain's saying to plaintiff, "All right, go on and fetch your party, and we will do as we contracted to do," shows knowledge and ratification of what Darrah and Dickey had assumed to do.

As the amended statement introduced no new cause of action, there was no error in permitting the amendment. The other assignments of error do not seem to require special notice. Judgment affirmed.

(178 Pa. St. 215)

**DAUGHERTY TYPEWRITER CO. v.
KITTANNING IRON & STEEL
MANUFACTURING CO.**

(Supreme Court of Pennsylvania. Oct. 5, 1896.)

ABATEMENT OF NUISANCE — INJUNCTION — AFFIDAVIT — DISCRETION OF COURT.

1. On application for injunction to restrain defendant from the manufacture of coke, on the ground that the smoke caused thereby was an injury to plaintiff's business, where it appeared that plaintiff had built its factory with knowledge of the fact that defendant had previously manufactured coke, and might again manufacture it, and that to restrain defendant from manufacturing coke would work great injury to its business, it was proper to refuse a preliminary injunction prior to a hearing on the merits.

2. On application for an injunction, after the defendant had submitted its affidavits, and closed its argument, the plaintiff asked to introduce an additional affidavit. *Held*, that it was not an abuse of discretion to refuse to allow it to be filed.

Appeal from court of common pleas, Armstrong county.

Application for injunction by the Daugherty Typewriter Company against the Kittanning Iron & Steel Manufacturing Company. From a decree refusing a preliminary injunction, the plaintiff appeals. *Affirmed*.

This was an application for a preliminary injunction to restrain the Kittanning Iron & Steel Manufacturing Company from maintaining and operating coke ovens. After plaintiff had introduced its affidavits, and made its argument, and the defendant had

introduced its counter affidavits, and closed its argument, the plaintiff asked for leave to introduce an additional affidavit, which was refused. The other facts sufficiently appear from the opinion of the trial court, which was as follows:

"The plaintiff company is a corporation organized for the purpose of manufacturing typewriting machines. In the year 1895, a site suitable for this work was selected, and a factory erected, which at present consists of two two-story brick buildings, one 40 by 100 feet, and the other 20 by 30 feet, well and substantially constructed, and thoroughly equipped with the most modern and highest type of machinery, including a nickel-plating outfit and japanning plant. This establishment is situated just outside of the borough of Kittanning, and adjoining or contiguous to the coke manufacturing plant of the defendant, being separated therefrom by the public highway and the roadbed of the Allegheny Valley Railway. It is alleged on part of the plaintiff that the present site was selected on account of its altitude, thus avoiding the moisture from the river and low land adjoining the same; and also on account of the adaptation this site has for obtaining the early morning light and the sunlight late in the evening, thus enabling the employees to operate the machinery rapidly and accurately in aligning and other purposes; and also that this site was selected because of the assurance the plaintiff company had of obtaining adjoining land for the enlargement of the plant, should the same become necessary. It appears also from the bill and the affidavits in support of the granting of a preliminary injunction that the said company has expended in these improvements and machinery above the sum of twenty thousand (\$20,000) dollars, and have employed a considerable number of experienced and skillful mechanics, who, together with those who are learning the art of constructing these machines, and other employees, constitute a pay roll numbering fifty-seven, and that the amount distributed in the payment of these employees for their services is twelve hundred (\$1,200) dollars every two weeks. The plaintiff company has been in business since about 1891, but, until the erection of the factory as above stated, the business was principally in the development of the Daugherty typewriter, and establishing the fact that the enterprise would be a commercial success. The first machines manufactured, namely, two thousand, were made under contract. The project of the enterprise in the minds of the stockholders having been considered a success, and having determined to erect a factory of their own, and manufacture on a large scale, sites in different localities for the erection of the factory were offered to the company. The site above referred to having been selected, the ground, consisting of one acre, was donated to the company, together with about four thousand dollars of money

subscribed by the citizens of Kittanning and vicinity. The plaintiff company began the manufacture of machines in its present factory about the last of August, 1896, and has been in constant operation since, working, part of the time, both day and night. It is alleged on the part of the plaintiff: That the business is a large one, and bids fair to attain very large proportions. That the company, upon the opening up of their factory, began the manufacture of a lot of five hundred machines, and up to this time have completed and sold about one hundred and thirty of that number, being all that have been completed. The remainder of said lot of five hundred, as well as a second lot of one thousand machines, the manufacture of which was commenced last fall, are now in the process of completion, and have reached an advanced stage in the work. Also, that the sales of the machines have been increasing steadily; and that the company is now in arrears in its orders about one hundred and twenty-five machines for immediate delivery, and has contracts for future delivery of machines during the current year to the amount of about two thousand. That the board of directors of the company have authorized the manufacture of three thousand machines for the ensuing year, commencing the 1st of April; and that the operations of the company have so far progressed that at the present time it is turning out six or seven machines per day, with the expectant increase to the amount of ten per day; within the next month. That the orders in possession of the company embrace machines for this country, and contracts for large numbers for Russia, Germany, France, India, and South America; and that for all of said trade the company have agents to handle and sell its machines, and said agents have invested a large amount of capital in said business. That a considerable number of machines to go abroad are pressing for immediate shipment. Also, that the company has a large number of efficient agents throughout the United States, who have been procured and selected at large cost and labor to the plaintiff, which will be a loss to the company if they are unable to supply them with machines to meet their present demand; and that the company has expended during the last three years the sum of six thousand dollars and upward in advertising, and is under contract for a large amount of advertising for the present year. These are the facts as averred and set forth in the plaintiff's bill, and supported by the affidavits presented; and we state them to show the alleged status, progress, and condition of the plaintiff company.

"The defendant company is also a corporation, and was incorporated under the laws of this commonwealth on the 25th day of June, 1894, under the corporate name of the Kittanning Iron & Steel Manufacturing Company. They are the successors and purchasers of the Kittanning Iron Company, Limited,

which was organized in 1879; and the works and location of both said companies' plants are identical. The defendant company's plant consists of a blast furnace, of the capacity of nine hundred tons of metal per week; of a rolling mill, consisting of thirty-three puddling furnaces, with the necessary boilers and machinery used in connection therewith; also, a coal breaker and washer, with boilers and engines; and a coke plant, consisting of sixty-six ovens. The coke ovens, breaker, and washer were erected in the year 1880, at a cost of thirty-five thousand (\$35,000) dollars; and that the plant is of that value at the present time. The blast furnace, with the improvements and additions, represents the value of about four or five hundred thousand dollars. The nucleus of this plant, which now consists of the rolling mill, the blast furnace, the coke ovens, and washer and breaker, had its beginning about forty-five years ago, and has been in operation, with intermissions, under different managements, up to the present time. Until the year 1879, the plant consisted of the rolling mill alone. In that year the erection of the blast furnace was begun, which was immediately followed by the construction of the coke manufacturing plant. At the time the iron plant was first established, it was quite beyond the improved and built-up portions of the town. At the time of the erection of the blast furnace and the coke ovens, that portion of the borough between the rolling mill and what has already been improved was pretty well built up; and at the present time the lots are pretty generally occupied by dwelling houses, and a considerable number of houses have been erected on land near to the defendant company's plant, on the territory outside of the limits of the borough.

"It is contended on the part of the plaintiff that the defendant company should be restrained by a preliminary injunction, afterwards to be made perpetual, from the operation of their coke manufacturing plant, for the reason that the ovens of said plant discharge great volumes of smoke, of heat, and of highly sulphurous and noxious vapors, which said by-product and vapors roll up the hill, and completely envelop the works of the plaintiff company; that they permeate and fill the same, even when the windows are closed; that, by reason of such by-product, sulphurous, noxious vapors, and smoke, entering the factory of said plaintiff, interfere with the operation of their works; that it tarnishes and seriously affects the machinery and tools of the plaintiff, also the dies and fixtures, which are required to be kept in a clean and polished condition for efficient work, thus destroying the value, not only of the machinery of the plaintiff, but rendering their manufactured work unfit for sale and shipment.

"From all the circumstances and facts surrounding this case, should the defendant company be interfered with in the use of

their property, before a full hearing and determination of the case? The manufacture of coke is a legitimate pursuit, and in this case is carried on as a constituent part of the iron plant of defendant. From the facts so far as developed, we cannot but conclude that plaintiff company suffers, at least, some injury and damage in the operation of its works, not only to the machinery and manufactured product, but also to the health, comfort, and the efficient work of the employees thereof; and, because of this, plaintiff contends that it will suffer loss in its contracts with agents employed to sell the machines, and will not be able to reap the benefit it should from the amounts invested in advertisement. If the injury and damage done to the machinery, the manufactured product, and to the health, etc., of the operators, be not sufficient of itself to move the conscience of a chancellor to interfere, we cannot see how the prospective sales, dependent upon the energy and efficiency of the agents and the efficacy of advertisements, can be added to counteract and remove any doubt the chancellor might have. We do not dispute the authorities cited by plaintiff company in support of its application; nor shall the statements of facts herein made be prejudicial to the rights of either party after answer made and final hearing had. Nor do we base our conclusion upon the fact that the plaintiff came near and in proximity to the plant of the defendant, long after it had been established and in operation, as the authorities cited by plaintiff fully sustain the principle contended for in this regard, that it had the right to select this site and use it for the purpose it is now used; and, if injured or damaged by defendant in the use and occupation of its plant, there is a remedy, but shall it be by equity or law? It may be said that it can be by equity; that law will not furnish an adequate remedy, because of the continuance of the nuisance, and the multiplicity of suits required to recover for damages sustained; and this may in a great measure be correct, but we must not lose sight of that principle, that in equity a decree is not of right, but of grace; and where, from the facts submitted, it would appear to the conscience of a chancellor that a decree enjoining would do greater injury than a refusal thereof, is it not the duty of the chancellor to refuse the preliminary injunction, and preserve the status of the parties until final hearing? In this case, both sides by the affidavits submitted claim irreparable injury,—the plaintiff if injunction be not granted, the defendant if it be granted; and the persons making these affidavits on both sides, as to irreparable injury, are men of excellent repute and good judgment, and well known to us. We, therefore, from all the facts as gleaned from the bill, the affidavits, and counter affidavits, as applicable to the law governing such cases, are constrained to refuse the application."

George A. Jenks, W. D. Patton, and M. F. Leason, for appellant. J. B. Neale, Ross Reynolds, and McCain & Christy, for appellee.

PER CURIAM. In any view that can be reasonably taken of the facts presented to the court below by the bill, affidavits, counter affidavits, etc., in this case, we are all of opinion that there was no error in refusing to grant the preliminary injunction. Nor do we think the learned court erred in refusing to consider the affidavit referred to in the second specification. As shown by the record, it was not presented until "after respondents had read their affidavits, and closed their arguments." According to the orderly course of procedure, that was too late; and, in the absence of anything to show the contrary, the presumption is that no satisfactory reason was given for the omission to offer it in time. But, aside from that, there appears to be nothing in the affidavit in question that could have had the effect of producing a different result. It is only in clear cases of abuse that the exercise of a trial court's discretion, in the orderly conduct of a case, should be interfered with. This is not such a case.

It is neither necessary nor proper that we should now intimate any opinion as to the merits of the case generally. It goes back for further proceedings; possibly for final hearing, on bill, answer, and full proofs. A materially different state of facts may then be presented. We therefore adhere to our general rule in appeals from interlocutory decrees, and merely hold that, as presented to the court below, the case is not one that would have justified a preliminary injunction. The decree is therefore affirmed, and appeal dismissed, with costs to be paid by the plaintiff.

(55 N. J. E. 175)

PRATT v. BOODY et al.

(Court of Chancery of New Jersey. Dec. 7, 1896.)

INJUNCTION — RELIEF AGAINST ACTION AT LAW — ACCOUNTING — DISCOVERY — ANCILLARY RELIEF — STATUTORY LIABILITY OF DEVISEES — ACCOUNT STATED — GAMBLING TRANSACTION — BURDEN OF PROOF.

1. Where, pending an action involving accounts between defendants and plaintiff's testator, plaintiff brings a bill to enjoin such action, and for a discovery and accounting as to the same transactions, and the discovery is fully obtained by defendants' sworn answer to plaintiff's bill, such bill will be considered as merely ancillary to complainant's defense in the action at law, and an injunction will not be granted.

2. The statutory action (Revision, 476; 2 Gen. St. 1679) to enforce a joint liability against the heirs and devisees of a testator being a purely legal remedy, equity will not enjoin its prosecution, or interfere with it except for the purpose of granting a discovery or other merely ancillary relief.

3. A bill to enjoin an action, brought under Revision, 476 (2 Gen. St. 1679), to enforce a joint

liability of the heirs and devisees of a testator, for a claim on an account against testator, may be sustained in so far as it seeks to compel a delivery and return of securities deposited by testator with defendants, since such relief is purely equitable, and could not have been given in the action at law on the account.

4. In a suit to restrain prosecution of an action at law on an account against plaintiff's testator, defendants set up by cross bill a claim against complainant as executrix and sole legatee of the testator on the same account. *Held*, that they were entitled to relief on the cross bill, though complainant's right to an injunction was denied on the ground that the law court could settle the account, and defendants, in their answer, had denied jurisdiction of the court to entertain complainant's bill for an injunction.

5. Equity has jurisdiction of a claim against the executrix and sole legatee for settlement of an account against the testator, since the statutory method of enforcing the liability of the legatee by means of a suit on the refunding bond would be inadequate, on the ground that the bond, if given in such case, would have been made by the legatee payable to herself as executrix.

6. Purchases and sales of stocks on a stock exchange, made by defendants as brokers for plaintiff's testator, did not form a gaming transaction, if the stocks were actually bought and delivered, and there was not a mere dealing in differences between prices, or speculations on the rise and fall of the market.

7. Evidence that statements of the purchase and sale of stocks by defendants, who were testator's brokers, were reported to testator as soon as made, and that monthly statements were submitted to him, showing the state of the accounts, and that he had previously examined such accounts, and made no objection thereto, does not sufficiently show an account stated, which can be enforced, as such, between defendants and his executrix.

8. The burden of proving that transactions relating to the purchase and sale of stocks, which are in form transactions between the customer as principal and the broker as agent, are wagering contracts, rests on the party asserting their illegality.

Bill by Caroline O. Pratt against David A. Boody and others for an accounting. Heard on pleadings and proof. Decree for complainant as to part of relief prayed, and for defendant on a cross bill.

This case is heard on bill, cross bill, and answers, and the issues, as presented on the record, involve a number of questions relating to equitable relief, some arising on the bill, and others on the cross bill. One issue, and a fundamental issue, on both the bill and cross bill, is whether a balance of account claimed by the defendants, Boody, McLellan & Co., to be due to them on their transactions as brokers for Charles E. Pratt, deceased, in his lifetime, is a valid claim, or whether it is illegal and invalid, because it is based, either wholly or in part, upon gambling or wagering transactions in stocks. The other issues arise collaterally out of this main question. Charles E. Pratt died about January 22, 1891, testate, and, by his will, his wife, the complainant, was the legatee and devisee of all his estate, real and personal, and the sole executrix of the will, which she duly proved. Charles E. Pratt also left heirs at law surviving him, and on August 30, 1893, the defendants commenced an action at law in the supreme court against the com-

plainant as devisee and against the heirs at law of Charles E. Pratt, to recover against them jointly the balance of account claimed to be then due (\$52,533.88, with interest from August 1, 1893); and to the declaration in this suit the complainant filed separate pleas, including a plea of payment, with notice of a set-off of a claim for \$13,618.71, with interest from September 1, 1893, alleged to be due to complainant from the defendants as a balance on their own account with her individually. After this suit was commenced, the defendants brought another suit in the supreme court against the complainant alone, in which suit the complainant also filed pleas of general issue and payment, with notice of set-off for the above claim of \$13,618.71. The defendants are willing to discontinue this latter suit, alleging that it was commenced by mistake, but the complainant refuses to consent to its discontinuance. The complainant, also, on August 29, 1893, one day before the commencement of the joint action in the New Jersey supreme court by defendants against her as devisee and the heirs at law of C. E. Pratt, herself commenced an action against the defendants in the court of common pleas of the city of New York, to recover from the defendants the above balance (\$13,618.71) alleged to be due her. These three actions at law being all pending, the complainant, on December 9, 1893, filed her bill in this cause (amended on December 23, 1893) for a discovery under oath of the transactions of defendants with Charles E. Pratt in his lifetime, for the taking of an account in equity instead of at law, and also to compel the return to complainant of certain securities which were delivered to defendants by Charles E. Pratt in his lifetime, and which they still hold. The bill alleges that these securities were assigned and given by Charles E. Pratt to the defendants without consideration, and as margins to secure and pay losses accrued or to accrue and become due to the firm from Pratt, in speculation in fluctuations in the price of stocks, bonds, and other securities which the firm might purchase or sell on account of Pratt; and it prays that any of the assignments or securities for this purpose may be decreed to be illegal and void, and the bonds, mortgages, and other securities re-assigned and delivered to complainant. The basis of the claim to transfer the jurisdiction over the account from a court of law, where it was pending, to the court of equity, was placed, in the bill, upon the complication and extent of the accounts, the necessity for discovery as to credits to be made, and other information. Upon filing the bill, an interlocutory injunction was issued restraining the defendants from proceeding in the action at law commenced by them against the complainant as devisee, and from commencing any other action or proceeding at law against her as devisee concerning the account. The defendants answer the bill under oath, giving the discovery asked, annexing a copy of

the account to the answer, being the same account served as a bill of particulars in the suit at law, and disclosing the securities which they hold or claim to hold as collateral for the account. They deny that these securities were delivered, as alleged in the bill, to secure defendants in Pratt's speculation, through them, in the fluctuations in the prices of stocks, etc.; and they say, under oath, that no agreement or arrangement, either express or implied, was made by them with Pratt, whereby they were to buy and sell stocks for him for the purpose of speculating in the fluctuations in prices, but that each sale or purchase was made on Pratt's express order, and the purchases or sales ordered were actually made, and, when purchases were made, the certificates held by them subject to Pratt's order, and either delivered to him or afterwards sold as ordered. They claim, therefore, to hold the securities in their hands as collateral to secure the account. They further deny the jurisdiction of the court of equity to take the account, alleging that no reason exists why it cannot be taken at law. By cross bill, however, which is annexed to the answer, the defendants seek to recover this balance of account by decree of this court, and ask the following relief, based on their account: Complainant, as the sole legatee and devisee of Charles E. Pratt, has taken possession of all his estate, real and personal, and holds all his estate to her own use, except so much as has been paid out by her for the debts of decedent. Defendants allege that they filed their claim with complainant as executrix, duly verified; that complainant has never filed any inventory, or rendered any account of the estate; and they ask a discovery of assets, with a decree against her, as legatee and devisee, to the extent of assets received, for the balance now due on the account. They admit, also, that a balance is due from them to complainant upon her individual account, but they allege that this balance so due (\$13,618.71) is, by virtue of an agreement made with them, as security for the balance due on the Charles E. Pratt account, and should be credited thereon; and they ask an injunction against the prosecution of this claim by complainant, either by set-off in the New Jersey suits, or by the action in New York. On this cross bill a restraining order to this effect was granted, and, together with the restraining order issued on the amended bill, has been continued pending final hearing. Defendants also claim, in their cross bill, that complainant should account to them for the proceeds of a certain mortgage for \$5,000 on Arizona property, which they also held as part of the collateral for Charles E. Pratt's account, and which was delivered after his death to complainant's agent, upon his agreement to collect the amount and deliver to them, but which he collected, and, they charge, in violation of the agreement, he delivered the proceeds of collection to complainant. The com-

plainant, answering the cross bill, admits the delivery of this security to her son, but alleges that it was delivered because it was of no value to defendant in its then condition, and denies it was delivered for the purpose of raising money on it for the benefit of defendants.

B. A. Vail, for complainant. Willard P. Voorhees and A. H. Strong, for defendants.

EMERY, V. C. (after stating the facts). The discovery sought by complainant's bill has been obtained by the answer under oath, to which no exception has been taken; and, as the bill to this extent must be treated as purely in aid of the complainant's defense in the action at law against her, that action must now be allowed to proceed, unless the relief which the complainant claims entitles her to a continuance of the injunction against the further prosecution of that suit. *Henwood v. Jarvis*, 27 N. J. Eq. 247, 250 (Runyon, Ch.; 1876), and cases cited. The right to further enjoin the suit at law is based upon the claim that the extent and complications of the accounts require them to be taken in equity, instead of at law. Now that the discovery has been granted, and the status of the accounts has been shown by the evidence, I am of the opinion that the accounts may be as well taken at law as in equity, and that nothing in the character of the accounts is sufficient to divest the court of the jurisdiction it has acquired over them. And there are two reasons why, in this particular case, the jurisdiction of this court, so far as the action at law is concerned, should be strictly confined to ancillary relief. In the first place, this action at law is an action to enforce a joint liability of the devisee and heirs at law, which is imposed by statute. *Revision*, 476; 2 Gen. St. 1679. This is a legal liability purely, not an equitable one, and a court of equity has no right to inquire into or enforce the liability of devisees under this statute. *Insurance Co. v. Meeker*, 37 N. J. Law, 282, 299, et seq.; *Insurance Co. v. Hopper*, 43 N. J. Eq. 387, 12 Atl. 528, affirmed 44 N. J. Eq. 604, 17 Atl. 1104; *Holley v. Weedon*, 1 Vern. 400; *Edwards v. McClave* (Emery, V. C.; 1896) 55 N. J. Eq. —, 35 Atl. 829. And if the court of equity has no right to enforce the liability under the statute, it has no right to interfere with the action, except in aid of the prosecution or defense, by discovery or other ancillary relief. Again, the vital question raised in relation to the account is its illegality, as based on a gaming or wagering contract, and this is a question of fact peculiarly appropriate in this case for the decision of a jury, and either party has the right to the judgment of that tribunal and of the law court upon the questions involved. So far as a permanent injunction against defendant's suit at law against her as devisee is concerned, the relief to complainant must be denied.

But the complainant's bill is also filed to compel the delivery and return of securities deposited to secure the account, and, as this is a purely equitable relief, beyond the power of a court of law to administer, the complainant has the right to call upon this court for an adjudication as to the validity of this claim upon the facts here presented. And the defendants, also, upon the case presented in their cross bill, and notwithstanding the denials of jurisdiction in their answer to complainant's bill to enjoin the suit at law, have the right to call upon a court of equity to establish their claim against the decedent's estate, in order that they may obtain a decree against the complainant, as the sole legatee of the personal estate, to satisfy the claim out of these assets. This is the general rule as to the liability of legatees. 3 Williams, Ex'rs, 1313, 1314. This liability of legatees is an equitable liability, independent of statute, and is not a legal liability except to the extent provided by statute, under our orphans' court act. Revision, § 67. And, the complainant being sole legatee, who, as appears by her bill, has taken possession of all the assets of the estate as her own, after paying the claims presented to her as executrix, the statutory method of enforcing the liability of a legatee by means of a suit on refunding bond (which would be her own bond, payable to herself as executrix) does not seem to be applicable. In this suit, therefore, as well on the cross bill against complainant as legatee as upon the bill of complainant to deliver the securities, this court has the right, and is obliged, to decide upon the question of the legality of the claim. This question is one altogether of fact, and must, so far as this case is concerned, be decided upon the proofs here presented. The decedent, Charles E. Pratt, commenced dealing with the defendants as brokers in the city of New York in April, 1888, and these dealings continued until his death, January 20, 1891; the defendants' firm in the meantime, and on January 1, 1889, being changed by the withdrawal of one member. These dealings consisted mainly, but not entirely, of the purchase and sale of stocks, bonds, etc., on the New York Stock Exchange, and the proofs show that these purchases and sales were made on Pratt's orders, and that the purchases and sales were actually made by the brokers, who held the stocks, etc., purchased as security for the account. The balance due from Pratt results from the transactions which include these purchases and sales, together with defendants' charges for commission, and interest. In form, the relation between Pratt and the brokers was that of principal and agent; but, in reference to stock transactions of this character, the rule is settled in our state that the inquiry is whether the real transaction between the broker and his customer is a mere dealing in the differences between prices, and in which the broker is really a principal,

and not an agent. This was the rule settled in *Flagg v. Baldwin* (Err. & App.; 1884) 38 N. J. Eq. 219; and the court in this case having found, as matter of fact, upon the evidence in the cause, that the contracts were mere wagers, and that it was never contemplated, intended, or agreed by either the customer or the brokers that the stocks purchased or sold were to become or be treated as the stocks of the customer, they held that the real contract was one merely to receive and pay differences. The transactions were therefore held to be invalid, as mere wagering contracts, within the meaning of our statutes against gaming, and were held to be contrary to the public policy settled by these laws. And it was further decided that this policy was to be enforced, in a case where our courts were called upon to enforce, in this state, securities given by the customer upon the illegal transaction, although the illegal transactions occurred in another state. The dealings in the present case arose altogether in New York; and, on the assumption that a complainant, filing a bill to compel the return of personal securities, voluntarily delivered in an illegal transaction in another state, and whose case, therefore, is not based on our statutes against gaming in this state, has the same equitable status as a defendant resisting the enforcement of the illegal contract, the question is whether the transactions in this case were illegal, under the rule laid down in *Flagg v. Baldwin*. Each case under this rule must depend upon the intention of both parties, that of the broker as well as of the customer, to be deduced from the evidence produced in each case; but, as I understand the application of the rule, the burden of showing that transactions relating to the purchase and sale of stocks, which are, in form, transactions between the customer as principal and the broker as agent, are in reality wagering contracts, in which the broker is really a principal, must rest upon the party asserting the illegality. Applying these rules to the whole evidence in the case, my conclusion is that the complainant has failed to show that the transactions were a mere dealing in differences, and that, upon the whole evidence, including the answers of defendants, which were called for under oath, the defendants have established by a preponderance of evidence that—so far, at least, as they were concerned—the transactions were intended to be real and legitimate purchases and sales as agents for Pratt. Apart from the transactions themselves, the only direct evidence as to the nature of the dealings between Pratt and his brokers is that furnished by the answers of the defendants, which were put in under oath. These answers deny that there was any agreement for the purchase and sale of stock or bonds for the purpose of speculation in the fluctuations in prices. In this vital point the case differs from *Flagg v. Baldwin*, where such agreement was affirma-

tively proved, and was held to be clearly made out.

The main reliance of the complainant in this case, to make out the illegal character of the transaction, is the account itself. It began in April, 1888, and up to February 1, 1889, shows dealings, purchases, and sales to the amount of nearly \$500,000, and up to this latter date the account itself, as explained in the evidence, shows the actual delivery to Pratt of a very large proportion of stock and bonds purchased for him by defendants upon his orders. On February 1, 1889, the balance due from Pratt to the defendants, as appears by the account, was \$120,739.94, and the defendants, to secure this balance, held stocks and bonds to the par value of \$168,000, the market value not being proved. From this date up to the time of Pratt's death, the purchases amounted to \$2,400,000, and the proportion of deliveries of stock to Pratt was not larger than 5 per cent. The account between February 1, 1889, and January 20, 1891, also includes the sale of some of the securities held on February 1, 1889, to secure the balance then due, the validity of which balance cannot, on the mere face of the accounts, be well disputed. I do not understand complainant's counsel to insist that up to this date (February 1, 1889) the account itself justifies the inference that it was an illegal or wagering account. The real question of fact is, what inference, as to the legality of the transactions, is to be drawn from the subsequent state of the accounts? During February, 1889, the purchases amounted to over \$200,000, and the actual deliveries to \$47,000. From this time until January 1, 1890, the purchases were over \$1,500,000, without any deliveries, except \$556 in July, 1889. From January 1, 1890, to Pratt's death, in January, 1891, the purchases were over \$650,000, while the actual deliveries to Pratt during this period amounted to \$57,337, or nearly 10 per cent. Complainant insisted that the small proportion of deliveries is sufficient to justify the conclusion that both parties intended the account to be a mere settling of differences, without any deliveries. But this inference does not seem to me to be justified. The account, on its face, would justify an inference that, after February, 1889, Pratt changed his method of purchases and sales, by making more frequent and numerous turns in the market, and was speculating through defendants; but it is not sufficient to show that actual deliveries were excluded by agreement. Pratt still required and received deliveries from time to time to a not inconsiderable amount, and, so long as these deliveries continued to be made to the extent admitted, there is no clear basis for any inference that it was understood between the parties that the account was a mere speculation in differences. These deliveries are not explained by complainant as they should be, on her theory that there was an actual wagering contract which provided for no delivery; and

their importance in deciding as to the validity of the whole account which included them, as well as others, must, as it seems to me, be very great. These deliveries, unexplained by complainant, corroborate the defendants' claim that the whole account, from the beginning, is based upon the legitimate dealings between them and the deceased as his agent, and were not intended to be mere speculations in differences. The letters of the defendants to Mr. Pratt, of January 17 and January 19, 1890, relied on by complainant, undoubtedly show that at that time Pratt was speculating in the fluctuations of prices in the specially named stocks, through defendants; but they are not sufficient, in my judgment, to show that it was understood between Pratt and the defendants that, even as to these particular transactions, actual deliveries were excluded by reason of anything in these letters, in case the transactions could not be closed out as directed, much less can these letters be sufficient to invalidate the whole series of transactions between the brokers and their customer. Upon the whole evidence presented in this case, I conclude, therefore, that the account of the defendants is not shown to be based upon an illegal wagering transaction or agreement, and that the defendants are entitled to recover the balance due on the account from the complainant, as legatee of Charles E. Pratt, to the extent to which the personal estate came to her as legatee, and has not been duly applied to the payment of debts.

An account will be necessary to ascertain, in the first place, the balance due to defendants, and, in the second place, to ascertain the amount of the personal estate of deceased with which complainant is chargeable for the payment of this balance. No account can be taken of the real estate devised, for the reason above stated; the complainant being, as far as appears, simply devisee, and her liability as such is purely legal, and cannot be enforced in equity. The defendants' counsel claimed that the account as presented must be taken as a settled and stated account; but, even admitting that the pleadings allow it to be so treated, the evidence relied on to establish this is not sufficient for this purpose. It consists mainly of evidence that statements of each transaction were reported to Mr. Pratt by the brokers as soon as made; that monthly statements were submitted to him, showing the state of the accounts or balances at the time; and that Mr. Pratt, in his lifetime, frequently examined the accounts, or was familiar with them, and that he made no objection to them. This may be sufficient to establish such an admission by deceased of the correctness of the accounts as will make them *prima facie* correct, and impose on complainant the burden of showing the incorrectness of any item objected to; but this evidence is not sufficient to establish an account stated which is to be enforced between the present parties. Defendants at the

hearings objected to inquiries by complainant in reference to particular items of the account, and, this inquiry being then suspended on their objection, it must be left open to the complainant on the accounting to show the particulars in which the account is incorrect. This decree for account, in favor of defendants and against complainant as legatee, to enforce an equitable liability on her part as such legatee, must, however, be made upon equitable terms and conditions. The defendants have in their hands collateral securities for the account, and, inasmuch as the complainant, as legatee, is bound for the payment of debts of deceased only after the exhaustion or application of these securities, the account to be taken, therefore, will include a statement of these. As to the proceeds of the Arizona mortgage for \$5,000, which the defendants held originally as collateral security, the complainant must be charged with this in taking the account. Upon the evidence relating to this, I reach the conclusion that this security was delivered to complainant's agent for the purpose of converting into money to be credited to the account, and it must, therefore, be accounted for.

In relation to the claim of the defendants to hold the balance admitted to be due from them to complainant on individual account as security for the payment of the balance due them on the Charles E. Pratt account, I overruled or struck out, at the hearing, the evidence upon which the defendants relied to prove an agreement made by Charles E. Pratt to this effect, on opening with them the complainant's account. Upon further consideration, I see no reason to change this ruling; and relief upon the defendants' cross bill, so far as it seeks to enjoin the complainant's suit or set-off at law, by reason of the alleged agreement, must be denied. There may be a question, however, whether, independent of any agreement, and treating the account of complainant as an independent account, recoverable at law, the same should not, in this suit, upon proper terms as to security, etc., be equitably set off against the balance found which may be due to defendants on the accounting from complainant as legatee of Charles E. Pratt. This question was not touched on at the hearing, and, before settling decree, I desire to hear counsel on this point. The suit against complainant as devisee being allowed to proceed, she would, of course, be entitled to the benefit of her set-off pleaded in that suit; but the set-off may not be available in that suit, and, on the other hand, the defendants here may not be able to recover in their other New Jersey suit at law, or to set off in the New York suit at law the equitable claim against complainant as legatee of Charles E. Pratt. Substantially the case seems to be one where there is a liquidated legal claim on one side and an equitable claim on the other, which is the subject of accounting; and, in view of my conclusion to allow the suit at law against

complainant as devisee to proceed, and at the same time to allow an accounting against complainant as legatee to be taken in this court, counsel should be heard on the question whether this court should exercise any equitable control over the complainant's prosecution of her claim at law pending the accounting, and, if so, upon what terms.

(50 N. J. L. 156)

AMERICAN TRANSP. & NAV. CO. v.
NEW YORK, S. & W. R. CO.

(Court of Errors and Appeals of New Jersey.
Nov. 6, 1896.)

APPEAL—EMINENT DOMAIN—SURVEY OF CONTEMPLATED ROUTE—LANDS OF CORPORATIONS.

1. The refusal of the court to grant a mandamus is not reviewable on error.

2. By filing a survey in the office of the secretary of state of the contemplated route, a railroad or similar company obtains a pre-emption of the land embraced in it.

3. Such a survey was made, and the land embraced was subsequently purchased by the railroad, the defendant in error. Application being made by the company that filed said survey for commissioners to condemn the land, and it appearing that the charter of such company forbade it to take land held by another corporation, *held*, that whatever remedy the applicant had was in equity, and that it could not acquire the land by procedure in a court of law.

(Syllabus by the Court.)

Error to supreme court.

Application by the American Transportation & Navigation Company against the New York, Susquehanna & Western Railroad Company in eminent domain proceedings. From a denial of a mandamus requiring the appointment of commissioners (32 Atl. 74), plaintiff brings error. Affirmed.

Cortlandt Parker, for plaintiff in error. J. Franklin Fort, for defendant in error.

BEASLEY, C. J. The American Transportation & Navigation Company made an application to a justice of the supreme court for the appointment of commissioners to appraise the value of certain lands which it sought to condemn for its corporate uses. This petition being refused, on the ground hereinafter mentioned, a motion was made in the supreme court for a mandamus ordering the justice to make the appointment as requested. The writ was not granted, and hence the removal of the proceeding to this court.

The ground on which the application for the appointment of the commissioners in question was refused by the justice was this, viz. that the lands to be condemned were then owned by the New York, Susquehanna & Western Railroad Company, the defendant in error, and that lands thus held were not liable to be taken by the plaintiff for any purpose whatever. It was held that this inability was the result of a restrictive proviso in the charter of the navigation company, which is in these words: "Provided, that in no case shall this company be authorized to

condemn or take possession of the land or property of any other corporation existing under the laws of this state, but shall have the right of access across the same, 'doing no unnecessary damage to the lands of such corporation or interference with the business thereof, and such damage, if any, shall be ascertained and paid in the manner hereinbefore provided.' At the inception of this condemnation procedure, the lands in controversy were owned and were in the possession of the defendant in error, and it was on this account that an order for a mandamus was refused. In this construction of the situation by the supreme court, this court concurs. To hold the opposite would be to permit this company to violate its own charter, the prohibition being expressed in unambiguous and plain terms that it shall not take the "land or property of any other corporation existing under the laws of this state"; and that is precisely what is being attempted to be done by this procedure. The legislature has said that lands circumstanced as these are shall not be condemned, and this court, as the subject is here presented to us, cannot annul or modify that mandate. Under present conditions, this court can regard only the legal title to the property, and, as that title is in the corporate defendant, the statutory prohibition against its compulsory acquisition of it by the plaintiff is clearly applicable.

With respect to the contention that, by filing in the office of the secretary of state "a map and description of said property as required by its charter and the statute," prior to the acquisition of the title to the premises by the defendant, an indefeasible right became vested in the plaintiff to take the land by condemnation, if it could not be purchased, it seems to me that the satisfactory answer to it is that the subject is not before us in such a form as to place it within the cognizance of this court. The inquiry thus set on foot belongs to a court of equity, and not to a common-law tribunal. Since the decision in the case of *Railroad Co. v. Blair*, 9 N. J. Eq. 648, it would seem that no one can doubt that, when one of these quasi public corporations has filed in due manner its survey and map in the office of the secretary of state, it thereby secures the pre-emption of the property thus described. This, I have always understood, has been and is the settled law of this subject, and it would seem that any other rule would be impracticable. How could the survey and mapping of any extended line of land upon which it was contemplated to lay a railroad track be of any avail, if such line could be broken in upon, at will, by rival companies? But, while the proposition that the plaintiff became invested with this pre-emptory right to the surveyed land is readily granted, it is deemed that it is equally clear that such right, under existing circumstances, cannot be enforced or realized by a purely legal proceeding. The difficulty is that, when

a tribunal can look only at the legal title, and when that tribunal finds that title lodged in a corporate defendant, it inevitably must follow that the statutory prohibition existing in the charter of the plaintiff must be declared to be a bar to the condemnation of the land in question. It may well be that, if the pre-emption of the plaintiff has been illegally invaded by the action of the defendant in putting the title in such a position that the plaintiff is barred from effectuating its right at law, relief against such wrong may be obtained in a court of equity, where, if necessary, the ownership of the land may be so modified as to remove the difficulty that now stands in the way of the present procedure.

With respect to the other points discussed in the briefs of counsel, this court agrees in the views on these subjects expressed by the supreme court. Before closing it is proper to say that, in looking into the papers brought up with this record, I have been surprised to find no ground whatever for this writ of error to rest upon. At the time of the argument it was taken by me for granted that such a course had been adopted in the supreme court as by force of our statute to so adjust the subject as to subject it to this review. But such, as is now discovered, is not the case. This writ brings before this court a naked refusal of the supreme court to order a mandamus to issue. Such a decision was not reviewable on error at common law, and has never been so in this state, subject to such supervision. This doctrine is clearly expressed and exemplified in *Layton v. State*, 28 N. J. Law, 575. If the counsel of the respondent had made the motion, this writ, there is every reason to suppose, would have been dismissed. As the case stands, let there be a judgment of affirmance.

(59 N. J. L. 264)

CAMDEN, G. & W. RY. CO. v. PRESTON.

(Court of Errors and Appeals of New Jersey.

Nov. 18, 1896.)

STREET RAILROAD—INJURY TO PERSON ON TRACK.

1. It is the duty of a carriage driver not to obstruct the track of a trolley car.

2. Whether his negligence was proximately contributory to the collision which followed is for the jury to determine.

(Syllabus by the Court.)

Error to circuit court, Gloucester county: Miller, Judge.

Action by Cornelius Preston, administrator of Charles C. Preston, against the Camden, Gloucester & Woodbury Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. Willard Morgan and Samuel H. Grey, for plaintiff in error. Robert S. Clymer, for defendant in error.

DAYTON, J. Suit was brought by Cornelius Preston, administrator of Charles C. Preston,

ton, to recover damages for the loss which the latter's widow and orphans sustained by his death. A verdict was rendered for the plaintiff below, and the case is brought into this court upon exceptions to the charge of the judge presiding at the trial. It appears by the evidence that the deceased was driving in an open pony wagon, after dark, from Camden to Woodbury, on the line of the electric railway. At a point on Broadway near the Newton Creek bridge, a car, coming in the same direction, collided with the wagon, threw out the deceased, and, the front wheel of the car passing over him, caused his immediate death. The defense to this action was contributory negligence on the part of the deceased; that, with abundant warning of the car's approach, he willfully and illegally drove, or continued, upon the track in such manner as to make the collision inevitable. The question of negligence is eminently one of fact, for the jury to determine; but the plaintiff in error complains that, in submitting the case to the jury, the law applicable to the facts was so erroneously stated as to mislead the jury and prejudice the company's rights.

It is alleged that the trial court erred in refusing to charge, first, "that if the jury believe, from the evidence, that the trolley motorman gave full and fair notice by ringing the bell, it was the duty of the carriage driver, the decedent, proceeding in the same direction, to drive on some other part of the road, and allow the trolley car to pass; and, if he did not, he was guilty of contributory negligence, and plaintiff cannot recover." Trolley companies, by permission of the legislature, may, in common with all persons, lawfully use that part of the highway over which their tracks are laid. Every other citizen may use all parts of the way, including the railway tracks, excepting use of the rails for the purpose of conducting the business of transportation in competition with the trolley companies. *Citizens' Coach Co. v. Camden Horse R. Co.*, 33 N. J. Eq. 267. An unreasonable obstruction to the passage of the trolley car, in the conduct of its business, like the unreasonable obstruction to the passage of any other vehicle in pursuit of its legitimate occupation along the street, would constitute a nuisance, and subject the offender to suit and penalty at law. The electric car in question had the right to continue on its course in the straight line to which it was confined by the railway tracks, provided that, in so doing, it did not interfere with the rights of others. It could not turn out for other vehicles, but in this case there was no impediment to prevent the decedent from turning out to let the car pass. In the exercise of their mutual rights, it was incumbent upon the driver of the carriage, upon notice of the approach of the electric car, to make way for the latter. It was his duty to do so. Willful and unnecessary obstruction to the car's progress at its usual and lawful speed could have been pun-

ished by legal process. The legislature, however, did not clothe the railway company with power by violence to enforce the law for its benefit, or to punish the violation of a public right. It could not take the law into its own hands, and by violent means force the obstructing vehicle from its way. In doing so it would clearly become a wrongdoer. *Railway Co. v. Lanning*, 18 N. J. Law J. 245; *Railway Co. v. Isley*, 49 N. J. Law, 468, 10 Atl. 685. In refusing to charge that such neglect of duty was, in this case, of itself, contributory negligence on the part of decedent, as was requested in the language embraced in the third exception, there was no error, because it does not follow necessarily that such neglect of duty was so proximately contributory to the collision as to relieve the company from responsibility. Neglect of a legal duty on plaintiff's part is not a good defense to an action for damages, unless it was proximately contributory to the injury. The question left to the jury was whether the defendant, under the circumstances, exercised reasonable care to avoid the accident. If the motorman knew that decedent's wagon was on the track, so that a collision with it was necessary, or even probable, should the car advance, it was his willful and wrongful act which caused the accident. If the agent of defendant, by the exercise of ordinary care, could have avoided the collision, notwithstanding decedent's negligence, he was bound to do so; and the company is responsible for any damages that resulted from failure in that respect. *Raisin v. Mitchell*, 9 Car. & P. 613; *Bridge v. Railway Co.*, 3 Mees. & W. 244; *Davies v. Mann*, 10 Mees. & W. 546; *Steele v. Burkhardt*, 104 Mass. 59. In all cases where the defendant's negligence was so gross as to imply a disregard of consequences, or a willingness to inflict the injury, the plaintiff may recover, even though he was a trespasser, or did not use ordinary care. *Railroad Co. v. Adams*, 26 Ind. 76. If the cause proximately contributed to the result, there can be no recovery; but, if it was only a remote cause or condition of the injury, a recovery can be had. If the motorman, before the collision, knew that decedent was on the track, although there unlawfully and negligently, in pushing his car ahead without reasonable care to prevent a collision, he would be guilty of an act of carelessness, independent of the previous negligence of the plaintiff. Whether, in the concurrent actions of the plaintiff and defendant's agent at the time of the accident, any negligence contributory to the result could be imputed to the decedent, was a question of fact, properly left to the jury to determine.

The defendant further requested the court to charge "that if the jury believe, from the evidence, that plaintiff's decedent was driving at the time of the accident, and was intoxicated, and for this reason did not observe the ringing of the bell, or the noise of the trolley, or light of the same, he was guilty of contributory negligence, and plaintiff cannot

recover." The response to this request was substantially a compliance with it. It was, in terms, sufficiently favorable to the defendant, and the exception cannot be sustained.

The fourth exception, being to the refusal of the court to charge that there was no proof that the motorman went on for the purpose of pushing the carriage off the track, and so struck the carriage, must be overruled. The court properly said it considered there was sufficient evidence for that to be one of the propositions for the jury to consider. The motorman knew that decedent had been driving on the track before him, and had failed to turn off when the bell was rung. He expected to have trouble, as was stated by the conductor of the car. It was his duty to have avoided the accident by exercising all reasonable care in the circumstances apparent to him. That it was the duty of the deceased to clear the track did not justify the driver of the car in abating one jot of his vigilance and care. The refusal of the judge to charge the jury that it was the legal duty of the plaintiff's intestate to get off the track, and that failure to perform such duty was of itself such contributory negligence as precluded the plaintiff from recovering damages, was not such an inaccurate statement of the law as to prejudice the case of the defendant. Judgment should be affirmed.

(59 N. J. L. 160)

GERBERT v. CONGREGATION OF THE SONS OF ABRAHAM.

(Court of Errors and Appeals of New Jersey.
Nov. 23, 1896.)

VENDOR AND PURCHASER — BREACH OF CONTRACT TO CONVEY — DAMAGES.

1. In an action on contract for breach of covenant to convey real estate with warranty of title, where the vendor's title is defective, nominal damages only can be recovered. *Drake v. Baker*, 34 N. J. Law, 358, overruled.

2. Where there is a contract to convey unimproved land with warranty of title, and the vendee, before conveyance is to be made, erects buildings upon the land without the request of the vendor, in an action on contract to recover damages for failure to convey, the vendor's title proving defective, the value of the buildings cannot be recovered by the vendee.

(Syllabus by the Court.)

Error to circuit court, Essex county; Childs, Judge.

Action by Peter Gerbert, executor of John Snyder, against the Congregation of the Sons of Abraham. Judgment for defendant, and plaintiff brings error. Reversed.

Colie & Swayze, for plaintiff in error. Coult & Howell, for defendant in error.

VAN SYCKEL, J. On the 1st of March, 1884, the plaintiff's testator, John Snyder, entered into a lease with the defendant in error for premises known as "No. 226 Washington Street," in the city of Newark, N. J., for the term of five years from April 1, 1884. The lease contained a stipulation for a fur-

ther term of five years, provided notice should be given by the lessee, three months before the expiration of the term, of the election of the lessee to take a further term. On the 12th of October, 1888, notice was given by the lessee that a further term was desired. No new lease was actually executed, but the lessee continued in possession of the premises after the expiration of the first term. The plaintiff's testator died in April, 1892, during the running of the second term of five years. The lease of March 1, 1884, contained the following clause: "And, further, that if the said party of the second part shall desire to purchase the demised premises, that he [the lessor] will at any time during the tenancy hereby created or agreed upon, for the consideration of seven thousand dollars, sell and convey by warranty deed, with the usual covenants, free and clear of all incumbrances, the demised premises to the said party of the second part, or such person or persons as they shall desire, upon their giving to him, his heirs, executors, or administrators, notice that they desire such conveyance; such conveyance to be made within thirty days after giving of such notice, and the payment of rent to cease at the delivery of such deed, and, if not delivered within the said thirty days, then said rent to cease at the end of that time." After the death of Snyder, the lessor, to wit, on the 1st day of June, 1892, a demand was made upon the executor of Snyder for a conveyance pursuant to the aforesaid provision. He was unable to make a conveyance because the testator had a life estate, only, in the premises as tenant by the curtesy; the title to the property having been in the wife at the time of her decease, which was before the lease was made. This suit was instituted for a breach of the covenant to convey pursuant to the demand made upon the lessor's executor.

The sole question to be decided is the measure of damages in this action on contract. Immediately after entering into possession under the lease in 1884, the defendant in error built a synagogue upon the premises, and expended thereon over \$2,600. This money was expended before a demand for a renewal of the lease, and several years before a conveyance was demanded. On the trial below, the defendant in error recovered damages for the loss of its bargain arising out of the increased value of the land, and also damages for the loss of the building which had been erected upon the premises. Upon the question as to damages arising from an appreciation in the value of the land, the trial judge was bound by the decision of the supreme court of this state in *Drake v. Baker*, 34 N. J. Law, 358, and he properly followed that case.

The first question to be determined is whether the rule adopted by our supreme court in *Drake v. Baker* shall be adhered to. Under the long-settled law of this state, if Snyder had conveyed in his lifetime to his lessee with a covenant of warranty, and if

thereafter the grantee had been evicted by the remainder-men, in an action on contract for damages flowing from a breach of the covenant of warranty, the only damages recoverable would have been the consideration money paid and the interest thereon; and, if the purchase money was wholly unpaid, nominal damages, only, could have been recovered. *Stewart v. Drake*, 9 N. J. Law, 139; *Holmes v. Sinnickson*, 15 N. J. Law, 313; *Morris v. Rowan*, 17 N. J. Law, 304. This rule has been so long recognized in our jurisprudence that it cannot now be subverted. That there is no substantial difference in the injury resulting, where there is an ouster after conveyance with warranty, and where there is a refusal to convey in pursuance of the contract to convey, when the vendor is unable to make title, which can reasonably support a rule for damages in the former case wholly different from that which prevails in the latter case, is too obvious to require discussion. The injury in both cases is the same,—the loss of the property; the loss of such profit as would have been incident to increased value. The loss in both cases arises from the breach of the vendor's covenant on account of the defect in his title. There can, therefore, be no solid basis for diversity in the rule of damages applicable to the two conditions, and the rule should be unified if there is no serious obstacle in the way.

The rule in *Drake v. Baker* was adopted upon the authority of the English cases, which at the time of the decision of that case had limited the application of the rule laid down in *Flureau v. Thornhill*, 2 W. Bl. 1078, that on breach of contract to convey, where the vendor's title proved defective, nominal damages, only, could be recovered. The exceptions ingrafted upon *Flureau v. Thornhill* in *Pounsett v. Fuller*, 17 C. B. 660; *Robinson v. Harman*, 1 Exch. 850; *Engel v. Fitch*, L. R. 3 Q. B. 315; and *Hopkins v. Grazebrook*, 6 Barn. & C. 31,—all cited in *Drake v. Baker*, and there relied upon,—greatly narrowed the sphere in which *Flureau v. Thornhill* would be a controlling authority. Since *Drake v. Baker* was decided, this rule has been most elaborately and exhaustively discussed and reviewed in the house of lords in England in the case of *Bain v. Fothergill*, reported in L. R. 7 H. L. 158, and the rule in England finally settled by discarding the distinctions which had been previously ingrafted upon the case of *Flureau v. Thornhill* in the cases relied upon in our court in *Drake v. Baker*. In *Bain v. Fothergill* the defendants were in possession of a mining royalty, under a written agreement for a lease, of which they had taken an assignment from one H. In H.'s agreement for a lease with the owners, it was stipulated that he should not assign without their permission. The defendants contracted with the plaintiff to sell their interest in the royalty, and this action was for the breach of that contract, in consequence of the inability of the defendants to

make title for want of the owners' assent to the assignment to them. The owners were willing to consent to the assignment to the plaintiff if he would stipulate not to assign without their permission. One of the defendants knew that this consent was necessary; the other did not. The court of exchequer held the case to be within the rule in *Flureau v. Thornhill*, and gave judgment for nominal damages only. The case was carried to the house of lords, and there affirmed. Three questions were propounded by the lord chancellor to the judges: (1) Whether, upon a contract for the sale of real property, where the vendor, without his default, is unable to make a good title, the purchaser is by law entitled to recover damages for the loss of his bargain. To this the answer was, he is not entitled. (2) Whether the actual possession of the property, the subject of the contract, is essential to bring the case within the rule laid down in *Flureau v. Thornhill*. To this the answer was in the negative. (3) Whether, if the rule of law is correctly laid down in *Flureau v. Thornhill*, the circumstances of the present case distinguish it, and take it out of that rule. To this the reply was also in the negative. The discussion in *Bain v. Fothergill* is most able and interesting, and, after a thorough review of all the previous English cases, the house of lords expressed the opinion that *Flureau v. Thornhill* was established law, and that *Hopkins v. Grazebrook* was no longer the rule; that *Flureau v. Thornhill* applied to every case where the vendor failed to convey through inability to make title; that the rule was the same whether the vendor had been guilty of fraud or not, for the motive of the defendant was immaterial in measuring damages for breach of contract; and that, therefore, even if there had been fraud, the vendee could not have recovered substantial damages in contract, but must have proceeded in an action for deceit. The cases upon which the doctrine approved in *Drake v. Baker* was rested having been so completely overruled by the English court, that case should, in our judgment, be now disregarded, and the law in this state be made harmonious in the two instances, where there is in all material respects precise similarity of circumstances, and no difference of substance upon which to support a difference in the rule of damages. Where fraud or deceit enters into the transaction, the vendee should be left to his action for deceit to recover for the loss he may sustain thereby. On this branch of the case nominal damages, only, should have been recovered. The only question submitted to this court in the case of *Trustees v. Gerbert*, reported in 57 N. J. Law, 395, 31 Atl. 383, was whether the covenant to convey applied to the renewal period of five years. The rule of damages applicable to the case was not discussed, nor did the court intend to make any deliverance on that subject.

The question remains whether the lessee

was entitled to recover for the cost of the improvements put upon the premises, as before stated. The first term under the lease ran from April 1, 1884, to April 1, 1889. The improvements included in the damages recovered below were all made soon after the lessee entered into possession in 1884, and the demand for a conveyance was not made until after the lessor's death, in 1892. The lease contained the following covenant: "And the said party of the second part [the lessee] hereby agrees that all improvements of any kind made on or about the said premises shall be and become the property of said party of the first part at the expiration of this lease or any renewal thereof." The covenant in the lease is simply to convey land; there is no agreement to convey land and buildings erected thereon by the lessee after entry. Under the common-law rule, buildings erected on the premises by the tenant become part of the freehold, and are the property of the lessor, without any allowance to the tenant. An exception has been ingrafted on this rule, that under certain circumstances gives the tenant the right of removal before the expiration of his term. But the common-law rule is still so rigidly adhered to that if a tenant, at the end of his term, renews his lease, and thereby acquires a new interest in the premises, his right to remove improvements is forfeited, unless he takes the precaution to reserve such right in the renewal lease. This is the established English rule, and it has also received the sanction of the New York court of appeals in *Loughram v. Ross*, 45 N. Y. 792, where the English cases are cited and relied upon. In *Smith v. Smith's Adm'rs*, 28 N. J. Law, 208, Chief Justice Green distinguishes between a vendee in possession under a parol agreement to purchase, who makes improvements expecting them to be for his own benefit, and not at the instance of his vendor, and a tenant who makes improvements under the assurance of his landlord that he shall have a conveyance of the premises with the improvements. In the former case he denies the right of the vendee to compensation on failure to obtain a conveyance. This accords with the doctrine of the English court as pronounced in *Worthington v. Warrington*, 8 Man., G. & S. 133. There the party entered into possession under an agreement for a two-years term with leave to make improvements at his own expense, with the option of purchasing at any time during the two years. The lessor, it afterwards appeared, had no title to the premises, and the action was brought to recover damages for breach of the contract and for the cost of the improvements. The court said: "If the purchaser thinks proper to enter into possession and to incur expenses in alterations before the title is ascertained, he does so at his own risk. I see nothing in this case to distinguish it from the ordinary one. The plaintiff should have taken care to ascertain that the title

was good, before he proceeded to lay out money upon the premises." The reason which lies at the foundation of the rule in *Flureau v. Thornhill* pertains here, and is clearly expressed by Lord Hatherly in *Bain v. Fothergill*. In distinguishing *Engel v. Fitch*, he said: "The vendor in that case was bound by his contract to do all that he could to complete the conveyance. Whenever it is a matter of conveyancing, and not a matter of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest, and also by force of the interest of others whom he can compel to concur in the conveyance. The foundation of the rule in *Flureau v. Thornhill* has been already more clearly expressed by my noble and learned friend who has preceded me, in saying that, having regard to the very nature of this transaction in the dealings of mankind in the purchase and sale of real estate, it is recognized on all hands that the purchaser knows on his part that there must be some degree of uncertainty as to whether, with all the complications of our law, a good title can be effectively made by his vendor; and, taking the property with that knowledge, he is not to be held entitled to recover any loss on the bargain he may have made; if, in effect, it should turn out that the vendor is incapable of completing his contract in consequence of his defective title."

In this case it must be held that the lessee made the improvements at his own risk, and not under an assurance that a title would be given including such improvements, inasmuch as they were made long before the lessee announced his election to purchase. The rights of the parties must be adjudged according to the status at the time the improvements were made, and that was the relation of landlord and tenant. The question now under discussion does not in fact differ from the question previously disposed of. By the renewal of the lease without any provision as to the buildings put upon the premises by the tenant, such buildings, as before stated, became incorporated with the real estate, and were the property of the lessor and the remainder-men. The subsequent election of the tenant to take a conveyance gave him a right to a conveyance of the real estate of which the buildings were part, and from which they were no longer, in legal contemplation, separate. The buildings could no longer be considered as improvements made by the lessee. The recovery of nominal damages for failure to convey will satisfy the legal claim for damages for failure to convey both land and buildings, the two being now one and inseparable. Where there is a contract to convey unimproved land, and the vendee, before conveyance, erects buildings upon it without the request of the vendor, it would be a rule of exceeding hardship which compels the vendor, when his title proves defective, to pay the cost of such improvements to any extent which the vendee might

choose to put upon it. Such a result could not reasonably be supposed to have been within the contemplation of the parties when the contract was executed. The vendor would be compelled to pay for improvements which he did not authorize to be made, and from which he would derive no benefit whatever if the vendee failed to perform on his part. In my opinion, the judgment below was also in this respect erroneous, and it should therefore be reversed.

(68 Conn. 184)

In re COIT et al.

(Supreme Court of Errors of Connecticut. June 25, 1896.)

INSOLVENCY — APPEAL FROM COMMISSIONERS' DECISION — SCOPE OF APPEAL.

1. Under Gen. St. § 590, an appeal lies from a decision of insolvency commissioners as to the valuation of the security held by a creditor, though no appeal was taken from that portion of their proceedings which related to the claim for which the security was held.

2. An appeal from a decision of insolvency commissioners, which recites that it was taken "from the doings of the commissioners, and from the said report, in the matter of the valuation by said commissioners of security held by T. upon a claim presented by him against said estate, which said claim exceeds the sum of \$100," brought up only the rulings so far as they referred to the valuation of the security, and did not bring up the rulings as to the claim presented against the estate.

Appeal from superior court, New London county; Shumway, Judge.

Voluntary insolvency proceedings by Orlo Atwood & Sons, in which Robert Coit and another were appointed trustees. From a decision of the insolvency commissioners, the trustees appealed to the superior court, and, from a judgment therein rendered, James Talcott, a creditor of the estate, appeals. No error.

Hadlai A. Hull and Tracy Waller, for appellant. Frank T. Brown and Walter C. Noyes, for appellees.

TORRANCE, J. Orlo Atwood & Sons, insolvent debtors, made an assignment in insolvency under the laws of this state, in the court of probate within and for the district of New London, and Robert Coit and William A. Gilbert were duly appointed as the trustees of the estate of said insolvent debtors. The trustees appealed from certain doings of the commissioners on said estate to the superior court, and, from the judgment rendered by that court on said appeal, James Talcott, a creditor of said estate, brings the present appeal to this court. Talcott presented a claim against said estate exceeding the sum of \$100, for which he held certain property of said estate as security; and the commissioners upon said estate inquired into the cash value of said security, and reported the same to the court of probate as required by law. In the superior court, Talcott claimed that the appeal by the trustees brought before that court the doings of the

commissioners both with reference to the claim presented by him against the estate and also with reference to the valuation of the security held by him for said claim, while the trustees claimed that said appeal brought only the last-named matter before the superior court. The superior court held that the appeal was only from the matter of the valuation of the security, and for this reason refused to hear Talcott concerning his claim against the estate, and rendered judgment only as to the value of the security.

That an appeal will lie, under section 590 of the General Statutes, from the doings of commissioners in the valuation of the security held by a creditor, even when no appeal is taken from their doings with reference to the claim presented for which the security is held, is settled in *Nowell's Appeal*, 51 Conn. 107, and is no longer an open question.

The controlling question in the case at bar is whether the trustees so limited and restrained the scope of their appeal as to bring only the matter of the valuation of the security before the superior court. That they had the right to so limit the scope of their appeal can admit of no doubt. *Scutt's Appeal*, 46 Conn. 38. The question whether they did so limit their appeal must be determined from the written appeal itself; and that shows that the appeal was "from the doings of the commissioners, and from the said report, in the matter of the valuation by said commissioners of security held by James Talcott upon a claim presented by him against said estate, which said claim exceeds the sum of one hundred dollars." We are of opinion that this language limited the scope of the appeal in the manner claimed by the trustees, and held by the superior court. There is no error. The other judges concurred.

(68 Conn. 198)

TURNER v. LAIRD et al.

(Supreme Court of Errors of Connecticut. June 25, 1896.)

WILLS—DEVISE OF MORTGAGED LAND—SATISFACTION OF MORTGAGE—WHAT FUND LIABLE—FAILURE OF MORTGAGEE TO PRESENT CLAIM—DIRECTION TO PAY DEBTS—CONTRIBUTION AMONG DEVISEES.

1. A specific devise of land, mortgaged by testator to secure his own debt, prima facie imports an intention that the debt shall be satisfied out of the general personal assets.

2. The failure of mortgagees to present their claims against the estate of a deceased mortgagor does not, as between the devisees of the mortgaged property and the executor, discharge the latter's obligation to pay the mortgage.

3. A provision in a will, directing the executor to pay all testator's just debts, includes debts secured by mortgage.

4. A devise of the residue remaining after payment of testator's "debts and funeral expenses, and the preceding legacies and devise," charges on the residuary real estate all debts which the personal estate is insufficient to satisfy.

5. Gen. St. § 558, providing that, when any es-

tate shall be taken for payment of debts, a contribution shall be due from the other legatees or devisees, applies only when the will is silent or its intent uncertain, and not where the estate taken is residuary estate, and testator required his debts to be paid before such residue was formed.

Case reserved from superior court, New London county; Thayer, Judge.

Action by Edward L. Turner, administrator, against Jessie Laird and others, to construe the will of Robert Balfour, deceased. Reserved, on the facts stated in the pleadings, for the consideration of the supreme court.

By the ninth article of his will testator devised "the Geer House" to his grandson in fee, subject to a life estate in the widow. In the tenth article he devised half of his residuary estate to a son for life, remainder to the same grandson, and the other half to another son in fee. The eleventh article provided that, should the grandson die leaving no issue, his share should go to testator's six children, share and share alike. After the execution of the will, testator mortgaged the Geer House and a store forming part of the residuary estate, to secure a note. No claim on such note was ever presented, and the term limited therefor had expired; but one payment of interest on the Geer House mortgage was made by the administrator before the time limited for presentation of claims had expired. The personal estate was wholly consumed in paying debts, legacies, and administration expenses, and the grandson died without issue during the life of the widow. The questions for the determination of the court were, whether the mortgages, or either of them, should be paid by the administrator, and, if so, out of what funds.

Gardiner Greene, Jr., for Jessie Laird and others. Solomon Lucas, for Rosetta Balfour and others.

BALDWIN, J. A specific devise of land, mortgaged by the testator to secure his own debt, prima facie imports an intention that such debt shall be satisfied out of the general personal assets. *Hewes v. Dehon*, 3 Gray, 205. In the case at bar, this presumed intention, with respect to the Geer House, finds additional support in the provision, made by the testator in the first article of his will, directing his executor to pay all his just debts and funeral expenses and the legacies subsequently given out of his estate. The word "debts," in such a connection, includes mortgage debts. *Bishop v. Howarth*, 59 Conn. 455, 465, 22 Atl. 432.

That the holders of the mortgages in question did not present their claims against the estate, did not, as between the executor and the devisees of the mortgaged property, discharge his obligation to pay them off. The extent of the testator's bounty to his grandson could not be thus reduced by the acts or omissions of third parties. The plaintiff's duty was the same as if the devise of the Geer House had been followed by an express di-

rection that any mortgage upon it should be paid by the executor. A payment thus required is made to effectuate a gift from the testator to the devisee. It may be, also, the satisfaction of a claim legally presented. It may, on the other hand, be made to a creditor who does not wish to receive it, but prefers to let the debt remain on interest, and rely on his collateral security for its ultimate discharge.

The residuary devise and bequest was of what might remain "after the payment of my said debts and funeral expenses and the preceding legacies and devise." This language charged on the residuary real estate all debts which the personal estate was insufficient to satisfy. Enough of the residuary real estate must, therefore, be sold to discharge the mortgage on the Geer House. That on the store building should be satisfied in the same way, unless the residuary devisees otherwise agree. Section 556 of the General Statutes, which provides that, when any estate devised shall be taken for payment of debts, a contribution shall be due from the other legatees or devisees, applies only when the will is silent, or its intent uncertain. Here the estate taken is residuary estate, and the testator required the debts to be paid before the residue was formed.

The superior court is advised that it is the duty of the plaintiff to pay the mortgage on the Geer House, and, if requested by any of the residuary devisees, that on the store building, and that the requisite funds should be raised by sale of so much as may be necessary of the residuary real estate. The other judges concurred.

(63 Conn. 219)

DENSLOW v. GUNN, Judge.

(Supreme Court of Errors of Connecticut. June 25, 1896.)

MANDAMUS—TO INFERIOR COURTS—COSTS.

1. In mandamus to compel an inferior court to perform a duty, in a matter where it has acted in good faith upon its interpretation of the law, costs should not be taxed against the respondent.

2. A supplementary judgment for costs against the respondent in mandamus proceedings, rendered several months after the judgment awarding the writ, is unauthorized.

Appeal from superior court, New Haven county; Shumway, Judge.

Application by Le Grand N. Denslow for a writ of mandamus, directed to George M. Gunn. Several months subsequent to the rendering of the final judgment awarding the writ, a supplemental judgment was entered, taxing costs against the respondent. Respondent appeals. Judgment set aside.

For former report, see 35 Atl. 264.

William B. Stoddard and Edward H. Rogers, for appellant. Edwin A. Smith, for appellee.

HAMERSLEY, J. Proceedings for the issue of writs of mandamus are controlled by

statute. Gen. St. §§ 1294, 1295. This statute is similar in principle to the statute of Anne, and was enacted substantially in its present form in 1821. Prior to that time it was by virtue of the common law of this state that writs of mandamus were issued, and the procedure followed that of the English common law, as modified by the statute of Anne. *Strong's Case*, Kirby, 345; *New Haven & Northampton Co. v. State*, 44 Conn. 376, 385. There can be no "judgment," in the strict sense, in these proceedings, except upon issue joined on the return to an alternative writ. Sometimes the application of the relation has been treated as if it were the alternative writ. Such practice is informal, ordinarily not to be commended, and never lawful except by consent of all parties, which consent should distinctly appear upon the record. *Denslow v. Gunn*, 67 Conn. 361, 35 Atl. 284; *Insurance Co. v. Fyler*, 60 Conn. 448, 22 Atl. 494. No question was raised as to the defective condition of the pleadings in this respect when the present case was before us on a former appeal, and such question is not raised now.

At common law costs were not allowed to the successful applicant for the writ. 2 Bac. Abr. tit. "Costs." They were, in certain cases, allowed in England by statute. Our statute authorizes the court to render judgment for either the complainant or the party complained of, to recover his costs, where an issue of fact is joined on the allegations of the return. This allowance of costs, when within the limit of the authority given, is a matter of discretion. It is not now necessary to decide whether such authority exists where no issue of fact is presented. When the writ, as in this case, is to compel an inferior court to perform a legal duty, in a matter where it has acted in good faith upon its interpretation of a statute imposing the duty, costs should not be taxed against the judge whose action is complained of. *Anon.*, 19 Wend. 157.

When the allowance of costs is discretionary, the action of the trial court cannot be reviewed upon appeal. *Welles v. Schroeder*, 67 Conn. 257, 34 Atl. 1061. But in this case we need not discuss whether the allowance of costs was discretionary or not, because the discretion, if it existed, had been finally exercised before the order appealed from was made. Our statute, in authorizing the court to render judgment for costs, clearly requires the inclusion of the costs, if allowed at all, in the judgment on the issues joined. The judgment for a peremptory mandamus, rendered in this case on an issue of law, did not include a judgment for costs, and therefore no costs could be taxed. The writ was issued immediately, and obeyed. Upon appeal, in the nature of a writ of error, this court found "no error," and the original judgment has remained in full force and unchanged. The order now appealed from, that the complainant recover his costs, made

some five months after the rendition of final judgment, apparently in the form of a supplementary judgment, is manifestly erroneous. There is error, and the judgment for costs is set aside. The other judges concurred.

(63 Conn. 215)

MORRISSEY v. BRIDGEPORT TRACTION CO.

(Supreme Court of Errors of Connecticut. June 26, 1896.)

STREET RAILWAYS—DRIVERS OF VEHICLES—CONTRIBUTORY NEGLIGENCE.

Plaintiff's servant was driving a horse and wagon along defendant's street-car track. A car approaching from behind rang its gong when about 125 feet distant. The driver looked back, and saw the car. Instead of turning directly off the track, the driver took a long, slanting turn, continuing with the wheels of one side between the rails for about 90 feet before the hind wheel passed off the track. The motorman, knowing that the driver had seen the car, did not check its speed until he arrived within 15 feet of the rear of the wagon. Then, seeing that the wagon was not entirely out of the way, he attempted to stop the car. The wagon was struck by the side step of the car, and overturned. *Held*, that the driver was guilty of contributory negligence precluding recovery.

Appeal from court of common pleas, Fairfield county; Curtis, Judge.

Action by John S. Morrissey against the Bridgeport Traction Company to recover damages for injuries to plaintiff's horse and wagon. There was judgment for the plaintiff, and defendant appeals. Reversed.

Morris W. Seymour and Howard H. Knapp, for appellant. James A. Wilson and Edward P. Nobbs, for appellee.

ANDREWS, C. J. If the court required of the defendant a higher degree of care in the management of its car than the law imposes, or if the court required of the plaintiff's driver a lower degree of care in driving his wagon, so as to avoid a collision with the defendant's car, than the law requires, then in either case there is an error of law which may be reviewed by this court. The driver heard the gong of the approaching car, turned, and saw the car coming behind him at a rate of speed greater than his own, when he was 125 feet away. His wagon was partly on the track of the defendant. It was his duty to drive off the track without loss of time. He did not do so, but continued along on the track, where he knew he was in danger of being hit, and where the wagon was hit as soon as the car overtook him. This conduct was negligent. It was an omission to use ordinary care which contributed to the injury complained of, and precludes any recovery for that injury, unless the conduct of the motorman on the car obviated the effect of that negligence. It is true that the motorman did not lessen the speed of the car until the car was within 15 feet of the wagon. He might rightfully act on the pre-

assumption that the driver would drive off the track before the car reached him. *Andrews v. Railroad Co.*, 60 Conn. 293, 299, 22 Atl. 566; *Glazebrook v. Railway Co.*, 160 Mass. 239, 35 N. E. 553; *Everett v. Railway Co.* (Cal.) 43 Pac. 207. And he had no duty to slacken his speed until he was made aware that the driver was not going to turn out. The wagon could have been removed from all danger in a less distance than the 15 feet, for there was nothing to prevent the driver from turning to the west, and into a place of safety. As soon as the conduct of the driver indicated to the motorman that the wagon was not to turn out of the way, the motorman did everything in his power to prevent injury. He did not rush upon the wagon. At no time was he reckless or willful. He did nothing which relieves the plaintiff from the effect of the driver's negligence. *Birge v. Gardner*, 19 Conn. 507; *Rowen v. Railroad Co.*, 59 Conn. 384, 21 Atl. 1073; *Cooley, Torts*, 674. The ruling of the court on this part of the case seems to assume that it is the duty of the defendant to so manage its cars that vehicles on its tracks, if "in full view" of the motorman, shall not in any event be injured, however careless the driver of the vehicle may be. We do not understand that the law affords any such immunity to the drivers of vehicles, or imposes any such duty on motormen. *Nolan v. Railroad Co.*, 53 Conn. 461, 472, 4 Atl. 106. We think there was error in holding that the negligence of the driver did not contribute to the injury. There is error, and the judgment is reversed. The other judges concurred.

(68 Conn. 221)

LEWIS v. HARTFORD DREDGING CO.
(Supreme Court of Errors of Connecticut. June 25, 1896.)

CONTRACTS — ACTIONS FOR BREACH — EVIDENCE — MEASURE OF DAMAGES.

1. In an action for breach of a contract to dredge material from the bed of a river and spread it over plaintiff's oyster grounds by a certain day in August, it appeared that, in order to raise seed oysters, it was necessary to spread some hard material upon such grounds; that the material to be dredged was better adapted than anything else for use on the grounds; that defendant had a dredging outfit necessary for such work; that, on abandonment of the work by one to whom defendant had let it, defendant informed plaintiff that it was doubtful if an outfit to do the work could be obtained, and he "must protect himself by obtaining other material that might be available"; and that plaintiff bought crushed stone for his grounds, which was the best material available. *Held*, that plaintiff could recover the amount which the planting with stone cost in excess of the expense he would have been subject to if the grounds had been planted as provided by the contract.

2. Expert testimony was admissible to show that material dredged from another place than that specified in the contract was unsuitable, and that crushed stone was adapted for "catching a set."

3. It was not error to admit in evidence a let-

ter from plaintiff to defendant, stating that, owing to the abandonment of the work, he had ordered some crushed stone, and he intended to order more unless it could assure him that it would perform the contract; that he afterwards ordered more at its cost; that he had no objection to its resuming the work, but, because of such purchases of stone, he would require a less amount of material from the river.

4. The difference in the market value, on August 12th, between an acre of plaintiff's oyster grounds, unplanted, and an acre planted in the manner provided by the contract, was not a proper element of damages; but the damages should have been limited to compensation for the loss of the use of the land until it again became practicable to improve it for oyster cultivation.

Appeal from superior court, Fairfield county; Elmer, Judge.

Action by Henry J. Lewis against the Hartford Dredging Company for damages for breach of a dredging contract, tried to the court without a jury. From a judgment rendered on facts found in favor of plaintiff, defendant appeals. Reversed.

It appeared that defendant employed one Tebo to do the work, and on July 19, 1893, plaintiff wrote to defendant, in substance, that, owing to Mr. Tebo's apparent abandonment of the work, he had ordered some crushed stone for his oyster beds, and had notified it he should order more at its expense, unless he had positive assurance that it would proceed with the contract; that he afterwards did order more; and that he had no objection to its carrying out the contract, but that he should require a correspondingly less amount of material from the river.

Lewis Sperry, for appellant. Stiles Judson, Jr., for appellee.

BALDWIN, J. The contract in suit was one for services to be rendered in dredging material from the bed of the Housatonic river at a designated point, and spreading it over the plaintiff's oyster grounds at Westport, by a certain day in August, when the spawning season for oysters was expected to open. These grounds were of such a character that, for raising seed oysters upon them, it was necessary to spread some hard material over them, in order to intercept the floating spawn. This, in the phrase of the trade, is "planting" them, to "catch a set." The material which could be dredged up at the point agreed on was largely shells, and better adapted to use on these grounds than anything else. To do work of this description, a certain kind of dredging outfit is required, capable of dumping shells with facility. The defendant had such an outfit, but, instead of employing it in the execution of the contract, employed one Tebo to undertake it, with an inferior and unsuitable plant. Tebo, finding that his outfit was ill adapted to dumping shells, abandoned the work after a few days, and the superintendent of the defendant then informed the plaintiff that it was doubtful if any other dredging outfit could be obtained to perform

the work, and that he "must protect himself by obtaining other material that might be available." Thereupon he bought crushed stone in New York, and had it spread upon part of his grounds, at an expense considerably greater than that to which he would have been subject had they been planted as the contract required. Such stone was the best material then available for planting purposes, and the only material in the market, so far as the plaintiff knew, which was adapted for use upon his grounds.

The superior court, in assessing the plaintiff's damages, properly allowed him this difference in cost. The breach of a contract to render services ordinarily entails a liability for nothing more than the difference between what it would cost to get the same services performed by another and the contract price. But in the case at bar no other could be found who was able to do the work. It could not be undertaken without a peculiar kind of outfit, which few possessed. The plaintiff only bought the crushed stone after the defendant had informed him that it was doubtful if such an outfit could be anywhere procured, and that he must protect himself by procuring other material than that which the contract contemplated. While it was much more costly than the river material would have been, it was the only thing to be had which would answer the purpose, and this purpose was one of which the defendant had reasonable notice before the contract was executed. The point at which the material was to be dredged was so far determined that the defendant could easily have ascertained the character of the river bed, and the place of delivery was also fully described. The defendant had dredged for oyster growers before, and had done this for the plaintiff, among others, to enable him to plant his oyster grounds for catching a set. Soundings would readily have disclosed the character of the bottom on which the material obtained from the river was to be spread. The defendant had no right to assume that any kind of material which might be dredged up anywhere would be adapted for use upon these grounds, and the plaintiff was justified in refusing to accept its tender of the muddy deposit obtained from the Bridgeport bar. He was justified, also, in taking the defendant at its word, and protecting himself against the consequence of its default by procuring suitable material for his purposes elsewhere. That he acted reasonably in the purchases he made is conclusively established by the findings of the trial court; and the numerous exceptions taken by the defendant to its conclusions of fact from the evidence in this respect are not the subject of an appeal. *Enfield v. Town of Ellington*, 67 Conn. 459, 34 Atl. 818.

To show that the material dredged from the Bridgeport bar was unsuitable for use on a sticky bottom, and that crushed stone was suitable, and well adapted for catching a set, expert testimony was properly received. Only from

those skilled in oyster culture could information on these points be expected.

The letter from the plaintiff of July 19th, while evidently written in an argumentative strain, was admissible to show that he gave the defendant prompt notice of his intention to set up the claims which are the basis of this suit, and to protect himself at its expense by the purchase of crushed stone.

But in the admission of evidence as to the difference in market value on August 12th between an acre of the plaintiff's oyster grounds, unplanted, and an acre planted in the manner provided by the contract, as well as in the award of damages including such an estimated difference in value, there was error. By its failure to provide the proper material for planting part of these grounds, the defendant became liable to pay the plaintiff such damages as might have been reasonably contemplated, at the date of the contract, as the probable and direct result of its breach. The defendant knew that the material which it was to dredge and spread was wanted to form a bed for oyster culture, and to form it by the opening of the spawning season. These special circumstances were in the minds of both parties; but, if they could in any case avail to create a right to special damages, of the nature claimed, for a failure to prepare the grounds for oyster cultivation,—the sole use to which they could be put,—it would be only on proof, either that such grounds, when planted with suitable material, were permanently improved, or that such material generally catches a set, and that a set generally results in a valuable crop of seed oysters. On the contrary, however, it appeared that the results of planting were uncertain and conjectural in character, and the trial court states that the item of \$2,280.13, included in its award of damages, which is now in question, was not based on any consideration of "future profits arising from the actual raising of oysters upon the unplanted area, or the enhanced value of the same from a 'set' attached to the material spread thereon, but is based upon a comparison of the market value of the planted and unplanted territory at the time fixed in the contract for its completion, and while the result of such planting was unknown." This difference in market value was fixed at \$30 an acre, while the contract price for planting (for which a deduction was allowed in ascertaining the exact loss) averaged less than \$14 an acre. No part of this enhanced value of over \$16 an acre could be attributed to any hardening of the bottom, by which, although no set were obtained, the grounds would be permanently improved. This was explicitly admitted in the trial by counsel for the plaintiff; and, although that circumstance is not mentioned in the finding of the trial court, as the defendant specially requested that it be stated, and it appears in an extract from the official stenographic report of the proceedings, filed with the request, which is agreed by counsel for both parties to be a correct narrative of what occurred, we consider the finding as if it had been so drawn as to set forth the admission as made. It follows that the ex-

pert witnesses and the court must have viewed the increase of value which would have followed the execution of the contract, as coming from the adaptation of the grounds to oyster culture during the spawning season then about to open. To allow for any enhancement of value on that account is, practically, to speculate on the chances of catching a set and raising a profitable crop. Such consequences were too remote for consideration, and too uncertain, both with respect to their nature and to the cause from which they would proceed. *Cohn v. Norton*, 57 Conn. 480, 494, 18 Atl. 595; *Howard v. Manufacturing Co.*, 139 U. S. 199, 11 Sup. Ct. 500.

As respects the area necessarily left unplanted in consequence of the defendant's default, damages (in the absence of special circumstances calling for the application of a different rule) should have been limited to compensation for the loss of the use of the land until it again became practicable and proper to plant or otherwise improve it for oyster cultivation, in the usual course of the oyster growers' business. Such loss would, ordinarily, be the fair rental value of the grounds, or, if this could not be ascertained, the interest on their market value, in their unplanted condition, with the amount chargeable for taxes upon them, for the period in question. The finding states, however, that the plaintiff owned several thousand acres of oyster grounds, only a portion of which was under cultivation, and an extensive plant of shops, docks, and oyster steamers. Of these grounds, 475 acres lay off Westport, of which only 100 had ever been planted. In the prosecution of the oyster business, "a certain area of oyster ground is planted each year, that successive crops may be matured and marketed or sold as seed oysters." If these special circumstances were, or ought to have been, known to the defendant before the execution of the contract in suit, and if the plaintiff could show that the failure to plant the whole of the Westport grounds so disarranged the ordinary and natural succession of his crops, or otherwise disturbed the ordinary and natural course of the business as respects the use of his other property, that he suffered special damages as a probable and direct result, which both parties ought, in reason, to have foreseen, a further recovery might be allowed, upon such an amendment of the complaint as to apprise the defendant of the nature of the loss actually sustained.

The plaintiff has alleged that he incurred expense in locating and staking out the place in the river where the dredging was to be done, and securing a license from the government of the United States for dredging there, and hiring inspectors for the work, and for scows and harrows to complete the distribution of the material to be dredged over his grounds, and steamers chartered to aid in the same work, and that he should be reimbursed for such part of these payments as was properly made to secure the planting of the portion of his grounds which was in fact left unplanted. If such

special circumstances existed, and were or should have been in the contemplation of the parties when the contract was executed, the plaintiff's claim in this respect, also, would be a proper one, so far as his expenditures were reasonably necessary for the purpose, subject to a deduction for any benefits which he may have otherwise received from them.

There is error in the award of the damages on account of the unplanted oyster grounds, and a new trial is granted for the sole purpose of reassessing the damages on that account, in accordance with the principles above stated. The other judges concurred.

MEMORANDUM DECISIONS.

CHAPPELL CHEMICAL & FERTILIZER CO. v. SULPHUR MINES CO. OF VIRGINIA et al. (Court of Appeals of Maryland. Dec. 3, 1896.) Appeal from circuit court of Baltimore city. Argued before McSHERRY, C. J., and BRYAN, BOYD, ROBERTS, and FOWLER, JJ. Randolph Barton and Skipwith Wilmer, for appellees.

FOWLER, J. The appeal in this case having been prematurely taken, the motion to dismiss it must prevail. The defendant, long after the time fixed by rule of court, demanded a jury trial, and without waiting for the action of the court upon his motion, and indeed before there was any trial of the case upon its merits, and before any judgment, final or otherwise, was rendered, this appeal was taken from what the order of appeal calls "the order of court of the 6th of February, 1896," denying the defendant the right of a jury trial. But no such order appears to have been passed. On the day mentioned in the order of appeal there was an order passed by the court below fixing the case for trial, but there was no action taken in pursuance of such order until subsequent to this appeal. There is another appeal pending here from the orders which were ultimately passed. Appeal dismissed.

(32 Md. 518)

PARKER et ux. v. McCOSKER et al. (Court of Appeals of Maryland. March 24, 1896.) Appeal from circuit court, Prince George's county. Action by McCosker & Molloy against J. H. Parker and wife. Judgment for plaintiffs, and defendants appeal. Reversed. F. Snowden Hill, for appellants. R. Ford Combs, for appellees.

ROBERTS, J. The facts of the preceding case (34 Atl. 539) are similar in all material respects to this case, save only that O'Brien had in this case, at the time of the sale of the goods to the appellants, a peddler's license, as required by law. In all other respects the cases are substantially the same. With the exception named, the views expressed in the preceding case are equally applicable here. For the reasons assigned in the previous case the judgment herein will be reversed. Judgment reversed, with costs, and new trial awarded.

BOSTON & M. R. R. v. UNION ST. R. CO. (Supreme Court of New Hampshire. Strafford. March 15, 1896.) Assumpsit by the Boston & Maine Railroad against the Union Street-Railroad Company. The court directed a verdict for

defendant, and plaintiff brings exceptions. Exceptions overruled. Worcester, Gafney & Snow and J. Kivel, for plaintiffs. W. F. Nason and R. G. Pike, for defendants.

PER CURIAM. Assumpsit for 84 tons of iron rails. The court ordered a verdict for the defendants, and the plaintiffs excepted. It appearing that one C. bargained with the plaintiffs for the iron, that he was not the defendants' agent, and had no authority from them to make the purchase, and there being no other evidence tending to show that the defendants contracted for the iron, the exceptions were overruled. **SMITH, J.**, did not sit.

SAWTELLE v. STATE. (Supreme Court of New Hampshire. Strafford, March 11, 1892.) Isaac B. Sawtelle was convicted of murder. Motion for a new trial on the ground of newly-discovered evidence. Dismissed. Former opinion, 32 Atl. 831. The Attorney General and Solicitor, for the State. J. A. Edgerly, J. H. Worcester, and G. F. Haley, for Isaac Sawtelle.

CLARK, J. In the matter of the petition of Sawtelle for a new trial on the ground of newly-discovered evidence, the petition is dismissed. There is no newly-discovered evidence to warrant a new trial.

(53 N. J. E. 227)

ASHTON et al., Appellants, v. WILKINSON et al., Respondents. (Court of Errors and Appeals of New Jersey. March Term, 1895.) Bill by Anna R. Ashton and others against George Wilkinson and others. From the decree (30 Atl. 895, 53 N. J. Eq. 227), complainants appeal. Affirmed. George Holmes and Joseph A. Flannery, for appellants. R. Wayne Parker, for respondents.

PER CURIAM. Order unanimously affirmed, for the reasons given by the chancellor.

(58 N. J. L. 205)

DELAWARE, L. & W. R. CO., Plaintiff in Error, v. HARDY, Defendant in Error. (Court of Errors and Appeals of New Jersey. June Term, 1895.) Error to supreme court. Action by Walter B. Hardy against the Delaware, Lackawanna & Western Railroad Company. There was a judgment in the supreme court (34 Atl. 986) affirming a judgment for plaintiff, and defendant brings error. Affirmed. For prior report, see 31 Atl. 281. Flavel McGee, for plaintiff in error. McCarter, Williamson & McCarter, for defendant in error.

PER CURIAM. The judgment of the supreme court is affirmed, for the reasons given by that court.

LUDLOW, MAGIE, BOGERT, BROWN, and SMITH, JJ., for affirmance. **THE CHANCELLOR, and GARRISON, GUMMERE, SIMS, and TALMAN, JJ.**, for reversal.

(53 N. J. E. 694)

HENNINGER et al., Appellants, v. HEALD et al., Respondents. (Court of Errors and Appeals of New Jersey. Nov. Term, 1895.) Bill by William R. Henninger and others against Charles E. Heald and others to rescind a contract of exchange of land. From the decree (29 Atl. 190, 52 N. J. Eq. 431), complainants appeal. Affirmed. Theodore Little, for appellants. Frederic W. Stevens and R. Wayne Parker, for respondents.

PER CURIAM. Decree unanimously affirmed, for the reasons given in the court of chancery.

(53 N. J. E. 688)

HUTCHINSON, Appellant, v. EXTON et al., Respondents. (Court of Errors and Appeals of New Jersey. Nov. Term, 1895.) Appeal from court of chancery. Bill by Sara Exton against

Robert C. Hutchinson and others for partition. From an order sustaining exceptions (32 Atl. 682) to the master's report, Robert C. Hutchinson appeals. Affirmed. Garret D. W. Vroom, for appellant. Barton B. Hutchinson, for respondents.

PER CURIAM. Order unanimously affirmed, for the reasons given in the court of chancery.

(53 N. J. E. 686)

OTTERTSON et al., Appellants, v. HALL, Respondent. (Court of Errors and Appeals of New Jersey. Nov. Term, 1895.) Appeal from court of chancery. Bill by Sarah M. Hall against Andrew Otterson and others to set aside a deed. From a decree (28 Atl. 907, 52 N. J. Eq. 522), defendants appeal. Affirmed. Peter V. Voorhees and Frank T. Lloyd, for appellants. Frederic W. Stevens, for respondent.

PER CURIAM. Decree affirmed, for the reasons given in the court of chancery.

THE CHIEF JUSTICE, and BOGERT, BROWN, KRUEGER, SMITH, and TALMAN, JJ., for affirmance. **DEPUE, GARRISON, LUDLOW, MAGIE, and SIMS, JJ.**, for reversal.

(58 N. J. E. 693)

PRICE, Appellant, v. FORREST et al., Respondents. (Court of Errors and Appeals of New Jersey. Nov. Term, 1895.) Appeal from court of chancery. Bill by Anna M. Forrest, administratrix of Samuel Forrest, and others, against Rodman M. Price and others. From an order (29 Atl. 215, 52 N. J. Eq. 16) granting a motion to punish said Price for contempt in disobeying an order of the court, he appeals. Affirmed. Flavel McGee, for appellant. Cortlandt Parker, for respondents.

PER CURIAM. Order unanimously affirmed, for the reasons given by the chancellor.

(57 N. J. L. 457)

STATE (PENNSYLVANIA R. CO. et al., Prosecutors), Plaintiffs in Error, v. NATIONAL DOCKS & N. J. J. CONNECTING RY. CO., Defendant in Error. (Court of Errors and Appeals of New Jersey. Nov. Term, 1894.) Error to supreme court. For opinion of supreme court, see 30 Atl. 183, 57 N. J. Law, 86. Charles L. Corbin and John R. Emery, for plaintiffs in error. James B. Vredenburg, for defendant in error.

PER CURIAM. The judgment in this case is unanimously affirmed, for the reasons given by the supreme court.

(53 N. J. E. 660)

WALN, Appellant, v. HANCE'S ADM'RS, Respondents. (Court of Errors and Appeals of New Jersey. Nov. Term, 1895.) Appeal from court of chancery. Bill by William Hance's administrators against Hannah Waln. Decree for complainants, and defendant appeals. For opinion of vice chancellor, see 32 Atl. 169. Affirmed. Joseph H. Gaskill, for appellant. William M. Lanning, for respondents.

PER CURIAM. Judgment affirmed.

THE CHIEF JUSTICE, and DEPUE, GUMMERE, LIPPINCOTT, LUDLOW, VAN SYCKEL, BOGERT, BROWN, SMITH, and TALMAN, JJ., for affirmance.

MAGIE, J. (dissenting). As I am unable to vote to affirm the decree in this cause, I deem it proper to briefly state my reasons. By the two receipts exchanged between the parties, dated April 13, 1876, and set out in the opinion of the vice chancellor, appellant became the owner of certain personal property, which she is estopped to deny belonged to the estate of her father, William Hance, deceased, and respondents, administrators of said deceased, became entitled to its purchase price, \$2,627.50, to be paid in the

manner set out in appellant's receipt. I think the learned vice chancellor misconstrued the terms of that receipt in respect to such payment. When appellant thereby gave authority to respondents, as administrators, to take out and deduct the price of that property from her share, on a final settlement of the estate, the authority conferred was, in my judgment, plainly limited to her share of such moneys as, upon such settlement, would be in the hands of the administrators. Obviously, the receipt did not create any charge upon appellant's interest in the real estate of deceased which did not come to the hands of respondents as administrators. If appellant's distributive share in the hands of the administrators after final settlement should prove insufficient to satisfy the claim of respondents, doubtless an implied contract on her part at once arose to pay respondents so much of the purchase price as remained unpaid. Respondents' accounts, passed by the orphans' court in 1884, show that appellant's distributive share was, in fact, insufficient, and, if that account was final, she thereupon became liable for the balance; but such liability furnishes no ground for a resort to equity. Respondents' remedy by an action at law was complete. Respondents resorted to an action at law by issuing an attachment against the interest of appellant, who had become a non-resident, in the proceeds of the sale of real estate which had descended to her and others as the heirs at law of William Hance, and which had been sold by an officer of the court of chancery under a bill for its partition among the owners. In aid of their proceedings at law, respondents had a right to ask the court of chancery to retain in its custody and control appellant's share of such proceeds until the determination of the action at law; but there is nothing in the case justifying a court of equity in passing upon the liability of appellant, and directing, as this decree does, the payment of her moneys to respondents upon a claim pending in the action at law yet undetermined. For these reasons I vote to reverse the decree, and modify it in accordance with the view above indicated.

(57 N. J. L. 456)

WATERS, Plaintiff in Error, v. MAYOR, ETC., OF CITY OF NEWARK, Defendants in Error. (Court of Errors and Appeals of New Jersey. Nov. Term, 1894.) Error to circuit court, Essex county. See opinion of supreme court on case certified, 28 Atl. 717, 56 N. J. Law, 361. Hayes & Lambert, for plaintiff in error. Sherrerd Depue, for defendants in error.

PER CURIAM. The judgment of the court below is unanimously affirmed, for the reasons given by that court.

STATE ex rel. SPENCER v. BOARD OF CHOSEN FREEHOLDERS OF SOMERSET COUNTY. (Supreme Court of New Jersey. June 29, 1896.) Application by Henry N. Spencer for writ of mandamus against the board of chosen freeholders of the county of Somerset. Writ granted. Argued February term, 1896, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

PER CURIAM. This case is identical in all respects with the case of *La Monte v. Board of Freeholders* (N. J. Sup.) 35 Atl. 1, and the rule to show cause should be made absolute, and an alternative mandamus ordered, for the reasons stated in the memorandum opinion in that case.

(59 N. J. L. 106)

STATE (NEW YORK & G. L. RY. CO., Prosecutor) v. CIRCUIT COURT OF ESSEX COUNTY. (Supreme Court of New Jersey. June 12, 1896.) Certiorari to circuit court, Essex county. Proceeding prosecuted by the New York & Greenwood Lake Railway Company to review the action of the circuit court of Essex county. Writ dismissed. Argued February

term, 1896, before DEPUE, VAN SYCKEL, and GUMMERE, JJ. Cortlandt Parker & Son, for prosecutor. Charles H. Halfpenny, for defendant.

PER CURIAM. This brings up for review an order made by the circuit court of the county of Essex dismissing an appeal taken to that court by the prosecutor for the purpose of having reviewed by that court an ordinance which was passed by the township committee of Bloomfield township, in that county, requiring the prosecutor to protect certain grade crossings by gates and flagmen. The case under consideration is identical in all respects with that of *McCullough v. Circuit Court* (decided at the present term of this court) 34 Atl. 1072, and the order brought up for review is sustained, and the writ of certiorari dismissed, for the reason stated in the opinion in that case.

(173 Pa. St. 439)

AUFDERHEIDE v. SCHROEDER et al. (Supreme Court of Pennsylvania. Nov. 11, 1896.) Appeal from court of common pleas, Allegheny county. Bill by John H. Aufderheide against John Frederick Schroeder and others to foreclose a deed of trust. From a decree for plaintiff, certain of the defendants appeal. Affirmed. Young & Trent and James R. Sterrett, for appellants. Davis & Magee, for appellee.

PER CURIAM. An examination of the testimony in this case convinces us that the findings of fact and decree made by the learned court below are correct in every particular. There was not only abundant testimony to support them, but any other decree made on the testimony would have produced an unjust result. Decree affirmed, and appeal dismissed, at the cost of the appellants.

(177 Pa. St. 620)

BLOOD v. CREW LEVICK CO. (Supreme Court of Pennsylvania. Oct. 5, 1896.) Appeal from court of common pleas, Warren county. This was an action of assumpsit by Clara S. Blood, executrix of the estate of A. R. Blood, deceased, for the use of H. E. Brown, against the Crew Levick Company. From a judgment for plaintiff, defendant appeals. Affirmed. Allen & Sons and Theodore F. Jenkins, for appellant. H. E. Brown and Samuel T. Neill, for appellee.

WILLIAMS, J. This case depends upon the same questions that have been considered and decided in the preceding case (35 Atl. 871), brought by the same legal plaintiff for the use of Brown Oil Company against the same defendant. It is not desirable to enter again upon their discussion. For the reasons there stated, the judgment is affirmed.

(176 Pa. St. 325)

In re BRYANT'S ESTATE. (Supreme Court of Pennsylvania. July 15, 1896.) Appeal from orphans' court, Philadelphia county. In the matter of the estate of Charles Bryant, deceased. From a decree awarding the estate to Ann Chance and others, English claimants, Daniel Bryant and others, Illinois claimants, appeal. Dismissed. J. Howard Gendell, for appellants. William W. Ker, for appellees.

MITCHELL, J. This appeal is dismissed, on the opinion of the auditing judge in the court below. See 35 Atl. 571. Appeal dismissed, with costs.

(176 Pa. St. 324)

In re BRYANT'S ESTATE. Appeal of CARPENTER. (Supreme Court of Pennsylvania. July 15, 1896.) Appeal from orphans' court, Philadelphia county. In the matter of the estate of Charles Bryant, deceased. From a decree awarding the estate to Ann Chance and others, English claimants, J. Edward Carpenter, escheator for the commonwealth of Pennsylvania,

appeals. Dismissed. Richard M. Cadwalader, for appellant. William W. Ker, for appellees.

MITCHELL, J. For reasons set forth in the opinion filed herewith in *Re Bryant's Estate*, 35 Atl. 571, this appeal is dismissed. Appeal dismissed, without costs.

(176 Pa. St. 326)

In re BRYANT'S ESTATE. Appeal of DEAN. (Supreme Court of Pennsylvania. July 15, 1896.) Appeal from orphans' court, Philadelphia county. In the matter of the estate of Charles Bryant, deceased. From a decree awarding the estate to Ann Chance and others, English claimants, Susan J. Dean, the Maine claimant, appeals. Dismissed. Robert J. Williams and Henry J. Scott, for appellant. William W. Ker, for appellees.

MITCHELL, J. This appeal is dismissed, upon the opinion of the auditing judge in the court below. See 35 Atl. 571. Appeal dismissed, with costs.

(177 Pa. St. 386)

CITY OF PHILADELPHIA v. CONTINENTAL PASS. RY. CO. (Supreme Court of Pennsylvania. Oct. 5, 1896.) Appeal from court of common pleas, Philadelphia county. Action by the city of Philadelphia against the Continental Passenger Railway Company to recover the cost of street paving. There was a judgment for defendant, and plaintiff appeals. Affirmed. John L. Kinsey, City Sol., and E. Spencer Miller and James Alcorn, Asst. City Sols., for appellant. Ellis Ames Ballard, Rufus E. Shapley, and John G. Johnson, for appellee.

WILLIAMS, J. The liability of the defendant to the city of Philadelphia is fixed, by the special law incorporating it, in almost the identical words found in the charter of the Empire Passenger Railway Company considered in *City of Philadelphia v. Empire Pass. Ry. Co.* (just decided) 35 Atl. 721. The question is therefore identical with that raised and decided in that case. For reasons there given, the assignments of error in this case are overruled, and the judgment is affirmed.

(177 Pa. St. 396)

CITY OF PHILADELPHIA v. RAUP et al. (Supreme Court of Pennsylvania. Oct. 5, 1896.) Appeal from court of common pleas, Columbia county; Metzger, Judge. Ejectment by the city of Philadelphia, trustee under the will of Stephen Girard, against George Raup and Elias Steetzler. From a judgment in favor of defendants, plaintiff appeals. Affirmed. Samuel H. Kaercher and F. Carroll Brewster, for appellant. S. P. Wolverton and George F. Baer, for appellees.

STERRETT, C. J. This is the fourth time that questions involving the title in controversy have been presented to and passed upon by this court. In *Goodman v. Sanger*, 85 Pa. St. 37, Id., 91 Pa. St. 71, and *Sanger v. Goodman* (not reported), substantially the same questions that are now presented were considered and disposed of. The last was a writ of error to the judgment for plaintiff below on the verdict directed by the learned trial judge. After referring to the fact that the case had been here twice before, the court, in unanimously affirming the judgment, said that every material question had already been passed upon; that *Robinson v. Williams*, 6 Watts, 281, and *Devor v. McClintock*, 9 Watts & S. 80, ruled the controversy, etc. As will be seen by reference to the cases referred to, and authorities therein cited, all the material questions presented in the record now before us have already been ruled adversely to the contention of the present plaintiff. The question as to the discharge of the Northumberland county taxes by the alleged sale for taxes due Columbia county was raised and decided when

the title now in controversy was before this court the third time. As shown by that record, the offers of evidence are substantially the same as those in the record now before us. As to the questions of abandonment, estoppel, redemption, etc., the language of Mr. Chief Justice Agnew in *Goodman v. Sanger*, supra, is equally applicable to the evidence in this case. We find nothing in the record that would justify us in sustaining either of the assignments of error; nor do we think that further discussion of the questions presented by either of them is necessary. Judgment affirmed.

(177 Pa. St. 378)

CITY OF PHILADELPHIA v. SEVENTEENTH & NINETEENTH STS. PASS. RY. CO. (Supreme Court of Pennsylvania. Oct. 5, 1896.) Appeal from court of common pleas, Philadelphia county. Action by the city of Philadelphia against the Seventeenth & Nineteenth Streets Passenger Railway Company. There was a judgment for defendant, and plaintiff appeals. Affirmed. Russell Duane and J. Bayard Henry, for appellant. John L. Kinsey, City Sol., and E. Spencer Miller and James Alcorn, Asst. City Sols., for appellee.

WILLIAMS, J. This case presents no questions except such as have been sufficiently discussed in *City of Philadelphia v. Hestonville, M. & F. R. Co.* (just decided, and in which an opinion is now on file) 35 Atl. 718. For the reasons given in that case, the assignments of error in this case are overruled, and the judgment is affirmed.

(178 Pa. St. 213)

COMMONWEALTH ex rel. McCORMICK, Attorney General, v. RYNKIEWICZ. (Supreme Court of Pennsylvania. Oct. 5, 1896.) Appeal from court of common pleas, Dauphin county. Quo warranto on the relation of H. C. McCormick, attorney general, to test the right of W. W. Rynkiewicz to hold the office of justice of the peace in the borough of Shenandoah. Judgment of ouster. Defendant appeals. Affirmed. A. W. Schalck, for appellant. M. E. Olmsted, for appellee.

PER CURIAM. This case was argued with *Com. v. Toomey*, *Com. v. Shoemaker*, and *Com. v. Williams*, 35 Atl. 1132, 1133, and *Com. v. Morgan*, Id. 589, involving substantially the same questions. A careful consideration of the record has satisfied us that there is no error in the judgment. The controlling questions have been fully discussed and correctly decided by the learned trial judge. It would serve no useful purpose to add anything to what has been said by him in the opinion referred to in the record. On that opinion, the judgment is affirmed.

(178 Pa. St. 214)

COMMONWEALTH ex rel. McCORMICK, Attorney General, v. SHOEMAKER. (Supreme Court of Pennsylvania. Oct. 5, 1896.) Appeal from court of common pleas, Dauphin county. Quo warranto on the relation of H. C. McCormick, attorney general, to test the right of William H. Shoemaker to hold office as justice of the peace in the borough of Shenandoah. Judgment of ouster. Defendant appeals. Affirmed. A. W. Schalck, for appellant. M. E. Olmsted, for appellee.

PER CURIAM. This case was argued with *Com. v. Toomey*, *Com. v. Rynkiewicz*, and *Com. v. Williams*, 35 Atl. 1132, 1133, and *Com. v. Morgan*, Id. 589, involving substantially the same questions. A careful consideration of the record has satisfied us that there is no error in the judgment. The controlling questions have been fully discussed and correctly decided by the learned trial judge. It would serve no useful purpose to add anything

to what has been said by him in the opinion referred to in the record. The judgment is therefore affirmed on that opinion.

(178 Pa. St. 215)

COMMONWEALTH ex rel. **McCORMICK**, Attorney General, v. **TOOMEY**. (Supreme Court of Pennsylvania. Oct. 5, 1896.) Appeal from court of common pleas, Dauphin county. Quo warranto on the relation of H. C. McCormick, attorney general, to test the right of Jeremiah A. Toomey to hold office as justice of the peace in the borough of Shenandoah. Judgment of ouster. Defendant appeals. Affirmed. A. W. Schalck, for appellant. M. E. Olmsted, for appellee.

PER CURIAM. This case was argued with *Com. v. Shoemaker*, *Com. v. Rynkiewicz*, and *Com. v. Williams*, 35 Atl. 1132, 1133, and *Com. v. Morgan*, Id. 589, involving substantially the same questions. A careful consideration of the record has satisfied us that there is no error in the judgment. The controlling questions have been fully discussed and correctly decided by the learned trial judge. It would serve no useful purpose to add anything to what has been so well said by him in the opinion referred to in the record. The judgment is therefore affirmed on that opinion.

(178 Pa. St. 211)

COMMONWEALTH ex rel. **McCORMICK**, Attorney General, v. **WILLIAMS**. (Supreme Court of Pennsylvania. Oct. 5, 1896.) Appeal from court of common pleas, Dauphin county. Quo warranto on the relation of H. C. McCormick, attorney general, to test the right of Thomas F. Williams to hold the office of justice of the peace in the borough of Shenandoah. Judgment of ouster. Defendant appeals. Affirmed. The opinion of the trial court, per McPherson, J., is as follows: "The undisputed facts in this case appear from the pleadings and an agreement filed by the parties. They are as follows: The borough of Shenandoah was incorporated in 1866 by the court of quarter sessions of Schuylkill county under the general borough act of 1851 (P. L. 320). In 1875 it was divided into five wards by the court in a proceeding under the act of 1874 (P. L. 159). Since this division of the borough the electors of each ward have voted for two justices of the peace, claiming that privilege by virtue of the act of June 21, 1839 (P. L. 376), and there are now ten of these officials in the borough, of whom eight (now before us in this and similar proceedings) are acting under color of an apparent election or appointment for each ward separately and a formal commission from the governor. The defendant was thus elected to the office of justice of the peace by the voters of the Third ward of the borough at the February election of 1893, and thereupon a commission was issued by the governor; this election and commission being the only support of his claim to exercise the duties, powers, and privileges of the office. He was elected by the separate votes cast in the ward, and not by concurrent votes cast in all the wards of the borough. In February, 1896, votes were cast concurrently in each ward for Martin J. Lawlor and John J. Cardin to fill the office of justice in said borough, and they have since received commissions from the governor. Proceedings to contest their election are now pending in the proper court of Schuylkill county. The defendant denies the validity of their election, alleging that no vacancy existed, because his own election was lawful and valid by virtue of the act of 1839, and accordingly insisting that the present writ must fail. The parties have agreed by writing filed that, if the court shall be of opinion 'that there may legally be elected two justices of the peace in each ward in the borough, then judgment to be entered in favor of the defendant; otherwise judgment of ouster to be entered against him.' The questions arising upon these facts have been

sufficiently discussed in an opinion filed this day in *Com. v. Morgan*, 35 Atl. 589. For reasons there given, we adjudge the defendant guilty of unlawfully holding and exercising the office, privilege, and power of justice of the peace in the said borough; and do further adjudge that he be excluded from such pretended office, privilege, and power, and that the commonwealth recover its costs from the defendant." A. W. Schalck, for appellant. M. E. Olmsted, for appellee.

PER CURIAM. This case was argued with *Com. v. Toomey*, *Com. v. Shoemaker*, and *Com. v. Rynkiewicz*, 35 Atl. 1132, 1133, and *Com. v. Morgan*, Id. 589, involving substantially the same questions. A careful consideration of the record has satisfied us that there is no error in the judgment. The controlling questions have been fully discussed and correctly decided by the learned trial judge. It would serve no useful purpose to add anything to what has been so well said by him in this case and in the opinion in *Com. v. Morgan* (May term, 1896), *supra*. The judgment is therefore affirmed on his opinion.

(177 Pa. St. 300)

CITY OF PHILADELPHIA, to Use of **CLEMENT** et al., v. **PHILADELPHIA & F. R. CO.** (Supreme Court of Pennsylvania. Oct. 5, 1896.) Appeal from court of common pleas, Philadelphia county. Action by the city of Philadelphia, to the use of Clement & Ruck, against the Philadelphia & Frankford Railroad Company. There was a judgment for plaintiff, and defendant appeals. Affirmed. Thomas Hart, Jr., for appellant. Charles H. Edmunds, for appellee.

LEAN, J. This appeal raises the same questions as those in the case of *City of Philadelphia v. Philadelphia & F. R. Co.* (opinion handed down this day) 35 Atl. 610. The judgment is affirmed for same reasons.

(177 Pa. St. 299)

CITY OF PHILADELPHIA, to Use of **PUGH**, v. **PHILADELPHIA & R. R. CO.** (Supreme Court of Pennsylvania. Oct. 5, 1896.) Appeal from court of common pleas, Philadelphia county. Action by the City of Philadelphia, to the use of John F. Pugh, against the Philadelphia & Reading Railroad Company. There was a judgment for plaintiff, and defendant appeals. Affirmed. Thomas Hart, Jr., for appellant. John M. Bidings, for appellee.

DEAN, J. This appeal raises the same questions as those disposed of by judgment in case of *Same Plaintiff v. Same Defendant* (opinion handed down this day) 35 Atl. 610. The judgment in this case is therefore affirmed for same reasons.

(177 Pa. St. 155)

CUMBERLAND VAL. R. CO. v. HARRISBURG & M. ELECTRIC RY. CO. et al. (Supreme Court of Pennsylvania. Oct. 5, 1896.) Appeal from court of common pleas, Cumberland county; E. W. Biddle, Judge. Bill by the Cumberland Valley Railroad Company to restrain the Harrisburg & Mechanicsburg Electric Railway Company and the Cumberland Valley Traction Company from crossing complainant's right of way. From a decree dismissing the bill, complainant appeals. Reversed as to the first-named defendant. Edward B. Watts, W. F. Sadler, and John Hays, for appellant. A. G. Miller and J. W. Wetzel, for appellees.

STERRETT, C. J. This case was argued with *Northern Cent. Ry. Co. v. Same Defendants* (Jan. term, 1896) 35 Atl. 624, in which an opinion has just been filed. While the facts of the two cases as to the locus in quo, etc., are different, the questions involved are substantially the same in both. In this case the alleged intrusion consists in crossing the plaintiff's land

or right of way underneath its tracks and the superstructure on which they rest. In the other case the attempted crossing was by an overhead bridge, spanning the land and right of way of the Northern Central Railway Company, plaintiff in that case. The general and controlling question, however, is practically the same in both cases. For reasons given in the opinion referred to, we think the learned judge of the common pleas erred in not granting the perpetual injunction specially prayed for, and the decree appealed from should therefore be reversed. The decree dismissing the bill is accordingly reversed, and the perpetual injunction specially prayed for is now granted against the Harrisburg & Mechanicsburg Electric Railway Company, one of the defendants, with costs to be paid by defendant, and as to the other defendant the bill is dismissed.

(178 Pa. St. 129)

DARR v. PENNSYLVANIA R. CO. (Supreme Court of Pennsylvania. Oct. 5, 1896.) Appeal from court of common pleas, Dauphin county. Action by Annie E. Darr against the Pennsylvania Railroad Company to recover for the death of her husband, caused by defendant's negligence. From a judgment in favor of plaintiff, defendant appeals. Reversed. L. W. Hall, for appellant. M. W. Jacobs and J. A. Stranahan, for appellee.

MITCHELL, J. This case grew out of the same circumstances as *Nye v. Railroad Co.* (opinion filed herewith) 35 Atl. 627, and for the reasons there assigned the judgment is reversed.

DUFF et al. v. PEORIA GRAPE SUGAR CO. (Supreme Court of Pennsylvania. Nov. 11, 1896.) Appeal from court of common pleas, Allegheny county. Assumpsit by P. Duff & Sons against the Peoria Grape Sugar Company. From a judgment affirming the report of a referee, and dismissing their exceptions, plaintiffs appeal. Affirmed. Ed. B. Scull, for appellants. W. S. Dalzell, for appellee.

PER CURIAM. The justices before whom this case was heard being equally divided in opinion, it is ordered that the judgment of the court below stand affirmed.

(177 Pa. St. 306)

FAUNCE v. CITY OF PHILADELPHIA. (Supreme Court of Pennsylvania. Oct. 5, 1896.) Appeal from court of common pleas, Philadelphia county. From the award of juries appointed to assess damages sustained by the opening of certain streets by the city of Philadelphia, Samuel P. Faunce appealed to the court of common pleas, where verdict was directed against him, and he again appeals. Reversed. Samuel Wakeling, for appellant. E. Spencer Miller, Asst. City Sol., and John L. Kinsey, City Sol., for appellee.

FELL, J. These cases involve the same questions considered and decided in *Quicksall v. City of Philadelphia* (Jan. term, 1896) 35 Atl. 609. For the reasons stated in the opinions filed in those cases, the judgments in these are reversed, with new venire.

(178 Pa. St. 16)

IMBRIE v. MANHATTAN LIFE INS. CO. (No. 77.) (Supreme Court of Pennsylvania. Oct. 5, 1896.) Appeal from court of common pleas, Allegheny county. Action by A. M. Imbrie, executor, against the Manhattan Life Insurance Company on a life insurance policy. There was a judgment for plaintiff, and defendant appeals. Affirmed.

DEAN, J. For the reasons given in No. 76, October term, 1896, between the same parties (opinion handed down this day; 35 Atl. 556), the judgment is affirmed.

IMBRIE v. MANHATTAN LIFE INS. CO. (No. 78.) (Supreme Court of Pennsylvania. Oct. 5, 1896.) Appeal from court of common pleas, Allegheny county. Action by A. M. Imbrie, executor, against the Manhattan Life Insurance Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

PER CURIAM. For the reasons given in No. 76, October term, 1896, between the same parties (opinion handed down this day; 35 Atl. 556), the judgment is affirmed.

IMBRIE v. MANHATTAN LIFE INS. CO. (No. 79.) (Supreme Court of Pennsylvania. Oct. 5, 1896.) Appeal from court of common pleas, Allegheny county. Action by A. M. Imbrie, executor, against the Manhattan Life Insurance Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

PER CURIAM. For the reasons given in No. 76, October term, 1896, between same parties (opinion handed down this day; 35 Atl. 556), the judgment is affirmed.

(178 Pa. St. 1)

METZGAR v. BOROUGH OF BEAVER FALLS et al. (Supreme Court of Pennsylvania. Oct. 5, 1896.) Appeal from court of common pleas, Beaver county. Suit by Martin Metzgar against the borough of Beaver Falls and others. There was a decree for defendants, and complainant appeals. Reversed. C. Heydrick, John G. Johnson, D. T. Watson, Walter Lyon, Charles H. McKee, John F. Sanderson, John M. Buchanan, and William A. McConnel, for appellant. James Rankin Martin, Edward B. Daugherty, and Louis Edwin Grim (R. H. Jackson, of counsel), for appellees. Richard W. Stiffey, Millard F. Mecklem, and Louis E. Grim, for Borough of Rochester.

DEAN, J. This appeal was argued first June 4, 1896, in the Middle district. Before the decision was handed down, we had notice by application to take original jurisdiction of the case of *White v. City of Meadville*, argued at Pittsburgh, October 7, 1895, involving some of the same questions. Decision was therefore withheld until after the argument of that case. Then followed an application for reargument of both cases. This was granted, and reargument had May 6, 1896. We have handed down this day the opinion in *White v. City of Meadville*, 35 Atl. 695, and on the main question it rules this case against defendants. The learned judge of the court below cited and relied on Appeal of Howard, 162 Pa. 374, 29 Atl. 641, as ruling the question before him. In *White v. City of Meadville*, we, after a full consideration, have concluded the decision in that case should not be followed. The question at issue on the answer to which the case turns appears from the following passage in the opinion of the court below: "Nothing need be said here on the controverted questions as to the wisdom of constructing waterworks; the sufficiency and character of the present water supply; the effect of the proposed new works on the business of the Union Water Company; and whether the company has failed in the performance of its duty. With these and like matters the court has nothing to do in the present proceeding. I cannot control or strike down the power and discretion vested in municipal authorities. The right of the borough of Beaver Falls to construct, own, and operate waterworks is undoubted. Whether or not this right shall be exercised is a matter to be determined by the corporate authorities; and, unless they have clearly violated the laws prescribing the manner in which their power shall be exerted, I cannot interfere. Appeal of Howard, 162 Pa. 374, 29 Atl. 641." To this defendant excepts, and alleges: "The borough has no power in this behalf beyond what is delegated to it by the commonwealth. Its sole power is, in the language of the statute, 'to provide a supply of water for

the use of the inhabitants.' This has been done. The inhabitants are supplied by the authority executed by other means. The duty of the borough has been thus executed. Its power has been supplanted and suspended. It has no authority to erect waterworks at the expense of taxpayers while such other means are operative." We have decided, in *White v. City of Meadville*, on a construction of the acts of assembly, the legislature never did intend to commit the duty of supplying water to a municipality to two different agencies, both in operation at the same time. The borough had authority "to provide a supply of water for the use of the inhabitants." This supply was provided by the Union Water Company, subject to such regulations in regard to streets, roads, and grades as the borough imposed. The borough did not attempt to construct works until years after the water company had laid its mains, and the public had been served. The rights of the water company vested by consent of the municipality and its contract to supply water for public purposes. The rights of the company are fixed by the act of April 29, 1874, under which it came into existence, and so are its obligations. If, as alleged, it fails to furnish a sufficient supply of pure water, the courts are open to any complainant. *Brymer v. Water Co.*, 172 Pa. 489, 33 Atl. 707. After 20 years, the borough has power to purchase the works at a price not exorbitant. We concur with the court below in its finding of facts, but not in its conclusions of law, as already noticed. Therefore the decree is reversed, and it is directed that an injunction issue restraining the borough of Beaver Falls and its officers from creating the proposed indebtedness of \$123,000 for the construction of waterworks, or any part thereof, and from issuing bonds to secure the same, or any part thereof. Further, that said defendants be enjoined from executing any contract for the construction of the proposed waterworks. Further, that the said borough and its officers be restrained from passing any ordinance, or doing any other act, matter, or thing, in furtherance of its purpose to increase its indebtedness, or erect said waterworks as aforesaid. It is further directed that defendants pay the costs of these proceedings.

(176 Pa. St. 533)

MOYER v. LEBANON MUT. INS. CO. (Supreme Court of Pennsylvania. July 15, 1896.) Appeal from court of common pleas, Elk county. Action by Lazarus Moyer against the Lebanon Mutual Insurance Company. There was judgment for plaintiff, and defendant appeals. Affirmed. Fred H. Ely and Andrew A. Leiser, for appellant. Kinley J. Tener and Harry Alvan Hall, for appellee.

FELL, J. This case was tried with *Moyer v. Insurance Office*, 35 Atl. 221, and involves the same questions. For the reasons stated in the opinion filed in that case, the judgment in this case is affirmed.

(177 Pa. St. 601)

OYSTER v. SHORT et al. Appeal of HORTON. (Supreme Court of Pennsylvania. Oct. 5, 1896.) Appeal from court of common pleas, Elk county; C. A. Mayer, Judge. Bill by D. C. Oyster against Alfred Short and others for the appointment of a receiver of the partnership doing business under the firm name of the Ridgway Bank, composed of plaintiff and defendants, and for the dissolution of the partnership. A receiver was appointed, and also a master and examiner to take testimony and report on distribution of the funds in the receiver's hands. From an order dismissing exceptions to and confirming the report of the master and examiner, and directing payment of the funds in accordance with the distribution made by the him, W. H. Horton, administrator of the estate of Hezekiah Horton, deceased, appeals. Affirmed. W. S. Hamblen, for appellant. Geo. A. Rathbun, C. B. Earley, S. W. Smith, Geo. R. Dixon, Geo. A. Allen, and L. Rosenzweig, for appellees.

GREEN, J. What has already been said in the appeal of this same appellant in the case at July term, 1895 (35 Atl. 710), disposes of the contentions made in this case, and for the reasons there stated we affirm the decree now appealed from. Decree affirmed and appeal dismissed, at the cost of the appellant.

PENDER v. SOLOMON et al. (Supreme Court of Pennsylvania. Nov. 9, 1896.) Appeal from court of common pleas, Allegheny county; Kennedy, Judge. Action by James Pender for personal injuries against Solomon & Ruben and others. Judgment for plaintiff against Solomon & Ruben, and they appeal. Affirmed. W. B. Rodgers and Joseph Stadtfeld, for appellants. Petty & Friend, for appellee.

PER CURIAM. Plaintiff's right to recover in this case depended on questions of fact which were for the exclusive consideration of the jury, and they were accordingly submitted to them by the learned president of the common pleas with full, clear, well-guarded, and accurate instructions, under which they rendered a verdict that has impliedly settled every material question of fact in plaintiff's favor. There appears to be no error in any of the court's rulings or instructions. The case was ably and accurately tried, and the judgment entered on the verdict should not be disturbed. Judgment affirmed.

(177 Pa. St. 235)

REYNOLDS v. CREVELING et al. (Supreme Court of Pennsylvania. Oct. 5, 1896.) Appeal from court of common pleas, Philadelphia county. Action by A. H. Reynolds against Alfred Creveling and others, now or lately trading as Creveling, Miles & Co., Limited. Judgment for plaintiff, and defendants appeal. Affirmed. John Marshall Gest, Edmund G. Butler, and Richard C. Dale, for appellants. Geo. Frederick Keene, Charles C. Lister, and John G. Johnson, for appellee.

STERRETT, C. J. In this case both parties appealed. In an opinion just filed in the appeal by plaintiff's executor at January term, 1896 (35 Atl. 686), the judgment entered by the court below has been reversed; and judgment entered here on the award of the referee in favor of plaintiff for the amount found by the referee, with interest, etc. This appeal by the defendants involves the same questions that have been disposed of in an opinion filed in *Bank v. Same Defendants* (July term, 1895) 35 Atl. 595. Both cases were argued together, and, for reasons given in opinion last referred to, the judgment as corrected in opinion first above referred to should be affirmed. As corrected on appeal of plaintiff's executor at January term, 1896, the judgment is affirmed.

(177 Pa. St. 291)

TAYLOR v. EVANS. (Supreme Court of Pennsylvania. Oct. 5, 1896.) Appeal from court of common pleas, Philadelphia county. Action by Benjamin Taylor against Margaret Evans to recover on a note. From a judgment for plaintiff, defendant appeals. Affirmed.

GREEN, J. For the reasons expressed in the opinion in *Evans v. Taylor* (July term, 1895) 35 Atl. 635, the defense set up in this case must be pronounced invalid, and therefore the judgment is affirmed.

(176 Pa. St. 186)

WARING et al. v. PENNSYLVANIA R. CO. (Supreme Court of Pennsylvania. July 15, 1896.) Appeal from court of common pleas, Allegheny county. Action by Waring Brothers & Co. against the Pennsylvania Railroad Company. From a judgment dismissing the cause, plaintiffs appeal. Affirmed. M. A. Woodward, Shiras & Dickey, and J. W. Lee, for appellants. Scott & Gordon, for appellee.

GREEN, J. For the reasons expressed in the opinion just filed in the case between the same parties (Dec. term, 1879; 35 Atl. 106), the judgment in this case is affirmed.

SMITH v. BATES, City Treasurer. (Supreme Court of Rhode Island. Oct. 3, 1896.) Action by Nellie M. Smith against Frank M. Bates, city treasurer. B. M. Bosworth and W.

Waldo Robinson, for plaintiff. J. L. Jenks, for defendant.

PER CURIAM. In this case the evidence is conflicting. The determination of the issue of fact submitted depended on the credibility of witnesses, of which the jury, who had the witnesses before them, were the judges. They found for the plaintiff, and it is not sufficiently clear that they made a mistake to justify us in setting aside the verdict.

END OF CASES IN VOL. 35.

